



# Hunter Valley Coal Network Access Undertaking

**Dated: 23 June 2011 (as varied on 17 October 2012 and [ ] 2014)**

**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 *Competition and Consumer Act 2010* ("**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 Part IIIA of the *Competition and Consumer Act 2010* (Cth) (“CCA”). 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, and in particular ARTC’s obligations to provide and maintain priority for passenger services under the *Transport Administration Act 1988* (NSW). 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. ARTC also recognises that non-coal users of the Network require certainty of access and that the views of non-coal users are to be considered and taken into account in making future decisions to invest in new Capacity on the Network.
- (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) ARTC recognises that the Network is also used by non-coal users. 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 is Efficient.
- (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 CCA. 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 at least sufficient revenue to meet the efficient costs associated with Access to the Network, having regard to the efficient operation of the Hunter Valley Coal Chain;
    - (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;
  - (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 CCA and the Competition Principles Agreement.

### 1.3 Recognition of Coal Chain Principles

In preparing the Access Undertaking, ARTC has sought to recognise the importance of the following principles to coal producers seeking to export coal to the Port of Newcastle:

- (a) coal producers require long term certainty of access to a contracted portion of Coal Chain Capacity, of which one component is contracted Capacity with ARTC;
- (b) the availability of a reliable process through which access to Capacity can be negotiated within the broader context of the Hunter Valley Coal Chain;
- (c) the development of a set of System Assumptions to apply across the Coal Chain and for ARTC to participate in the development of these System Assumptions in so far as they relate to the Network and to reflect the applicable Relevant System Assumptions in Access Holder Agreements; and
- (d) there should be workable alignment between the allocation and utilisation of Capacity and the allocation and utilisation of capacity at the coal terminals at the Port of Newcastle.

### 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:
  - (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) The Network means the network of railway lines delineated or defined in **Schedule B**, excluding Annexure 1 to **Schedule B**, where Annexure 1 to **Schedule B** contains a map, being a representation of these railway lines for illustrative purposes only.
- (c) 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) Subject to **section 2.2(c)**:
  - (i) this Undertaking takes effect twenty one (21) days after the ACCC has published its decision to accept the Undertaking under **section 44ZZA(3)** of the CCA (“**Effective Date**”);
  - (ii) on and from the Effective Date, all provisions of the Undertaking are taken to have commenced operation on 1 July 2011 (“**Commencement Date**”); and
  - (iii) to the extent that the provisions of the Undertaking are applicable to the New Segments, such provisions are taken to have commenced operation on the New Segments Commencement Date.
- (b) The Undertaking will continue until the earlier to occur of:
  - (i) the fifth (5th) anniversary of the Commencement Date; or



- (ii) the withdrawal of this Undertaking in accordance with the CCA, being, the Term of the Undertaking.
- (c) If a person applies to the Australian Competition Tribunal under **section 44ZZBF(1)** of the CCA within the 21 day period referred to in **section 2.1(a)** for a review of the ACCC's decision to accept this Undertaking and the Tribunal affirms the ACCC's decision, then the Effective Date and the Commencement Date will be the time of the Tribunal's decision.
- (d) ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking including in relation to the grant of Access Rights to the Network from the earlier of the Commencement Date and the Effective Date.

### 2.3 Variation of Undertaking

ARTC may only vary the Undertaking with the consent of the ACCC under **section 44ZZA(7)** of the CCA.

### 2.4 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, an Applicant seeking access to a reserved train path under this section will be offered an Access Agreement in accordance with **section 3.14(b)** and will be able to negotiate the terms and conditions of that Access Agreement in accordance with **section 3** of the Undertaking.

### 2.5 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.

## 2.6 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 3.7**.

### 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; and
  - (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's reasonable satisfaction that it is able to meet the following prudential requirements:
  - (i) the Applicant must be Solvent;
  - (ii) the Applicant, or a Related Body Corporate 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 Body Corporate 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**, then the Applicant may refer the matter to the arbitrator in accordance with **section 3.15(f)**. 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(f)** 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) ARTC and the Access Holder acknowledge, 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 is designated or indicated in writing, as being the confidential information of the Provider or any of its Related Bodies Corporates (“**Confidential Information**”) is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider and not use that Confidential Information for any purpose other than the provisions of this Undertaking allow.
- (b) To avoid doubt, information provided by an Access Holder to ARTC on the forecast and actual volume of coal to be transported on the Network by an Access Holder is Confidential Information.
- (c) 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;
  - (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; or
  - (iv) derived or produced from Confidential Information but disclosed in an aggregated form, on at least a Pricing Zone basis.
- (d) ARTC and the Access Holder 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 Body Corporate (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 or the RCG to the extent reasonably necessary to enable the HVCCC and RCG to co-ordinate

the operation and capacity development of the Hunter Valley coal chain;

- (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;
- (v) to the ACCC to the extent reasonably required to undertake its functions in relation to the Undertaking and the CCA;
- (vi) subject to entering into appropriate confidentiality arrangements with the auditor, to an auditor appointed under **section 4.10(f)** of this Undertaking; or
- (vii) to the lessor of the Network, if required under the terms of the NSW Lease.

### **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 relevant Hunter Valley Coal Chain Service Providers do not effectively and reasonably participate in the initial review of Capacity, ARTC will not consider itself bound to participate in the review.
- (d) For the purposes of this **section 3.6**, effective and reasonable participation by ARTC and the other relevant Hunter Valley Coal Chain Service Providers means the provision of information to the Applicant, and where requested, the provision of information to the HVCCC, which it reasonably considers necessary to enable the HVCCC to advise the Applicant of the operating requirements to deliver the throughput sought and to carry out an assessment of the impact of the Access Rights sought on Coal Chain Capacity.

### **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;
- (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; and
  - (B) any advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, on the operating requirements needed to deliver Coal Chain Capacity, and on whether the Applicant has sufficient Network Exit Capability to enable the utilisation of the Coal Access Rights sought.
- (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.
- (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.



### 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)**.
- (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(f)**.
- (c) 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**.
- (d) 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 8.4**.

### 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(f)**.
- (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(f)**.

### **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 **section 3.12** applies and ARTC refers the matter to the arbitrator under **section 3.15(f)** 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) This **section 3.13** applies to the extent two or more Applicants have submitted an Access Application for Access Rights to Available Capacity existing and commissioned at the time each of the Access Applications is received, each of which satisfies the requirements of **section 3.7(a)(ix)(A)** and it is not reasonably possible for ARTC to fulfil, in whole, the request for Access Rights made under those Access Applications (each a "**Mutually Exclusive Access Application**").
- (b) An Access Application may become a Mutually Exclusive Access Application at any time before an Access Agreement is executed pursuant to that Application.
- (c) An Applicant will be notified as soon as practicable after ARTC has identified that its Application has become a Mutually Exclusive Access Application and the extent to which the Access Rights sought are affected.

- (d) ARTC will, if requested, provide reasonable assistance to an access seeker to identify whether its Access Application can be modified so that it is no longer a Mutually Exclusive Access Application.
- (e) Subject to **section 3.13(f)**, ARTC will allocate the affected Access Rights to the Applicant under a Mutually Exclusive Access Application who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Unless impracticable, 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 (including the relative time likely to be required to finalise an Access Agreement with each party).
- (f) If in ARTC's reasonable opinion, two or more Mutually Exclusive Access Applications, which relate to Coal Access Rights, provide ARTC with a comparable present value of future returns to ARTC determined in accordance with **section 3.13(e)** and after considering all risks associated with the Access Agreements, ARTC will offer to allocate the affected Access Rights on a pro rata basis to the relevant Applicants.

For example, ARTC would offer to pro-rate the affected Access Rights to export producers if the two applications satisfied certain criteria including the same zone, same terms and conditions and the term of each was greater than 10 years.

- (g) To avoid doubt, if an Access Holder seeks to renew Coal Access Rights in accordance with a specific right of renewal provided in its Access Holder Agreement, that request for a renewal will not be treated as an Access Application and will have, to the extent provided in the Access Holder Agreement, priority over an Access Application for Access Rights which are mutually exclusive with the Coal Access Rights sought to be renewed.

### 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 will offer Applicants the choice of the following as an Access Agreement:
  - (i) subject to the Applicant satisfying the Network Exit Capability requirement in **section 3.7(a)(ix)** and the prudential requirements in **section 3.4(e)**, for Applicants seeking Coal Access Rights:
    - (A) the Indicative Access Holder Agreement subject to the Applicant seeking Access Rights intended for the operation of Indicative Services or Interim Services;
    - (B) an updated Access Holder Agreement to reflect agreed amendments to the Indicative Access Holder Agreement. A negotiated Access Holder Agreement will incorporate those clauses from the Indicative Access Holder Agreement identified as Tier 1 (mandatory) provisions in **Schedule A:1** and will, (unless otherwise agreed between ARTC and the

Applicant) at least address those provisions identified as Tier 2 (negotiable) provisions in **Schedule A:1**, as applicable to the destination of the Coal Access Rights sought. The details of **Schedule A:1** do not provide an exhaustive list of the issues that may be included in an Access Holder Agreement; or

- (C) current available market terms and conditions in the form of an Access Holder Agreement which had been negotiated and agreed by ARTC and an Access Holder in accordance with **section 3.14(b)(i)(B)**, as published on ARTC's website, as applicable;
- (ii) for Applicants seeking Non-Coal Access Rights:
- (A) subject to the Applicant satisfying those prudential requirements in **section 3.4(e)(i), (ii) and (iv)**, an Access Agreement on the terms and conditions contained in the Indicative Interstate Access Agreement but amended to:
    - (i) define the network covered by the Access Agreement as the Network subject to this Undertaking;
    - (ii) incorporate those provisions identified as Tier 1 (mandatory) Non Coal Provisions in **Schedule A:2**;
    - (iii) delete the section relating to extensions and additional capacity (being clause 4.7 as at the Commencement Date) to the extent it relates to the Network;
    - (iv) any other amendments reasonably considered necessary to take into account the particular circumstances of the Hunter Valley and to be consistent with the terms of this Undertaking,

but to avoid doubt the Access Rights sought by the Applicant will not be considered an indicative service for the purposes of the Indicative Interstate Access Agreement and those terms and conditions applicable to an indicative service in the Indicative Interstate Access Agreement will not apply;

- (B) an updated Access Agreement to reflect agreed amendments to the terms and conditions of the Indicative Interstate Access Agreement. A negotiated Access Agreement will incorporate those provisions identified as Tier 1 (mandatory) Non-Coal provisions in **Schedule A:2** and will, unless otherwise agreed between ARTC and the Applicant, at least address those provisions identified in **Schedule A:2** as Tier 2 (negotiable) Non-Coal provisions; or
- (C) the current available market terms and conditions in the form of an Access Agreement for Non-Coal Access Rights which had been negotiated and agreed by ARTC and an Access

Holder in accordance with **section 3.14(b)(ii)(B)** as published on ARTC's website, as applicable.

- (c) ARTC must offer the Indicative Access Holder Agreement to an Applicant for Coal Access Rights:
  - (i) if the Applicant seeks Access Rights for the operation of Indicative Services or Interim Services;
  - (ii) if the Applicant meets the Network Exit Capability requirement in **section 3.7(a)(ix)** and the prudential requirements in **section 3.4(e)**; and
  - (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 8**;
- (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 **sub-section 3.14(e)** as soon as practicable.

### **3.15 Dispute resolution**

- (a) 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.
- (b) An Operator who has been appointed agent for the Access Holder as contemplated in **section 3.4(b)** may, with that Access Holder's prior written consent, participate in a dispute notified by that Access Holder under this **section 3.15** in relation to the Operator Sub-Agreement in which case, ARTC, the Operator and the Access Holder will be the parties to the Dispute.
- (c) 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 4.15(d)** and **4.20(f)** will be dealt with in accordance with **section 3.15(f)** of the Undertaking.

(d) **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.

(e) **Mediation**

(i) If the Dispute is not resolved under **section 3.15(d)** 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(e)**; or
- (B) if the parties do not wish to resolve the Dispute by mediation under this **section 3.15(e)**, 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(f)**.

(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(e)(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) each party may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
- (C) each party will bear its 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.

(f) **Arbitration**

(i) If the Dispute is not resolved under **section 3.15(d)**, or at any time after the appointment of the mediator (if any) under **section 3.15(e)**, 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(f)**. If the Applicant serves notice on the arbitrator under this **section**



**3.15(f)**, that notice will also include an agreement by that Applicant to:

- (A) pay the amounts and rates described in **section 3.15(f)(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(f)**, 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(f)**, 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(f)(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 CCA, 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 CCA 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 CCA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the CCA;
  - (iii) will take into account the matters referred to in section 44X of the CCA; and
  - (iv) otherwise comply with **section 3.15(f)(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 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 *Competition and Consumer Regulations 2010* (Cth). If the *Competition and Consumer Regulations 2010* (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 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**”).

### 4.3 Ceiling Revenue Limits

- (a) In relation to Segments identified as forming part of Pricing Zone 1 and 2 in Schedule E, Access revenue from any Access Holder, or group of Access Holders must not exceed the Economic Cost of those Segments which are required on a stand alone basis for the Access Holder or group of Access Holders (“**Ceiling Limit**”).
- (b) In relation to Segments identified as forming part of Pricing Zone 3 in Schedule E, the Access revenue from any Access Holder, or group of Access Holders must not exceed the 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 calendar year (t -1).
- (c) Access revenue for the purposes of this **section 4.3** does not include Access revenue returned to a Contributor as a result of the operation of a user funding agreement between the Contributor and ARTC.

### 4.4 Regulatory Asset Base

#### (a) Determination of RAB

The Regulatory Asset Base (“**RAB**”) for a Segment or group of Segments, will be determined in accordance with this **section 4.4(a)**.

The initial value of the RAB (“**Initial RAB**”) 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, set at the value of those Segments determined in accordance with the NSW Rail Access Undertaking as at the Commencement Date and if the date those values took effect is earlier than the Commencement Date, that part of the Initial RAB will be rolled forward to the Commencement Date in accordance with the asset valuation roll forward principles under the NSW Rail Access Undertaking as at August 2010 or as otherwise agreed between ARTC and the Independent Pricing and Regulatory Tribunal to determine an opening Initial RAB;
- (ii) in relation to other Segments, initially valued using the depreciated optimised replacement cost method of valuing assets, and approved by the ACCC. 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.

In relation to the Segments identified as forming part of Pricing Zone 3 in Schedule E, the RAB will be rolled forward annually according to the following methodology:

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

$$(1 + RoR) \times RAB_{t-1 \text{ start}} - \text{Out-turn Revenue}_{t-1} + \text{Out-turn Opex}_{t-1} + \text{Net Capex}_{t-1} \times (1 + 0.5 \times RoR)$$

where:

$RAB_{t \text{ start}}$  is RAB at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date or the New Segments Commencement Date (as applicable), would be the Initial RAB).

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

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

RoR is the nominal pre tax Rate of Return.

Out-turn Revenue<sub>t-1</sub> is the total Access revenue earned by ARTC in the preceding calendar year (t-1) but will not include:

- (i) a Capital Contribution received from an Applicant or an Access Holder; or
- (ii) Access revenue returned to a Contributor as a result of the operation of a user funding agreement between the Contributor and ARTC.

Out-turn Opex<sub>t-1</sub> is the total operating expenditure incurred by ARTC in the preceding calendar year (t-1), on an Efficient basis, determined in accordance with **sections 4.5(a)(i), (iv) and (vii) and 4.5(b)**.

Net Capex<sub>t-1</sub> is the net additions to the RAB in the preceding calendar year (t-1), that is out turn Capital Expenditure by ARTC less the written down value of any disposals during the preceding calendar year (t-1) on a Prudent basis, including interest cost incurred during construction up until 1 July in the calendar year the asset was commissioned, capitalised in the year the asset was commissioned and determined by reference to the relevant form of the Rate of Return (to the extent that Capital Expenditure is incurred on a Prudent basis, including interest cost), but will not include Capital Contributions.

**(b) RAB Floor Limit**

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

- (i) as at the Commencement Date or the New Segments Commencement Date (as applicable), the Initial RAB;
- (ii) rolled forward annually according to the following methodology

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

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

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 or the New Segments Commencement Date (as applicable), would be the Initial RAB).

RAB Floor Limit<sub>t-1 end</sub> is the RAB Floor Limit at the end of the preceding calendar year (t-1).

RAB Floor Limit<sub>t-1 start</sub> is the RAB Floor Limit at the start of the preceding calendar year (t-1).

CPI<sub>t-1</sub> is the inflation rate for the preceding calendar year (t-1), determined by reference to the CPI for the September quarter of that year.

Net Capex<sub>t-1</sub> 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 the written down value of any disposals during the preceding calendar year (t-1) on a Prudent basis, including interest cost incurred during construction up until 1 July in the calendar year the asset was commissioned, capitalised in the year the asset was commissioned and determined by reference to the relevant form of the Rate of Return (to the extent that Capital Expenditure is incurred on a Prudent basis, including interest cost), but will not include Capital Contributions.

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

#### 4.5 Economic cost

- (a) For the purposes of this **section 4**, Economic Cost of a Segment means:
- (i) Segment Specific Costs;
  - (ii) Depreciation of Segment Specific Assets, where the value of those assets is determined in accordance with **section 4.4(b)**;
  - (iii) a return on Segment Specific Assets, being determined by applying a real pre-tax Rate of Return to (RAB Floor Limit<sub>t-1 start</sub> + RAB Floor Limit<sub>t-1 end</sub>) \* 0.5, where the value of the RAB Floor Limit is determined in accordance with **section 4.4(b)**;
  - (iv) an allocation of Non-Segment Specific Costs;
  - (v) an allocation of depreciation of Non-Segment Specific Assets, determined on a straight line basis, by reference to a reasonable estimate of the economic useful life of Non-Segment Specific Assets, and determined from the time the assets become serviceable;
  - (vi) an allocation of return on Non-Segment Specific Assets, being determined by applying a real pre-tax Rate of Return to the value of Non-Segment Specific Assets, from the time the assets become serviceable, where the value of those assets will include the capitalisation of interest cost incurred during construction up until the time the assets become serviceable, capitalised at that time and determined by reference to the relevant Rate of Return; and
  - (vii) the costs described in **sub-sections (a)(i) to (vi)** as applicable to Additional Capacity.

- (b) All costs described in **sub-sections (a)(i), (iv), (v) and (vi)**, all applicable costs described in **sub-section (a)(vii)**, and all operating expenditure in **section 4.4(a)** are to be assessed on an Efficient basis.
- (c) All costs are to be assessed on a stand alone basis.
- (d) To avoid doubt, nothing in this **section 4** will prevent ARTC from charging Contributors and other Access Holders TOP Charges and non-TOP Charges as a result of the operation of a user funding agreement between Contributors and ARTC, in which case the TOP Charges and non-TOP Charges will be charged in accordance with **section 10.2**.

#### **4.6 Cost allocation**

- (a) For the purposes of **section 4.5**, 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.

#### **4.7 Depreciation**

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

- (a) Depreciation is to be calculated for each calendar year, using a straight line methodology (unless otherwise agreed with an Access Holder and approved 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 coal mines utilising the Pricing Zone of which that Segment or group of Segments forms part;
- (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 coal mines utilising a Pricing Zone may vary between Pricing Zones as approved by the ACCC.

- (c) Depreciation is to be charged each year on the inflation adjusted opening balance of the RAB Floor Limit and on the Prudent Capital Expenditure associated with all of the assets commissioned in that year, charged for a period of half of that year.

#### **4.8 Rate of return**

For the Term of the Undertaking, the real pre-tax Rate of Return is 9.10% and the nominal pre-tax Rate of Return is 11.83%.

#### **4.9 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 4.10**. ARTC will calculate the total unders or overs amount as part of its submission to the ACCC (**section 4.10(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) determine an allocation of the total unders or overs amount, for each Constrained Coal Customer based on the proportion of revenue, paid for Access Rights over the Constrained Network, by each Constrained Coal Customer, net of any rebate of the take or pay component of the Charges paid to that Constrained Coal Customer following the application of the system wide true-up tests and the annual individual reconciliation, and where applicable, in accordance with the equitable allocation to be carried out under **section 10.2**;
  - (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.
- (c) For clarity, any refund provided to a Constrained Coal Customer under **section 4.9(b)(vi)(A)** will not exceed the total payments made by the Constrained Coal Customer in excess of Direct Costs in a calendar year.
- (d) If ARTC voluntarily waives TOP Charges for an Access Holder that are otherwise contractually payable those waived TOP Charges are recoverable through increased TOP Charges applied to other Access Holders, or through unders and overs accounting under this **section 4.9**, or through a combination of both, except where the waiver is for the sole benefit of the Access Holder whose TOP Charges have been waived.
- (e) A waiver of TOP Charges by ARTC under clause 11 of the Indicative Access Holder Agreement (including to facilitate a permanent change to the Service Assumptions for a Train Path as contemplated at clause 11.5(c)(iii) of the Indicative Access Holder Agreement) that would result in the use of an Indicative Service by that Access Holder or, in ARTC's reasonable opinion, a non-indicative Service by that Access Holder which provides for more efficient use of Capacity or Coal Chain Capacity will, for the purposes of **subsection (d)**, be deemed to:
  - (i) have benefits that are not solely for the Access Holder whose TOP Charges have been waived; and
  - (ii) be recoverable through increased TOP Charges applied to other Access Holders, or through unders and overs accounting under this **section 4.9**, or through a combination of both.
- (f) To avoid doubt, any variation to TOP Charges paid during a calendar year resulting from complying with **section 4** of the Undertaking, and specifically through complying with the applicable Ceiling Limit and calculation of any allocation of the total unders and overs amount, will not constitute a voluntary waiver of TOP Charges for the purpose of **subsections (d) and (e)**.

#### 4.10 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;

- (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; and
  - (iii) where documentation in (i) above demonstrates that RAB is above RAB Floor Limit in Pricing Zone 3, documentation demonstrating that Indicative Access Charges, or Interim Access Charges, as applicable, satisfies the requirements in **section 4.3(b)**.
- (b) The documentation submitted by ARTC to the ACCC will, unless otherwise agreed with the ACCC and having regard to the relevant circumstances applicable at the time, meet the information provision guidelines and the timeframes set out in **Schedule G**.
- (c) If the ACCC reasonably considers that it requires additional information, other than that provided by ARTC in accordance with **Schedule G**, in order to carry out its assessment under **section 4.10(d)**, it may request this information from ARTC in accordance with section 3 of **Schedule G** and upon receipt of such a request ARTC will use reasonable endeavours to provide the information to the ACCC as soon as reasonably practicable.
- (d) 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 4.4** in rolling forward RAB or the RAB Floor Limit, the ACCC may have regard to the submissions of relevant industry participants but if Capital Expenditure has been endorsed by the RCG in accordance with **section 9**, the ACCC will not consider whether that Capital Expenditure is Prudent;
  - (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.
- (e) The ACCC will determine whether ARTC has incurred Efficient costs and Efficient operating expenditure in accordance with **section 4.5(b)**, and determine the change (if any) to:

- (i) the total unders and overs amount or allocation; and
- (ii) closing RAB in **section 4.4(a)**,

that results from Economic Cost under **section 4.5(a)** only including Efficient costs and Efficient operating expenditure determined in accordance with **section 4.5(b)**.

(f) **Annual TUT Audit**

- (i) At least three months prior to the end of a previous calendar year, ARTC will:
  - (A) advise the ACCC in writing of the identity of the person that it proposes to appoint as the auditor (“**Proposed Auditor**”) to audit ARTC’s compliance with its obligations under Schedule 2 of Access Holder Agreements in relation to the performance of the system true up test in each Pricing Zone in that calendar year (“**TUT Audit**”); and
  - (B) provide such information or documents that the ACCC requires to assess the skill and independence of the Proposed Auditor, and the proposed terms of engagement and confidentiality arrangements.
- (ii) The Proposed Auditor must have the relevant skill to perform the TUT Audit and be independent of ARTC. Without limitation, the Proposed Auditor is not independent if he or she:
  - (A) is a current employee or officer of ARTC or its Related Bodies Corporate;
  - (B) has been an employee or officer of ARTC or its Related Bodies Corporate in the past 3 years;
  - (C) in the opinion of the ACCC, holds an interest in ARTC or its Related Bodies Corporate;
  - (D) has within the past 3 years been a professional adviser to ARTC or its Related Bodies Corporate;
  - (E) has a contractual relationship, or is an employee of a firm or company that has a contractual relationship, with ARTC or its Related Bodies Corporate.
- (iii) If, within 5 Business Days of receipt by the ACCC of the information or documents from ARTC referred to in **section 4.10(f)(i)**, or such further period as required by the ACCC and notified to ARTC:
  - (A) the ACCC does not object to the Proposed Auditor, ARTC will appoint the Proposed Auditor as auditor to conduct the TUT Audit (“**Auditor**”) as soon as practicable on terms approved by the ACCC; or

- (B) the ACCC does object to the Proposed Auditor, ARTC will as soon as practicable appoint a person identified by the ACCC as the Auditor on terms approved by the ACCC,
- and forward to the ACCC a copy of the executed terms of engagement of the Auditor.
- (iv) Following the appointment of the Auditor in accordance with **section 4.10(f)(iii)**, ARTC will instruct the Auditor to conduct the TUT Audit as soon as practicable in accordance with the approved terms referred to in **section 4.10(f)(iii)**.
  - (v) Subject to the Auditor continuing to meet the requirements in **section 4.10(f)(ii)** for the period of appointment, ARTC may appoint the Auditor to conduct the TUT Audit for consecutive calendar years.
  - (vi) A person who is, or who has been, appointed as Auditor is eligible for re-appointment as Auditor, and will not be taken to fail the independence requirement on the sole basis that the person was previously appointed as Auditor under this **section 4.10**.
  - (vii) ARTC will maintain and fund the Auditor and will indemnify the Auditor for reasonable expenses and any loss, claim or damage arising from the performance by the Auditor of functions required to be performed in conducting the TUT Audit, except where such expenses, loss, claim or damage arises out of the negligence, fraud, misconduct or breach of duty by the Auditor.
  - (viii) The actual costs reasonably incurred in connection with the conduct of the TUT Audit (which will include those costs referred to in section 4.10(f)(vii)) will be included in the Economic Costs.
  - (ix) ARTC will provide to the Auditor any information or documents requested by the Auditor that the Auditor reasonably considers necessary and relevant for conducting the TUT Audit.
  - (x) Not later than 30 April of the following calendar year, ARTC will provide the final written report of the TUT, as prepared by the Auditor ("**Final Audit Report**"), to the ACCC to review as part of the annual compliance assessment process under this Undertaking.
  - (xi) The ACCC will review the Final Audit Report and will decide, and will notify ARTC of, any amounts of underpayment of rebates that are owing to Access Holders or amounts of overpayment of rebates ARTC is entitled to recover.
  - (xii) If, at any time after receiving the Final Audit Report, the ACCC considers that a reconciliation between ARTC and Access Holders in respect of the incorrect calculation of rebates under the system true up test under schedule 2 of Access Holder Agreements will not materially affect the unders and overs accounting, then the ACCC will decide the amounts to be made or recovered by ARTC.
  - (xiii) Within 15 Business Days of receiving notification from the ACCC under **section 4.10(f)(xi)**, ARTC will inform the individual Access

Holders of any amounts of underpayment of rebates owing to them or amounts of overpayment of rebates they are required to remit to ARTC as determined by the ACCC in accordance with clause 2.8 of Schedule 2 of the Access Holder Agreements.

- (xiv) Within 15 Business Days of giving that notice, ARTC will make payments of the amounts owing as advised under **section 4.10(f)(xiii)** to individual Access Holders and is entitled to recover from Access Holders any amounts owing to it in accordance with clause 2.8 of Schedule 2 of the Access Holder Agreements.

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

For Coal Access Rights:

- (a) Charges may be on the basis of a combination of:
  - (i) actual usage (being a function of distance and gross mass (\$/gtkm) for a Pricing Zone); and
  - (ii) a take or pay component 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 Pricing Zone-wide true-up tests and an annual individual reconciliation.

#### **4.12 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 **sub-section (c)**,

for a Pricing Zone.

- (b) The Charges for Non-Coal Access Rights will be set so that the Access revenue received by ARTC from an Access Holder of Non-Coal Access Rights in respect of a single journey between a Network entry point and a Network exit point, taking into account each component of a Charge outlined above, will be no greater than the average Access revenue received by ARTC for Coal Access Rights to complete the same journey, adjusted to reflect the relative difference in Capacity consumed by the Non-Coal Access Rights when compared to the Coal Access Rights.
- (c) 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	0
Pricing Zone 2	0
Pricing Zone 3	0.16

- (d) Subject to **sub-section (e)**, the application of the excess network occupancy component relates only to the contracted Train Path, and not the utilisation of the Train Path.
- (e) In determining the excess network occupancy component, ARTC will pro-rate 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.
- (f) 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.
- (g) 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 (c)**.
- (h) 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.

- (i) Notwithstanding the structure described above, all elements of the Charge are open to negotiation.

#### **4.13 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 the New Segments Commencement Date (as applicable); 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) providing 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.

#### **4.14 Indicative Access Charge**

- (a) ARTC will determine for each year the Indicative Access Charges for Coal Access Rights with the characteristics of applicable Indicative Services (being Initial Indicative Services in **section 4.17** and Final Indicative Services to be determined in accordance with **section 4.18** respectively), having regard to the System Assumptions. System Assumptions applicable to the Indicative Services 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 characteristics and Indicative Access Charges would apply to all Segments within a Pricing Zone. Indicative Service characteristics and Indicative Access Charges may both vary between Pricing Zones.
- (c) Once Indicative Access Charges for Indicative Services are finalised each calendar year in accordance with **section 4.20**, 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 Characteristics
<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 4.14(c)** above to Applicants seeking Coal Access Rights with applicable Indicative Service characteristics.

#### 4.15 Charge differentiation

- (a) In formulating its Charges for Coal Access Rights other than Coal Access Rights for Indicative Services contracted for under an Indicative Access Holder Agreement, ARTC will:

- (i) subject to **section 4.15(a)(iii)**, reflect the commercial impact on ARTC's business of the relative consumption of Capacity and Coal Chain Capacity compared to Indicative Services and the logistical impact on ARTC's business of the relative reduction in Capacity and relative reduction in Coal Chain Capacity compared to Indicative Services;
- (ii) have regard to a range of factors which impact on its business including:
  - (A) the Indicative Access Charges for Indicative Services;
  - (B) 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;
  - (C) the commercial impact on ARTC's business which includes:
    - (aa) the term of the Access Holder Agreement;
    - (ab) the consumption of ARTC's resources;
    - (ac) the Segments of the Network relevant to the Access Rights sought;
    - (ad) previously negotiated Charges agreed under the terms of the Undertaking, where relevant, as published by ARTC under **section 2.6(b)**;
  - (D) logistical impacts on ARTC's business which include:
    - (aa) the impact on other Services and risk of failure of the endorsed Operator to perform its obligations under the Operator Sub-Agreement; and
    - (ab) system flexibility;
  - (E) Capital Contributions or other contributions by the Applicant to ARTC's costs;
  - (F) the cost of any Additional Capacity; and
- (iii) for the purpose of assisting transition between regulatory and contractual arrangements and to remove uncertainty to support investment decisions relating to Trains, charge the same price for the two primary existing services using the Network as at the Commencement Date in accordance with **sub-paragraphs (A) and (B)** below during the Regulatory Transition Period:
  - (A) the Charges for the services described in **section 4.19(c)** as Interim Service 1 and Interim Service 2 in Pricing Zone 1 may be the same, and the Charges for Interim Service 1 and Interim Service 2 in Pricing Zone 2 may be the same,

notwithstanding those services will no longer constitute Interim Services after the Interim Period; and

- (B) for the purposes of this **section 4.15(a)(iii)**, Charges are taken to mean the unit TOP price and unit Non-TOP price.
- (b) In formulating its Charges for Non-Coal Access Rights, ARTC will have regard to a range of factors which impact on its business including:
  - (i) previously negotiated Charges agreed under the terms of the Access Undertaking, where relevant, as published by ARTC under **section 2.6(b)**;
  - (ii) 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;
  - (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) the credit risk associated with the business;
    - (F) the market value of the Train Path sought;
    - (G) the Segments of the Network relevant to the Access Rights sought;
    - (H) logistical impacts on ARTC's business including the impact on other Services and reduced Capacity;
    - (I) Capital Contributions or other contributions by the Applicant to ARTC's costs; and
    - (J) the cost of any Additional Capacity.
- (c) For the purposes of **section 4.15(a)(i)**, **section 4.15(a)(ii)(D)(ab)**, **section 4.15(b)(iii)(D)** and **(H)** 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.
- (d) If an Access Holder disagrees with a Charge formulated by ARTC, other than an Indicative Access Charge or Interim 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(f)** of the Undertaking (if an Access Holder disagrees with an Interim Access Charge during the Interim Period, an Initial Indicative Access Charge during the Initial Period or an Indicative Access Charge then the Access Holder must give ARTC a Dispute Notice in accordance with the requirements in **section 4.20(f)**).

- (e) If the Dispute Notice given under **section 4.15(d)** 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 or Interim Services in that Pricing Zone in accordance with the requirements in **section 4.20(f)**, then a dispute notified under **section 4.15(d)** will be stayed pending the arbitrator's determination of the dispute notified under **section 4.20(f)**.

#### **4.16 Limits on Charge differentiation**

- (a) Subject to **sections 4.15(a), 4.15(b)** and **4.15(c)** above (as applicable), and to ARTC having an obligation under clause 3.8 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 4.15(a), 4.15(b)** and **4.15(c)** above (as applicable), in formulating its Charges, ARTC will not differentiate between Applicants:
  - (i) in circumstances where:
    - (A) the characteristics of the Access Rights sought are alike;
    - (B) the Applicants are operating within the same end market; and
  - (ii) for Coal Access Rights, on the basis of the marginal cost of production of the mines being served by the Coal Access Rights sought, to the extent such information is known to ARTC.
- (c) 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.

#### **4.17 Initial Indicative Services and Initial Indicative Access Charges**

- (a) Within 30 Business Days of receiving approval from the ACCC to vary the Undertaking for the adoption of Initial Indicative Services, ARTC will publish the characteristics of the Initial Indicative Services, Initial Indicative Access Charges and Charges for non-Indicative Services, including those which are Interim Services, and the annual process for the finalisation of Indicative Access Charges under **section 4.20** will not apply to the determination of Indicative Access Charges for that year.

- (b) From the first day of the calendar month following the publication of the prices in accordance with **section 4.17(a)** until the Final Indicative Services and Indicative Access Charges approved by the ACCC come into effect under **section 4.18 (“Initial Period”)**, the characteristics set out in **section 4.17(d)** will apply as the Initial Indicative Services.
- (c) Indicative Access Charges applicable to the Initial Indicative Services (**“Initial Indicative Access Charges”**) will until the expiry of the Initial Period be subject to annual review in accordance with **section 4.14**. Subject to **section 4.20**, each calendar year until the expiry of the Initial Period, ARTC will, using reasonable endeavours and having regard to available information, determine:
- (i) Initial Indicative Access Charges applicable to the Initial Indicative Services as described in **section 4.17(d)**; and
  - (ii) Charges for other Services associated with Coal Access Rights applicable during the Initial Period (including those which are Interim Services).
- (d) The following Initial Indicative Access Charges for Initial Indicative Services will apply on and from the first day of the calendar month following the publication of the prices as contemplated in **section 4.17(a)**.

Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Initial Indicative Service Characteristics
<b>In Pricing Zone 1*</b>			
Initial Indicative Service 1	0.844	8.314	30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 96 wagon train length 1543 metres maximum train length section run times as per applicable Hunter Valley standard working timetable
Initial Indicative Service 2	0.812	9.636	25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon train length 1350 metres maximum train length section run times as per applicable Hunter Valley standard working timetable
<b>In Pricing Zone 2*</b>			
Initial Indicative Service 1	2.393	6.920	30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 96 wagon train length

Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Initial Indicative Service Characteristics
			1543 metres maximum train length section run times as per applicable Hunter Valley standard working timetable
<b>In Pricing Zone 3*</b>			
Initial Indicative Service 1	0.837	5.564	25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon train length 1350 metres maximum train length section run times as per applicable Hunter Valley standard working timetable

\*Pricing Zones contain Segments as specified at Schedule E as at the Commencement Date

- (d1) The following Initial Indicative Access Charge for the Initial Indicative Service in Pricing Zone 3 will apply on and from the New Segments Commencement Date:

In Pricing Zone 3*	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Initial Indicative Service Characteristics
Initial Indicative Service 1	1.496	9.635	25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon train length 1350 metres maximum train length section run times as per applicable Hunter Valley standard working timetable

\*Pricing Zone 3 contains Segments as specified at Schedule E as at the New Commencement Date

- (e) ARTC will offer the applicable Initial Indicative Access Charges to Applicants seeking Coal Access Rights with applicable Initial Indicative Service characteristics during the Initial Period.

#### 4.18 Determination of the Final Indicative Services (efficient train configuration)

- (a) ARTC will develop, in consultation with the HVCCC, the proposed characteristics of the indicative services which ARTC considers will deliver the optimum utilisation of Coal Chain Capacity, given certain System Assumptions (“**Final Indicative Services**”). The intention is that this process will be a more robust modelling exercise than that used for selecting the Initial Indicative Services and will include scenarios under which System Assumptions are also varied in addition to the Coal Train configurations.

- (b) Within 30 months of the Commencement Date, ARTC will:
- (i) consult with the HVCCC, Access Holders and Operators on the proposed characteristics of the Final Indicative Services and whether gtkm is the appropriate pricing unit to encourage efficient consumption of Capacity;
  - (ii) submit to the ACCC proposed characteristics of the Final Indicative Services developed in consultation with the HVCCC and, having reasonable regard to submissions arising from the consultation at subsection (i) above, if ARTC considers that gtkm is not an appropriate pricing unit to encourage efficient consumption of Capacity, an alternative pricing unit that ARTC considers will encourage efficient consumption of Capacity; and
  - (iii) seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the proposed characteristics as those of the Final Indicative Services and the alternative pricing unit (if any).
- (c) In consulting with the HVCCC, Access Holders and Operators, ARTC will:
- (i) assist the HVCCC to undertake modelling; and
  - (ii) will follow the principles of consultation set out in **Schedule F**,  
with the objective of determining the Coal Train configuration which will deliver optimum utilisation of Coal Chain Capacity and ARTC will use its best endeavours to agree with the HVCCC the characteristics to be submitted to the ACCC as the proposed Final Indicative Services.
- (d) In support of its application to vary the Undertaking for the adoption of the characteristics proposed in **section 4.18(b)** as the Final Indicative Services, ARTC will submit to the ACCC:
- (i) proposed characteristics of the Final Indicative Services which it considers will deliver optimum utilisation of Coal Chain Capacity including:
    - (A) maximum train axle load;
    - (B) maximum train speed;
    - (C) train length; and
    - (D) section run times;
  - (ii) the proposed indicative access charges for the proposed Final Indicative Services; and
  - (iii) supporting documentation.
- (e) If the ACCC accepts the characteristics proposed by ARTC in consultation with the HVCCC as the Final Indicative Services, and accepts the variation sought by ARTC to this Undertaking, ARTC will:
- (i) promptly publish on its website:

- (A) the characteristics proposed under **section 4.18(b)** as the Final Indicative Services; and
  - (B) the indicative access charges accepted by the ACCC for the Final Indicative Services as the Indicative Access Charges, in the format set out in **section 4.14(c)**;
- (ii) offer the Indicative Access Charges to Applicants seeking Coal Access Rights for the Final Indicative Services (including Access Holders seeking to vary their Access Holder Agreements so as to operate Final Indicative Services on existing contracted Train Paths) to apply in the year immediately following the date the variation to the Access Undertaking accepting the Final Indicative Services and Indicative Access Charges comes into effect and the annual process for the finalisation of Indicative Access Charges under **section 4.20** will not apply to the determination of Indicative Access Charges for that year; and
  - (iii) determine Charges for Coal Access Rights other than Access Rights for the Final Indicative Services to apply in the year immediately following the date the variation to the Access Undertaking accepting the Final Indicative Services and Indicative Access Charges comes into effect, in accordance with **section 4.15** and in doing so will take into account the Indicative Access Charges accepted by the ACCC in determining those Charges.
- (f) If the ACCC does not accept the characteristics proposed by ARTC as the Final Indicative Services, ARTC will, within a timeframe reasonably specified by the ACCC (not to be less than 3 months) having regard to the need for further modelling and industry consultation, submit revised characteristics to the ACCC and seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the revised characteristics as the Final Indicative Services.

#### **4.19 Interim Services and Interim Access Charges**

- (a) From the Commencement Date until the Final Indicative Services and the Indicative Access Charges approved by the ACCC come into effect under **section 4.18** (“**the Interim Period**”), the characteristics set out in **section 4.19(c)** will apply as the Interim Services.
- (b) Access charges for Coal Access Rights with Interim Service characteristics as described in **section 4.19(c)** (“**Interim Access Charges**”) will be determined by ARTC each calendar year of the Interim Period in accordance with **section 4.15(a)**.
- (c) The following Interim Access Charges for Interim Services will apply as at the Commencement Date.

<b>Segments</b>	<b>Non-TOP \$/kgtkm (ex GST)</b>	<b>TOP \$/kgtkm (ex GST)</b>	<b>Interim Service Characteristics</b>
<b>In Pricing</b>			



Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Interim Service Characteristics
<b>Zone 1*</b>			
Interim Service 1	0.935	7.563	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
Interim Service 2	0.935	7.563	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 74 wagon train length section run times as per applicable Hunter Valley standard working timetable
Interim Service 3	0.935	7.563	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>			
Interim Service 1	0.572	7.563	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
Interim Service 2	0.572	7.563	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 74 wagon train length section run times as per applicable Hunter Valley standard working timetable
<b>In Pricing Zone 3*</b>			
Interim Service 1	0.769	5.575	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

\*Pricing Zones contain Segments as specified at Schedule E as at the Commencement Date

- (d) ARTC will offer the Interim Access Charges to Applicants seeking Coal Access Rights with applicable Interim Service characteristics during the Interim Period.

#### **4.20 Process for finalising Indicative Access Charges**

- (a) Before 1 July of each year ARTC may seek from each Access Holder, to the extent necessary, any proposed variations to the Access Holder's contracted coal volumes for the following calendar year.
- (b) Each calendar year, 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.
- (c) The Indicative Access Charges will be based on the contracted coal volumes for that calendar year, any additional volumes that ARTC considers likely to be contracted coal volumes for that relevant year, and ARTC's forecast costs as determined under **sub-section (b)**.
- (d) Subject to **sub-section (e)**, ARTC will notify by 1 November of each calendar year:
  - (i) the aggregate coal volumes which will include reasonably expected contracted coal volumes, ARTC's annual forecast costs as determined under **sub-section (b)** to those Access Holder holding Coal Access Rights in each Pricing Zone;
  - (ii) the Indicative Access Charges to those Access Holders holding Coal Access Rights for Indicative Services; and
  - (iii) ARTC's forecast RAB value of the aggregate of Segments in Pricing Zone 3 as at both the start and the end of the next calendar year to those Access Holders holding Coal Access Rights in Pricing Zone 3.
- (e) ARTC will not be required to provide information on aggregate coal volumes if it reasonably considers that the provision of such information will allow an Access Holder to determine the individual contracted coal volumes or anticipated coal volumes of another Access Holder.
- (f) 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(f)**. 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(f)**. 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.

- (g) ARTC will promptly publish the final Indicative Access Charges on its website in the format set out in **section 4.14(c)**:
  - (i) if there is no arbitration - following the end of the twenty (20) Business Day dispute period; or
  - (ii) if there is an arbitration - following the determination by the arbitrator.
- (h) All references to Indicative Services and Indicative Access Charges in this **section 4.20** will be read as
  - (i) Interim Services and Interim Access Charges respectively during the Interim Period; and
  - (ii) Initial Indicative Services and Initial Indicative Access Charges respectively during the Initial Period.
- (i) To avoid doubt, the requirement in **section 4.20(f)** to give ARTC a Dispute Notice if Access Holders holding two thirds or more contracted gtkm in the relevant pricing zone dispute Interim Access Charges or Initial Indicative Access Charges applies separately to Access Holders operating Interim Services and Initial Indicative Services in the relevant Pricing Zone (as applicable).

#### **4.21 Provision of forecast information and coal volumes**

- (a) In addition to the information provided to each Access Holder of Coal Access Rights under **section 4.20(d)**, ARTC will provide to each Access Holder of Coal Access Rights before 1 November of each calendar year:
  - (i) ARTC's forecast annual total operating expenditure for each of the next 10 calendar years;
  - (ii) ARTC's forecast annual capital expenditure for each of the next 10 calendar years as set out in the most recent version of the Hunter Valley Corridor Capacity Strategy (including all RCG endorsed capital expenditure as provided for in that document); and
  - (iii) subject to **section 4.20(e)**:
    - (A) the aggregate annual coal volumes contracted by Access Holders for each of the next 10 calendar years; and
    - (B) the minimum aggregate annual coal volumes for all Access Holders for each of the next 10 calendar years, which will be determined by identifying the shortest possible term applicable to each Access Holder Agreement, should the Access Holder exercise any rights of early termination under that agreement.
- (b) The 10 year information provided by ARTC under this section will include information for the calendar year for which Indicative Access Charges or the Interim Access Charges, as applicable, are determined and information provided for under **section 4.20(d)**.

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## 5 CAPACITY MANAGEMENT

### 5.1 System Assumptions

- (a) ARTC will participate in the development of System Assumptions via the HVCCC and will use reasonable endeavours to agree System Assumptions with the HVCCC, the coal terminal operators at the Port of Newcastle and other relevant service providers. To avoid doubt, if a System Assumption is based on a subset of assumptions (which at the Commencement Date includes the Relevant System Assumptions), then ARTC will also use reasonable endeavours to agree those assumptions.
- (b) ARTC will base each Capacity Analysis carried out under **section 5.2** on the Relevant System Assumptions and ARTC will reflect the elements (f) to (j) of the Relevant System Assumptions in the Access Holder Agreements.
- (c) If ARTC does not agree with any assumption as detailed in the System Assumption Document as issued by the HVCCC from time to time (which to avoid doubt may include any Relevant System Assumption which is not agreed between the HVCCC and ARTC or an assumption detailed in the System Assumption Document that is based on a Relevant System Assumption which is not agreed between the HVCCC and ARTC), it must, within 20 Business Days of the publication of the System Assumption Document notify the HVCCC and the ACCC of, and publish on its website:
  - (i) the assumption with which ARTC does not agree;
  - (ii) the grounds on which ARTC does not agree with that assumption, together with supporting documentation for those grounds in reasonable detail; and
  - (iii) the assumption which ARTC reasonably proposes should apply instead of the assumption referred to in **section 5.1(c)(i)** (and, if applicable, the Relevant System Assumptions on which that assumption should be based).
- (d) If ARTC disagrees with the assumption on the basis that it considers (acting reasonably) that the practical adoption of:
  - (i) ARTC's proposed assumption is necessary for reasons of safe operation of the Network or to prevent an adverse impact on the condition of the Network; or
  - (ii) the HVCCC's assumption would have an adverse commercial implication for ARTC (provided that ARTC may not rely on this paragraph (ii) to the extent that the adverse commercial implication for ARTC would arise under the operation of system true up test under Schedule 2 of Access Holder Agreements entered into pursuant to the Undertaking),

then ARTC's notification under **section 5.1(c)** must state that this is the basis for the disagreement.

- (e) Within twenty 20 Business Days of receipt of the notice referred to in **section 5.1(c)**, the HVCCC may notify ARTC that it wishes to raise a dispute based

on the reasoning provided by ARTC for not adopting the relevant assumption. The HVCCC is not permitted to raise a dispute if ARTC disagrees with an assumption on the basis of one of the grounds in **section 5.1(d)** but to avoid doubt, this does not prevent the HVCCC raising a dispute on whether ARTC has acted reasonably in relying on **section 5.1(d)**.

- (f) Within 10 Business Days of the HVCCC giving a dispute notice under **section 5.1(e)**, senior representatives from ARTC and the HVCCC will meet and use reasonable endeavours, acting in good faith, to resolve the dispute by joint discussions. If the dispute is not resolved, either party may notify a dispute with the ACCC for determination by arbitration in accordance with **section 3.15(f)(ii)**.
- (g) Upon receiving dispute notice under **section 5.1(f)**, the ACCC will determine whether the assumption referred to in **section 5.1(c)(i)** or the assumption referred to in **section 5.1(c)(iii)** is the more reasonable assumption taking into account:
  - (i) the context of the daily operations of the Hunter Valley Coal Chain at the time of the publication of the System Assumption Document (as applicable), including for the purposes of accurately determining Capacity; and
  - (ii) the interests of:
    - (A) Access Holders with Coal Access Rights for export coal;
    - (B) Access Holders with Coal Access Rights for domestic coal;
    - (C) other users of the Network; and
    - (D) ARTC,
 including whether ARTC or the parties referred to in **paragraphs (A) to (C)** will be materially disadvantaged, including in the context of, and basis upon, which ARTC or the party entered into the Access Agreement or Access Holder Agreement and, where applicable, in applying assumptions in the system true up test under Schedule 2 of the Access Holder Agreements which are different to those to which ARTC or the party has previously agreed and relied upon in entering the Access Agreement or Access Holder Agreement, provided that, in considering whether ARTC or the parties referred to in **paragraphs (A) to (C)** are materially disadvantaged as a result of that difference, the ACCC must take account of the reasons for that difference at the applicable time.
- (h) If the ACCC reasonably considers that it requires additional information from ARTC to make a determination under **section 5.1(g)**, it may request that information from ARTC and, upon receipt of such a request, ARTC must use reasonable endeavours to provide that information to the ACCC as soon as reasonably practicable.
- (i) Once the ACCC makes its determination under **section 5.1(g)** as to which assumption is the more reasonable assumption, that assumption will be

regarded as a System Assumption or (where applicable) a Relevant System Assumption for the purposes of the Undertaking.

- (j) Until such time as the ACCC makes its determination, all calculations, assessments and determinations made by ARTC on the basis of the then applicable System Assumptions will be made on the basis of the assumption referred to in **section 5.1(c)(iii)**. If the determination of the ACCC is that the assumption referred to in **section 5.1(c)(i)** is to apply, that assumption will be regarded as a System Assumption or (where applicable) a Relevant System Assumption for the purposes of the Undertaking and ARTC will revise accordingly any calculations, amendments or determinations made on the basis of the assumption referred to in **section 5.1(c)(i)** in relation to the TOP rebates arising from the system true up test under Schedule 2 of Access Holder Agreements to the extent necessary.

## **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 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.
- (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, in accordance with the following steps:
  - (i) ARTC will seek the HVCCC's views as to whether the provision of the Access Rights sought will have an impact on Coal Chain Capacity;
  - (ii) where the HVCCC provides its view within 20 Business Days, or such other time as agreed with ARTC, ARTC will consider the view expressed by the HVCCC in good faith;
  - (iii) where ARTC disagrees with the view expressed by the HVCCC, ARTC will provide the HVCCC (and if requested, the Applicant where that Applicant is not a member of the HVCCC) with written reasons, subject to confidentiality restrictions, why it disagrees with the HVCCC's assessment within 10 Business Days of receipt of that assessment, or such other period as agreed with the HVCCC and will

ask the HVCCC to consider ARTC's reasons and provide its revised view within a specified timeframe;

- (iv) where the HVCCC provides its view within the specified timeframe, ARTC will consider the revised view of the HVCCC in good faith.
- (e) While ARTC will have regard to the HVCCC's views in accordance with **section 5.2(d)**, ARTC will have the sole right to determine whether there is sufficient Available Capacity to grant the Access Rights sought by the Applicant.

### 5.3 Identification of Shortfall in existing Capacity

- (a) If, at any time during a month, ARTC identifies that there is likely to be a shortfall in Capacity to meet all remaining unconditional Capacity entitlements held by all Access Holders in that month, after taking into account likely usage of Access Holders with an allocation period of a quarter, and the shortfall arises other than as a result of planned maintenance, ("**Capacity Shortfall**") then ARTC will:
  - (i) as soon as reasonably practicable, inform each Access Holder (if affected), coal terminal operators at the Port of Newcastle and the HVCCC of the expected duration of the Capacity Shortfall but to avoid doubt, ARTC's representation of the expected duration of the shortfall is not binding on ARTC; and
  - (ii) subject to ARTC meeting its obligations under **section 5.4** and **section 5.5**, consult with the HVCCC in accordance with the principles in **Schedule F** with the objective of coordinating its response to the Capacity Shortfall with the other Hunter Valley Coal Chain Service Providers.
- (b) For the purposes of this **section 5**, 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.

### 5.4 Event leading to Capacity Shortfall of less than five days

- (a) If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of five days or less and there will be insufficient Capacity to meet all remaining unconditional Capacity entitlements held by all Access Holders in that Month after taking into account likely usage of Access Holders with an allocation period of a quarter, ARTC will allocate the Capacity available in accordance with the following principles:
  - (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);
  - (ii) Capacity remaining after the allocation of Capacity under **sub-section (a)(i)** will be allocated to Access Holders at ARTC's discretion. In exercising its discretion, ARTC must take into account its contractual obligations under Access Agreements but may

allocate Capacity other than on an equitable basis if it is consistent with the objective of ensuring efficient utilisation of Capacity and Coal Chain Capacity during the Capacity Shortfall and after considering any recommendations provided by the HVCCC under **section 5.3(a)(ii)**; and

- (iii) In exercising its discretion under **section 5.4(a)(ii)**, ARTC will use its best endeavours, to the extent practicable, not to reduce availability of contracted access rights from load points not affected by the Capacity Shortfall under this **section 5.4**.
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **section 5.4(a)**.

## **5.5 Event leading to Capacity Shortfall greater than five days**

- (a) If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of more than five days or an event resulting in a Capacity Shortfall subsequently has a duration of more than five days, and there will be insufficient Capacity to meet all remaining unconditional Capacity entitlements held by all Access Holders in that month after taking into account likely usage of Access Holders with an allocation period of a quarter, ARTC will allocate the Capacity available in accordance with the following principles:
  - (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);
  - (ii) To the extent practicable, contracted access rights from load points not affected by the Capacity Shortfall (for example, load points east of the event causing the Capacity Shortfall), will not be reduced by the Capacity Shortfall and Access Holders should continue to be able to use Capacity entitlements originating from unaffected load points; and
  - (iii) ARTC will, to the extent practicable, reduce access rights for each affected load point (for example, a load point west of the event causing the Capacity Shortfall where the Access Holder has Capacity entitlements remaining in that month) with the objective that each affected load point will at the end of the month have borne an equitable pro-rata share of the Capacity Shortfall.
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **section 5.5(a)**.

## **5.6 Shortfall in creation of Additional Capacity**

- (a) Where there is a delay in the completion of a project creating Additional Capacity such that some, but not all, Additional Capacity becomes available, or a project creating Additional Capacity creates less Capacity than expected, that Capacity will be allocated among the Access Holders who have Capacity Entitlements to the Additional Capacity on an equitable pro-rata 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.

- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **section 5.6(a)**.

#### **5.7 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.
- (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.

#### **5.8 Review of mechanism to identify and assign Capacity losses**

- (a) Within 12 months of the Commencement Date, ARTC will, in consultation with the HVCCC, commence a review of the policy and processes for identifying and allocating losses of Capacity caused by Access Holders and their Operators and potential incentive mechanisms to minimise such losses where they have a material impact on Capacity or Coal Chain Capacity or the Capacity entitlements of Access Holders, including those processes outlined in clause 11.6 of the Indicative Access Holder Agreement.
- (b) As part of that review, ARTC will:
  - (i) if the HVCCC agrees to conduct the industry wide review within 12 months of the Commencement Date, participate in good faith in that review and will consider any proposals arising from that review accordance with the consultation process outlined in **section 5.8(c)**;
  - (ii) invite the HVCCC, Access Holders and other Hunter Valley Coal Chain service providers to:
    - (A) provide their views of whether particular actions or omissions of Access Holders or their Operators (such as cancellation of scheduled Services) have a material impact on Capacity, Coal Chain Capacity or the Capacity entitlement of Access Holders; and
    - (B) submit proposals for a suitable framework to address any adverse impact on Capacity caused by such actions or omissions including any rules for the allocation of losses of Capacity to the responsible Access Holder,

within a specified time (which must not be less than six weeks).

- (c) ARTC will in good faith consider any proposals arising from the HVCCC review (if carried out) or the submissions and proposals provided to ARTC within a specified time pursuant to ARTC's review (as applicable) and if ARTC reasonably determines, following consultation with the HVCCC (and further consultation with other stakeholders at ARTC's discretion) that:
- (i) particular actions or omissions of Access Holders or their Operators have a material impact on Capacity, Coal Chain Capacity or the Capacity entitlement of Access Holders; and
  - (ii) a proposal received under **section 5.8(b)**, including a proposal which has been amended following consultation with ARTC and the HVCCC, meets the following criteria:
    - (A) the proposal, if adopted, would be likely to have demonstrably positive benefits in increasing the Available Capacity and allocating the impact of an event causing a Capacity shortfall to the Access Holder causing the incident or event leading to the Capacity shortfall;
    - (B) the anticipated benefits of the proposal outweigh the potential detriments of the proposal including the costs associated with implementation and monitoring of the proposal and an increase in the likelihood of disputes in assigning Capacity losses among Hunter Valley Coal Chain participants; and
    - (C) the proposal has the support of the HVCCC and the broad support of Hunter Valley Coal Chain participants including Access Holders and the Hunter Valley Coal Chain service providers,

then ARTC will, by no later than two years from the Commencement Date, submit the revised proposal, including supporting documentation to the ACCC and will seek the approval of the ACCC to vary the Undertaking to provide for the adoption of the proposal.
- (d) If the ACCC accepts the proposal submitted by ARTC under **section 5.8(c)** and approves the variation sought by ARTC to the Undertaking, then any amendments to the Indicative Access Holder Agreement approved by the ACCC as part of the variation will be identified as a Tier 1 (Mandatory) Coal Provision in **Schedule A:1** to the Undertaking, and those amendments will be automatically incorporated into all Access Holder Agreements for Coal Access Rights, on the date the new or varied Access Undertaking comes into effect.
- (e) If ARTC decides not to submit a variation application to the ACCC under **section 5.8(c)**, ARTC must, by no later than two years from the Commencement Date publish, subject to confidentiality restrictions, a report on its website setting out its reasons for rejecting any proposals developed or submitted under **section 5.8(b)**.

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## 6 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 in accordance with the steps set out in **section 5.2(d)** and **(e)**, as applicable);
  - (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;
  - (vi) the owners of track not part of the Network meet the initial and continued costs associated with constructing and maintaining the connection and agree to reasonable terms associated with the construction, maintenance and operation of the connection as determined by ARTC; and
  - (vii) the connection is not inconsistent with the terms of any lease, licence or other arrangement to which ARTC is a party in respect of the land on which the connection is to be built. Subject to any confidentiality restrictions or obligations, ARTC will make available extracts of the relevant terms on request.
- (b) For the purposes of **section 6**, connection includes the Turnout and, if the construction of railway track on land owned or controlled by ARTC forming part of the Hunter Valley Network corridor is necessary to connect the Turnout to the owner's track, the portion of railway track on ARTC owned or controlled land forming part of the Hunter Valley Network corridor necessary to connect the Turnout to the other owner's track.
- (c) Unless otherwise agreed, ARTC will generally lease the assets relating to the connection from the owner for a nominal sum to the extent such assets form part of the Network and ARTC reasonably considers it necessary to have operational control of those assets.
- (d) If ARTC has refused consent under **section 6(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.

- (e) To avoid doubt, if, at any time during the negotiation period, a dispute arises between the parties in relation to the matters under this **section 6**, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in **section 3.15**.

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## **7 CAPACITY INVESTMENT FRAMEWORK OVERVIEW**

### **7.1 Purpose**

- (a) The purpose of this **section 7** is to provide an overview of the investment framework for providing Additional Capacity outlined in detail in **sections 8 to 11**.
- (b) This **section 7** is an aid to interpretation of **sections 8 to 11** but, to the extent an inconsistency arises, **sections 8 to 11** will prevail over this **section 7**.

### **7.2 Overview of framework**

There are three main steps in the capacity investment framework:

- (a) **Project initiation** - This is the process by which new Projects to provide Additional Capacity are identified and ARTC is obliged to prepare a Concept Assessment Report for endorsement to the RCG. This project initiation step is set out in **section 8**.
- (b) **Industry consultation** - This process provides a staged process for development and implementation of a project in consultation with industry as represented by the RCG commencing with concept assessment. The process involves a number of stages where the RCG is asked to endorse the project proceeding to the next stage. The industry consultation process is set out in **section 9**.
- (c) **Under funding option** - If ARTC elects not to fund all or part of a Project (whether or not endorsed by the RCG or the ACCC), then users will have the right to fund that investment and ARTC will have an obligation to undertake that Project as agreed pursuant to a user funding agreement or as a result of an arbitration. The user funding arrangements are set out in **section 10**.

**Section 11** sets out ARTC's decision making process for consenting to Additional Capacity and funding Projects which is relevant to the above steps.

### **7.3 Step 1 - Project initiation**

- (a) Projects providing Additional Capacity can be initiated for concept assessment in a number of ways:
  - (i) as identified in the Hunter Valley corridor capacity strategy and endorsed by the RCG;
  - (ii) as recommended by the HVCCC at any time;
  - (iii) as requested by an Applicant at any time; or
  - (iv) as proposed by ARTC at any time.

- (b) The primary means of identifying the need for Projects to meet that need will be the Hunter Valley corridor capacity strategy. ARTC's obligations to prepare, consult on and publish a Hunter Valley corridor capacity strategy are set out in **section 8.1**.
- (c) Projects initiated by ARTC, the HVCCC or an Applicant may, but do not have to be, a Project included in the Hunter Valley corridor capacity strategy.
- (d) The party initiating a Project must fund the Concept Assessment Report but, if the RCG endorses the Project to proceed to project feasibility, then those costs will become part of the Project costs and will be refunded to that party.

#### **7.4 Step 2 - Industry consultation for a project**

- (a) The industry consultation process must be used for Projects creating Additional Capacity and may be used by ARTC for projects which do not involve the creation of Additional Capacity.
- (b) The industry consultation process involves five stages - concept assessment, project feasibility, project assessment, project implementation and project close out.
- (c) ARTC may seek endorsement from the RCG to proceed to the next stage.
  - (i) If endorsed by the RCG, then the costs incurred for the next stage are deemed Prudent to the extent of the endorsement.
  - (ii) If endorsed by the RCG, then any variation to previously endorsed costs for that stage are deemed Prudent to the extent of the endorsement.
  - (iii) If proceeding to the next stage is not endorsed by the RCG, then ARTC may elect to seek ACCC endorsement of the relevant costs as Prudent.
- (d) ARTC is not required to proceed with a Project which does not, in ARTC's reasonable opinion, satisfy the Technical Criteria (subject to dispute resolution).
- (e) At each stage, ARTC will advise the RCG of its intention as to whether it agrees to fund the next stage (or any increase in Project Costs during project implementation) having regard to the Financial Criteria.

#### **7.5 Step 3 - User funding option**

- (a) If at any time, ARTC advises that it will not fund a Project, then the user funding option described at **section 10.1** is available.
- (b) ARTC will negotiate in good faith with relevant Contributors to agree a user funding agreement under which ARTC will proceed with the Project and the Contributor will fund the Project.
- (c) The ACCC will be the arbitrator of any dispute.

- (d) The intent of the user funding option is to have a flexible mechanism by which the industry can fund Projects through a Capital Contribution where ARTC elects not to do so, including Projects which in whole or in part are deemed Prudent in accordance with **section 9**.
- (e) A Contributor will recover its funding in accordance with the Capital Contribution Principles.

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## **8 PROJECT INITIATION**

### **8.1 Hunter Valley corridor capacity strategy**

- (a) ARTC will develop a Hunter Valley corridor capacity strategy annually.
- (b) 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:
  - (i) be based on contracted volumes sought by existing and prospective access holders;
  - (ii) be aligned with Newcastle port terminal capacity forecasts; and
  - (iii) identify maximum future capacity requirements.
- (c) The Hunter Valley corridor capacity strategy will include capacity expansion options which:
  - (i) seek to ensure sufficient Capacity to meet coal producers' combined demand forecasts;
  - (ii) 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;
  - (iii) include a preliminary high level assessment of objectives, and an indicative cost estimate and benefits;
  - (iv) include an estimate of cost to be incurred in the concept assessment stage; and
  - (v) include recommendations on the preferred options.
- (d) Before finalising the Hunter Valley corridor capacity strategy, ARTC will:
  - (i) convene and conduct an annual meeting with the HVCCC and relevant coal terminal operators at the Port of Newcastle. The objective of the consultation is to provide that any planned expansions to the Network in the Hunter Valley corridor capacity are aligned with expansions at the coal terminals at the Port of Newcastle;

- (ii) publish a draft Hunter Valley corridor capacity strategy on the ARTC website and invite comments on the options set out in draft strategy from all users of the Network including Access Holders with Coal Access Rights, Access Holders with Non-Coal Access Rights, and above rail operators; and
- (iii) consider the views submitted by those stakeholders in good faith and take those views into account in finalising the Hunter Valley corridor capacity strategy.
- (e) ARTC will publish the Hunter Valley corridor capacity strategy on its website, which will include its assessment of Capacity based on the Relevant System Assumptions, as soon as practicable after it is finalised each year under **section 8.1(d)(iii)**.

## **8.2 Additional Capacity endorsed by the RCG for concept assessment**

ARTC may seek formal endorsement from the RCG of a project identified in the Hunter Valley corridor capacity strategy to proceed to concept assessment and, if endorsed, the costs of undertaking the Concept Assessment Report will be deemed as Prudent and included in the RAB or expensed in the year incurred.

## **8.3 Additional Capacity recommended by the HVCCC**

- (a) The HVCCC may at any time recommend to ARTC a Project. The Project may, but does not need to be, a Project identified in the Hunter Valley corridor capacity strategy.
- (b) If the HVCCC makes such a recommendation, ARTC will consult with the HVCCC to develop the Project and will use reasonable endeavours to agree with the HVCCC an estimated cost and timeframe to prepare a Concept Assessment Report for that Project.
- (c) If the HVCCC pays the agreed costs, ARTC will prepare a Concept Assessment Report for that Project and use reasonable endeavours to do so in the agreed timeframe.
- (d) If requested by the HVCCC, ARTC will submit the Concept Assessment Report to the RCG for endorsement to proceed to project feasibility (unless in ARTC's reasonable opinion the Project does not satisfy the Technical Criteria in which case it will provide written reasons to the HVCCC).
- (e) If the RCG endorses the Project to proceed to project feasibility, ARTC will reimburse the HVCCC the agreed costs to prepare the Concept Assessment Report and the costs incurred in preparing the Concept Assessment Report will be deemed Prudent and included in the RAB or expensed in the year incurred.

## **8.4 Additional Capacity requested by the Applicant**

- (a) If an Applicant requests Additional Capacity under **section 3.9(d)** and following the provision of the Indicative Access Proposal under **section 3.10**, wishes to proceed with the request for Additional Capacity, ARTC will consult with the Applicant and, if appropriate the HVCCC, to develop the associated Project and will use reasonable endeavours to agree with the

Applicant an estimated cost and timeframe to prepare a Concept Assessment Report for that Project.

- (b) If the Applicant pays the agreed costs, ARTC will prepare a Concept Assessment Report for that Project and use reasonable endeavours to do so in the agreed timeframe.
- (c) If requested by the Applicant, ARTC will submit the Concept Assessment Report to the RCG for endorsement to proceed to project feasibility (unless in ARTC's reasonable opinion the project does not satisfy the Technical Criteria in which case it will provide written reasons to the Applicant).
- (d) If the RCG endorses the Project to proceed to project feasibility, ARTC will reimburse the Applicant the agreed costs to prepare the Concept Assessment Report and the costs incurred in preparing the Concept Assessment Report will be deemed Prudent and included in the RAB or expensed in the year incurred.
- (e) To the extent the Project is developed and implemented through the industry consultation process set out in **section 9** ARTC will keep the Applicant informed of the progress of the Project.
- (f) To avoid doubt, the preparation of the Concept Assessment Report and the industry consultation process in relation to the Project may occur in parallel with the negotiation of an Access Agreement under **section 3.12** and/or following the entry into of an Access Agreement (which may, for example, provide for the provision of Access Rights in relation to the Additional Capacity subject to the RCG endorsement of the Project).
- (g) The Project requested by the Applicant under **sub-section (a)** may, but does not need to be, a Project identified in the Hunter Valley corridor capacity strategy.

### **8.5 Additional Capacity identified by ARTC**

ARTC may at any time prepare a Concept Assessment Report in relation to a project for RCG endorsement to proceed to project feasibility. The Project may, but does not need to be, a project identified in the Hunter Valley corridor capacity strategy.

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## **9 INDUSTRY CONSULTATION**

### **INTRODUCTION**

#### **9.1 Overview**

- (a) If a Project to provide Additional Capacity is initiated under **section 8** and proceeds to concept assessment, ARTC will undertake industry consultation in relation to the Project in accordance with this **section 9**.
- (b) ARTC may also use the industry consultation process to obtain endorsement for projects to the extent they do not involve Additional Capacity (for example asset replacement, cost reduction or safety related projects).
- (c) The objectives of the consultation process are to:



- (i) inform Hunter Valley Coal Chain participants of Additional Capacity requirements and investment strategies;
  - (ii) provide a process for Hunter Valley Coal Chain participant input, aimed at, among other things the alignment of projects to provide Additional Capacity with projects to expand capacity at the coal terminals at the Port of Newcastle; and
  - (iii) provide a process for the applicable industry participants to participate in the development and management of projects and to endorse Capital Expenditure incurred by ARTC in providing Additional Capacity or incurred in relation to the Network as Prudent.
- (d) The depth of analysis and documentation prepared at each stage of consultation will reflect the cost, benefits and risks of a project.
- (e) The stages of consultation set out below will be followed in accordance with this **section 9** except where:
- (i) ARTC considers that the process would unjustifiably compromise timely delivery of the project, and the RCG consents to a modified consultation process for that project; or
  - (ii) ARTC considers that a project is minor in its scope or cost in which case ARTC will consult on the group of minor projects rather than each minor project individually. A project would typically be considered minor in scope or cost if it relates to ongoing annual programmes for asset replacement rather than a project to deliver Additional Capacity and if a project does not relate to an ongoing annual programme for asset replacement, then ARTC may only consult on it as part of a group of minor projects with the consent of the RCG.
- (f) Any endorsed costs incurred in complying with the provisions of this **section 9** will normally be included in the RAB where a project is commissioned, or otherwise expensed in the year incurred.
- (g) ARTC will use reasonable endeavours, to the extent within its control, to undertake the stages of consultation set out in **sections 9.3 to 9.7** 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.

## 9.2 The RCG

- (a) ARTC will convene, and conduct, regular monthly meetings with the RCG for the purpose of consulting with applicable industry representatives and obtaining endorsement of Capital Expenditure associated with Additional Capacity or other Capital Expenditure on the Network. 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 meetings where ARTC considers this will assist project development and delivery.

- (b) At the commencement of this Undertaking, the RCG will comprise the following membership (as selected by the relevant industry participants). One representative of:
- (i) each Access Holder who holds the largest volume of contracted coal gtkm in each Pricing Zone;
  - (ii) any other Access Holder with more than 7% of contracted coal gtkm on the Network who is not already eligible to appoint a representative under **sub-section (i)**;
  - (iii) all Access Holders with less than 7% of contracted coal gtkm on the Network and the Representative may split its vote according to the percentage of contracted coal gtkm held by each represented party if requested;
  - (iv) each Operator, in its capacity as an Operator, with more than 10% of contracted coal gtkm on the Network who is not an Access Holder with more than 10% of contracted coal gtkm on the Network (in a non-voting capacity); and
  - (v) the HVCCC (in a non-voting capacity).
- (c) 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, but do not have to be participants in the HVCCC.
- (d) 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.
- (e) Subject to **sub-section (f)**, RCG member voting will be weighted on the basis of contracted coal gtkm for the current calendar year and the next nine calendar years, in the Pricing Zone in which a project is proposed to occur.
- (f) In determining voting entitlement, other than for the purposes of endorsing project assessment at **section 9.4(d)** and any stage beyond that, ARTC may, at its discretion, include any coal gtkm in the Pricing Zone which ARTC reasonably expects will become contracted coal gtkm, for the current calendar year or for any of the following nine calendar years, immediately following the completion of the proposed project. To avoid doubt ARTC may, in exercising this discretion, determine that a prospective access holder which is not a current member of RCG has a voting entitlement.
- (g) 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.
- (h) ARTC may elect to continue to the next stage of project development without RCG endorsement. Where this occurs, ARTC may elect to seek endorsement of the expenditure from the ACCC in respect of project development and delivery to the extent not endorsed by the RCG. Expenditure incurred by ARTC on project development or delivery will be included in the RAB or expensed when incurred as endorsed by the ACCC. ARTC may seek the

ACCC's endorsement in advance of, or subsequent to, incurring the expenditure.

## PROJECT DEVELOPMENT STAGES

### 9.3 Concept assessment

- (a) Where ARTC prepares a Concept Assessment Report under **section 8**, it will use reasonable endeavours to ensure the report complies with **sub-section (b)** unless agreed otherwise with the RCG, HVCCC or an Applicant (as applicable).
- (b) The objective of the Concept Assessment Report will be to enable a preliminary assessment of the potential costs, benefits and risk involved and unless ARTC and the RCG, HVCCC or an Applicant (as applicable) agrees otherwise, will include an indicative assessment of:
  - (i) project objectives;
  - (ii) broad cost estimates and associated benefits;
  - (iii) preliminary financial analysis;
  - (iv) preliminary risk assessment; and
  - (v) indicative timeframes for the development and the delivery of the project.
- (c) At the time ARTC submits a Concept Assessment Report to the RCG, ARTC will advise whether it intends to fund the project feasibility stage of the project, subject to project feasibility being endorsed by the RCG.
- (d) ARTC may seek endorsement from the RCG to proceed to project feasibility. Endorsement to proceed to project feasibility would include:
  - (i) endorsement of any variation to the estimated costs endorsed under **section 8.2** or ARTC's costs of preparing the Concept Assessment Report for the HVCCC or an Applicant (as applicable), incurred in undertaking concept assessment;
  - (ii) endorsement for ARTC's estimated costs and proposed timeframe to undertake project feasibility,

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

### 9.4 Project Feasibility

- (a) For each project endorsed at the concept assessment stage, ARTC will provide a project feasibility report to the RCG.
- (b) Unless ARTC and the RCG agree otherwise, the project feasibility report will include:
  - (i) confirmation of project objectives, including a preliminary functional specification;

- (ii) brief outline of scope;
  - (iii) identification of estimated project costs (with a +/-20% range);
  - (iv) potential benefits, including capacity, maintenance and operating benefits;
  - (v) preliminary risk assessment;
  - (vi) preliminary project management plan, including initial estimate of timeline for milestones;
  - (vii) details of any variation to the budgeted costs to undertake Project Feasibility; and
  - (viii) outline of project assessment stage, including an estimate of budget.
- (c) At the time ARTC submits a project feasibility report to the RCG, ARTC will advise whether it intends to fund the project assessment stage of the project, subject to project assessment being endorsed by the RCG.
- (d) ARTC may seek formal endorsement from the RCG to proceed to project assessment. Endorsement to proceed to project assessment would include:
- (i) endorsement of any variation to the estimated costs endorsed under **section 9.3(d)(ii)** incurred in undertaking project feasibility; and
  - (ii) endorsement for ARTC's estimated costs and proposed timeframe to undertake project assessment,
- to be included in the RAB or expensed in the year incurred.

## 9.5 Project Assessment

- (a) For each project endorsed at the project feasibility stage, ARTC will provide a project assessment report for endorsement to the RCG.
- (b) Unless ARTC and the RCG agree otherwise, the project assessment report will include:
  - (i) project objectives report, including functional specification;
  - (ii) scope of work report, including:
    - (A) assessment of technical and operating requirements;
    - (B) developed concept design, with survey if required; and
    - (C) independent design verification if required;
  - (iii) project schedule including time tolerances and 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;
  - (iv) financial evaluation, including estimated impact on access pricing;

- (v) developed project management plan which may include:
  - (A) project configuration management plan;
  - (B) project delivery strategy;
  - (C) resource management plan;
  - (D) cost management plan;
  - (E) quality management plan;
  - (F) safety management plan;
  - (G) procurement management plan;
  - (H) interface management plan;
  - (I) scope and budget change management plan;
  - (J) environmental plan;
  - (K) project phases, milestones and deliverables;
  - (L) project risk assessment report; and
  - (M) regulators notification, if needed.
- (c) At the time ARTC submits a project assessment report to the RCG, ARTC will advise whether it intends to fund project procurement for the project, subject to project procurement being endorsed by the RCG.
- (d) ARTC may seek formal endorsement from the RCG to proceed to project procurement. Endorsement to proceed to project procurement would include any variation between the endorsed estimated cost range identified during project assessment and the project budget identified during project feasibility and:
  - (i) endorsement of any variation to the estimated costs endorsed under **section 9.5(b)(iii)** incurred in undertaking project assessment; and
  - (ii) endorsement of ARTC's estimated costs and proposed timeframe to comply with the provisions of project procurement, including costs incurred in obtaining independent expert determination as applicable,

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

## 9.6 Project implementation

### (a) Procurement

- (i) ARTC may, at its discretion, commence procurement in parallel with project assessment, prior to endorsement to proceed to project implementation.

- (ii) 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.
  - (iii) Where a cost outside of the range, or contingency endorsed in the project assessment stage is confirmed (“**Cost Variation**”) and/or there is a material variation from the project schedule (“**Schedule Variation**”) under **section 9.4(b)(iii)**, ARTC will seek the endorsement of the RCG for those variations.
  - (iv) Where ARTC undertakes confirmation of scope, project timing and cost through an alliance or internal evaluation, the RCG may, at its cost, seek to review the scope, project timing and cost, having regard to all elements of the selected method of project delivery.
  - (v) If the RCG endorses the Cost Variation and/or Schedule Variation, ARTC will proceed with project implementation.
  - (vi) If the RCG endorses less than the Cost Variation, or does not endorse the Schedule Variation, ARTC may refer the matter to an agreed independent expert for a determination as to whether the Cost Variation is Prudent or whether the Schedule Variation is reasonable (having regard to whether it arose from a matter outside of ARTC’s reasonable control or which could not have been reasonably anticipated by ARTC), in accordance with **section 9.6(d)**.
  - (vii) Upon the independent expert determining on the cost to be taken as Prudent in accordance with **sub-section (vi)** (which, to avoid doubt, must take into account any change in project schedule which the independent expert considers reasonable), then subject to **sub-section (viii)**, ARTC will proceed with project implementation regardless of whether the independent expert determines the full amount of the Cost Variation as Prudent.
  - (viii) If the independent expert determines the cost which is Prudent is less than the Cost Variation and/or the Schedule Variation is not reasonable, then ARTC may either:
    - (A) proceed with the project implementation by way of alliance or internal evaluation, at the costs determined by the independent expert as Prudent and in accordance with the project schedule determined by the independent expert; or
    - (B) proceed by way of an open competitive tender and undertake project implementation in accordance with the costs and project schedule determined as a result of that independent tender process.
  - (ix) Any cost of delay resulting from following this process will be deemed Prudent with respect to the project.
- (b) **Project management plan**
- (i) ARTC will:

- (A) finalise the project management plan developed during project assessment, including a contract management plan and operational readiness plan and provide the finalised project management plan and project schedule including time tolerances and project budget to the RCG for endorsement; and
    - (B) advise whether it intends to fund the project delivery stage of the project in accordance with the revised project budget and/or project schedule resulting from project procurement, subject to project delivery being endorsed by the RCG.
  - (ii) Endorsement of the finalised project management plan would include endorsement of the project budget and schedule for project delivery to be included in the RAB or expensed in the year incurred.
- (c) **Project delivery**
- (i) ARTC will implement the finalised project management plan.
  - (ii) ARTC will provide progress reports to the RCG at RCG meetings, the nature and frequency of which will be agreed with the RCG. Unless ARTC and the RCG agree otherwise, a progress report will include:
    - (A) a report on the physical status of work commenced;
    - (B) an assessment of remaining time and required resources to complete the project;
    - (C) an assessment of expected resource availability;
    - (D) identification of any issues; and
    - (E) exceptions, where ARTC would advise the RCG that the project will deviate outside of its planned cost margins, as set out in the project budget, or outside of the planned timing tolerance margins, as set out in the project schedule, both included with the project assessment report to be provided under **section 9.5(a)**.
  - (iii) Where a variation to the endorsed project budget or project schedule identified at **section 9.5(b)(iii)** including contingency, or an endorsed variation at **section 9.6(a)(iii)** or approved by an independent expert at **section 9.6(a)(viii)**, arises the following will apply:
    - (A) ARTC will submit a revised project schedule and/or costing to the RCG for endorsement having regard to the prudence of the revised costing and the reasonableness of the revised project schedule but will continue with project delivery while a decision in respect of the endorsement is pending;
    - (B) the RCG may endorse all or part of the variation and where the RCG endorses all of the variation, ARTC will continue with project delivery;

- (C) where the RCG endorses less than the full variation and/or endorses a different project schedule, ARTC may refer the matter to an agreed independent expert for review in accordance with **section 9.6(d)**. ARTC will continue with project delivery while that expert determination is pending;
- (D) the review of the independent expert will have regard to whether the variation is Prudent and/or whether the variation to the project schedule is reasonable and arose from a matter outside of ARTC's reasonable control or which could not have been reasonably anticipated by ARTC;
- (E) If the independent expert decides the full extent of the variation to be taken is Prudent and/or the variation to the project schedule is reasonable, ARTC will continue with project delivery;
- (F) If the independent expert decides the full extent of the variation to be taken is not Prudent or the variation to the project schedule is not reasonable, ARTC may cease project delivery, or, having regard to the findings of the independent expert, propose a variation to the RCG in accordance with **section 9.6(c)(iii)(A)**; and
- (G) Any cost incurred by ARTC in complying with this **sub-section (iii)**, including any cost of delay resulting from following this process will be deemed Prudent with respect to the project. To avoid doubt, any expenditure incurred by ARTC in continuing a project pending endorsement by the RCG or an independent expert, will be deemed Prudent with respect to the project.

(d) **Independent expert review**

- (i) Unless the parties agree otherwise, where ARTC refers a matter to an agreed independent expert under **section 9.6(a)(vi)** or **section 9.6(c)(iii)(C)**, the independent expert will:
  - (A) if the parties are unable to agree on the appointment of an independent expert within 10 Business Days of the matter being referred to expert determination, be appointed by the President of the Institute of Arbitrators and Mediators Australia ("**IAMA**");
  - (B) act as an expert and not an arbitrator;
  - (C) proceed as quickly as possible and consistent with a fair and proper assessment of the matter;
  - (D) observe the rules of natural justice but will not be required to observe the rules of evidence;
  - (E) 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

(F) have regard to the principles, methodologies and provisions set out in the Undertaking.

(ii) 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.

(e) **Commissioning**

(i) ARTC will commission the project into operation upon completion of project delivery.

(ii) If the project has a delivery time frame of more than 12 months, and the RCG consents to a staged delivery of the project, upon completion of any stage, any capital expenditure and interest cost incurred during construction associated with that stage will be deemed Prudent at the date of completion of that stage.

(iii) If a project is commissioned after the latest of:

(A) the project delivery date set out in the project schedule at **section 9.5(b)(iii)** finalised and provided as part of the project management plan under **section 9.6(c)(iii)(C)**;

(B) if a new project schedule has been endorsed by the RCG under **section 9.6(c)(iii)(B)**, the project delivery date set out in that endorsed project schedule; and

(C) if a new project schedule has been determined by an independent expert under **section 9.6(c)(iii)(C)**, the project delivery date set out in that project schedule,

then, any interest incurred in respect of construction during the period between the (new) project delivery date and the project actual commissioning date will not be deemed Prudent.

**9.7 Project close-out**

(a) Upon completion of project implementation, ARTC will provide a project close-out report for the RCG. Unless ARTC and the RCG agree otherwise, a project close-out report will include:

(i) formal acceptance of works;

(ii) outstanding works and if necessary a completion plan;

(iii) cost report; and

(iv) verification of benefits delivered.

(b) 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.

#### **9.8 Endorsement of project development stages**

- (a) 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 and any coal gtkm included under **clause 9.2(f)**, either directly or through RCG representatives, with over 50% of contracted coal gtkm in that Pricing Zone will constitute endorsement by the RCG of that stage of project development.
- (b) 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 and any coal gtkm included under **clause 9.2(f)**, either directly or through RCG representatives, with over 70% of contracted coal gtkm in that Pricing Zone will constitute endorsement by the RCG of that stage of project development.
- (c) To avoid doubt, **sub-section (a)** will apply if a Contributor agrees to fund Additional Capacity such that the increase in the Indicative Access Charge for that Pricing Zone is equal to or less than 10%.

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## 10 USER FUNDING OPTION

### 10.1 User funding option

- (a) If:
- (i) ARTC advises at any project development stage that it will not, or will no longer, fund a Project or will only fund a Project to certain level which is less than that expected to complete the Project; or
  - (ii) ARTC ceases a Project under **section 9.6(c)(iii)(F)**,  
and an Applicant or an Access Holder (“**Contributor**”) notifies ARTC that they are willing to fund the Project in whole or in part through a Capital Contribution such that ARTC’s financial position is no worse off, then ARTC and the Contributor will negotiate in good faith to agree a user funding agreement under which ARTC will proceed with the Project and the Contributor will provide funding for the Project.
- (b) Within a reasonable time of the Contributor giving a notice under **sub-section (a)**, ARTC will provide the Contributor with an indicative timetable for negotiating a user funding agreement including any investigations or information required by ARTC to proceed with negotiation. Once agreed, ARTC will use reasonable endeavours to adhere to the timetable and notify the Contributor of any delays.
- (c) Subject to ARTC’s agreement, a Contributor may fund ARTC’s costs of providing Additional Capacity:
- (i) by the Contributor providing an amount of initial funding in advance of a Project commencing sufficient for ARTC to commence the Project and providing additional funding for the next stages of the Project when agreed milestones are achieved with the objective that ARTC is not required to fund the Project out of its own working capital;
  - (ii) by the Contributor reimbursing the relevant costs as and when they are incurred by ARTC; or
  - (iii) in any other way that ARTC and the Contributor agree.
- (d) In negotiating a user funding agreement, a Contributor may elect:
- (i) to seek to have some or all of the Project costs deemed as Prudent through the Project proceeding through the RCG or seeking ACCC endorsement of the Project costs as Prudent (in which case ARTC will provide reasonable cooperation to the Contributor at the Contributor’s cost); and/or
  - (ii) fund the Project without seeking to have some or all of the Project costs included into the RAB.
- (e) The Contributor will recover the capital cost associated with its funding, in accordance with the Capital Contribution Principles as set out in **section 10.2**

and the mechanism for recovery will depend on the extent to which the Project costs are endorsed as Prudent either by the RCG or ACCC.

- (f) Where the Additional Capacity is initially funded by a Capital Contribution, an equitable form of reconciliation between the Contributor, ARTC and another user sharing the Additional Capacity will apply, consistent with the Capital Contribution Principles in **section 10.2**.

## **10.2 Capital Contribution Principles**

- (a) The following principles will apply in relation to the negotiation of a user funding agreement between ARTC and a Contributor to achieve an equitable form of reconciliation under **section 10.1(f)**:
  - (i) ARTC will be economically no worse off as determined in accordance with the criteria set out in **sub-section (b)**.
  - (ii) In determining Charges for the relevant Pricing Zone, ARTC will have regard to:
    - (A) achieving full recovery of VCC from all Access Holders on the basis of actual usage;
    - (B) the Charges applicable to the Contributor and other Access Holders will be equitable subject to the relevant provisions of **section 4.14** and **section 4.15** of this Undertaking; and
    - (C) the Contributor will not achieve recovery of capital cost associated with assets funded by a Capital Contribution ("**Contributed Assets**") that exceeds the Rate of Return.
- (b) "**Economically No Worse Off**" means, in relation to the Contributed Assets of a Contributor in a Segment, earning a rate of return on assets funded by ARTC ("**ARTC Assets**") that have a value forming part of the RAB Floor Limit for that Segment in the year that the Contributed Assets are commissioned ("**Relevant ARTC Assets**"):
  - (i) in the year that the Contributed Assets are commissioned and each year thereafter; and
  - (ii) following reconciliation with the Contributor in accordance with these Capital Contribution Principles,  
  
that is no less than the rate of return on the Relevant ARTC Assets that ARTC would have earned in the year that the Contributed Assets are commissioned, had the Contributed Assets not been commissioned. To avoid doubt, the rate of return on the Relevant ARTC Assets in each year will be determined in accordance with **section 4** of the Undertaking and based on the average of the opening and closing value of the Relevant ARTC Assets.
- (c) Where a Capital Contribution is made by the Contributor, to the extent that the related Capital Expenditure is Prudent in accordance with **section 9** of this Undertaking, or determined as Prudent by the ACCC:

- (i) ARTC will have regard to the following objectives in determining Charges for the relevant Pricing Zone:
    - (A) Maximising recovery of (or contribution to) applicable FCC and NCC, in proportion to relative consumption of assets funded by ARTC or a Capital Contribution (“**Combined Assets**”).
    - (B) Maximising recovery of (or contribution to) the capital cost associated with Contributed Assets, determined with reference to the useful life of the Contributed Assets and Rate of Return approved under this Undertaking, in proportion to relative consumption of the Combined Assets.
  - (ii) Subject to **sub-section (a)(i)** and **sub-section (a)(ii)(C)**, recovery of capital cost associated with Contributed Assets by the Contributor will be based on an allocation of revenue obtained through the Charges between ARTC and the Contributor such that ARTC and the Contributor achieve an equitable rate of capital cost recovery from ARTC Assets and Contributed Assets respectively.
  - (iii) The Contributor will not receive any priority in the allocation of Additional Capacity made available through Contributed Assets.
- (d) Where a Capital Contribution is made by the Contributor, to the extent that the related Capital Expenditure is not Prudent in accordance with **section 9** of this Undertaking, or is not endorsed to be Prudent by the ACCC:
- (i) ARTC will have regard to the following objectives in determining Charges for relevant Pricing Zone:
    - (A) Maximising recovery of (or contribution to) the non-capital component (operating expenditure) of applicable FCC and NCC, in proportion to relative consumption of Combined Assets.
    - (B) Maximising recovery of (or contribution to) the capital component (depreciation and return) of applicable FCC and NCC, in proportion to relative consumption of ARTC Assets.
    - (C) Subject to **sub-section (d)(i)(D)**, there will be no recovery of (or contribution to) the capital cost associated with Contributed Assets.
    - (D) Where another Access Holder elects to utilise the Additional Capacity made available through Contributed Assets, maximising recovery from that Access Holder of (or contribution to) the capital cost associated with Contributed Assets, determined with reference to the useful life of the Contributed Assets and Rate of Return approved under the Undertaking, in proportion to relative consumption of Contributed Assets.

- (ii) The Contributor will not recover the capital cost associated with Contributed Assets except where another Access Holder elects to utilise the capacity made available through the Contributed Assets, in which case the recovery of capital cost associated with Contributed Assets will be based on an allocation of revenue obtained through the Charges between ARTC and the Contributor such that ARTC and the Contributor achieve an equitable rate of capital cost recovery from ARTC Assets and Contributed Assets respectively.
- (iii) The Contributor will receive priority in the allocation of Additional Capacity made available through Contributed Assets.
- (e) Other than the principles at **sub-sections (a)(i) and (ii) and sub-section (d)(i)(C)** ARTC and the Contributor may agree to depart from the principles set out in this **section 10.2** to apply to the equitable form of reconciliation.

### **10.3 Construction and ownership of assets**

- (a) Unless it otherwise agrees, ARTC will manage the construction of the Additional Capacity under the user funding option.
- (b) Any Additional Capacity, once created, will be owned by ARTC (or the lessor under the NSW Lease) and managed by ARTC.

### **10.4 Dispute resolution**

A dispute as to the terms of a user funding agreement will be a “Dispute” for the purposes of **section 3.15** and references to “Applicant” in that section will be construed as a reference to the Contributor.

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## **11 ARTC DECISION MAKING**

### **11.1 ARTC consent to a project**

- (a) If, in ARTC’s reasonable opinion, a Project does not satisfy the Technical Criteria, ARTC may decide not to proceed to the next stage in which case it will give written reasons to the RCG and, if applicable, the Applicant who has initiated the Project.
- (b) If the RCG and/or, if applicable, the Applicant who initiated the Project raises a dispute as to whether the Technical Criteria are satisfied, then it will be a “Dispute” for the purposes of **section 3.15**.
- (c) If the dispute is raised by the RCG, then “Applicant” in **section 3.15** will be construed to include one or more members of the RCG acting as a representative of the RCG.

### **11.2 ARTC decision to fund a project**

- (a) If, in ARTC’s opinion, the Project does not satisfy the Financial Criteria, ARTC may elect not to fund a Project, discontinue funding a Project or only fund a Project to a certain level (in which case ARTC will promptly notify the RCG and the Applicant (if applicable)).

- (b) At each stage, ARTC will advise the RCG and, if applicable, the Applicant who has initiated the Project whether ARTC intends to fund the next stage of the Project.
- (c) If a cost variation occurs during project implementation. ARTC will promptly advise the RCG and, if applicable, the Applicant who has initiated the Project whether it will fund that cost variation at the same time as ARTC seeks endorsement of that variation from the RCG under **section 9.6(a)(iii)** or **section 9.6(c)(iii)(A)** unless the Applicant has already agreed to fund the Project under a user funding agreement.
- (d) ARTC's funding may be subject to conditions (for example endorsement of the next stage by the RCG or up to a maximum level).
- (e) If ARTC elects not to fund a Project in whole or in part, ARTC will provide written reasons why the Financial Criteria are not satisfied to the RCG and, if applicable, the Applicant who has initiated the Project.
- (f) If ARTC elects not to fund all or part of the Project, or a condition to its funding is not met and not waived by ARTC, then the user funding option under **section 10** applies.

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## **12 NETWORK TRANSIT MANAGEMENT**

### **12.1 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 for Coal Access Rights; and
  - (ii) Capacity Entitlements under existing Access Agreements for Non-Coal Access Rights.
- (b) ARTC will provide the MTP to the HVCCC to assist the HVCCC in advising ARTC in relation to the day-to-day scheduling of Trains.

### **12.2 Short Term Capacity Management**

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

- (a) the MTP and the remaining Capacity Entitlements of Access Holders under Access Holder Agreements and other Access Agreements;
- (b) any relevant input provided by the HVCCC; and
- (c) the Network Management Principles ("NMPs").

### **12.3 Network Transit Management**

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

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## 13 PERFORMANCE MEASUREMENT AND INCENTIVES

### 13.1 Network Key Performance Indicators

- (a) ARTC will report on its website performance against the Network Key Performance Indicators set out in **Schedule D**, at the frequency referred to in **Schedule D**. To avoid doubt, in reporting on the performance against the Network Key Performance Indicators, ARTC will not report on the performance of individual Access Holders or Operators.
- (b) ARTC's obligation to report performance under this **section 13** will not arise until the completion of the first full period in respect of which performance is measured, this means that:
  - (i) ARTC will not report quarterly performance until the completion of the first full quarter after the Commencement Date or New Segments Commencement Date in respect of the New Segments (as applicable); and
  - (ii) ARTC will not report annual performance until the completion of the first full calendar year after the Commencement Date or New Segments Commencement Date in respect of the New Segments (as applicable).

### 13.2 Negotiation of key performance indicators for each Access Agreement

- (a) ARTC will negotiate with an Applicant in good faith the key performance indicators to be included in an Access Agreement, and any changes to the key performance indicators in the Access Agreement during the term of the Access Agreement.
- (b) In negotiating the key performance indicators for an Access Agreement ARTC's objectives include to have a consistent set of key performance indicators for all Access Holders which are also consistent with:
  - (i) the applicable Relevant System Assumptions;
  - (ii) other incentives and measures of ARTC's performance including the performance indicators contained in the NSW Lease; and
  - (iii) in the case of an Access Holder Agreement for Coal Access Rights:
    - (A) coal chain performance indicators;
    - (B) the Network Key Performance Indicators reported by ARTC under **section 13.1** of the Access Undertaking, where applicable;
    - (C) any particular incentives and measures of ARTC's performance contained in the Indicative Access Holder Agreement including the application of the system wide true-up tests, and

unless otherwise agreed by ARTC and the Applicant, the key performance indicators to be included in an Access Holder Agreement for Coal Access



Rights will be a subset of the Network Key Performance Indicators, as contemplated by the reporting scope for each indicator identified in the second column of the Network Key Performance Indicators table in section 1 of **Schedule D**, except that the reporting detail for each indicator identified in the fourth column of that table will be specific to the Applicant.

- (c) If requested by the Applicant or, if ARTC reasonably considers necessary, ARTC will include one or more Operators nominated by an Applicant in the negotiation of the key performance indicators to be included in the Access Agreement and in any review of those indicators.

### **13.3 Development of non-TUT related ARTC performance incentives**

- (a) Within six months of the Commencement Date, ARTC will:
  - (i) prepare and publish on its website options for a proposed performance incentive scheme which has the objectives of encouraging ARTC, through financial reward, to improve operating, maintenance and capital expenditure efficiency, and achieve desirable safety performance, to be included in the Undertaking; and
  - (ii) invite submissions from Access Holders and other stakeholders on the proposed performance incentive scheme, within a specified time (which must be not less than 6 weeks from the publication of the options).
- (b) ARTC will in good faith consider the submissions provided within the specified time and by no later than 12 months from the Commencement Date will:
  - (i) prepare a report addressing options for a proposed performance incentive scheme having regard to the submissions and containing ARTC's proposed variation to the Undertaking to include its proposed performance incentive scheme;
  - (ii) provide the report to the ACCC; and
  - (iii) lodge a variation application with the ACCC under **section 44ZZA(7)** of the CCA consistent with the report.
- (c) To avoid doubt, the performance incentive scheme under this **section 13.3** may be developed separately from the TUT-related performance incentive scheme to be developed under **section 13.5** and is not required to include performance incentives to the extent they would overlap with those to be developed under **section 13.5**.

### **13.4 Review of system wide TUT**

- (a) As soon as practicable after the completion of two full calendar years following the Commencement Date, ARTC will commence a review of the operation and effectiveness of the system wide true up test ("TUT") in Schedule 2 of the Indicative Access Holder Agreement ("TUT Review").

- (b) ARTC will invite submissions from Access Holders and other stakeholders, to be made within a specified timeframe (which must be not less than 6 weeks from the publication of a request for submissions), on whether:
  - (i) having regard to the consequences of failing the TUT, the TUT provides appropriate incentives to make available Capacity for use either on a contracted or ad hoc basis; and
  - (ii) the TUT provides appropriate incentives for ARTC having regard to the:
    - (A) the objectives in **section 1.2**;
    - (B) the coal chain principles recognised in **section 1.3**; and
    - (C) practical experience of Network and Hunter Valley Coal Chain operations and performance relevant to the operation of the TUT from the Commencement Date to the time of review.
- (c) ARTC will in good faith consider the submissions provided in accordance with **section 13.4(b)** and complete the TUT Review within 6 months of the commencement of the TUT Review.
- (d) At the completion of the TUT Review, ARTC:
  - (i) will publish a report on its website (subject to confidentiality restrictions), and provide a copy to the ACCC, setting out its view on the operation and effectiveness of the TUT and its response to any material concerns raised by Access Holders or stakeholders in the context of the TUT Review; and
  - (ii) may submit a proposed variation to the Undertaking as a result of the TUT Review to the ACCC for approval, or if it chooses not to, will set out in the report reasons why it is not submitting a variation application.

### **13.5 Development of TUT-related ARTC performance incentives**

- (a) ARTC will either in parallel with, or following completion of, the TUT Review:
  - (i) prepare and publish on its website options for a proposed performance incentive scheme which has the objectives of encouraging ARTC, through financial reward, to improve its performance in relation to making Capacity available for use either on a contracted or ad hoc basis and balancing the negative consequences of failing the system wide TUT, to be included in the Undertaking; and
  - (ii) invite submissions from Access Holders and other stakeholders on the proposed TUT-related performance incentive scheme, within a specified time (which must be not less than 6 weeks from the publication of the options).

- (b) ARTC will in good faith consider the submissions provided within the specified time and prepare a report addressing options for a proposed TUT-related performance incentive scheme having regard to the submissions and containing ARTC's proposed variation to the Undertaking to include its TUT-related proposed performance incentive scheme and:
  - (i) provide that report to the ACCC; and
  - (ii) may lodge a variation application with the ACCC under **section 44ZZA(7)** of the CCA consistent with the report, or if it chooses not to, will set out in the report reasons why it is not submitting a variation,

at the same time as it submits the TUT Review report to the ACCC for approval under **section 13.4(d)** or as part of the TUT Review report.
- (c) If ARTC decides to conduct the development of a TUT-related ARTC performance scheme after completion of the TUT Review, ARTC will complete development of a TUT-related ARTC performance scheme within 6 months of the completion of the TUT Review or such longer period as required to consider or address any variations that may be proposed or required by the ACCC.

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## 14 DEFINITIONS

### 14.1 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 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 forming part of the Network or Associated Facilities;

**“Applicant”** means the person seeking Access Rights under **section 3** 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, based on and applying:

- (a) Relevant System Assumptions; and
- (b) other assumptions related to operating the Network for non-coal Services as reasonably determined by ARTC;

**“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 to be used in a certain period;

**“Capital Contribution”** means a direct payment other than by way of a Charge by an Applicant or Access Holder in connection with Capital Expenditure undertaken by ARTC, paid up-front or over a period of time. Where a Capital Contribution is to be paid over a period of more than one year, the value of the Capital Contribution may be represented as a single amount determined on a net present value basis by application of the relevant form of the Rate of Return;

**“Capital Contribution Principles”** means the principles included in **section 10.2**;

**“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 4.4**;

**“CCA”** means the *Competition and Consumer Act 2010* (Cth);

**“Ceiling Limit”** has the meaning given in **section 4.3**;

**“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 the System 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 Access Holders;

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

**“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;

**“Concept Assessment Report”** means the report described in **section 9.3**;

**“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 4.9**;

**“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;

**“Contributor”** has the meaning given in **section 10.1**;

**“CPI”** means the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics;

**“Credit Support”** means either:

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

**“Depreciation”** has the meaning described in **section 4.7**;

**“Direct Cost”** means maintenance expenditure, including major periodic maintenance that varies with usage of the Network, and may include other costs that vary with the usage of the Network but excluding Depreciation, assessed on an Efficient basis;

**“Economic Cost”** means the cost described in **section 4.5**;

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

**“Efficient”** means, in respect to costs and operating expenditure, costs incurred by a prudent service provider managing the Network, acting efficiently, having regard to any matters particular to the environment in which management of the Network occurs including:

- (a) the Hunter Valley Coal Chain where a key objective in maintenance planning is to maximise coal chain throughput and reliability;
- (b) ARTC’s obligations to maintain the Network having regard to the terms of applicable Access Agreements and Access Holder Agreements existing at the time; and
- (c) ARTC’s obligations under the law, applicable legislation (including regulations) or the NSW Lease.

**“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;

“**FCC**” has the meaning described in **section 4.13(a)(ii)**;

“**Final Indicative Services**” has the meaning given to it in **section 4.18** and will have the characteristics approved by the ACCC in accordance with **section 4.18**;

“**Financial Criteria**” means:

- (a) whether the investment to provide the Additional Capacity is endorsed by the RCG under **section 9** or has been endorsed as Prudent by the ACCC;
- (b) whether there are 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;
- (c) whether the terms and conditions of the relevant Access Agreements raise any material risk to ARTC recovering NCC associated with the Additional Capacity over the economic life of the Additional Capacity;
- (d) ARTC’s ability to service and raise financing through debt and equity for the Additional Capacity;
- (e) the opportunity cost to ARTC given the relative risk and returns associated with the Additional Capacity financing relative to other investment opportunities; and
- (f) the net effect on ARTC’s balance sheet, gearing ratios and any other debt covenants in existence at the time;

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

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

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

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

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

(ii) who provide rail infrastructure to facilitate these activities;

**“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;

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

**“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;

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

**“Indicative Access Charges”** means the Charges for Indicative Services determined by ARTC under **section 4.14** from time to time;

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

**“Indicative Access Proposal”** means the preliminary Access proposal submitted by ARTC under **section 3.10**;

**“Indicative Interstate Access Agreement”** means the indicative track access agreement included with an access undertaking accepted by the ACCC from time to time under Division 6 of Part IIIA of the CCA that covers the Interstate Network and, at the Commencement Date, means the indicative agreement included in Schedule D of the interstate access undertaking, accepted by the ACCC on 30 July 2008;

**“Indicative Services”** means Initial Indicative Services or Final Indicative Services operating on the Network as applicable;

**“Initial Indicative Access Charges”** has the meaning given to it in **section 4.17(c)** and for the first calendar year of the Initial Period will be as set out in **section 4.17(d)** and for the calendar year containing the New Segments Commencement Date will be as set out in **section 4.17(d1)**;

**“Initial Indicative Services”** means Indicative Services operating on the Network during the Initial Period that have the characteristics set out in **section 4.17(d)**;

**“Initial Period”** has the meaning given to it in **section 4.17(b)**;

**“Interim Access Charges”** has the meaning given to it in **section 4.19(a)** and for the calendar year containing the Commencement Date will be as set out in **section 4.19(c)**;

**“Interim Services”** has the meaning given to it in **section 4.19(a)** and will have the characteristics set out in **section 4.19(c)**;

**“Interim Period”** has the meaning given to it in **section 4.19(a)**;



“**Interstate Network**” means the network of railways lines delineated or defined in Schedule E of the interstate access undertaking accepted by the ACCC on 30 July 2008;

“**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, as referred to in **section 3.4(e)**;

“**Mutually Exclusive Access Application**” has the meaning described in **section 3.13(a)**;

“**NCC**” has the meaning described in **section 4.13(a)(iii)**;

“**Network**” has the meaning described in **section 2.1(b)**;

“**Network Exit Capability**” means:

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

“**Network Management Principles**” means the principles regulating Train movements on the Network, set out in **Schedule C**;

“**New Segments**” means the following Segments in Pricing Zone 3 as specified in **Schedule E**:

- (a) Gap – Watermark;
- (b) Watermark- Gunnedah;
- (c) Gunnedah – Boggabri; and
- (d) Boggabri – Turrawan;

“**New Segments Commencement Date**” means 1 January 2014;

“**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 are not Segment Specific Assets;

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

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

**“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 H** given by a Related Body Corporate 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**;

**“Project”** means a project to create Additional Capacity;

**“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 9.7(b)**; 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, where efficient costs will reflect the costs incurred by a prudent service provider on an Efficient basis;
  - (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
  - (viii) where applicable, support by the relevant industry participants;

“**RAB Floor Limit**” has the meaning given in **section 4.4(b)**;

“**Rate of Return**” has the meaning described in **section 4.8**;

“**RCG**” means the Rail Capacity Group;

“**Regulatory Transition Period**” means the period between the Commencement Date and 31 December 2014;

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

“**Relevant System Assumptions**” means the following assumptions provided to, or agreed with, the HVCCC and published on ARTC's website (subject to any confidentiality restrictions) or as determined under **section 5.1**:

- (a) ARTC track including path numbers;
- (b) live run management;
- (c) ARTC system losses;
- (d) maintenance intervention;
- (e) train parking capacity (for shut downs);
- (f) section run times;
- (g) maximum train length;
- (h) maximum train axle load;
- (i) maximum train speed; and
- (j) any other assumptions reasonably determined by ARTC from time to time as necessary for the purposes of determining Capacity;

“**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:

- (a) form part of RAB and are subject to **section 4.4** of the Undertaking; and  
either
- (b) ARTC can directly identify with a Segment because those assets are physically or functionally part of a Segment; or,

- (c) ARTC has otherwise directly identified with a Segment having regard to recovery of relevant costs associated with those assets consistent with the beneficial use of those assets;

**“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;

**“System Assumptions”** means the assumptions for the Hunter Valley Coal Chain as detailed in the System Assumption Document as varied from time to time, including:

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

except if not agreed to by ARTC, then those System Assumptions reasonably determined by ARTC from time to time and published on its website in accordance with **section 5.1(c)(iii)**, unless otherwise determined in accordance with **section 5.1(g)**;

**“System Assumptions Document”** means the document prepared by the HVCCC in consultation with ARTC and operators of coal terminals at the Port of Newcastle that

details System Assumptions and simulation model outputs for the relevant Coal Chain Capacity scenarios;

**“Technical Criteria”** means whether the infrastructure required to provide the Additional Capacity of the Network:

- (a) is technically feasible and consistent with the economically efficient operation of the Network and meets ARTC’s engineering and operational standards;
- (b) is consistent with the safe and reliable operation of the Network and will not impact on the safety of any user of the Network;
- (c) does not reduce Capacity or Coal Chain Capacity; and
- (d) does not otherwise compromise ARTC’s legitimate business interests, except that this will not include consideration any of the factors included under the Financial Criteria;

**“Term”** means the term of this Undertaking as described in **section 2.2(b)**;

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

**“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;

**“Turnout”** means the points, signal and de-rail device connecting, or for operating the connection of, a connecting track with the Network;

**“Undertaking”** means this undertaking as amended from time to time in accordance with **section 2.3**;

**“VCC”** has the meaning described in **section 4.13(a)(i)**.

## **14.2 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.

## Signing page

**DATED:** the twenty third day of June 2011 (as varied on 17 October 2012 and [ ] 2014).

**EXECUTED** by **AUSTRALIAN  
RAIL TRACK CORPORATION  
LTD** by its duly authorised Officer:

.....  
John Fullerton  
Chief Executive Officer

# SCHEDULES

- A. Essential Elements of Access Holder Agreement
- B. Network
- C. Network Management Principles
- D. Performance Measurement and Incentives
- E. Segments
- F. HVCCC consultation principles
- G. ARTC Annual Compliance Report: Information provision and timing
- H. Parent Guarantee



# SCHEDULE A:1 - Elements of Coal Access Agreements

## **Tier 1 (mandatory) provisions for all Access Holder Agreements for Coal Access Rights \***

- 1 IAHA Clause 1.5: Tier 1 Mandatory Provisions
- 2 IAHA Clause 3.1: Grant of Train Paths for transport of coal IAHA
- 3 IAHA Clause 3.2: Annual Determination of BPU, MTC and NPC
- 4 IAHA Clause 3.3: Determination of Monthly Tolerance Cap and Tolerance
- 5 IAHA Clause 3.4: Identification of Path Usages
- 6 IAHA Clause 3.6: Availability Exceptions
- 7 IAHA Clause 3.14: Network Exit Capability requirement
- 8 IAHA Clause 5.4: Calculation of TOP Rebate and Ad-Hoc Charge Rebate
- 9 IAHA Clause 6: Capacity shortfall
- 10 IAHA Clause 11.1(c): Variation of a Train Path for the purposes of maximising the use and reliability of the Network
- 11 IAHA Clause 11.4: Removal of Path Usages for under-utilisation
- 12 IAHA Clause 11.5: Use of Non-Compliant Services
- 13 IAHA Clause 11.6: Cancellations of services
- 14 IAHA Clause 15: Confidentiality
- 15 IAHA Clause 16.4: Temporary Trade of Path Usages
- 16 IAHA Clause 16.5: Treatment of Traded Path Usages
- 17 IAHA Clause 16.6: CTS Administrator and HVCCC
- 18 IAHA Clause 16.7: The effect of assignment (but only to the extent it relates to clause 16.4)
- 19 IAHA Clause 16.8: Reduction in time period for ARTC approval of trades
- 20 IAHA Clause 19.1: New or varied Access Undertaking
- 21 IAHA Train Path Schedule: Clause 4.1 Capacity Condition Precedent; Clause 4.2 Removal of path usages for failure to satisfy Capacity Condition Precedent
- 22 IAHA Schedule 2: System true-up test
- 23 IAHA Schedule 3: Clause 4.1(c) Determination of TOP Price<sub>PZ</sub> and Non-TOP Price<sub>PZ</sub>, - dispute resolution provisions

\* Except if the Access Holder Agreement is for Access Rights to transport coal to a destination other than the Port of Newcastle, in which case:

- the Tier 1 (mandatory) provisions are items 1, 3, 5, 6, 8, 9, 10, 12, 13, 20, 22, 23; and
- items 2, 4, 7, 11, 14, 15, 16, 17, 18, 19 and 21 will be treated as Tier 2 (negotiable) provisions.

**Tier 2 (negotiable) provisions for all Access Holder Agreements for Coal Access Rights**

- 1 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;
- 2 Access Holder's non-exclusive access to Network;
- 3 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;
- 4 each party warranting the accuracy of information provided;
- 5 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;
- 6 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;
- 7 charges to be determined in accordance with **section 4.13** and **section 4.20** of the Undertaking, as applicable;
- 8 ARTC may charge for access to Extensions and Additional Capacity;
- 9 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- 10 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;
- 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 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 14 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;
- 15 termination of Access Holder Agreements on termination or cessation of ARTC's leasehold rights;
- 16 appropriate termination and suspension provisions;
- 17 indemnities by the Access Holder and ARTC;
- 18 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 19 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;
- 20 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;
- 21 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Holder Agreement;
- 22 dispute resolution procedures; and
- 23 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.

# SCHEDULE A:2 - Elements of Non Coal Access Agreements

## **Tier 1 (mandatory) provisions for an Access Agreement for Non-Coal Access Rights**

- 1 IAHA Clause 6: Capacity shortfall provisions which are aligned and consistent with those set out in **section 5.3, 5.4 and 5.5** of this Undertaking; and
- 2 A provision equivalent to clause 19.1(b) of the IAHA setting out that any changes to a Tier 1 (mandatory) Non-Coal Provision identified in an Access Undertaking accepted by the ACCC, will be automatically incorporated into the Access Agreement.

## **Tier 2 (negotiable) provisions for an Access Agreement for Non-Coal Access Rights**

- 1 the right of ARTC to seek security from the Access Holder;
- 2 Access Holder's non-exclusive access to Network;
- 3 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;
- 4 each party warranting the accuracy of information provided;
- 5 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;
- 6 ARTC may charge for access to Extensions and Additional Capacity;
- 7 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- 8 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;
- 9 under-utilised capacity may be withdrawn by ARTC;
- 10 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;
- 11 implementation and compliance with ARTC's Environmental Licence and environmental management system manual;

- 12 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;
- 13 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 14 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;
- 15 termination of Access Agreements on termination or cessation of ARTC's leasehold rights;
- 16 indemnities by the Access Holder and ARTC including in relation to Incidents;
- 17 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 18 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;
- 19 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;
- 20 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Agreement;
- 21 where the Access Holder is an Operator, the Operator holds appropriate Accreditation;
- 22 where the Access Holder is not an Accredited Operator, an obligation on the Access Holder to procure the services of an Accredited Operator to operate the Trains on the contracted Train Paths;
- 23 the Access Holder, and where relevant, the Operator holds appropriate insurance;
- 24 the Access Holder or, where relevant, the Operator provides a warranty regarding Rolling Stock;
- 25 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;
- 26 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;
- 27 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;
- 28 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;
- 29 the Access Holder and, where relevant, the Operator provides ARTC with a train manifest for each train service and inform ARTC of any cancellations;

- 30 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;
- 31 the Access Holder and, where relevant, the Operator complies with applicable and appropriate safety standards;
- 32 the ability of ARTC to inspect and conduct audits on the Access Holder;
- 33 appropriate termination and suspension provisions; and
- 34 dispute resolution procedures.

## SCHEDULE B - Network

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

1. Islington Junction turnouts (116A points (164.690 km)/115A points (164.633 km)) to Port Waratah (107W points (via DEP 169.731 km)/111W points (via DEP 169.552 km)/109W points (166.311 km)/113 points (116.403 km)/PWCS boundary)
2. Scholey Street Junction turnouts (95 points (164.806 km)/98 points (164.804 km))(Via Coal) to Muswellbrook 288.800 km<sup>1</sup>
3. Hanbury Junction turnouts (137A points (168.955 km)/136A points (168.986 km)) to Kooragang Island (107S points (via ARR 174.984 km))
4. Kooragang East Junction turnouts (142E points (168.968)/143E points (168.997 km) to Sandgate turnouts (181B points (171.334 km)/183D points (171.502))
5. Muswellbrook 288.800 km to Ulan 435.300 km
6. Muswellbrook 288.800 km to Gap 416.000 km
7. Gap 416.000 km to Turrawan 548.465 km

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



## ANNEXURE 1 TO SCHEDULE B

See Map ARTCSHV (one (1) page) which has been provided as a separate map for illustrative purposes only, and forms part of this annexure.

The map represents the railway lines described at Schedule B as at the New Segments Commencement Date. This map may change over the Term. Applicants should refer to ARTC's website for an up to date map of the railway lines described at Schedule B.

# SCHEDULE C - Network Management Principles

The Train Priority Matrix (Table D1), the Decision Matrix (Table D2) and the set of Rules proposed below are contained in the NSW Lease. In recognition of the particular objectives of Coal Trains but within the constraints of the NSW Lease, ARTC has supplemented these rules with an additional set of guidelines to be applied when Coal Trains run out of course.

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 other time frame as otherwise agreed by the members of the HVCCC) setting out the plan for the running of Coal 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.

**“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.

**“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 with 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.

**“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

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

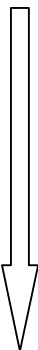
Train Decision Factors apply to resolve the competing interests of Customer's Trains using the Hunter Valley Network.

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**

Decreasing order of priority	Type of train service in ARTC Network
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

**Table D2 – Decision Matrix**

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

**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 Measurement and Incentives

## 1. Network Performance Indicators

Network Key Performance Indicator	Reporting Scope	Responsibility for performance	Reporting Frequency	Reporting Level
<b>Network Performance</b>				
Transit Time – Infrastructure Configuration Capability <sup>1</sup>	Coal Trains Only <sup>2</sup>	ARTC Industry RCG	Quarterly	Pricing Zone
Transit Time – Infrastructure Practical Capability <sup>3</sup>	Coal Trains Only <sup>4</sup>	ARTC	Quarterly	Pricing Zone
Maximum Axle load <sup>5</sup>	Coal only	ARTC Industry RCG	Quarterly	Pricing Zone
Maximum Speed <sup>6</sup>	Coal only	ARTC Industry RCG	Quarterly	Pricing Zone
Train Length <sup>7</sup>	Coal only	ARTC Industry RCG	Quarterly	Pricing Zone
<b>System Performance</b>				
Transit Time – Scheduled/Actual <sup>8</sup>	Coal Trains Only	ARTC Industry	Quarterly	Pricing Zone
Infrastructure Maintenance Requirement (planned/actual) <sup>9</sup>	ARTC Requirements	ARTC	Quarterly	Pricing Zone
Coal Chain Losses – ARTC cause <sup>10</sup>	Coal only	ARTC	Quarterly	Network
Coal Chain Losses – non-ARTC cause <sup>11</sup>	Coal only	Industry	Quarterly	Network

<sup>1</sup> A measure of transit time over the Network, delivered by the infrastructure given its configuration (alignment, grades, curves and associated permanent speed restrictions). Measured by simulated operation of a reference Indicative Service over the Network (excluding prevailing temporary speed restrictions). Reported on the basis of average speed.

<sup>2</sup> Separate reporting will be undertaken in relation to an Indicative Service (or an average of Interim Services as applicable) over each Pricing Zone. Reported performance will only relate to that on the Network.

<sup>3</sup> A measure of transit time over the Network, delivered by the infrastructure given its configuration (as measured by Transit Time – Infrastructure Configuration Capability) and maintenance requirements (including the simulated transit time impact of temporary speed restrictions). The transit time impact of temporary speed restrictions is determined by applying the temporary speeds restrictions in place on the Network to a simulation model designed to determine the total of time lost by reference Indicative Service subject to each temporary speed restriction. Reported on the basis of average speed.

<sup>4</sup> Separate reporting will be undertaken in relation to an Indicative Service (or an average of Interim Services as applicable) over each Pricing Zone. Reported performance will only relate to that on the Network.

<sup>5</sup> Lowest at any point in a Pricing Zone.

<sup>6</sup> Lowest at any point in a Pricing Zone.

<sup>7</sup> Lowest at any point in a Pricing Zone. Pricing Zone 1 is reliant on Port capability.

<sup>8</sup> A measure of transit time required by and used by the market. Difference between schedule and actual Network entry time and Network exit time. Reported on the basis of average speed.

<sup>9</sup> Path usages required by ARTC. Measured by reference to the long term planning requirement (as determined during annual sculpting), short term adjustments (daily train plan) and actual requirements.

<sup>10</sup> Path usages unavailable or cancelled due to actual system losses arising from ARTC. Measured by reference to the long term planning requirement (as determined in accordance with System Assumptions), short term adjustments (daily train plan) and actual requirements. Refer System True Up prescribed at Schedule 2 of the Indicative Access Holder Agreement.

<sup>11</sup> Path usages unavailable or cancelled due to actual system losses arising from parties other than ARTC. Measured by reference to the long term planning requirement (as determined in accordance with System Assumptions), short term adjustments (daily train plan) and actual requirements. Refer System True Up prescribed at Schedule 2 of the Indicative Access Holder Agreement.

<b>Network Key Performance Indicator</b>	<b>Reporting Scope</b>	<b>Responsibility for performance</b>	<b>Reporting Frequency</b>	<b>Reporting Level</b>
<b>Workable Alignment</b>				
Coal Throughput (tonnes) <sup>12</sup> – actual/planned	Coal only	Industry	Quarterly	Network
<b>Rail Capacity Group</b>				
Project Implementation Delay <sup>13</sup> (not Prudent)	RCG Projects	ARTC	Quarterly	Network
<b>Track Condition<sup>14</sup></b>				
Track quality measured by index.	Not available for individual AHAs	ARTC	Quarterly	Pricing Zone
<b>Unit Cost</b>				
Infrastructure Maintenance <sup>15</sup> per GTK	Not available for individual AHAs	ARTC	Annually	Network
Network Control and Operations Cost <sup>16</sup> per train km	Not available for individual AHAs	ARTC	Annually	Network
Operating Cost <sup>17</sup> per GTK	Not available for individual AHAs	ARTC	Annually	Network
Capital Cost <sup>18</sup> per GTK <sup>19</sup>	Coal Only Not available for individual AHAs	ARTC Industry RCG	Annually	Network

<sup>12</sup> Actual/planned port inbound receivals as reported by HVCCC, plus sum of all actual/planned domestic coal moved on the Network.

<sup>13</sup> Delay arising under section 9.6(e)(iii) to the extent where any interest in respect of construction is not deemed Prudent under that section.

<sup>14</sup> To be measured by Track Quality Index (TQI) and averaged over each Segment. The TQI is calculated over 100m sections, using 0.5m raw data from the AK car. TQI is the sum of the standard deviations (x3) in each rail for a 20m inertial top (average over left and right rail), horizontal alignment (versine over a 10m chord (average over left and right rail)), twist over 2.0m and gauge.

<sup>15</sup> Total annual expenditure associated with infrastructure maintenance directly identified with, or allocated to the Network determined in accordance with section 4.

<sup>16</sup> Total annual expenditure associated with network control, transit management, logistics, terminal operations, operations planning and management directly identified with, or allocated to the Network determined in accordance with section 4.

<sup>17</sup> Total annual expenditure associated with infrastructure maintenance, network control and operations cost and system management functions directly identified with, or allocated to the Network determined in accordance with section 4.

<sup>18</sup> Depreciation and return based on RAB Floor Limit determined in accordance with section 4.

<sup>19</sup> Contracted coal GTK.



## SCHEDULE E - Segments

Pricing Zone	Segment	Description	Length
3	<a href="#">0968</a>	Boggabri – Turrawan Jct	27.0
3	<a href="#">0967</a>	Gunnedah – Boggabri	41.4
3	<a href="#">0988</a>	Watermark – Gunnedah	33.0
3	<a href="#">0966</a>	Gap – Watermark	31.1
3	<a href="#">0965</a>	Werris Creek – Gap	5.2
3	<a href="#">0964</a>	Murulla – Werris Creek	71.4
3	<a href="#">0963</a>	Dartbrook Jct – Murulla	42.9
1	0915	Islington Jct – Scholey St Jct	0.7
1	0916	Scholey St Jct – Port Waratah	3.0
1	0917	Scholey St Jct – Waratah (Via Coal)	0.9
1	0925	Waratah – Hanbury Jct (Via Coal)	1.7
1	0926	Hanbury Jct – Sandgate (Via Coal)	2.9
1	0927	Hanbury Jct – Kooragang East Jct	2.4
1	0929	Kooragang East Jct - NCIG Jct	0.8
1	0930	NCIG Jct To Kooragang Island	5.9
1	0931	Kooragang East Jct To Sandgate	0.5
1	0936*	Sandgate To Thornton (Via Coal)	11.7
1	0937	Thornton To Maitland (Via Coal)	10.4
1	0944	Telarah To Farley	0.8
1	0946	Maitland To Farley	1.4
1	0947	Farley To Branxton	21.7
1	0948	Branxton To Whittingham	18.4
1	0951	Whittingham To Saxonvale Jct	8.3
1	0952	Saxonvale Jct To Mount Thorley	2.8
1	0955	Whittingham To Camberwell Jct	12.9
1	0956	Camberwell Jct To Glennies Creek	6.9
1	0957	Glennies Creek To Newdell Jct	8.4
1	0958	Newdell Jct To Draytons Jct	9.7
1	0959	Newdell Branch	2.7
1	0961	Draytons Jct To Muswellbrook	16.8
3	0962	Muswellbrook To Dartbrook Jct	7.8
1	0970	Muswellbrook To Bengalla Jct	5.4
2	0971	Bengalla Jct To Anvill Hill	12.8
2	0972	Anvill Hill to Sandy Hollow Junction	22.6
2	0973	Sandy Hollow Jct To Wilpinjong	95.1
2	0974	Wilpinjong To Ulan Colliery Jct	9.7

\* 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 - Principles to guide ARTC/ HVCCC Consultation

Where ARTC is required to consult with the HVCCC under this Undertaking or IAHA and a specific process is not set out in that provision, ARTC will use reasonable endeavours to follow the following steps to the extent practical and in light of the specific circumstances:

- ARTC will request the HVCCC to provide ARTC with its view by a specified date, as reasonably determined by ARTC;
- Where the HVCCC provides its view by the notified date, ARTC will consider that view in good faith;
- Where ARTC disagrees with the view and there is sufficient time for the HVCCC to reconsider its view, as reasonably determined by ARTC, ARTC will provide its reasons to the HVCCC and will ask the HVCCC to reconsider in light of ARTC's reasons by a specified date, as reasonably determined by ARTC;
- Where the HVCCC provides its revised view by the notified date, ARTC will consider the revised view expressed by the HVCCC in good faith;
- Ultimately, ARTC is not obliged to follow the HVCCC's recommendation.

# SCHEDULE G - Annual Compliance Assessment - information provision and timing

## 1. ARTC annual reporting obligations

As set out in **section 4.10** of this Undertaking, 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.

## 2. Information to be provided by ARTC

ARTC will provide the following information as a minimum to the ACCC in order for the ACCC to carry out its assessment under **section 4.10** of this Undertaking:

- (a) a covering letter from ARTC stating that it submits documentation on its compliance with this Undertaking and the relevant year to which it relates.
- (b) documentation demonstrating ARTC's compliance with the annual RAB and RAB Floor Limit roll forward as set out at **section 4.4** of this Undertaking, including:
  - (i) an explanation of how each component<sup>20</sup> of the RAB and RAB Floor Limit has been calculated in accordance with the formula in this Undertaking, and any assumptions used;
  - (ii) a breakdown of values for each component of the RAB and RAB Floor Limit, including a split into Constrained Network and non-Constrained Network and, for Capital Expenditure, values to Segment and asset (project) level (where values are zero, this should be stated);
  - (iii) a table summarising the values for each component of the RAB and RAB Floor Limit and the outcome of the calculations, including the average closing value for the RAB and RAB Floor Limit;
  - (iv) evidence of any endorsement by the RCG of any proposed Capital Expenditure where relevant;
  - (v) evidence of disposals value including any endorsement by the RCG of any proposed disposals, and where possible, appropriate references to the Booz Allen Hamilton DORC database which established the regulatory asset base value as at 1 July 1999<sup>21</sup>, and any references to the depreciated optimised replacement cost in relation to assets in Segments not ascribed a regulatory asset value in accordance with the NSW Rail

<sup>20</sup> This refers to the components used to calculate the RAB and RAB Floor Limit as set out in the formulae in Section 4.3 of this Undertaking.

<sup>21</sup> The Booz-Allen and Hamilton report, Valuation of Certain Assets of the Rail Access Corporation, 14 May 2001, was the basis for the Independent Pricing and Regulatory Tribunal of NSW's June 2001 recommendation (accepted by the Minister for Transport in December 2001) which established the depreciated optimised replacement cost (DORC) value for rail assets in the Hunter Valley coal network.

Access Undertaking in force at the time immediately preceding the Commencement Date of this Undertaking, and approved by the ACCC from time to time, and demonstrating adjustments to derive the current value of disposals;

- (vi) the spreadsheet or other models underlying calculations (not for publication);
  - (vii) the name, address, contact details (including email address) of stakeholders considered by ARTC to be relevant Applicants and Access Holders and other parties consulted regarding compliance matters. This is to include a contact at CEO/Executive level for the purpose of an ACCC letter and a regular operational contact for email notification. Where a stakeholder identified by ARTC is not a relevant Applicant or Access Holder, ARTC will indicate their relationship with ARTC and/or their interest in ARTC's compliance, for instance: end user, industry advocate, etc. This information is not provided for publication.
- (c) details as to ARTC's compliance with the ceiling test, including allocation of the total unders or overs amount to Constrained Coal Customers, including:
- (i) a table indicating the values for the total unders or overs amount for the review period including:
    - (A) Access revenue;
    - (B) Full Economic Costs for the review period, with a detailed breakdown into standard operating cost line items, return, depreciation;
    - (C) the total unders or overs amount (for publication), and the proposed allocation of the total unders or overs amount to Constrained Coal Customers (not for publication);
    - (D) comparative values from the previous review period;
  - (ii) an explanation of the assumptions and methodology used to derive the above values, and any changes made since the previous review period;
  - (iii) the spreadsheet or other models underlying calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any allocation of the total unders or overs amount to Constrained Coal Customers (not for publication) which should clearly indicate which Segments formed part of the Constrained Network for the review period;
  - (iv) evidence of any relevant Access Holders' endorsement of the total unders or overs amount;
- (d) where the documentation shows RAB to be greater than the RAB Floor Limit in Pricing Zone 3, documentation setting out the Interim Access Charge or Indicative Access Charge, as applicable for Pricing Zone 3 in that calendar year and the previous calendar year.
- (e) a copy of the Final Audit Report contemplated at **section 4.10(f)(x)** of this Undertaking.
- (f) the name, title and contact details of the person or persons authorised by ARTC to provide more information in relation to the submission.
- (g) Where the ACCC considers that ARTC has not provided a complete submission, it will notify ARTC of what further documents and information are required by the ACCC to enable it to make determinations required under **section 4.10** of this Undertaking. Upon receipt of this notification,

ARTC will use reasonable endeavours to provide this information to the ACCC as soon as practical.

### 3. Further information requests by the ACCC

- (a) If the ACCC requests further information from ARTC in order to carry out the compliance assessment under **section 4.10**, ARTC will use reasonable endeavours to provide the information sought by the ACCC as soon as practicable.
- (b) Further, if the ACCC decides to engage an independent expert consultant to assist with certain aspects of the annual compliance assessment, the ACCC may request reasonable additional information from ARTC. Upon receipt of such a request, ARTC will use reasonable endeavours to provide the information to the ACCC as soon as practicable.

### 4. Confidentiality of material provided to the ACCC

- (a) Other than material expressly excluded from publication in this Schedule G, and in the interests of a transparent process and to facilitate informed submissions from stakeholders, the ACCC may publish on its website any submissions made by ARTC, relevant to the annual review.
- (b) Where ARTC considers that any documents or information provided to the ACCC, which may be published by the ACCC in accordance with (a) above, is confidential or commercially sensitive, this must be clearly stated in writing at the time that it is provided, accompanied by reasons for this claim. In this event, the ACCC may request ARTC to, in addition to the submission containing confidential or commercially sensitive information; also provide a version of the submission omitting such information; that would be suitable for publication.

### 5. Indicative timetable for annual review

- (a) Ideally, the annual compliance assessment should be completed within the calendar year following the year which is the subject of the review. Table 1 below is an indicative timetable that sets out the key steps in the annual compliance assessment and assigns an indicative timeframe, which the ACCC and ARTC will endeavour to adhere to, but is subject to change to in light of the prevailing circumstances.

**Table 1: Indicative timetable for annual review of compliance**

<b>Date</b>	<b>Action (and any relevant provision of the Undertaking)</b>	<b>Who</b>
End April	Submission of documents demonstrating compliance ( <b>section 4.10 (a)</b> ) and information outlined under Section 2 of this Attachment	ARTC
Mid May	Publish complete, non-confidential submission on ACCC website or request further information from ARTC	ACCC
End May	Any further information to be provided	ARTC
Early June	Invite comments from stakeholders on ARTC's compliance with the annual RAB and RAB Floor Limit roll forward. Invite comments from stakeholders on ARTC's compliance with the ceiling test and determination of the total unders or overs amount	ACCC
Mid July	Due Date for stakeholders submissions	ACCC

Mid July	Publish non-confidential comments from Access Seekers on ACCC website	ACCC
Mid July	Invite comments from ARTC in relation to stakeholder comments	ACCC
Mid August	Comments from ARTC due	ARTC
End October	Determinations made ( <b>section 4.10 (d)</b> )	ACCC
End October	Publish findings on ACCC website ( <b>section 4.10(d)(iv)</b> ) and advise ARTC	ACCC

## SCHEDULE H - Parent Guarantee

# Parent Guarantee and Indemnity

Dated

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

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

# Parent Guarantee and Indemnity

## Details

Parties	Guarantor and Beneficiary	
<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.
<b>Governing law</b>	New South Wales	
<b>Date of deed</b>	See Signing page	



# 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;

- (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.

### 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.

### **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.

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);
  - (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.

## **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.

### **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.

### **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

## Annexure A - Indicative Access Holder Agreement



# Access Holder Agreement

## for Indicative Services in the Hunter Valley

Dated

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

and

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

# Access Holder Agreement

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# Access Holder Agreement

## Details

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



# 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:

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

**Accredited** means to be an Accredited Owner or an Accredited Operator (as the case may be) as defined under the Rail Safety Act and “**Accreditation**” 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 Charge** has the meaning given in **Schedule 3**;

**Ad Hoc Charge Rebate** is the rebate determined in accordance with **clause 5.4(b)**;

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

**Additional Capacity** means, in relation to the Network, the capability of the Network to carry additional task by an enhancement or improvement of the infrastructure forming part of the Network or Associated Facilities;

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

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

**Associate** means in relation to an access holder;

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

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

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

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

**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);

**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;

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

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

**Capacity** means the capability of the Network for Services, including Additional Capacity, based on and applying:

- (a) Relevant System Assumptions; and
- (b) other assumptions related to operating the Network for non-coal Services as reasonably determined by ARTC;

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

**CCA** means the *Competition and Consumer Act 2010* (Cth);

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

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

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

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

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

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

**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;

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

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

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

**Credit Support** means either:

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

**CTS Administrator** is the body, appointed from time to time, responsible for the establishment, administration, operation and maintenance of the Terminal Operators' capacity trading system and, as at the Commencement Date of this Agreement is the HVCCC;

**CTS Clearing House** is the online interface on the website of the CTS Administrator where access holders can publish offers and requests for capacity at Terminal Operators and path usages and receive the contact details of other access holders who indicate their interest in participating in a Trade;

**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;

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

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

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

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

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

**Functional Coal Path** is a theoretical path meeting the requirements of clause 2.3(b) of **Schedule 2**;

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

**GTK** means gross tonnes multiplied by kilometres;

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

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

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

**Incident** means a breakdown, accident or emergency on the Network which involves 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 determined in accordance with the Access Undertaking (and includes any Interim Indicative Access Charges provided for in the Access Undertaking);

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

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

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

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

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

**Key Performance Indicators** means those performance measures identified in **Schedule 4**;

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

**Live Run Superintendent Group** means the Live Run Superintendent Group, or where that body no longer exists, is a reference to the body which has the responsibility which most closely performs the functions of that organisation, as reasonably determined by ARTC;

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

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

**Material Default** means any breach of a fundamental or essential term or repeated breaches of any of the terms of an agreement;

**Month** means a calendar month;

**Monthly Tolerance Cap** means the limit for each Pricing Zone on the tolerance available to be used by access holders in that Pricing Zone in that Month as determined from time to time by ARTC in accordance with **clause 3.3(a)**;

**Mtpa** means metric (million) tonnes per annum;

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

**Network Control** means the control 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:

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

**Network Key Performance Indicators** means the performance indicators included in Schedule D of the Access Undertaking;

**Network Management Principles** means the Network Management Principles contained in the Access Undertaking;

**Non-Compliant Service** means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Relevant System Assumptions** means the following assumptions provided to, or agreed with, the HVCCC and published on ARTC's website (subject to any confidentiality restrictions) or as determined under section 5.1 of the Access Undertaking:

- (a) ARTC track including path numbers;
- (c) live run management;
- (d) ARTC system losses;
- (d) maintenance intervention;
- (e) train parking capacity (for shut downs);
- (f) section run times;
- (g) maximum train length;
- (h) maximum train axle load;
- (i) maximum train speed; and
- (j) any other assumptions reasonably determined by ARTC from time to time as necessary for the purposes of determining Capacity;

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

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



**Safeworking Rules** means all policies and notices issued by ARTC 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;

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

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

**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;

**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;

**Start Date** has the meaning given in the relevant Train Path Schedule;

**System Assumptions** means the assumptions for the Hunter Valley Coal Chain as detailed in the System Assumptions as varied from time to time including:

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

except if not agreed to by ARTC, then those System Assumptions reasonably determined by ARTC from time to time and published on its website in accordance with section 5.1(c)(iii) of the Access Undertaking, unless otherwise determined in accordance with section 5.1(g) of the Access Undertaking;

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

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

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

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

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

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

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

**Tier 1 (Mandatory) Provision** means:

- (a) a clause in the indicative access holder agreement included in the Access Undertaking first accepted by the ACCC which is identified as a Tier 1 (mandatory) provision in Schedule A:1 of that Access Undertaking; or
- (b) if the ACCC has accepted a new or varied Access Undertaking, a clause in the indicative access holder agreement included in the new or varied Access Undertaking which has been identified in that Access Undertaking as a clause which is mandatory to be included in all access holder agreements granting access rights to the Network to transport coal in the form set out in the indicative access holder agreement accepted as part of the new or varied Access Undertaking;

**TMTC** means the Target Monthly Tolerance Cap for each Pricing Zone, being the lesser of:

- (a) the percentage of overall Capacity which will be commissioned and available for use in the Pricing Zone in the relevant Contract Year, as reasonably determined by ARTC as the target monthly tolerance cap:
  - (i) following consultation with the RCG;
  - (ii) having regard to the level of Capacity that would be available for the purpose of system flexibility resulting from endorsed expenditure, as advised by the RCG, to deliver Capacity for that purpose; and
  - (iii) as specified by ARTC in the Hunter Valley corridor capacity strategy for that Contract Year; and
- (b) ten per cent of the overall Capacity to be commissioned and available for use in the Pricing Zone in the relevant Contract Year;

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

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

**TOP Rebate** is the rebate determined in accordance with **clause 5.4(c)**;

**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 Train 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;

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

- (a) with knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or
- (b) with deliberate or reckless disregard for the (foreseeable and harmful) consequences of the conduct.

## **1.2 Interpretation**

In this agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a party includes a person to whom any right or obligation under this agreement is transferred;
- (d) a reference to the consent of a party means the prior written consent of that party;
- (e) a reference to a document or a specific provision of that document includes all amendments or supplements to, or replacements or novations of, that document or the specific provision of that document, as applicable (particularly in relation to the Access Undertaking which may change from time to time);

- (f) 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;
- (g) headings are for convenient reference only and do not affect the interpretation of this agreement;
- (h) unless otherwise indicated, a reference to a clause or a Schedule is a reference to a clause or Schedule of this agreement;
- (i) 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;
- (j) 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;
- (k) 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;
- (l) a reference to \$ and dollars is to Australian currency;
- (m) “relating to” includes arising from, concerning or in connection with (whether directly or indirectly); and
- (n) terms defined in a Schedule to this agreement have the same meaning when used in the General Terms of this agreement.

### **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**

Subject to **clause 1.5**, if a **Train Path Schedule** imposes additional terms in relation to a Train Path, then those terms will take priority over the body of this agreement to the extent any inconsistency arises between them.

### **1.5 Tier 1 Mandatory Provisions**

- (a) To the extent that any part of this agreement, including any term of the Train Path Schedule, is inconsistent with a Tier 1 (Mandatory) Provision, the Tier 1 (Mandatory) Provision will prevail.
- (b) Any clause of this agreement which is a Tier 1 (Mandatory) Provision will be interpreted by reference to the objectives of the Access Undertaking, and the coal chain principles recognised by ARTC in the Access Undertaking.

### **1.6 Amendment to Consumer Price Index**

If either:

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

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

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

### **2.3 Train Path Schedules**

Each Train Path Schedule:

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

than three years notwithstanding that the Access Holder has failed to submit a Renewal Notice.

## **2.4 Termination on cessation of all Train Paths**

Subject to **clause 12.7**, this agreement automatically terminates on expiry or termination of all Train Path Schedules.

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# **3 Access rights**

## **3.1 Grant of Path Usages for transport of coal**

- (a) **(Base entitlement)** ARTC grants to the Access Holder, for the purpose of transporting coal, the availability of, and the right to use the Base Path Usages for each Train Path in each Allocation Period determined in accordance with **clause 3.2**. The Access Holder's entitlement to its Base Path Usages for a Train Path in a Contract Year ends when it has utilised its Annual Contracted Path Usages for that Train Path.
- (b) **(Tolerance)** ARTC will make additional Capacity available in each Month in each Pricing Zone (up to the Monthly Tolerance Cap determined in accordance with **clause 3.3**) for the purpose of providing access holders with coal access rights, including the Access Holder, a degree of flexibility as to the period in which they may use their annual contracted path usages. If available, the Access Holder may use Path Usages in addition to the Base Path Usages for a Train Path provided:
  - (i) the aggregate number of Path Usages used by the Access Holder in a Period under this **clause 3.1(b)**, over all Train Paths contracted by the Access Holder in the Pricing Zone, does not exceed the Tolerance determined in accordance with **clause 3.3**; and
  - (ii) the number of Path Usages (excluding Ad Hoc Path Usages) used by the Access Holder on the Train Path do not exceed the Access Holder's Annual Contracted Path Usages in that Contract Year for that Train Path.
- (c) **(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.
- (d) **(Limitations)** The Access Holder's rights under this **clause 3.1** to use a Path Usage must be exercised through an Operator and is subject to the terms and conditions set out in this agreement, including ARTC's Passenger Priority obligations and the Availability Exceptions.

## **3.2 Annual Determination of BPU, MTC and NPC**

- (a) For the first Contract Year:
  - (i) the Access Holder's Base Path Usages for each Period will be agreed between ARTC and the Access Holder, as set out in the **Train Path Schedules**;

- (ii) the Monthly Tolerance Cap for each Pricing Zone for each Month will be notified by ARTC to the Access Holder prior to the commencement of this agreement; and
  - (iii) the Network Path Capability for each Pricing Zone for each Period will be notified by ARTC to the Access Holder prior to the commencement of this agreement.
- (b) For each subsequent Contract Year, ARTC will, before the commencement of that Contract Year, determine the Access Holder's Base Path Usages for that Contract Year in accordance with the following steps.
  - (i) Following consultation with the HVCCC and the relevant Terminal Operators on the impact of Network Exit Capability and System Assumptions on Coal Chain Capacity, ARTC will use reasonable endeavours to publish by 1 July of each Contract Year, but in any event before 30 September of each Contract Year:
    - (A) 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**");
    - (B) for each Maintenance Month, the aggregate number of path usages lost in each Pricing Zone as a result of the major Network outage in that month ("**Maintenance Losses**"); and
    - (C) any known Availability Exception which ARTC reasonably anticipates will have a material impact on the Capacity entitlements of access holders in the following Contract Year.
  - (ii) ARTC will determine, for each Period of the following Contract Year, the Access Holder's Base Path Usages for each Train Path in accordance with the following principles:
    - (A) ARTC will reduce the Access Holder's entitlement to Path Usages below the Average Path Usages in each Period in which a Maintenance Month occurs on the basis of all access holders with train paths for Coal Trains in that Pricing Zone bearing an equitable share of the Maintenance Losses and any known Availability Exceptions for that Month and, in doing so, will take into account the number of days in a Month.
    - (B) ARTC will increase the Access Holder's entitlement to Path Usages above the Average Path Usages in other Periods in that Contract Year to make up for the reduction for Maintenance Losses and any known Availability Exceptions in the Maintenance Month and, in doing so, will take into account the number of days in a Month.
    - (C) The Base Path Usages for each Period in the Contract Year must in aggregate equal the Annual Contracted Path Usages for that Contract Year.

- (D) If the Path Usages are for the purpose of transporting coal to the Port of Newcastle, ARTC will consult with the HVCCC with the objective of aligning the Access Holder's Base Path Usages with the Access Holder's allocation of capacity at the relevant coal terminals and will use reasonable endeavours to achieve such alignment to the extent practicable.
- (c) For each Contract Year subsequent to the first Contract Year, ARTC will use reasonable endeavours to notify the Access Holder by 30 September of the previous Contract Year but in any event before the commencement of the Contract Year, of the:
  - (i) Network Path Capability in each Pricing Zone for each Period of the Contract Year, determined in accordance with **clause 2.3 of Schedule 2**;
  - (ii) the Monthly Tolerance Cap in each Pricing Zone for each Month of the Contract Year, determined in accordance with **clause 3.3**; and
  - (iii) Base Path Usages for the Contract Year.
- (d) If the Access Holder disputes the Base Path Usages, it must notify ARTC of that dispute under **clause 14** within one month of being notified and the dispute will be determined by expert determination in accordance with **clause 14.4**. If the Access Holder does not notify a dispute within this time, it is deemed to have accepted the Base Path Usages.
- (e) If the Access Holder has nominated more than one Operator for a Train Path, then the Base Path Usages will be proportionately allocated to the Operators in accordance with the same proportions applying for the Average Path Usages.

### 3.3 Determination of Monthly Tolerance Cap and Tolerance

- (a) For each Contract Year subsequent to the first Contract Year, ARTC will determine the Monthly Tolerance Cap for each Pricing Zone for each Month of that Contract Year in accordance with the following steps:
  - (i) subject to **clause 3.3(a)(ii)**, having regard to the TMTC as an objective:
    - (A) ARTC will reduce the Monthly Tolerance Cap for each Pricing Zone below the TMTC for that Contract Year for each Maintenance Month to take into account the reduction in Capacity for Maintenance Losses and any known Availability Exceptions in that Month which will impact on Capacity in the Pricing Zone, and in doing so, will take into account the number of days in a Month; and
    - (B) ARTC will increase the Monthly Tolerance Cap for each Pricing Zone above the TMTC to make up for the reduction for Maintenance Losses and any known Availability Exceptions in the Maintenance Month, and in doing so, will take into account the number of days in a Month;



- (ii) if the delivery of the TMTC is identified in the Hunter Valley corridor capacity strategy as conditional upon the commissioning of Additional Capacity and the completion date for the project creating the Additional Capacity is after the commencement of the Contract Year, ARTC will, for those Months prior to the completion date of that project, have regard to a target monthly tolerance cap which ARTC reasonably considers reflects the Capacity available for tolerance prior to the completion of that project (rather than TMTC) when carrying out the steps in **clause 3.3(a)(i)(A) and 3.3(a)(i)(B)**.
- (b) If the project to deliver Additional Capacity is delayed beyond the expected completion date, or the project delivers less Capacity than anticipated, then ARTC will, prior to the commencement of the Month when the Additional Capacity was due to be commissioned, advise the Access Holder by notice of any reduction in the Monthly Tolerance Cap in those subsequent Months.
  - (c) The Access Holder's Tolerance in each Pricing Zone for each Period will be determined in accordance with the following:
    - (i) If the Access Holder has an Allocation Period of a Month, the Access Holder's Tolerance in each Pricing Zone for each Month will be  
  
the higher of:  
  
 (A)  $10\% \times \sum (AVPU_{TP1} \dots AVPU_{TPN})$ ; or  
  
 (B) 13 Path Usages;  
  
 where:  
  
 $\sum (AVPU_{TP1} \dots AVPU_{TPN})$  = the sum of the Average Path Usages for each Train Path in that Pricing Zone in the Month as set out in the **Train Path Schedules**. If a Train Path spans more than one Pricing Zone, then the Average Path Usages for that Train Path will count towards the Tolerance in each Pricing Zone.  
  
 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.
    - (ii) If the Access Holder has an Allocation Period of a Quarter, the Access Holder's Tolerance in each Pricing Zone for each Quarter will be  
  
the higher of:

(A)  $10\% \times 0.33 \sum (AVPU_{TP1} \dots AVPU_{TPN})$ ; or

(B) 13 Path Usages;

where:

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

- (d) If **clause 3.3(c)(i)** or **3.3(c)(ii)** 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.
- (e) Within twelve months from the date an Access Undertaking is accepted by the ACCC covering the Network first comes into effect, ARTC will commence a consultation with access holders on the level of Tolerance available and will provide a report to the RCG summarising the results of this review. The purpose of this review is to consider the impact of the level of tolerance on Coal Chain Capacity.

### 3.4 Identification of Path Usages

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

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

### 3.5 Identification of Allocation Period

- (a) For the first Contract Year, the Access Holder's Allocation Period for a Train Path is set out in the Train Path Schedule.
- (b) For each subsequent Contract Year, if the Access Holder and its Associates have aggregate load point allocations less than or equal to three Mtpa to the terminals operated by PWCS for any Contract Year from 1 January 2012 until the expiry of this agreement, then the Access Holder is eligible to elect, by notice in writing to ARTC, an Allocation Period of a Quarter for that Contract Year.
- (c) If the Access Holder wishes to elect an Allocation Period of a Quarter for a Contract Year, the Access Holder must:
  - (i) submit an election notice to ARTC by 31 August of the preceding Contract Year establishing to ARTC's reasonable satisfaction that its aggregate nominations at the terminals operated by PWCS

(taking into account any renewals and extensions) is less than or equal to the applicable maximum amount specified in **clause 3.5(b)** for that Contract Year; and

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

### 3.6 Availability Exceptions

- (a) The availability of a Train Path or a Path Usages is subject to:
  - (i) ARTC's Passenger Priority obligations under **clause 3.8** of this agreement;
  - (ii) emergencies or genuine and material safety considerations;
  - (iii) 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 relating to the Network; and
  - (vii) Third Party Works,

("Availability Exceptions"), provided that the Availability Exceptions apply only to the extent that the occurrence of the Availability Exception prevents ARTC (acting reasonably) from making that particular Train Path or Path Usage available to the Access Holder.
- (b) The Access Holder agrees at all times during the Term not to access or attempt to access the Network in any way other than is authorised by this agreement, or as authorised under a separate valid and binding access holder agreement.

### 3.7 Use of a Train Path is not exclusive

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

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

### 3.8 Passenger Priority in New South Wales

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

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

### 3.9 Early and late Services

- (a) If a Path Usage has been scheduled for use by the Access Holder's nominated Operator under a Daily Train Plan, the Operator must present to Network Control a Train which is ready in all respects for departure within 15 minutes of the time nominated in the applicable Daily Train Plan for departure of that Train.
- (b) Notwithstanding **clause 3.9(a)**, ARTC will use its best endeavours to accommodate a Service which is running early or late, is presented at the point of entry to the Network late or is presented at the point of entry to the Network more than 15 minutes early by providing another Path Usage on that Train Path for that Service at ARTC's first available opportunity (subject to the Network Management Principles).
- (c) Nothing in this **clause 3.9** requires ARTC to provide a Path Usage where to do so would be inconsistent with the Network Management Principles or ARTC's obligations (consistent with the Network Management Principles) to a user of the Network other than the Access Holder or its nominated Operator (where such obligations had first arisen before the first entry of the Train on the Network to which this **clause 3.9** relates).

### 3.10 Warranty of accuracy of information

- (a) Subject to **clause 3.10(b)**, each party represents and warrants to the other that all material information provided by the first-mentioned party to the other, whether pursuant to this agreement or otherwise, in relation to use of the Network is, to the first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.
- (b) Each party agrees that forward looking information is subject to uncertainties and that the warranty in **clause 3.10(a)** does not apply to

forward looking information and representations as to future matters, however, each party must use reasonable endeavours, at the time such information is provided to the other party, to ensure the accuracy of the forward looking information and future representations, in so far as is reasonably practicable.

### **3.11 Manner of control of the Network by ARTC**

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

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

### **3.12 Light engine movements**

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

### **3.13 Key performance indicators**

- (a) If requested by the Access Holder, ARTC will report actual performance against each of the Key Performance Indicators, within a reasonable period following the completion of the reporting period specified in **Schedule 4**, as determined by ARTC having regard to the specific characteristics of each indicator.
- (b) The parties will meet regularly, and in any case at least once each Contract Year, for the purpose of discussing actual performance against the Key Performance Indicators in **Schedule 4**.
- (c) If requested by a party, the other party agrees to include one or more Operators in a review of performance against the Key Performance Indicators, as contemplated at **clause 3.13(a)**.
- (d) The Key Performance Indicators will be reviewed in good faith by ARTC and the Access Holder at least once every two Contract Years and, in any case, promptly following a review of the Network Key Performance Indicators.

### **3.14 Network Exit Capability requirement**

- (a) If the Access Holder is seeking to transport a particular cargo of coal to the Port of Newcastle and the HVCCC or a Terminal Operator advises ARTC that the Access Holder does not have sufficient Network Exit Capability to offload the anticipated coal at a coal terminal at the Port of Newcastle, then ARTC is not obliged to make available a Path Usage to the Access Holder for the period where it does not have sufficient Network Exit Capability.

- (b) To avoid doubt, the Access Holder's obligation to pay TOP Charges is not reduced as a result of ARTC not making available Path Usages under **clause 3.14(a)**.

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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 only refuse the nomination if:
  - (i) the nominated Operator has received a rectification notice or similar notice from ARTC for Material Default of any agreement with ARTC and the event giving rise to that rectification notice or similar notice has not been rectified; or
  - (ii) the Operator's Services do not comply with the Services Assumptions applicable to that Train Path or Path Usage.
- (c) Where an Access Holder has nominated more than one Operator for a Train Path, the Access Holder will, or will procure its Operators, to inform ARTC which Operator is using each Path Usage for that Train Path, in accordance with the ARTC requirements for determining and issuing a Daily Train Plan.

### **4.3 Operator Sub-Agreements**

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

### **4.4 Nomination of new Operators**

- (a) The Access Holder may nominate a new Accredited Operator (who is not currently an approved Operator for any Train Path under this agreement) on 10 Business Days' written notice to ARTC. The notice must include sufficient information (to be specified on ARTC's website from time to time) about the Accredited Operator to enable ARTC to consider the nomination.

- (b) ARTC will use its best endeavours to approve or reject that nomination within 10 Business Days of the later of receiving notice or the required information. ARTC is only entitled to reject a nomination if:
  - (i) the Operator is not accredited at the time of the nomination;
  - (ii) the Accredited Operator does not have an unconditional Operator Sub-Agreement with ARTC endorsed by the Access Holder;
  - (iii) the nominated Operator has received a rectification notice or similar notice from ARTC for Material Default of any agreement with ARTC and the event giving rise to that rectification notice or similar notice has not been rectified;
  - (iv) ARTC forms the view, acting reasonably, that the Accredited Operator is not of sufficient financial capacity to meet potential liabilities under the Operator Sub-Agreement provided that ARTC is only able to form this view if it has requested Credit Support from the Operator and the Operator has not provided the Credit Support within the timeframe provided under the Operator Sub-Agreement.

#### **4.5 No valid Operator nomination**

- (a) The Access Holder agrees that ARTC has no obligation to make a Train Path or Path Usage available for use where:
  - (i) the Access Holder has failed to nominate an Accredited Operator for that Train Path or Path Usage;
  - (ii) the nominated Operator is not, or is no longer, an Accredited Operator, or its Operator Sub-Agreement 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**

- (a) If the Access Holder is not also the Operator for a Path Usage, the Access Holder appoints each nominated Operator, as its agent for the following purposes:
  - (i) providing inputs and agreeing to the final Daily Train Plan and the scheduling of Trains or changes to that plan or schedule for the Path Usages for which it is nominated by the Access Holder;

- (ii) the use of a Path Usage for which the Operator is nominated and scheduled to use under the Daily Train Plan including giving and receiving notices and instructions in relation to availability of Path Usages and the Services using those Path Usages in accordance with the Operator Sub-Agreement;
- (iii) agreeing to temporary changes to Train Paths, Path Usages or the Services in accordance with clauses 3.2(a) and 9 of the Operator Sub-Agreement; and
- (iv) the day to day operation of the Network for the Path Usages for which it has been nominated by the Access Holder as the Operator in accordance with **clause 4** of this agreement and the Train Path Schedule, including communications with the Network Control Centre, providing Train manifests to ARTC and informing ARTC of any changes to the Services (including under clauses 5.4(k), (l) and (m) of the Operator Sub-Agreement),

but the actual operation of Services on any Path Usage remains the responsibility of the Operator.

- (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.
- (c) To avoid doubt, the Access Holder does not incur liability for Incidents caused by the acts or omissions of the Operator as a result of the operation of this Agreement.

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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**.



## 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 or part of the Month if applicable.
- (b) The Access Holder must pay the invoice by the later of:
  - (i) the 21st day of that Month; or
  - (ii) 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 invoice by the later of:
  - (i) the 21st day of that Month; or
  - (ii) seven days from the date the invoice was received.
- (c) If the Access Holder disputes an invoice, it must pay the undisputed amount of the invoice. **Clause 14** applies to the dispute.

## 5.4 Calculation of TOP Rebate and Ad-Hoc Charge Rebate

- (a) Within 35 Business Days of the end of each calendar year in which the Access Holder has an entitlement to Path Usages in a Train Path Schedule, ARTC will:
  - (i) determine if there is a Ad Hoc Charge Rebate owing to the Access Holder for Ad Hoc Charges paid for each Train Path in each Pricing Zone determined in accordance with the formulae in **clause 5.4(b)**; and
  - (ii) undertake an annual reconciliation of the TOP Rebate owing to the Access Holder for each Train Path in each Pricing Zone determined in accordance with the formulae in **clause 5.4(c)** ("**Annual Reconciliation**").
- (b) If  $APU - Ad\ Hoc\ Path\ Usages < ACP$ , then the Access Holder is entitled to a rebate of Ad Hoc Charges paid to ARTC for Ad Hoc Path Usages on the Train Path in the Pricing Zone calculated in accordance with the following formula:

$$[ACP - (APU - \text{Ad Hoc Path Usages})] \times \text{Ad Hoc TOP}_{PU}$$

Where:

**APU or Actual Path Usages** means 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 unconditional Annual Contracted Path Usages for that Train Path in the Pricing Zone specified in the **Train Path Schedules** less any Path Usages not made available under **clause 3.14**, **clause 4.5** or **clause 11.6** of this agreement for the previous Contract Year;

**(Ad Hoc TOP<sub>PU</sub>)** means the average Ad Hoc Charge associated with that Train Path in that Pricing Zone which will be calculated by dividing the total Ad Hoc Charge payable for Ad Hoc Path Usages for that Train Path in that Pricing Zone in the Previous Contract Year by the total Ad Hoc Paths Usages for that Train Path in that Pricing Zone in the previous Contract Year);

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

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

$$(ACP - APU) \times TOP_{PU}$$

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

$$\sum (SPR_1 \dots SPR_N)$$

Where:

**TOP<sub>PU</sub>** is the average Train Path TOP Charge associated with a Path Usage for that Train Path in that Pricing Zone which will be calculated by dividing the monthly Aggregate Train Path TOP Charge by the Aggregate Average Path Usages;

**Aggregate Train Path TOP Charge** is, for the first Contract Year, the sum of the amounts for that Pricing Zone set out in column 10 for each applicable tranche of Path Usages in the tables in clause 3 of all the **Train Path Schedules**, and for each following Contract Year, the sum of the Train Path TOP Charges for that Pricing Zone calculated using the relevant TOP Prices as re-determined in accordance with **Schedule 3** and any changes agreed to the relevant Input Information in the **Train Path Schedules** for that Contract Year;

**Aggregate Average Path Usages** is, for the first Contract Year, the sum of the figures for that Pricing Zone set out in column 4 for each applicable tranche of Path Usages in the tables in clause 3 of all the **Train Path Schedules**, and for each following Contract Year, the sum of the Average

Path Usages for that Pricing Zone using any changes agreed to the relevant Input Information in the **Train Path Schedules** for that Contract Year;

To avoid doubt, the calculation of the Aggregate Train Path TOP Charge and the Aggregate Average Path Usages will include all tranches of Path Usages in that Pricing Zone which have a Start Date before the end of the Contract Year and does not include tranches of Path Usages having a Start Date after the end of the Contract Year;

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

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

- (d) Within 20 Business Days of performing the Annual Reconciliation ARTC will make a payment to the Access Holder of the TOP Rebate determined under **clause 5.4(c)** and the Ad Hoc Charge Rebate determined under **clause 5.4(b)**.
- (e) Except as required under **clause 5.7**, ARTC is not required to pay any interest in relation to the TOP Rebate or the Ad Hoc Charge Rebate.
- (f) If the Access Holder disputes the amount of the TOP Rebate or the amount of the Ad Hoc Charge 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 ARTC of a dispute within this time, it is deemed to have accepted the TOP Rebate and the Ad Hoc Charge Rebate as accurate and waives any right to make a Claim in respect of the TOP Rebate, Ad Hoc Charge Rebate, TOP Charges or the Ad Hoc Charges payable in the previous Contract Year.
- (g) 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.
- (h) 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 under **clause 5.4(c)** 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 5.7** from the time that such monies should have been paid.

## **5.6 Variation of Charges**

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

attributable to the provision by ARTC to the Access Holder of access to the Network.

- (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 Interest

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

- (a) bench mark lending rate charged by the National Australia Bank or its successors (“NAB”), as published in the Australian Financial Review newspaper, at the time of such default; or
- (b) if the lending rate specified in **clause 5.7(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.

## 5.8 Goods and Services Tax

- (a) Definitions

In this clause:

**Adjustment Note** has the meaning given in the GST Legislation;

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

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

**GST** has the meaning given in the GST Legislation;

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

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

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

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

- (b) **GST exclusive prices**

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

(c) **GST Payable**

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

(d) **GST Groups**

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

(e) **Payment under indemnity**

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

(f) **Reimbursement**

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

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## 6 Capacity shortfall

### 6.1 Identification of Shortfall in existing Capacity

- (a) If, at any time during a Month, ARTC identifies that there is likely to be a shortfall in Capacity to meet all remaining unconditional Capacity entitlements held by all access holders in that Month, after taking into account likely usage of access holders with an allocation period of a Quarter, and the shortfall arises other than as a result of planned maintenance provided for in **clause 3.2**, (“**Capacity Shortfall**”) then ARTC will:
- (i) as soon as reasonably practicable, inform each access holder (if affected), Terminal Operators and the HVCCC of the expected duration of the Capacity Shortfall but to avoid doubt, ARTC’s representation of the expected duration of the shortfall is not binding on ARTC; and
  - (ii) subject to meeting its obligations under **clause 6.2** and **clause 6.3**, consult with the HVCCC in accordance with the principles set out

in Schedule F of the Access Undertaking with the objective of coordinating its response to the Capacity Shortfall with the Terminal Operators and above rail operators.

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

## **6.2 Event leading to Capacity Shortfall of less than five days**

- (a) If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of five days or less, and there will be insufficient Capacity to meet all remaining unconditional Capacity entitlements held by all access holders in that Month after taking into account likely usage of access holders with an allocation period of a Quarter, ARTC will allocate the Capacity available in accordance with the following principles:
  - (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);
  - (ii) Capacity remaining after the allocation of Capacity under **subsection (a)(i)** will be allocated to access holders at ARTC's discretion. In exercising its discretion ARTC must take into account its contractual obligations under access agreements but may allocate Capacity other than on an equitable basis if it is consistent with the objective of ensuring efficient utilisation of the Capacity and Coal Chain Capacity during the Capacity Shortfall and after considering any recommendations provided by the HVCCC under **clause 6.1(a)(ii)**; and
  - (iii) in exercising its discretion under **subsection (a)(ii)**, ARTC will use its best endeavours, to the extent practicable, not to reduce availability of contracted access rights from load points not affected by the Capacity Shortfall under this **section 6.2**.
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **clause 6.2(a)**.

## **6.3 Event leading to Capacity Shortfall of greater than five days**

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

- (ii) To the extent practicable, contracted path usages from load points not affected by the Capacity Shortfall (for example, load points east of the event causing the Capacity Shortfall), will not be reduced by the Capacity Shortfall and access holders should continue to be able to use contracted path usages originating from unaffected load points.
- (iii) ARTC will, to the extent practicable, reduce the number of path usages for each affected load point (for example, a load point west of the event causing the Capacity Shortfall where the Access Holder has Capacity Entitlements remaining in that month) with the objective that each affected load point will at the end of the Month have borne an equitable pro-rata share of the Capacity Shortfall.
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **clause 6.3(a)**.

#### **6.4 Shortfall in creation of Additional Capacity**

- (a) Where there is a delay in the completion of a project creating Additional Capacity such that some, but not all, Additional Capacity becomes available, or a project creating Additional Capacity creates less Capacity than expected, that capacity will be allocated among the access holders who have entitlements to the Additional Capacity on an equitable pro-rata basis. By way of example, if one access holder had 60% of all contracted entitlements to the Additional Capacity created by that project, then 60% of the available Additional Capacity will be allocated to that access holder.
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under **clause 6.4(a)**.

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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 referred to in **clause 7.1(a)** will be reviewed every 12 months from the Effective Date to reflect any increase in TOP Charges. The results of the review are not subject to **clause 14**.
- (c) The Access Holder must promptly notify ARTC of any downgrade in the Access Holder's credit rating (or that of the person providing a Parent Guarantee) below the Acceptable Credit Rating.
- (d) If the Access Holder's credit rating is upgraded to an Acceptable Credit Rating, ARTC will return the Credit Support provided under **clause 2** or this **clause 7.1**.
- (e) If the Access Holder has provided Security, then, ARTC may draw on the Security on the last Business Day prior to the expiry of the Security unless,

at least three Business Days before the expiry date of the Security, replacement Security to the required amount has been provided by or on behalf of the Access Holder. In such case, ARTC must promptly repay the Security drawn once the replacement Security is provided.

- (f) Upon termination or expiry of the agreement, ARTC will release the Security to the Access Holder provided that at such time the Access Holder does not owe any further monies to ARTC under this agreement, in which case, the Security will:
  - (i) if an amount has not at that time become due and payable, be retained by ARTC until such time as the amount is paid or becomes due and payable; and
  - (ii) if an amount is, or becomes due and payable, but has not yet been paid, be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.
- (g) **Clauses 7.1(e) and 7.1(f)** survive termination or expiry of this agreement.

## **7.2 Obligation to grant Security - payment default**

- (a) If ARTC does not already hold Security, then, subject to **clause 7.2(b)**, the Access Holder will deliver to ARTC and keep current at all times during the Term, Security in the amount of one month's TOP Charges.
- (b) The Security referred to in **clause 7.2(a)** will be provided by the Access Holder within seven days of the Access Holder receiving a request from ARTC. ARTC may only serve such a notice on the Access Holder under this **clause 7.2(b)** if the Access Holder has defaulted in the payment of any monies owed by it to ARTC under this agreement and has not remedied that default before the expiry of seven days (unless the moneys due are the subject of a default).
- (c) The request for Security by ARTC is in addition to, and without derogation from, any other rights ARTC may exercise against the Access Holder by reason of the breach of this agreement. Subject to **clause 7.2(d)**, the continuance of the Security (or any replacement thereof under **clause 7.2(b)**) is a condition of the performance by ARTC of its obligations under this agreement. The decision of ARTC to issue a notice under **clause 7.2(b)** is not subject to **clause 14**.
- (d) If, after Security has been provided in accordance with this **clause 7.2**, the Access Holder has not been in default in the payment of monies owed by it to ARTC under this agreement for a continuous period of three months, ARTC will, on request of the Access Holder, promptly release the Security to the Access Holder. This **clause 7.2(d)** does not preclude ARTC from issuing a further notice under **clause 7.2(b)** if the circumstances described in that clause apply.
- (e) The amount of the Security referred to in **clause 7.2(a)** will be reviewed every 12 months from the Effective Date to reflect any increase in TOP Charges. The results of the review are not subject to **clause 14**.
- (f) Subject to **clause 7.2(d)** the term of the Security will be for at least 364 days. ARTC may draw on the Security on the last Business Day prior to the expiry of the Security unless, at least three Business Days before the expiry



date of the Security, replacement Security to the required amount has been provided by or on behalf of the Access Holder, and in such case, ARTC will promptly repay the Security drawn once the replacement Security is provided.

- (g) Upon termination or expiry of the agreement, ARTC will release the Security to the Access Holder provided that at such time the Access Holder does not owe any monies to ARTC under this agreement, in which case, the Security will:
  - (i) if an amount has not at that time become due and payable, be retained by ARTC until such time as the amount is paid or becomes due and payable; and
  - (ii) if an amount is due and payable but has not yet been paid, be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.
- (h) **Clauses 7.2(f) and (g)** survive termination or expiry of this agreement.

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

- (a) The Credit Support will be held by ARTC as security for the performance of the obligations of the Access Holder under this agreement and may be called upon by ARTC in any circumstances in which ARTC suffers any loss as a result of default by the Access Holder under this agreement.
- (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 this **clause 7.3** limits ARTC's entitlement to recover the full amount of ARTC's loss as a result of default by the Access Holder under this agreement.

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## **8 Control and management of access to the Network**

### **8.1 ARTC to control**

As between the parties, control of the Network and management of access to the Network, remains at all times with ARTC. ARTC will control the Network in the manner described in this agreement and the Operator Sub-Agreements.

### **8.2 Warranty of entitlement to grant access**

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

### **8.3 Network Access provider's obligations**

ARTC agrees at all times during the Term:

- (a) to undertake the function of Network Control over the Network;
- (b) to comply with the Network Management Principles;
- (c) to have Associated Facilities in place to enable an Operator to use the Train Paths on the terms of this agreement;
- (d) to receive, record and collate information from an Operator and other users of the Network for the purposes of generating the invoices referred to in **clause 5** and more effectively exercising the functions referred to in **clauses 8.3(a) and (b)**;
- (e) to maintain and operate the Network Control Centre and a communication system for the purpose of communication with an Operator and other users of the Network, and to facilitate an Operator's access to that communication system;
- (f) to use its best endeavours to provide an Operator with details, as soon as reasonably practicable of all Incidents which have affected or could potentially affect the ability of any Train to retain its Path Usage, or else affect its security or safety or the security and safety of the freight or passengers; and
- (g) to comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to ARTC's management, control and ownership of the Network.

#### **8.4 Conduct of ARTC**

- (a) In formulating its Indicative Access Charges, ARTC will not differentiate between access holders in circumstances where the characteristics of the Indicative Services are alike.
- (b) 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.
- (c) Without limiting **clause 8.4(a)**, if:
  - (i) ARTC sells a train path for an Indicative Service to a third party ("**Third Party Train Path**"); and
  - (ii) the Access Holder considers, acting reasonably, that the Third Party Train Path is a like train path when compared to a Train Path for an Indicative Service purchased by it under this agreement ("**Like Train Path**"); and
  - (iii) the Access Holder has evidence to suggest that the Third Party Train Path has been sold by ARTC for a price less than that charged by ARTC to the Access Holder for the Like Train Path,

then the Access Holder may make a written submission to ARTC claiming that the Indicative Access Charges payable by it under this agreement for

the Like Train Path should be reduced to that charged by ARTC for the Third Party Train Path, such submission detailing at least the following:

- (iv) the Indicative Access Charges payable by it for the Like Train Path;
  - (v) why the Like Train Path and the Third Party Train Path are to be considered like train paths in the context of **clause 8.4(a)**;
  - (vi) the Indicative Access Charges that the Access Holder asserts ARTC is charging the third party for the Third Party Train Path.
- (d) ARTC will, within 30 days of receipt of a written submission under **clause 8.4(c)**, 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.
- (e) In the event that the Access Holder does not agree with ARTC's decision under **clause 8.4(d)(ii)** and the reasons for it, the Access Holder may give ARTC a notice under **clause 14** whereupon the dispute will be resolved in accordance with **clause 14**.

## **8.5 Working with the HVCCC**

- (a) ARTC will provide the HVCCC with a copy of each access holder's train path schedules, as amended from time to time, for the purpose of enabling the HVCCC to determine whether an access holder has an entitlement to a Path Usage before scheduling a Service.
- (b) If ARTC is required to consult with the HVCCC under this agreement and a specific process is not set out in that provision, ARTC will use reasonable endeavours to follow the steps set out in Schedule F to the Access Undertaking to the extent practical.

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# **9 Repairs and maintenance of the Network**

## **9.1 ARTC to repair and maintain the Network**

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

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# **10 Accreditation**

## **10.1 Accreditation Warranty**

- (a) ARTC warrants that during the Term it has and will maintain Accreditation to the extent related to the Network and required by law.
- (b) ARTC will notify the Access Holder of any material notice received from any Governmental 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
    - (C) if the Requesting Party is ARTC, whether ARTC will relieve the Access Holder of its obligation to pay TOP Charges;
  - (ii) subject to the qualifications set out in **clauses 11.1(c), 11.1(f), 11.2- 11.4, 11.7, 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.
- (c) For the purpose of **clause 11.1(b)(ii)** the Access Holder cannot withhold consent in the case of variations required:
  - (i) by reason of ARTC's obligations relating to safety of the Network;
  - (ii) for the purpose of Passenger Priority; and
  - (iii) for the purpose of maximising the use and the reliability of the Network, provided the variations do not materially adversely affect the Access Holder's entitlement to the Path Usages set out in the **Train Path Schedules**.
- (d) Subject to **clauses 11.6, 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)**.

- (e) The Notified Party's response as to whether it consents or not under **clause 11.1(b)(ii)** to the Requesting Party's notice given under **clause 11.1(b)(i)** and if the Notified Party is ARTC, its response as to whether it will adjust the Access Holder's TOP Charges, will be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party's response is to refuse consent, the Notified Party will within such time also provide full reasons for refusal in writing to the Requesting Party.
- (f) Unless **clause 11.1(c)** 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.
- (g) If ARTC has advised the Access Holder, in accordance with **clause 11.1(d)** that it will not adjust the Access Holder's TOP Charges, then the Access Holder is entitled to withdraw a notice provided under **clause 11.1(b)(i)**, notwithstanding that ARTC may have consented to that notice.

## **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 **clauses 11.2(b)**, **11.2(c)** and **11.3**, ARTC may, without notice to the Access Holder or the relevant Operator, perform repairs, maintenance or upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network, the carrying out of any new work on the Network, or taking possession of the Network, are reasonably likely to materially affect a Train Path, ARTC will, prior to commencement of the works:
  - (i) take all reasonable steps to minimise any disruption to the Train Path;
  - (ii) notify the Access Holder and relevant Operator of the works as soon as reasonably practicable; and
  - (iii) use its best endeavours to provide an alternative Train Path or Path Usage,

but need not obtain the Access Holder or Operator's consent to such repairs, maintenance or upgrading, or possession of the Network.
- (c) Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. ARTC will consult with the Access Holder and the relevant Operator a reasonable time before taking possession of the Network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to Services.

## **11.3 Third Party Works**

- (a) The Access Holder acknowledges that:

- (i) third parties (some of whom have statutory rights) may carry out or require to be carried out Third Party Works on the Network during the Term; and
  - (ii) notwithstanding any other provision of this agreement, ARTC reserves the right to permit third parties to carry out Third Party Works if that party has a legal right to undertake those Third Party Works, including as arising from legislation or the NSW Lease.
- (b) If ARTC expects that planned Third Party Works are reasonably likely to have a material effect on a Train Path or Path Usage, ARTC will, as soon as reasonably practicable, and in any case, prior to the commencement of the works (except in the case of emergency):
- (i) notify the Access Holder and the relevant Operator of the Third Party Works; and
  - (ii) use its reasonable endeavours to provide an alternative Train Path or Path Usage,
- but need not obtain the Access Holder or Operator's consent to such Third Party Works.
- (c) Subject to ARTC complying with **clause 11.3(b)** but notwithstanding any other provision of this agreement, the Access Holder agrees that ARTC has no Liability to the Access Holder nor will the Access Holder make a Claim against ARTC for any costs, expenses, losses or damages incurred by the Access Holder in relation to or as a consequence of Third Party Works.

#### 11.4 Removal of Path Usages for Under-utilisation

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

$$\text{Actual Path Usages}_{M, \dots, M-5} / \text{Base Path Usages}_{M, \dots, M-5} < 85\%$$

then, ARTC will request the Access Holder to provide reasons to ARTC demonstrating that it has a sustained requirement for the Path Usages that were not utilised in the previous six months, and if the Access Holder fails to establish that it has a sustained requirement for those Path Usages to ARTC's reasonable satisfaction, then ARTC has the right to elect, by notice in writing to the Access Holder (of not less than 30 days), to delete Path Usages from the relevant **Train Path Schedule** in accordance with **clause 11.4(b)**.

Where:

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

Base Path Usages<sub>M, ..., M-5</sub> is the aggregate Base Path Usages for that Train Path in that Month and the immediately preceding five Months, or if the Access Holder has an Allocation Period of a Quarter for that Contract Year, the aggregate Base Path Usages in that Quarter and the immediately preceding Quarter;

- (b) ARTC will not exercise its rights under **clause 11.4(a)** if:
  - (i) the Access Holder has an Allocation Period of a Month and for that Month or in any of the five immediately preceding Months for any Pricing Zone spanned by the relevant Train Path, the result of the system monthly true-up test carried out in accordance with **Schedule 2** is that the System Availability Shortfall for that Pricing Zone is greater than zero; or
  - (ii) the Access Holder has an Allocation Period of a Quarter and, for that Quarter or for the immediately preceding Quarter for any Pricing Zone spanned by the relevant Train Path, the result of the system quarterly true-up test carried out in accordance with **Schedule 2** is that the System Availability Shortfall for that Pricing Zone is greater than zero.
- (c) If ARTC elects to delete Path Usages under **clause 11.4(a)**, then it may delete a number of Path Usages from a Train Path up to, but not exceeding Base Path Usages<sub>M, ..., M-5</sub> - Actual Path Usages<sub>M, ..., M-5</sub>. 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 for the purposes of clauses **11.4(a)** if:
  - (i) the relevant Operator has failed to present a Train at the scheduled entry point onto the Network; or
  - (ii) the relevant Train is in fact, loaded with and transports a quantity of coal which is less than 90% of the assumed gross tonnes per Service (loaded) identified in the **Train Path Schedule** for that Train Path.
- (e) If ARTC elects to delete any Path Usage under **clause 11.4(a)** then the Access Holder's obligations to pay the TOP Charges from the date of deletion will be reduced to reflect the removal of the Path Usage.
- (f) To avoid doubt, if the Access Holder has been unable to utilise Train Paths as a result of Force Majeure, an Availability Exception or any reasonable operational reason affecting the level of production at a relevant mine (such as longwall moves or adverse geological conditions), then ARTC must, after consulting with the Access Holder, take into account the impact of that occurrence in applying this **clause 11.4**.

## 11.5 Use of Non-Compliant Services

- (a) **(Request to temporarily use a Non-Compliant Service)** ARTC will not unreasonably withhold its consent to a request from the Access Holder to operate a Non-Compliant Service for a Period (including a request from the Access Holder for an Operator to operate more than the number of Services specified to be operated by that Operator in a Period in the Train Path Schedule) if:
  - (i) the Access Holder provides ARTC with three days notice of its intention to use or operate a Non-Compliant Service; and

- (ii) ARTC is satisfied that the use or operation of the Non-Compliant Service in that Period will not have a material adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder. Where the Non-Compliant Service has the same Services Assumptions prescribed for that Train Path in the Train Path Schedule, then there is deemed to be no adverse impact.
- (b) If ARTC consents to the use or operation of a Non-Compliant Service, ARTC may (but is not required to) update the TOP Charges to be payable by the Access Holder to reflect the characteristics of the Non-Compliant Service used or operated by the Access Holder.
- (c) **(Permanent change to Service Assumptions)** ARTC will not unreasonably withhold its consent to a variation of the Service Assumptions for a Train Path (including a variation of the number of Services specified to be operated by an Operator each Period in the Train Path Schedule) if:
  - (i) the Access Holder provides ARTC with 30 days notice of the new service assumptions proposed by the Access Holder for the Train Path;
  - (ii) ARTC is satisfied that the use or operation of the Path Usages in accordance with the new service assumptions proposed by the Access Holder will not have a material adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder;
  - (iii) the variation of the Service Assumptions does not lead to a reduction in TOP Charges that would otherwise be payable.
- (d) Despite **clause 11.5(c)(iii)**, ARTC will not unreasonably withhold its consent to a permanent change to the Service Assumptions for a Train Path that would lead to a reduction in TOP Charges if, in ARTC's reasonable opinion reached in consultation with the HVCCC, the variation involves the transfer to a Service which provides for more efficient use of Capacity and Coal Chain Capacity.
- (e) If the Service Assumptions applicable to a Train Path have been permanently amended under **clause 11.5(c)**, the Access Holder agrees that the applicable **Train Path Schedule** will be amended to reflect the new Service Assumptions and the TOP Charges payable by the Access Holder under **clause 5.2** will be updated to reflect the new Service Assumptions.
- (f) **(Consistent use of a Non-Compliant Service without consent)** If the Access Holder consistently uses Non-Compliant Services and,
  - (i) the Access Holder has not sought and obtained consent from ARTC to use a Non-Compliant Service under this **clause 11.5**;
  - (ii) ARTC reasonably considers that the use or operation of the Non-Compliant Services has a material adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder; or
  - (iii) ARTC reasonably considers that there is a material difference in the TOP Charges paid by the Access Holder for those Path Usages



and the TOP Charges that would otherwise be payable for those Path Usages had the Service Assumptions reflected the characteristics of the Non-Compliant Service or the Services used are Non-Compliant Services due to the train type used to operate the Services,

ARTC may issue a warning notice requiring the Access Holder to use a Service which complies with the Service Assumptions in the applicable Train Path Schedule.

- (g) ARTC will withdraw a warning notice provided under **clause 11.5(f)** if ARTC is reasonably satisfied that:
  - (i) the Access Holder had grounds for using a Non-Compliant Service; and
  - (ii) the Access Holder will not continue to use a Non-Compliant Service without ARTC's consent (acting reasonably).
- (h) If the Access Holder has received a warning notice under **clause 11.5(f)** (which has not been withdrawn) and if, after 14 days from the receipt of the warning notice, the Access Holder continues to use a Non-Compliant Service then ARTC may at its absolute discretion, on 30 days' notice to the Access Holder, do one or more of the following:
  - (i) review and adjust the Service Assumptions in the applicable **Train Path Schedule** to reflect the characteristics of the Non-Compliant Service;
  - (ii) review and adjust the Annual Contracted Path Usages in the applicable **Train Path Schedule** including deleting the number of Path Usages from the relevant **Train Path Schedule** which ARTC reasonably considers equivalent to the difference in Capacity consumed by the Non-Compliant Service and the Capacity that would have been consumed had the Access Holder used a Service which complied with the applicable Service Assumptions; or
  - (iii) adjust the TOP Charges to be paid by the Access Holder having regard to:
    - (A) the characteristics of the Non-Compliant Service when compared with the Service Assumptions set out in the applicable Train Path Schedule; and
    - (B) the factors which impact on ARTC's business and Coal Chain Capacity which ARTC is able to have regard to in formulating its Charges.
- (i) To avoid doubt, the Access Holder's obligation to pay TOP Charges will be updated to reflect the revisions to the Service Assumptions made under **clause 11.5(h)(i)**.
- (j) To avoid doubt, where a Path Usage is deleted from a **Train Path Schedule** under this **clause 11.5**:
  - (i) the Access Holder's obligation to pay TOP Charges in respect of that deleted Path Usage is unaffected; and

- (ii) the Tolerance available to the Access Holder, calculated in accordance with **clause 3.3** will be reviewed and adjusted to reflect the Access Holder's reduced entitlement to Path Usages in the affected Periods.
- (k) ARTC is not entitled to take any of the steps set out in **clause 11.5(h)** after one year from the date of the warning notice but this does not invalidate any steps taken before this time.
- (l) In exercising its rights under this **clause 11.5**, ARTC may have regard to, and is entitled to rely on, information provided by and recommendations or opinions of, the HVCCC on the impact of Non-Compliant Services, or the operation of Services complying with the new Service Assumptions (as applicable), on Coal Chain Capacity and Capacity.
- (m) Nothing in this **clause 11.5(f) - (l)** affects ARTC's entitlement to suspend or terminate a **Train Path Schedule** in accordance with **clause 12** of this agreement.

## 11.6 Cancellation of services

- (a) ARTC will request the HVCCC to inform ARTC on a weekly basis of the total number of cancelled services assigned to the Access Holder in the previous week by the Live Run Superintendent Group, as collated and reported by the HVCCC, and whether the total number of cancellations assigned to the Access Holder in that week has had, in the reasonable opinion of the HVCCC, an impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder in that week.
- (b) To avoid doubt, the number of cancelled services assigned to the Access Holder, as collated and reported by the HVCCC, may include cancellations of services scheduled to be used or operated by or on behalf of another access holder where the cancellation was assigned to the Access Holder by the Live Run Superintendent Group.
- (c) If ARTC is informed by the HVCCC that the cancellations in **clause 11.6(a)** have had, in the reasonable opinion of the HVCCC, an impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder, then ARTC may remove Path Usages from the Access Holder's Base Path Usages in the Period immediately following the Period in which the cancellations had an impact on Capacity, Coal Chain Capacity, or the contractual entitlement of another access holder.
- (d) If Base Path Usages are removed in accordance with this **clause 11.6(c)**, ARTC will delete the number of removed Path Usages from the Access Holder's Annual Contracted Path Usages in the relevant Train Path Schedule by notice to the Access Holder. To avoid doubt, a cancellation or a reduction of Path Usages made available to the Access Holder as a result of a Capacity Shortfall under **clause 6** will not constitute a cancellation under this **clause 11.6**.
- (e) The number of Path Usages to be removed from the Access Holder under **clause 11.6(c)** will:
  - (i) in respect of the number of cancellations assigned to the Access Holder due to a single event be no more than two; and

- (ii) in total will be no more than the number of cancellations reported in **clause 11.6**.
- (f) If ARTC is informed by the HVCCC that the cancellations reported in this **clause 11.6** have had, in the reasonable opinion of the HVCCC, an impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder, but ARTC has not removed Base Path Usages from the Access Holder, then ARTC will provide written reasons for its decision not to remove Base Path Usages from the Access Holder to:
  - (i) the HVCCC; or
  - (ii) if requested, the Access Holder where it is not a member of the HVCCC, subject to any confidentiality restrictions,

within 10 Business Days of making that decision.
- (g) To avoid doubt, the Access Holder's obligation to pay TOP Charges will be unaffected by the removal of Base Path Usages under this **clause 11.6**.
- (h) **Clause 14** does not apply to any determination by ARTC under this **clause 11.6**.
- (i) In exercising its rights under **clause 11.6**, ARTC is entitled to rely on information provided by, and the recommendations and opinions of, the HVCCC.
- (j) This **clause 11.6** is subject to any changes arising from the review under section 5.8 of the Access Undertaking.

#### **11.7 Cost of variation**

Any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under this **clause 11** (other than **clauses 11.4** and **11.5**), **16** and **21.1** will be borne between the parties to this agreement in such proportion as the parties agree (based on negotiations carried on in good faith), or in the absence of such agreement, by the party which incurs such losses, additional costs or other damages.

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

Permanent variations pursuant to **clauses 11.1** to **11.6**, or **16.3** or **21.1** of a Train Path or Path Usages are deemed to be an amendment to the relevant Train Path Schedule.

#### **11.9 Temporary variations and cancellations of Train Paths**

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

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## 12 Suspension and termination

### 12.1 Termination for breach

- (a) If a party (“**defaulting party**”) defaults in the performance of any of its material obligations under this agreement, the other party (“**aggrieved party**”) may give notice in writing (“**Rectification Notice**”) to the defaulting party requiring the defaulting party to:
- (i) in the case of a failure to pay money when due, pay the outstanding amounts (including interest calculated in accordance with **clause 5.7**) 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 Material 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 the applicable time specified in **clause 12.1(a)** or to the extent that **clause 12.1(a)(iii)** is applicable, does not comply with the timetable set out in the Rectification Response;
  - (ii) to the extent that **clause 12.1(a)(iii)** is applicable, does not provide a Rectification Response within the time specified in **clause 12.1(a)(iii)**;
  - (iii) to the extent that **clause 12.1(a)(iii)** is applicable, does not provide a reasonably satisfactory Rectification Response meeting the requirements of **clause 12.1(a)(iii)(A)** and **(B)**,
- then the aggrieved party may at any time thereafter suspend such rights of the defaulting party under the relevant Train Path Schedules or this agreement but only to the extent such rights correspond to the performance of the obligation in default or as are necessary to prevent a continuation of the default, by giving not less than 30 days notice.
- (c) If the defaulting party does not within a reasonable time after the suspension of this agreement under **clause 12.1(b)** rectify the default, the aggrieved party may terminate the obligations of both parties under a **Train Path Schedule** or this agreement (as appropriate) but only to the extent such obligations relate to the cause giving rise to the right to terminate, by giving not less than 30 days notice.

- (d) Notwithstanding that ARTC may be the defaulting party, nothing in **clause 12.1(b)** derogates from or affects ARTC's rights and powers to manage the Network under this agreement or any other agreement with any other person, including any access holder agreement with any other access holder.

## 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
  - (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 No other termination

Despite any law or rule to the contrary:

- (a) neither party may terminate or has any right to terminate or obtain any order with the effect of terminating this agreement; and

- (b) this agreement will not terminate, be frustrated (whether at common law or by statute), be repudiated or taken to have been repudiated for any reason, except in accordance with **clauses 12.1, 12.2 and 12.3** of this agreement.

## **12.5 Suspension for lack of ARTC Accreditation**

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

## **12.6 Suspension**

- (a) Without in any way limiting the rights of a party under **clause 12.1, 12.2 or 12.3** a party who is entitled to terminate this agreement under any of those clauses may elect instead to suspend the obligations of both parties under this agreement or a **Train Path Schedule** (subject to **clause 12.6(b)**) but only to the extent such obligations relate to the cause giving rise to the right to terminate and only until such time as the cause giving rise to the right to terminate is remedied.
- (b) An election referred to in **clause 12.6(a)** is revocable at any time by the party who made it and has no effect upon obligations, debts or liabilities which have accrued before the election to suspend this agreement.

## **12.7 Effect of termination or suspension**

- (a) Upon termination or suspension of a **Train Path Schedule** or this agreement (including under **clause 2**) all rights of the Access Holder to use the Network (to the extent of the termination or suspension) will cease immediately.
- (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.

## 12.8 Early termination and TOP Charges

- (a) If ARTC terminates a **Train Path Schedule** or this agreement (other than under **clause 2**, **clause 12.1** for a breach by ARTC, **clause 12.2** due to ARTC ceasing to carry on business or becoming insolvent or **clause 12.3** of this agreement), the Access Holder must within one month of termination pay ARTC an amount equal to the present value of the TOP Charges which would have otherwise been payable over the remaining term of each terminated **Train Path Schedule** as calculated by ARTC. In calculating the present value, ARTC will:
- (i) assume the TOP Charges which would apply over the remaining term of each terminated **Train Path Schedule** are those applying at the date of termination;
  - (ii) subject to **paragraph (b)**, if the Project Completion Condition Precedent for a tranche of Path Usages under a terminated **Train Path Schedule** is not satisfied, assume that it will be satisfied on the relevant Start Date (as last notified by ARTC); and
  - (iii) use a discount rate equal to the applicable rate of return approved under the Access Undertaking at the time of termination.
- (b) If an uncompleted project in the **Train Path Schedule** is for the sole benefit of the Access Holder, ARTC must negotiate in good faith with the Access Holder to mitigate the future costs incurred in relation to that project and ARTC must, acting reasonably, take into account any such agreed reduction in calculating the amount payable under **paragraph (a)**.
- (c) If:
- (i) within two years of ARTC's termination, ARTC enters into, or varies, an access holder agreement with another party (with a term of at least two years) for a Train Path which is the same as, or substantially similar to, a Train Path under a terminated Train Path Schedule; and
  - (ii) in ARTC's reasonable opinion the Capacity contracted under the new or varied access holder agreement relates to the same Capacity contracted by the Access Holder under the terminated Train Path Schedule,
- ARTC must rebate an amount paid under **clause 12.8(a)** which ARTC reasonably considers to be the present value of the expected take or pay charges it will receive under the relevant **Train Path Schedule** of the new or varied agreement to the extent that the Capacity is the same.
- (d) In calculating the present value of the take or pay charges it will receive under the relevant **Train Path Schedule** of the new or varied access holder agreement:
- (i) ARTC must use a discount rate equal to the applicable rate of return approved under the Access Undertaking at the time of the termination; and
  - (ii) the expected take or pay charges under the new or varied agreement will be for the lesser of the minimum term of that

agreement and the remaining term (at the time of the rebate) of the terminated **Train Path Schedule** but for the termination.

- (e) ARTC is not required to pay a rebate under **paragraph (c)** to the extent it exceeds the amount paid under **paragraph (a)**.
- (f) To avoid doubt, if ARTC enters into more than one new access holder agreement in accordance with this **clause 12.8**, **clauses 12.8(c)** and **12.8(d)** will apply to each new access holder agreement entered into by ARTC.
- (g) The Access Holder acknowledges that the amount payable under this **clause 12.8** is a genuine pre-estimate of ARTC's loss arising from an early termination of a **Train Path Schedule** or this agreement.
- (h) This **clause 12.8** survives termination of this agreement.

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## 13 Indemnities and Liability

### 13.1 Mutual releases

- (a) Except for an entitlement to a TOP 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;
  - (vi) any breach of this agreement which directly or indirectly causes ARTC to fail to make a Path Usage or Train Path available to the Access Holder (including **clauses 4, 8 and 9**); or
  - (vii) ARTC relying on any information provided by, or recommendation or opinions, of the HVCCC under **clauses 11.5, 11.6, 16.3, 16.4, 16.6** or clause 4 of the Train Path Schedules;unless:
  - (viii) the event giving rise to the Liability is caused by the fraudulent or Wilful Misconduct of ARTC; or
  - (ix) the particular Claim is not able to be excluded or limited pursuant to the provisions of any legislation.



- (b) To avoid doubt, **clause 13.1(a)** does not prevent the Access Holder from seeking equitable non-monetary relief, including an injunction or declaration, in relation to a breach or anticipated breach of this agreement by ARTC except that such relief cannot include any form of damages or monetary compensation for a failure to provide a Path Usage or an obligation on ARTC to make a replacement Path Usage available.
- (c) ARTC releases the Access Holder from:
  - (i) any Claims ARTC may have; or
  - (ii) Liability incurred by ARTC,
 relating to Incidents unless:
  - (iii) the event giving rise to the Liability is caused by the fraudulent or Wilful Misconduct of the Access Holder; or
  - (iv) the particular Claim is not able to be excluded or limited pursuant to the provisions of any legislation.

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

### **13.2 Conditions and warranties**

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

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

### **13.3 Mutual exclusion of Consequential Loss**

Other than for liability for TOP Charges under **clauses 12.8** and **16.3** or the indemnities given under **clauses 4.6** and **13.5**, neither party will be liable to the other party for any Consequential Loss relating to this agreement however arising (including under this agreement, in tort including negligence, or for breach of any statutory duty).

### **13.4 Mutual Liability cap**

- (a) If a Claim or Liability arises that is not covered by **clause 13.1** or **13.2**, and other than the liability to pay Charges (including under **clauses 12.8** 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) but excluding Liability caused by fraudulent or Wilful Misconduct is limited to the lesser of the annual cap, as determined under **clause 13.4(b)**, and the amount of the TOP Charges payable for that Contract Year.

- (b) The annual cap will be \$2 million in 2011 for the first Contract Year and will be escalated at the commencement of each subsequent Contract Year in accordance with the following formula:

$$\text{Cap}_t = \text{Cap}_{t-1} \times (\text{CPI}_t / \text{CPI}_{t-1})$$

Where:

$\text{Cap}_t$  is the annual cap for that Contract Year;

$\text{Cap}_{t-1}$  is the annual cap for the previous Contract Year;

$\text{CPI}_t$  = the CPI last published before the commencement of that Contract Year; and

$\text{CPI}_{t-1}$  = the CPI last published before the commencement of the previous Contract Year.

### 13.5 Related claims

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

- (a) made by an Associate against ARTC relating to the matters set out in **clauses 13.1(a)(i) to 13.1(a)(vii)** except to the extent such Claims are made under written agreements which ARTC has with that Associate; and
- (b) for contribution or cross-claims made by an Operator against ARTC which relate to Claims made by the Access Holder or an Associate against the Operator.

### 13.6 Proportionate liability

To avoid doubt, the parties agree that section 35 of the *Civil Liability Act 2002* (NSW) applies to any apportionable claim relating to this agreement.

### 13.7 Survival

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

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## 14 Resolution of disputes

### 14.1 Procedure to settle disputes

- (a) If there is a dispute between the parties relating to or arising out of this agreement (“**a Dispute**”), then, unless otherwise expressly agreed to the contrary by the parties, such Dispute will be resolved in accordance with this **clause 14**.
- (b) If either party reasonably considers that a dispute also involves an Operator, then:
  - (i) for a Dispute raised under this agreement, ARTC and the Access Holder consent to, and will not in any way prevent, the Operator from being joined to the procedure detailed in this **clause 14**; and

- (ii) for a dispute (as defined in clause 17 of an Operator Sub-Agreement) raised under an Operator Sub-Agreement the Access Holder agrees that where a notice of joinder is given by ARTC joining the Access Holder to the dispute, then the dispute under the Operator Sub-Agreement will also constitute a Dispute under this agreement. The dispute resolution procedure under this agreement and the Operator Sub-Agreement will be run as a joint procedure and all references to “parties” and “each party” will include a reference to the Operator. For the purposes of this **clause 14.1(b)(ii)**, to the extent of any inconsistency between the dispute resolution procedures in this **clause 14** and clause 17 of the Operator Sub-Agreement, the terms of the Operator Sub-Agreement will prevail.
- (c) The Access Holder agrees that where it is joined to a dispute raised under an Operator Sub-Agreement:
  - (i) the Access Holder is bound by the dispute resolution process under clause 17 of the Operator Sub-Agreement; and
  - (ii) 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.
- (d) Either party may give to the other party to the Dispute a notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with under this **clause 14**.
- (e) Upon provision of a Dispute Notice under **clause 14.1(d)**, the procedure that is to be followed to settle a Dispute arising under this agreement is as follows:
  - (i) for a Dispute over a rebate paid under **clause 5.4** of this agreement or a Dispute referable to this clause under the Train Path Schedule:
    - (A) first, negotiation under **clause 14.2**; 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
  - (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** or **clause 14.1(e)** 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(a)**, 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, they must procure the Expert to 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**

- (a) ARTC and the Access Holder acknowledge, subject to **clause 15.2** and **15.3**, that all information provided by one party (“**Provider**”) to the other (“**Receiver**”) under this agreement that is designated or indicated in writing, as being the confidential information of the Provider or any of its Related Bodies Corporate (“**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.

- (b) To avoid doubt, information provided by the Access Holder to ARTC on the forecast and actual volume of coal to be transported on the Network by the Access Holder is Confidential Information.

## 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;
- (d) derived or produced from Confidential Information but disclosed in an aggregated form, on at least a Pricing Zone basis.

## 15.3 Permitted disclosure

ARTC and the Access Holder may disclose Confidential Information:

- (a) necessary for the provision of advice by the Receiver's legal advisers, financiers (and their advisers), accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (b) to its Related Bodies Corporate (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (c) subject to entering into appropriate confidentiality arrangements with the HVCCC and the RCG, to the HVCCC or the RCG to the extent necessary to enable the HVCCC or the RCG to co-ordinate the operation and capacity development of the Hunter Valley coal chain;
- (d) to an Operator to the extent that it is necessary or desirable for the parties to do so for the purpose of complying with this agreement;
- (e) to the ACCC, to the extent reasonably required to undertake its functions in relation to the Access Undertaking and the CCA;
- (f) subject to entering into appropriate confidentiality arrangements with the auditor, to an auditor appointed under **section 4.10(f)** of the Access Undertaking to conduct a review of the system true up test under **Schedule 2**; or
- (g) to the lessor of the Network, if required under the terms of the NSW Lease.

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## 16 Assignment, trading and novation

### 16.1 By ARTC

- (a) The Access Holder agrees that ARTC may, by prior written notice to the Access Holder, assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement:
  - (i) to a successor of ARTC or any person to whom ARTC transfers management of the Network or any material part of it to which this agreement applies; or
  - (ii) on the expiration or earlier termination of the NSW Lease, to the lessor of the Network or a nominee of the lessor of the Network,and the Access Holder is deemed to have given its consent to an assignment and novation of this agreement and will cooperate with ARTC and execute any instrument reasonably required by ARTC to give effect to the novation or assignment.
- (b) In all circumstances other than those referred to in **clause 16.1(a)**, ARTC may not assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Access Holder, which will not be unreasonably withheld.

### 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, such consent not to be unreasonably withheld.

### 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 present value of TOP Charges it would have received from the Access Holder over the remaining term of the relevant **Train Path Schedule** but for the assignment or novation and the present value of the expected take or pay charges it will receive following assignment and novation where the TOP Charges will be assumed over the relevant period to be equal to those applying, and the discount rate to be used

will be the rate of return approved under the Access Undertaking, at the time of the assignment or novation; and

- (B) if the difference calculated in accordance with **clause 16.3(a)(ii)(A)** is greater than zero, then either the Access Holder or the incoming party must enter into arrangements satisfactory to ARTC for the payment of that amount; and

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 a Path Usage has been permanently assigned by or to the Access Holder to another access holder under this **clause 16.3**, ARTC and the Access Holder agree that the applicable **Train Path Schedule** will be amended to reflect that assignment.
  - (c) As contemplated in **clause 16.6(c)**, in deciding whether to provide consent under this **clause 16.3**, ARTC will consult with the HVCCC.

#### **16.4 Temporary trade of Path Usages**

- (a) (**Safe harbour trades**) An access holder ("**Former Access Holder**") may trade ("**Trade**") a Path Usage (for a period of less than 12 months) to a person who has an access holder agreement with ARTC ("**New Access Holder**") without ARTC's consent subject to the following conditions:
  - (i) the Former Access Holder, and New Access Holder must give ARTC at least three days notice of the Trade;
  - (ii) the New Access Holder's load point for the traded Path Usage must be:
    - (A) closer to the Port of Newcastle than the Former Access Holder's load point; and
    - (B) within the same or a closer Pricing Zone as the Former Access Holder's load point;
  - (iii) the destination of the traded Path Usage when utilised by the New Access Holder will be the same destination had the traded Path Usage been utilised by the Former Access Holder. To avoid doubt, a discharge point of Kooragang Coal Terminal, Carrington Coal Terminal, the Newcastle Coal Infrastructure Group Terminal at Newcastle or any other export coal terminal at Newcastle will be considered the same destination;
  - (iv) the Former Access Holder and New Access Holder must provide evidence that the HVCCC accepts that the Trade will not have an adverse impact on Coal Chain Capacity and on the Capacity entitlements of other access holders (in the form of a recommendation made by the HVCCC) and 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;

- (v) 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;
  - (vi) the New Access Holder's nominated Operator must comply with the Service Assumptions relating to the Train Path;
  - (vii) the Former Access Holder and the New Access Holder have the same Allocation Period in the Contract Year the Trade takes place and the Trade is for an unconditional Base Path Usage of the Former Access Holder in that Contract Year; and
  - (viii) the New Access Holder must only use the Path Usage in the same Period the Path Usage was available for use by the Former Access Holder.
- (b) For each Trade carried out in accordance with this **clause 16.4**:
- (i) 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 (but only to the extent of actual usage); and
  - (iii) to avoid doubt, the New Access Holder will not be liable for any Ad Hoc Charge when using the traded Path Usage.
- (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 which apply to a Former Access Holder and to a New Access Holder respectively in relation to that Trade.
- (d) **(Non-safe harbour trades)** If an Access Holder requests to Trade a Path Usage which does not meet the conditions in **clause 16.4(a)**, subject to satisfying **clause 16.4(a)(viii)**, ARTC:
- (i) will not unreasonably refuse its consent if the HVCCC advises under **clause 16.6(c)**, that the Trade will not have an impact on Coal Chain Capacity and the Capacity entitlements of other access holders and will, in the absence of such advice from the HVCCC be entitled to refuse consent;
  - (ii) will use reasonable endeavours to inform the HVCCC of its decision whether or not it approves a trade as soon as practicable;
  - (iii) in any case, must inform the HVCCC of its decision within two weeks of ARTC being notified of the Trade, or in such other period (which may not be more than two weeks) as notified by ARTC to all access holders and the HVCCC as a result of **clause 16.8** or from time to time following consultation with the HVCCC by ARTC; and

- (iv) may impose reasonable conditions on an approval of a Trade, including the period in which the Path Usage may be used.
- (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) If there is more than one **Train Path Schedule** or the Access Holder has more than one access agreement for the Network with ARTC, this **clause 16.4** also applies to a Trade by the Access Holder of a Path Usage for one train path for use in relation to another train path of the Access Holder.

## 16.5 Treatment of traded Path Usages

- (a) For the purposes of this agreement where a Path Usage has been the subject of a Trade under **clause 16.4** of this agreement, the Former Access Holder will be deemed to have utilised the Path Usage traded to the New Access Holder in the Period in which it was available for use by the Former Access Holder, and the Path Usage the subject of the Trade:
  - (i) will not be counted towards the number of path usages actually used by the New Access Holder for the purposes of **clause 5.4** of this agreement and clauses 2.3 and 2.4 of **Schedule 2** of this agreement; and
  - (ii) will be treated as part of the Former Access Holder's base path usages.
- (b) To avoid doubt, where a Path Usage is the subject of more than one Trade, the Path Usage will continue to be treated as part of the original Former Access Holder's base path usages and will not form part of the base path usages of any New Access Holder to who receives the traded Path Usage.

## 16.6 CTS Administrator and HVCCC

- (a) The Access Holder may use the CTS Clearing House, in accordance with the procedures and functionality of the CTS Clearing House, to identify an access holder willing to participate in a Trade.
- (b) In accordance with the timeframes in **clause 16.4**, ARTC will consider all Trades notified to ARTC by the CTS Administrator and will inform the CTS Administrator whether a Trade meets the requirements in **clause 16.4(a)** (and that explicit ARTC consent is therefore not required) and if ARTC consent is required under **clause 16.4**, whether ARTC consents to that Trade.

- (c) In deciding whether consent should be given under **clauses 16.3** or **clause 16.4(d)**, ARTC will seek the advice of the HVCCC.
- (d) ARTC will consider in good faith, and is entitled to rely on, the information provided by, and recommendations or opinions of, the HVCCC under **clauses 16.4(a)(iv)** and **16.6(c)** as to the impact of the Trade on Coal Chain Capacity and the Capacity entitlements of access holders and has no Liability to access holders where it has relied on an HVCCC recommendation. ARTC 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.

## **16.7 The effect of assignment**

Transfers under **clause 16.1**, **clause 16.3** or **clause 16.4** of this agreement will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this agreement prior to the date of such a transfer.

## **16.8 Reduction in time period for ARTC approval of trades**

- (a) Within 12 months from the date the Access Undertaking first takes effect, ARTC will conduct a review of the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades including a decision to approve a trade subject to conditions, which do not meet the conditions set out in **clause 16.4(a)** ("**Trade Consent Period**").
- (b) In conducting that review, ARTC will seek the views of the HVCCC on the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades including a decision to approve a trade subject to conditions, which do not meet the conditions set out in **clause 16.4(a)**, taking into account the appropriate time necessary to determine the impact of the trade on Coal Chain Capacity and the Capacity entitlements of other access holders, and ARTC will consider the views expressed by the HVCCC in good faith.
- (c) ARTC will provide to the HVCCC, and if requested, to the Access Holders if it is not a member of the HVCCC, written reasons for its decision on whether to alter the maximum Trade Consent Period under **clause 16.4(d)**, and will provide notice to the HVCCC and the Access Holder of any new maximum Trade Consent Period.

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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 New or varied Access Undertaking**

- (a) The Access Holder acknowledges that the Term may encompass new or varied Access Undertakings being accepted by the ACCC.
- (b) The parties agree that:
  - (i) any changes to a Tier 1 (Mandatory) Provision or the addition of a new Tier 1 (Mandatory) Provision in the indicative access agreement included in an Access Undertaking accepted by the ACCC as contemplated under **clause 19.1(a)**, will be automatically incorporated into this agreement, on the date the new or varied Access Undertaking comes into effect; and
  - (ii) to the extent there are changes to any other provisions of the indicative access agreement included in an Access Undertaking accepted by the ACCC under **clause 19.1(a)** which are inconsistent with this agreement, the parties will negotiate in good faith to modify this agreement to reflect the amendments to the indicative access holder agreement included in the 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 possible, the commercial and economic position of both parties arising from the agreement, and if the parties cannot agree,

then the dispute will be a Dispute to be resolved in accordance with **clause 14**; and

- (iii) if this agreement contains a provision which is not contained in the indicative access agreement and is not inconsistent with any provision of the indicative access agreement, that provision will be retained unless the parties agree otherwise.

## **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.

### **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

Subject to any variation of this agreement made in accordance with **clause 19**, The variation or waiver of a provision of this agreement, or a party's consent to a departure from a provision by another party, will be ineffective unless in writing, signed by the parties.

### 21.2 Costs

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

### **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. To avoid doubt, this document and the Operator Sub-Agreements will not effect the ability of the parties to enter into an user funding agreement as contemplated in the Access Undertaking.

### **21.7 Counterparts**

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

### **21.8 Approvals and consents**

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

### **21.9 Discretion in exercising rights**

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

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

#### **21.10 Partial exercising of rights**

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

**EXECUTED** as an agreement



# Schedule 1 - Network

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

1. Islington Junction turnouts (116A points (164.690 km)/115A points (164.633 km)) to Port Waratah (107W points (via DEP 169.731 km)/111W points (via DEP 169.552 km)/109W points (166.311 km)/113 points (116.403 km)/PWCS boundary)
2. Scholey Street Junction turnouts (95 points (164.806 km)/98 points (164.804 km))(Via Coal) to Muswellbrook 288.800 km<sup>1</sup>
3. Hanbury Junction turnouts (137A points (168.955 km)/136A points (168.986 km)) to Kooragang Island (107S points (via ARR 174.984 km))
4. Kooragang East Junction turnouts (142E points (168.968)/143E points (168.997 km) to Sandgate turnouts (181B points (171.334 km)/183D points (171.502))
5. Muswellbrook 288.800 km to Ulan 435.300 km
6. Muswellbrook 288.800 km to Gap 416.000 km
7. Gap 416.000 km to Turrawan 548.485 km

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

# Schedule 2 - System True-Up Test

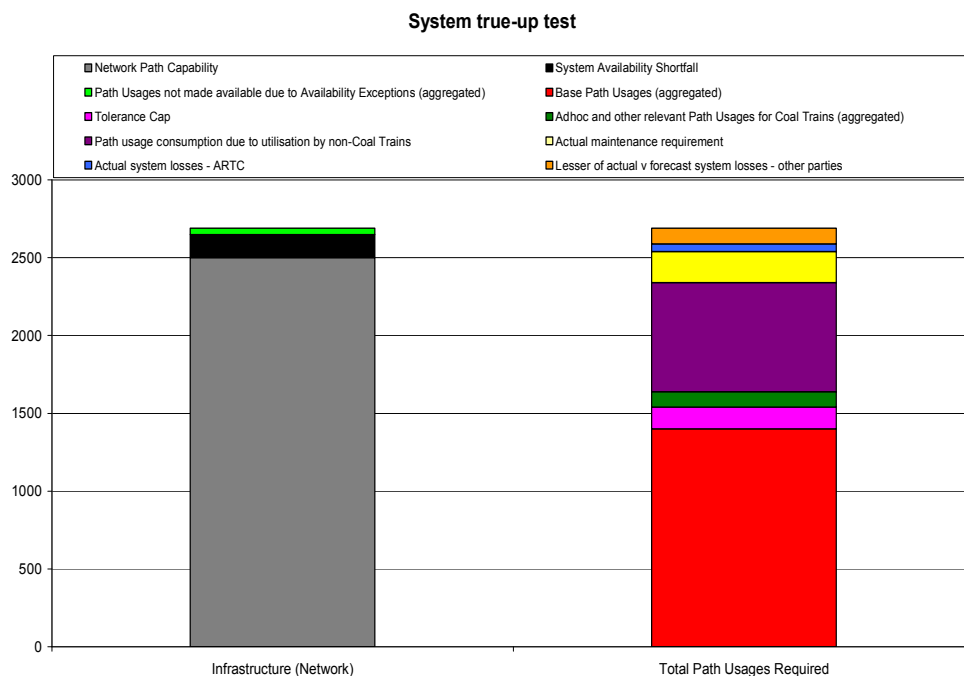
## 1 Periodic report

- (a) Within 15 Business Days of the end of each Period, ARTC will publish a report setting out the results of the system true-up test for each Pricing Zone.

## 2 System true-up tests

### 2.1 Description

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



## 2.2 Application

In this **Schedule**:

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

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

**Network Path Capability** or **NPC** (in the diagram “*Network Path Capability*”) means the capability of the Network, specified as the number of Functional Coal Paths capable of being made available in a Period, including Functional Coal Paths made available as a result of any Additional Capacity commissioned and available, at the commencement of the Period in which the system true-up test is to be carried out, as determined in accordance with **clause 2.3** of this Schedule;

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

- (a) in all agreements between ARTC and an access holder granting access rights to the Network to transport coal in the Period:
  - (i) the aggregate base path usages which, if the relevant Period is a Month, will be the aggregate monthly base path usages and, if the relevant Period is a Quarter, will be the aggregate quarterly base path usages (in the diagram “*Base Path Usages (aggregated)*”);
  - (ii) the aggregate ad hoc path usages provided in the Period in respect of which a Coal Train is operated and,
    - (A) if the relevant Period is a Month, the aggregate quarterly base path usages in respect of which a Coal Train was actually operated in that Month, or
    - (B) if the relevant Period is a Quarter, the aggregate monthly base path usages in respect of which a Coal Train was actually operated in that Quarter(in the diagram “*Ad hoc and other relevant Path Usages for Coal Trains (aggregated)*”);
- (b) if the relevant period is a Month, the Monthly Tolerance Cap for the Month, or if the relevant Period is a Quarter, the aggregate Monthly Tolerance Cap in the three months making up the Quarter (in the diagram “*Tolerance Cap*”);
- (c) the aggregate path usages required by ARTC in the Period to meet maintenance requirements in the Period (in the diagram “*Actual maintenance requirement*”);
- (d) the aggregate path usages unavailable in the Period due to actual system losses arising from ARTC (in the diagram “*Actual system losses - ARTC*”);
- (e) the aggregate path usages unavailable in the Period due to either actual system losses arising from parties other than ARTC, or the aggregate path usages forecast by ARTC to be unavailable in the Period due to system losses arising from parties other than ARTC,

whichever is the lesser (in the diagram, “*Lesser of actual v forecast system losses - other parties*”);

- (f) the aggregate Path Usages not made available to Coal Trains due to Capacity being utilised by Trains other than Coal Trains in the Period, where both a forward and related return journey of a Train other than a Coal Train is treated as a single Path Usage (in the diagram “*Path usage consumption due to utilisation by non-Coal Trains*”);

less the Path Usage not available due to an Availability Exception identified in **clause 3.6** for all users of the Network but not to the extent those path usages may have been excluded from the determination of the elements in (a) to (f) above (in the diagram “*Path usages not made available due to Availability Exceptions*”).

## 2.3 Determination of Network Path Capability

- (a) For each Contract Year subsequent to the first Contract Year, ARTC will determine the NPC for each Period in that Contract Year in accordance with the following steps:
  - (i) Following consultation with the HVCCC on the expected Capacity of the Network, ARTC will use its best endeavours to publish by 30 September of the previous Contract Year, and in any event before the commencement of the Contract Year, the number of Functional Coal Paths that the Network would be capable of providing in the Contract Year in each Pricing Zone in each Period on the theoretical assumption that the Network was only used by Coal Trains and which is consistent with the Relevant System Assumptions to the extent applicable (**NPC**).
  - (ii) The number of Functional Coal Paths available in each Pricing Zone in each Period (**NPC**) will be the number of Functional Coal Paths available as measured at the following points of the Network which are considered by ARTC to broadly represent the Capacity of each Pricing Zone:
    - (A) For Pricing Zone 1, Whittingham Junction;
    - (B) For Pricing Zone 2, Ulan Junction; and
    - (C) For Pricing Zone 3, Werris Creek.
  - (iii) If a project creating Additional Capacity is identified in the Hunter Valley corridor capacity strategy as having the purpose of increasing the number of path usages for coal trains in a Pricing Zone, the number of Functional Coal Paths determined under **subclause (b)(i)** (the NPC), will reflect the Additional Capacity that is due to be commissioned prior to the commencement of that Period.
  - (iv) If the project to deliver Additional Capacity is delayed beyond the expected completion date, or the project delivers less Capacity than anticipated, then ARTC will, prior to the commencement of the Month when the Additional Capacity was due to be commissioned, advise the Access Holder by notice of any reduction in the NPC in those subsequent Months, which reductions will only reflect that delay to or the extent to which the project delivers less Capacity than anticipated.
  - (v) If amendments are agreed to the Relevant System Assumptions by ARTC and the HVCCC, ARTC will vary the NPC as appropriate to reflect the number of Functional Coal Paths that would be available on the application of the new Relevant System Assumptions.

- (b) For the purposes of this Schedule, a Functional Coal Path is one which is capable of being used by a Coal Train which complies with elements (f) - (j) of the Relevant System Assumptions.
- (c) To avoid doubt the Network Path Capability of a Quarter will be equal to the sum of the Network Path Capability of each Month making up that Quarter.

## 2.4 Entitlement to TOP rebate accrual in a Period

- (a) Subject to **clause 2.6(a)** of this Schedule if the applicable system true-up test shows that for a Pricing Zone spanned by a Train Path of the Access Holder under this agreement:

System Availability Shortfall is greater than zero

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

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

where:

**AH TOP<sub>PU</sub>(\$)** is the Access Holder's average Train Path TOP Charge calculated using the same method for calculating TOP<sub>PU</sub> as described in **clause 5.4(c)** of this agreement;

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

$$BPU + AT - APUBP$$

where:

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

**APUBP** means, subject to **clause 16.5** of this agreement, the actual path usages used by the Access Holder in the Period counted towards Base Path Usages in accordance with **clause 3.4** of this agreement;

**AT** means the Allowed Tolerance resulting from a claim made under **clause 2.5** of this **Schedule**;

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

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

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

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

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

## 2.5 Allowed Tolerance

- (a) With respect to a Pricing Zone in a Period, if:
  - (i) the SAS is greater than zero;
  - (ii) the Access Holder does not receive one or more Tolerance path usages that the Access Holder believes it was entitled to; and
  - (iii) the Access Holder provides ARTC with evidence demonstrating its entitlement to the Tolerance path usages not received, in accordance with subclause (b)(ii),

then, subject to subclauses (b) and (c), ARTC will include those Tolerance path usages which the Access Holder was entitled to but did not receive ("**Allowed Tolerance**"), in the Access Holder's AH IS for the purposes of determining its entitlement to a TOP rebate accrual in that Period.
- (b) In order for ARTC to include the Access Holder's Allowed Tolerance in its AH IS for a Pricing Zone in a Period, the Access Holder must:
  - (i) make a claim in writing within 5 Business Days from the end of the relevant Period, identifying for each Tolerance path usage it did not receive in that Period:
    - (A) the date on which the Tolerance path usage was required;
    - (B) the load point and destination of the relevant Train Path; and
  - (ii) provide sufficient evidence to demonstrate, to ARTC's reasonable satisfaction, that on the date identified in subclause (b)(i)(A):
    - (A) the Access Holder was ready and capable of railing coal from the nominated load point;
    - (B) the Access Holder had Network Exit Capability relevant to the Tolerance path usage not received;
    - (C) the Network Exit Capability was available for use.
- (c) ARTC will in good faith consider the Access Holder's claim, having regard to the evidence provided, to reasonably determine whether a claimed path usage meets the criteria for Allowed Tolerance under subclauses (a) and (b).
- (d) ARTC will advise the Access Holder in writing which claimed Tolerance path usages will constitute Allowed Tolerance and the reasons for disallowing any claim or part claim.
- (e) To avoid doubt:

- (i) a claim made in accordance with clause 2.5(b) of this Schedule may contain a claim for more than one Tolerance path usage not received, and may include claims for more than one Pricing Zone for the same path usage where appropriate;
- (ii) ARTC will include any Allowed Tolerance for each access holder with a successful claim regardless of whether the aggregate of Allowed Tolerance exceeds the Monthly Tolerance Cap.

## 2.6 Exceptions and limitations

- (a) To avoid doubt, the Access Holder will not accrue a rebate in respect of a Train Path if in that Period, subject to **clause 16.5** of this agreement, the number of Path Usages for which an Operator actually operated a Service for the Access Holder on that Train Path in a Pricing Zone to transport coal, is equal to or exceeds the aggregate of the Access Holder's Base Path Usages and Allowed Tolerance in that Pricing Zone for that Period less any Path Usages not made available under **clause 3.14**, **clause 4.5** or **clause 11.6** of this agreement.
- (b) To avoid doubt, if Network Path Capability is greater than or equal to Total Path Usages Required for a Period in a Pricing Zone, then no rebate accrues to the Access Holder for that Period in respect of that Pricing Zone.
- (c) For any Pricing Zone over a Period, if all access holders with train paths within the Pricing Zone use their full base path usages and there are no allowed tolerances for that Pricing Zone in that Period, then ARTC will not be required to carry out the system true-up test set out in this **Schedule 2** for that Period.

## 2.7 Provision of system true-up test information

Within three weeks of the end of each Period, ARTC will:

- (a) publish on its website the system true-up test results for each Pricing Zone in respect of any System Availability Shortfall, except where ARTC reasonably considers such information would despite aggregation disclose confidential information about an individual access holder; and
- (b) notify the Access Holder of any rebate accruing to the Access Holder in a Period under clause 2.4 of this Schedule 2.

## 2.8 Amounts owing and payable from annual TUT audit

If, as a result of the annual audit of ARTC's compliance with its obligations under this **Schedule** in relation to the performance of the system true up test conducted in accordance with section 4.10(f) of the Access Undertaking, the ACCC determines that the TOP Rebates for the Access Holder have not been calculated correctly, then ARTC will pay any underpayment and is entitled to recover any overpayment as determined by the ACCC and in accordance with the procedures set out in section 4.10(f) of the Access Undertaking

# 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 the sum of the total take or pay payments due under a **Train Path Schedule** in a Month calculated as follows:

$\sum (\text{Monthly GTK}_{PZ} \times \text{TOP Price}_{PZ})$  for each specified Operator for each Pricing Zone spanned by the Train Path,

(for example, for each Month in the first Contract Year, the Train Path TOP Charge will be the sum of the amounts specified in **column 10** of the applicable tranches of Path Usages tables in **clause 3** of the relevant **Train Path Schedule**)

where:

**Monthly GTK<sub>PZ</sub>** is the “Assumed Monthly GTK per PZ” for each specified Operator for each Pricing Zone as set out in **column 8** of the applicable tranches of Path Usages tables in **clause 3** of each **Train Path Schedule** for each Train Path;

**TOP Price<sub>PZ</sub>** is the take or pay price for each specified Operator for each Train Path in each Pricing Zone (in c/GTK):

- (a) for the first Contract Year of this agreement - the amount set out in **column 9** of the applicable tranches of Path Usages tables in **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 3**.

---

## 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:

$\sum (\text{Actual GTK}_{PZ} \times \text{NTP}_{PZ})$  for each Pricing Zone spanned by the Train Path,

where:

**Actual GTK<sub>PZ</sub>** is the sum of (Train Path Kms<sub>E</sub> x AGT<sub>E</sub>) and (Train Path Kms<sub>L</sub> x AGT<sub>L</sub>) in a Pricing Zone;



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

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

**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 specified Operator for each Pricing Zone (in c/GTK):

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

---

## 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 a Charge ("**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>** is the TOP Price<sub>PZ</sub> for the specified Operator whose service used the Ad Hoc Path Usage as determined in accordance with **clause 1** of **this Schedule** unless the Operator or 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**.

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

If:

- (a) the Access Holder must pay a TOP Charge in relation to a tranche of Path Usages under a Train Path Schedule; and
- (b) the Access Holder has no right to use that tranche of Path Usages under the **Train Path Schedule** due to the Access Holder not having satisfied the Capacity Condition Precedent in relation to those Path Usages; and
- (c) the Access Holder has an Ad Hoc Path Usage for that Train Path (ie a Service is operated on its behalf on the Train Path in excess of its Base Path Usages and available Tolerance for that Train Path),

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

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## 4 Determination of TOP Price<sub>pZ</sub> and Non-TOP Price<sub>pZ</sub>

### 4.1 Price determination process

In this clause, Prices means the TOP Price<sub>pZ</sub> and the Non-TOP Price<sub>pZ</sub> for each **Train Path Schedule** which is in force for a Contract Year.

- (a) For the Contract Year in which the Commencement Date occurs, the Prices are set out in the relevant Train Path Schedule.
- (b) The Prices that apply under **Schedule 3** for each following Contract Year are:
  - (i) to the extent that ARTC is providing the Access Holder with Indicative Services under this agreement, the Prices for those services are the final Indicative Access Charges published by ARTC and determined in accordance with the Access Undertaking; and
  - (ii) to the extent that ARTC is providing the Access Holder with non-Indicative Services under this agreement, the Prices for those services are the Charges notified to the Access Holder by ARTC, and determined in accordance with the Access Undertaking.
- (c) The parties agree:
  - (i) that the dispute resolution procedures under the Access Undertaking will apply to any dispute they have relating to the Prices (including any time limits or thresholds for raising disputes);
  - (ii) any determination of the arbitrator pursuant to the Access Undertaking is 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.

#### **4.2 Dispute resolution under access protocols**

If the Access Undertaking comprises the access protocols published by ARTC (in the circumstances contemplated by the definition of Access Undertaking under **clause 1.1**), ARTC will include in those access protocols, an effective resolution process to provide for binding determination by an independent arbitrator of any disputes between the Access Holder or ARTC in relation to the Prices.

---

## **5 Variation**

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

# Schedule 4 - Key Performance Indicators

## 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

[illegible]

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

[illegible]

Signed

Full Name (Print)

Director/Secretary

# Access Holder Agreement

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

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### 1 Definitions

In this **Schedule**:

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

**Effective Date** is the Start Date set out in **column 1** of tranche of Path Usages tables in **clause 3** of this **Schedule** and where there is more than one tranche of Path Usages for the Train Path, the Start Date in **column 1** which is earliest in time;

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

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

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

**Initial Term** means 10 years;

**Project Completion Conditions Precedent** means the conditions precedent set out in **columns 12-14** of the tranche of Path Usages tables in **clause 3** of this **Schedule**, the requirements for which are detailed in **clause 4.3** of this **Schedule**;

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

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

**Start Date** means for a tranche of Path Usages, the date set out in **column 1** of the tranche of Path Usages tables in **clause 3** of this **Schedule** for those Path Usages.

---

## **2 Term**

### **2.1 Term of this Schedule**

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

### **2.2 Commencement of right to use Path Usages**

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

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

### **2.3 Commencement of obligation to pay TOP Charges for Path Usages**

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

### **2.4 Annual Renewal of Schedule**

- (a) Before the end of each Contract Year, the Access Holder may renew the term of this **Schedule** by giving written notice to ARTC that the term of the **Schedule** will be extended for the year which is 10 years in advance of the year in which the renewal is submitted (**Renewal Year**). The Access Holder may only give one Renewal Notice under this **Schedule** in a Contract Year.
- (b) The Access Holder must identify in the Renewal Notice the number of Path Usages to be contracted for in the Renewal Year and that number must be less than or equal to the number of Path Usages contracted for in the year immediately preceding the Renewal Year.
- (c) If the Access Holder has not provided a Renewal Notice to ARTC in accordance with **clause 2.4(a)** of this **Schedule** in a Contract Year, the Access Holder will be unable to renew the term of the Schedule in any subsequent Contract Year.

## 2.5 Extension of Schedule

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

# Access Holder Agreement

## 3 Train Path: [Mine XY]

### 3.1 Train Path Description and Service Assumptions

Train Path Description		
Load point	[ ]	
Discharge point	CCT	
Pricing Zones	xx	xx
Kilometres (one way) per PZ	xx	xx

Service Assumptions	Operator 1	Operator 2 [If applicable]
Train axle load	xx	xx
Train length (metres)	xx	xx
Maximum speed (km/hr)	xx	xx
Section run times (minutes)	xx	xx
Assumed GT per service - loaded and unloaded	xx	xx

### 3.2 Tranche 1 of Path Usages (existing)

Input Information							Initial Price/Charge			
1	2	3	4	5	6	7	8	9	10	11
Start Date <sup>1</sup>	Annual Contracted Path Usages <sup>2</sup>	Allocation Period <sup>3</sup> (Monthly or Quarterly)	Average Path Usages <sup>5</sup> (1/12)	Nominated operator and number of path usages	Assumed GT per service	Pricing Zone	Assumed Monthly GTK per PZ	Initial TOP Price per Pricing Zone (c/GTK) <sup>4</sup>	Initial Train Path TOP Charge per Pricing Zone <sup>5</sup>	Initial Non-TOP Price per Pricing Zone (c/GTK)
xx/xx/20xx	xxxx	xxxx	xx	Op 1:x:xx	xxxx (unloaded) xxxx (loaded)	x	xxxm (unloaded) xxxm (loaded)	Zone x x xx	\$xxxx	xx
						x	xxxm (unloaded) xxxm (loaded)	Zone x x xx	\$xxxx	xx

Project Completion Conditions Precedent		
12	13	14
Pricing Zone	Project 1	Project 2
x	xxx	xxx
x	xxx	xxx

### 3.3 Tranche 2 of Path Usages (new)

Input information							Initial Price/Charge			
1	2	3	4	5	6	7	8	9	10	11
Start Date <sup>1</sup>	Annual Contracted Path Usages <sup>2</sup>	Allocation Period <sup>3</sup> (Month or Quarter)	Average Path Usages <sup>5</sup> (1/12)	Nominated operator and number of path usages	Assumed GT per service	Pricing Zone	Assumed Monthly GTK per PZ	Initial TOP Price per Pricing Zone (c/GTK) <sup>4</sup>	Initial Train Path TOP Charge per Pricing Zone <sup>5</sup>	Initial Non-TOP Price per Pricing Zone (c/GTK)
xx/xx/20xx	xxx x	xxxx	xx	Op 1:xx	xxxx (unloaded) xxxx (loaded)	1	xxm (unloaded) xxm (loaded)	Zone x xx	\$xx	
						3	xxm (unloaded) xxm (loaded)	Zone x xx	\$xx	

Project Completion Conditions Precedent		
12	13	14
Pricing Zone	Project 1	Project 2
x	xx	xx
x	xx	xx

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

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## 4 Conditions Precedent

### 4.1 Capacity Condition Precedent

- (a) ARTC's obligation to first make available each tranche of Path Usages in **clause 3** of this **Schedule** and the Access Holder's entitlement to have access to each tranche of Path Usages in **clause 3** is conditional upon the Access Holder providing:
- (i) evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability, based on the applicable Service Assumptions, to offload the anticipated coal associated with the Path Usages in that tranche (and any other unconditional Path Usages) at the discharge point specified in **clause 3** of this **Schedule** for a period of at least 10 years from the applicable Start Date; and.

*[Drafting note: To avoid doubt, if parties negotiate a term less than 10 years (i.e. a non-indicative agreement), the applicant will only be required to demonstrate Network Exit Capability for that agreed term.]*

- (ii) where the tranche of Path Usages are for the purpose of transporting coal to a coal terminal at the Port of Newcastle, written confirmation from the HVCCC that there is sufficient Coal Chain Capacity to offload the anticipated coal associated with the Path Usages in that tranche (and any other unconditional Path Usages) at the discharge point specified in **clause 3** of this **Schedule** for a period commencing at the Start Date and ending at the end of the first full Contract Year after the Start Date.

The Capacity Condition Precedent does not apply to a negative tranche of Path Usages.

- (b) Where the tranche of Path Usages are for the purpose of transporting coal to a coal terminal at the Port of Newcastle, ARTC will be satisfied that the Access Holder has sufficient Network Exit Capability if the Access Holder provides ARTC with a copy of an executed contract with a Terminal Operator which provides for sufficient terminal allocations to offload the anticipated coal for a period of 10 years from the applicable Start Date after taking into account any other unconditional Path Usages.
- (c) If the Access Holder is able to:
- (i) satisfy the Capacity Condition Precedent at the Start Date for some but not all of the tranche of Path Usages; or
- (ii) subsequently satisfy the Capacity Condition Precedent in relation to some or all of the Path Usages (to the extent not already removed by ARTC under **clause 4.2** of this **Schedule**) at a later date (on the basis that the reference in the Capacity Condition Precedent to the Start Date is read as being that later date),

then, the Capacity Condition Precedent will be considered satisfied in respect of those number of Path Usages in that tranche which ARTC considers equivalent to the lesser of the Access Holder's Network Exit Capability or the available Coal Chain Capacity relevant to those Path Usages.

- (d) In determining the number of Path Usages which are equivalent to the Access Holder's Network Exit Capability or the available Coal Chain Capacity relevant to Path Usages, under **clause 4.1** and **clause 4.2** of this **Schedule**, ARTC may have regard to, and is entitled to rely on, the information provided by, and the recommendations and opinions of, the HVCCC.
- (e) This condition precedent is for the benefit of ARTC and may only be waived by ARTC. ARTC must promptly notify the Access Holder of the satisfaction or waiver of this condition precedent.

#### **4.2 Removal of path usages for failure to satisfy Capacity Condition Precedent**

- (a) If:
  - (i) the Access Holder has been unable to satisfy the Capacity Condition Precedent in **clause 4.1(a)** in whole or in part for a tranche of Path Usages by the later of the applicable Start Date, and if there are Project Completion Conditions Precedent for those Path Usages, satisfaction of those Project Completion Conditions Precedent; and
  - (ii) the Access Holder cannot demonstrate to ARTC's reasonable satisfaction that it will be able to satisfy the Capacity Condition Precedent within three months from receipt of a notice by ARTC to do so,

then ARTC has the right to elect by notice in writing to the Access Holder (of not less than 60 days) to delete the Path Usages for which the Access Holder has not satisfied the Capacity Condition Precedent from **clause 3.2** or **3.3** of this **Schedule**.
- (b) If the Access Holder was able to satisfy the Capacity Condition Precedent for some but not all the Path Usages, then ARTC will not delete those number of Path Usages which ARTC considers equivalent to the lesser of the Access Holder's Network Exit Capability or the available Coal Chain Capacity relevant to those Path Usages.
- (c) If ARTC elects to delete any Path Usage under **clause 4.2(a)**, the Access Holder's obligations to pay TOP Charges for those Path Usages will be reduced from the date of deletion to reflect the removal of the Path Usages.
- (d) To avoid doubt, if the Access Holder has been unable to satisfy the Capacity Condition Precedent and ARTC does not elect to delete Path Usages under **clause 4.2(a)**, then the Access Holder will remain liable for the TOP Charges associated with those Path Usages from the later of the applicable Start Date, and if there are Project Completion Conditions Precedent for those Path Usages, satisfaction of those Project Completion Conditions Precedent.

#### **4.3 Reliance on the HVCCC**

In exercising its rights under this **clause 4**, ARTC is entitled to rely on the information provided by, and recommendations or opinions of, the HVCCC.

#### 4.4 Project Completion Condition Precedent [where applicable]

- (a) ARTC's obligation to first make available the Path Usages in **clause 3.3** of this **Schedule** and the Access Holder's entitlement to have access to those Path Usages is conditional upon:
  - (i) Completion of the following projects ("listed projects"):
    - (A) [ ] ;
    - (B) [ ] ; and the
    - (C) [ ] .
  - (ii) 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
  - (iii) in ARTC's reasonable opinion, the listed and new projects being commercially viable having regard to:
    - (A) the terms and conditions of all the access agreements relevant to the listed and new projects; and
    - (B) circumstances for ARTC to service and raise financing through debt and equity for the listed and new projects;
    - (C) opportunity cost to ARTC given the relative risk and returns associated with the financing of the listed and new projects relative to other investment opportunities; and
    - (D) net effect on ARTC's balance sheet, gearing ratios and any other debt covenants in existence at the time.
- (b) 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 if this is the case, ARTC will:
  - (i) offer the Access Holder the opportunity to make a capital contribution (as defined in the Access Undertaking) to the project, in which case the principles applicable to capital contributions as set out in the Access Undertaking will apply to that capital contribution; or
  - (ii) if requested by the Access Holder, enter into good faith negotiations with the Access Holder with the aim of securing alternative funding arrangements to deliver that project.

- (c) ARTC must promptly notify the Access Holder if it believes that this condition unlikely to be satisfied and provide reasons for the basis of ARTC's belief.
- (d) 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.
- (e) This condition precedent is for the benefit of ARTC and may only be waived by ARTC. ARTC must promptly notify the Access Holder of the satisfaction or waiver of this condition precedent

#### **4.5 Dispute resolution**

Other than a dispute in relation to **clause 4.4(a)(iii)**, a dispute under this **clause 4** will be resolved by expert determination under **clause 14.4** of this agreement.

# Access Holder Agreement

## Annexure A - Operator Sub-Agreements