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

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~~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~~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;

Positive Performance Incentive Scheme means the positive performance metrics included in **Schedule 5**;

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 3.1~~1.1~~** of **Schedule 3~~3~~**;

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

Total Quarterly Incentive Amount has the meaning given in **Schedule 5**;

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.

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.

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 that 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) $10\% \times \sum (AVPU_{TP1} \ldots AVPU_{TPN})$; or

(B) 13 Path Usages;

where:

$\sum (AVPU_{TP1} \ldots AVPU_{TPN})$ = 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% x 0.33 $\sum(AVPU_{TP1}....AVPU_{TPN})$; or

(B) 13 Path Usages;

where:

$\sum(AVPU_{TP1}....AVPU_{TPN})$ = 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)**.

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.

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~~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 - Ad Hoc Path Usages)] x 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_{PU}** 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) if (ACP - APU) x $TOP_{PU} \leq \sum (SPR_1 \ldots SPR_N)$,

(ACP - APU) x TOP_{PU}

(ii) if (ACP - APU) x $TOP_{PU} > \sum (SPR_1 \ldots SPR_N)$,

$\sum (SPR_1 \ldots SPR_N)$

Where:

TOP_{PU} 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;

$\sum$ ($SPR_1 \ldots SPR_N$) 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.

5.4A Calculation of Performance Incentive Amount

(a) Within 45 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 determine if there is an amount payable by the Access Holder under the Positive Performance Incentive Scheme set out in **Schedule 5** to ARTC determined in accordance with the formulae in **clause 5.4A(b)** (**"Performance Incentive Amount"**).

(b) If the Total Annual Incentive Amount > 0, then the Access Holder is liable to pay ARTC the Performance Incentive Amount calculated in accordance with the following formula:

TAIA x (AHPU /NPU)

Where:

TAIA or Total Annual Incentive Amount means for each Contract Year, the sum of the total quarterly incentive amounts calculated in accordance with **Schedule 5**.

AHPU means for each Contract Year, the sum of the Access Holder's total contracted GTK in that year based on the unconditional Annual Contracted Path Usages for all Train Paths specified in the **Train Path Schedules**.

NPU means for each Contract Year, the Network's total contracted GTK in that year based on the aggregate number of unconditional path usages contracted by all holders of coal access rights on the Network.

(c) Except as required under **clause 5.7**, the Access Holder is not required to pay any interest in relation to the Performance Incentive Amount.

(d) Within 20 Business Days of calculating the Performance Incentive Amount under **clause 5.4A(b)**, ARTC will issue to the Access Holder an invoice for the Performance Incentive Amount for the previous Contract Year.

(e) 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.

(f) If the Access Holder disputes the amount of the Performance Incentive Amount, it must notify ARTC of that dispute under **clause 14** within two weeks of the date of the issue of the invoice 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 Performance Incentive Amount as accurate and waives any right to make a Claim in respect of the Performance Incentive Amount payable in the previous Contract Year.

(g) Any Performance Incentive Amount payable to ARTC under this **clause 5.4A** will not be deemed to be revenue received by ARTC and will not be included for the purpose of annual compliance with the pricing principles in the Access Undertaking.

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.

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 **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 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)**.

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.

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.

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.

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.

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:

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

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 $\text{Usages}_{M,\ldots,M-5}$ 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 $\text{Usages}_{M,\ldots M-5}$ 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 $_{M, \ldots M-5}$ - Actual Path Usages$_{M, \ldots M-5}$. 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.

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.

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:

$Cap_t = Cap_{t-1} \times (CPI_t / CPI_{t-1})$

Where:

Cap_t is the annual cap for that Contract Year;

Cap_{t-1} is the annual cap for the previous Contract Year;

CPI_t = the CPI last published before the commencement of that Contract Year; and

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.

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 referrable 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.

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.

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.

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.

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.

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**.

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.

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[1]

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[2] 416.000 km

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

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

Schedule 2 - 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

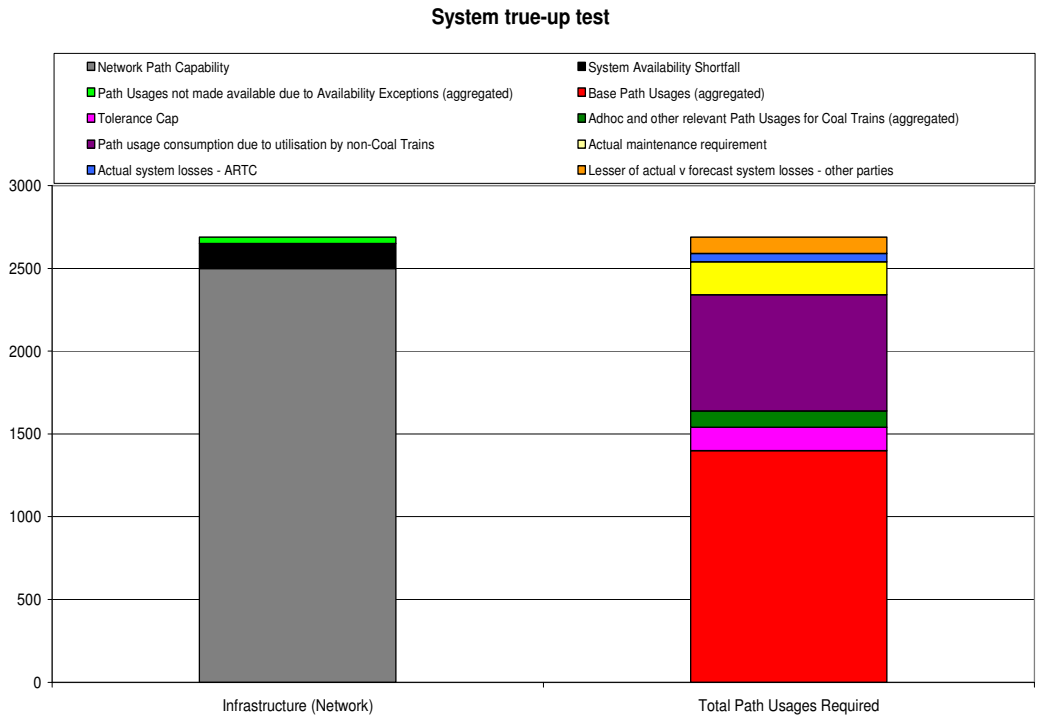
2.1 Description

(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

= Total Path Usages Required - Network Path Capability

(b) where the Network Path Capability is greater than or equal to the Total Path Usages Required

= zero.

Network Path Capability or **NPC** (in the diagram "*Network Path Capability*") means the capability of the Network, specified 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 it 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:

$$\text{AH TOP}_{PU}(\$) \times \text{AH IS} \times [\text{SAS} / \sum(\text{AH}_1 \text{ IS} \ldots \text{AH}_N \text{ IS})]$$

where:

AH TOP_{PU}($) is the Access Holder's average Train Path TOP Charge calculated using the same method for calculating TOP_{PU} 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**;

$\sum(\text{AH}_1$ IS ... 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 … AH_N IS)] is greater than one, [SAS / $\sum$(AH_1 IS … 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

3 TOP Charges

3.1 TOP Charges

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

3.2 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:

$\sum$ (Monthly GTK_{PZ} xTOP $Price_{PZ}$) 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 $_{PZ}$ 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$_{PZ}$ 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~~3~~**.

4 Non-TOP Charges

4.1 Non-TOP Charge for each Service

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

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

where:

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

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

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

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

and

NTP_{PZ} is the Non-TOP Price for each 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~~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.

5 Ad Hoc Charges

5.1 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_{PZ} x TOP Price $_{PZ}$) for each Pricing Zone spanned by the Train Path,

where:

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

TOP Price $_{PZ}$ is the TOP Price $_{PZ}$ 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_E and Train Path Kms_L have the meaning set out in **clause 2** of this Schedule.

5.2 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.

6 Determination of TOP Price$_{PZ}$ and Non-TOP Price$_{PZ}$

6.1 Price determination process

In this clause, Prices means the TOP Price$_{PZ}$ and the Non-TOP Price$_{PZ}$ 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~~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.

6.2 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.

7 Variation

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

Schedule 4 - Key Performance Indicators

Schedule 5 - Positive Performance Incentive Scheme ("PPIS")

1 PPIS

1.1 Definitions

For the purpose of this Schedule:

PPIS Metric means each of PPIS Metric 1, PPIS Metric 2 and PPIS Metric 3 set out in **clause 2** of this **Schedule 5** and included in Schedule D of the Access Undertaking.

PPIS Metric 1 means the percentage of cancelled services for a Quarter determined by ARTC in accordance with **clause 2.1** of this **Schedule 5**.

PPIS Metric 2 means the minutes of transit time lost on the Network resulting from the imposition of temporary speed restrictions for a Quarter determined by ARTC in accordance with **clause 2.2** of this **Schedule 5**.

PPIS Metric 3 means the track quality index for a Quarter determined by ARTC in accordance with **clause 2.3** of this **Schedule 5**.

QIAC means the applicable Quarterly Incentive Amount Cap determined by ARTC for each PPIS Metric.

Quarterly Incentive Amount means the incentive amount for each PPIS Metric determined by ARTC each Quarter in accordance with **clause 1.3** of this **Schedule 5**.

Total Annual Incentive Amount means for each Contract Year, the sum of the Total Quarterly Incentive Amounts (if any) for the PPIS Metrics in that year.

Total Quarterly Incentive Amount means for each Quarter, the sum of the Quarterly Incentive Amounts (if any) for the PPIS Metrics in that Quarter.

TV means the applicable target value for each PPIS Metric.

UB means the applicable upper bound for each PPIS Metric.

1.2 Performance assessment

(a) At the end of each Quarter, ARTC will determine:

(i) the PPIS Metrics in that Quarter, as determined by ARTC having regard to the specific characteristics of each PPIS Metric set out in **clause 2** of this **Schedule 5**; and

(ii) the Quarterly Incentive Amount for each of PPIS Metric 1, PPIS Metric 2 and PPIS Metric 3 calculated in accordance with **clause 1.3** of this **Schedule 5**;

(b) At the end of each Contract Year, ARTC will determine the Total Quarterly Incentive Amount for that year.

1.3 Determination of Quarterly Incentive Amount

The Quarterly Incentive Amount for each PPIS Metric is determined as follows:

(a) if the PPIS Metric for the Quarter is equal to or exceeds the TV for that PPIS Metric, the Quarterly Incentive Amount for that PPIS Metric will be deemed to be zero;

(b) if the PPIS Metric for the Quarter is less than or equal to the UB for that PPIS Metric, the Quarterly Incentive Amount for that PPIS Metric will be deemed to be the QIAC for that PPIS Metric; or

(c) if the PPIS Metric is less than the TV for that PPIS Metric and exceeds the UB for that PPIS Metric, the Quarterly Incentive Amount for that PPIS Metric will be calculated in accordance with the following formula:

(TV – PPIS Metric)/(TV – UB) x QIAC

2 Determination of PPIS Metric

2.1 PPIS Metric 1 – Coal Chain Losses – ARTC cause

(a) PPIS Metric 1 will be determined by ARTC at the end of each Quarter in accordance with the following formula:

ACT/PT

Where:

ACT (ARTC Cancelled Tonnes) means for each Quarter, the aggregate of the Assumed Tonnes for each ARTC Cancelled Service in that Quarter

Assumed Tonnes means:

(a) if the ARTC Cancelled Service would have been unloaded if it had been operated on the Network, zero; or

(b) otherwise, the difference in tonnes between the loaded and unloaded weight specified in [column 6] ("Assumed GT per service") the relevant Train Path Schedule for the ARTC Cancelled Service

[Drafting Note: "Assumed GT per service" column reference to be inserted in accordance with the Access Holders Train Path Schedule]

ARTC Cancelled Service means a cancelled service assigned to, and accepted by, ARTC in the Quarter by the Live Run Superintendent Group, as collated and reported by the HVCCC, and which are directly attributable to an act or omission of ARTC and excludes any cancelled service attributable in whole or in part to:

(a) an Availability Exception;

(b) an act or omission of an Access Holder or Operator; or

~~(i)~~(c) an act or omission of an owner of rail infrastructure, other than ARTC, that is not related to or connected with the Network including track structures, over or under track structures, supports, tunnels, bridges, signalling systems, communication systems and associated plant, machinery and equipment.

PT (Planned Tonnes) means the aggregate of the HVCCC's monthly published total planned tonnage for that Quarter.

(b) The following TV and UB will apply for PPIS Metric 1.

PPIS Metric 1	**TV**	**UB**
Network	0.97%	0.58%

(c) QIAC for PPIS Metric 1 will be determined by ARTC having regard to access revenue (based on an average coal haul and average Charge for coal access rights for the Network) that ARTC would have earned through the achievement of the difference in volume throughput between ARTC's performance at TV and performance at UB in respect of PPIS Metric 1.

2.2 PPIS Metric 2 – Transit Time – impact of temporary speed restrictions

(a) PPIS Metric 2 will be determined by ARTC at the end of each Quarter in accordance with the following:

(i) the average for the minutes of transit time lost due to Temporary Speed Restrictions in place on the last day of each month calculated by ARTC in that Quarter (being the average of 3 values for the Quarter); and

(ii) a simulated operation of a reference Indicative Service over the whole of the Network, (as if all parts of the Network were placed end to end) in accordance with the Network Key Performance Indicator, 'Transit Time – Infrastructure Practical Capability', set out in Schedule D of the Access Undertaking.

Where

Temporary Speed Restriction means a speed restriction applied by ARTC to the Network during the Quarter, which is directly attributable to the state of repair of the Network, to minimise the risk of an incident or accident until the Network can be repaired. To avoid doubt the following will not be considered to be a Temporary Speed Restriction:

(i) a speed restriction that ARTC reasonably applies to reduce the risk of degradation or damage to the Network including but not limited to a temporary speed restriction imposed as a result of a Force Majeure event which allows services to recommence on the Network;

(ii) a speed restriction that ARTC reasonably applies in order to carry out major capital works on the Network;

(iii) a speed restriction that ARTC reasonably applies as a result of a structural condition arising from prior operation above original design capacity including but not limited to where a structure is beyond its economic life; and

(iv) a speed restriction that ARTC reasonably retains because the carrying out of works necessary to remove that speed restriction is not economic.

(b) The following TV and UB will apply for PPIS Metric 2.

PPIS Metric 2	TV	UB
Network	14.41 minutes	9.31 minutes

(c) The QIAC for PPIS Metric 2 will be determined by ARTC having regard to:

(i) a reasonable assessment of the impact that a reduction in transit time on the Network may have on the capability of the Network to accommodate increased train paths and volume throughput; and

(ii) access revenue (based on an average coal haul and average Charge for coal access rights for the Network) that ARTC would have earned through the achievement of the difference in volume throughput between ARTC's performance at TV and performance at UB in respect of PPIS Metric 2.

2.3 PPIS Metric 3 – Track condition measured by index

(a) PPIS Metric 3 will be the track quality index (**TQI**) determined by ARTC at the end of each Quarter:

(i) in accordance with the applicable key performance indicator, 'Track quality measured by index', set out in Schedule D of the Access Undertaking; and

(ii) will include TQI measurements on each part of the Network that have been taken from the most recent run of ARTC's AK car (or other similar equipment) during that Quarter.

(b) The following TV and UB will apply for PPIS Metric 2.

PPIS Metric 3	TV	UB
Network	23.07	22.42

(c) The QIAC for PPIS Metric 3 will be determined by ARTC as one third of one percent of the aggregate access revenue in respect of all contracted coal access rights on the Network payable by access holders to ARTC.

3 Provision of PPIS information

(a) Within 40 Business Days of the end of each Quarter, ARTC will publish on ARTC's website a report setting out:

(i) each PPIS Metric in that Quarter, as determined by ARTC in accordance with this **Schedule 5**; and

(ii) the Total Quarterly Incentive Amount for that Quarter.

(b) Within 40 Business Days of the end of each Contract Year ARTC will publish on ARTC's website the Total Annual Incentive Amount for that year.

Access Holder Agreement

Signing page

DATED:_____

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

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

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

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.

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				Project Completion Conditions Precedent		
1	2	3	4	5	6	7	8	9	10	11	12	13	14
Start Date[1]	**Annual Contracted Path Usages[2]**	**Allocation Period[3] (Monthly or Quarterly)**	**Average Path Usages[5] (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)[4]**	**Initial Train Path TOP Charge per Pricing Zone[5]**	**Initial Non-TOP Price per Pricing Zone (c/GTK)**	**Pricing Zone**	**Project 1**	**Project 2**
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	xxx	xxx
						x	xxxm (unloaded) xxxm (loaded)	Zone x x xx	$xxxx	xx	x	xxx	xxx

3.3 Tranche 2 of Path Usages (new)

Input information							Initial Price/Charge				Project Completion Conditions Precedent		
1	2	3	4	5	6	7	8	9	10	11	12	13	14
Start Date[1]	Annual Contracted Path Usages[2]	Allocation Period[3] (Month or Quarter)	Average Path Usages[5] (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)[4]	Initial Train Path TOP Charge per Pricing Zone[5]	Initial Non-TOP Price per Pricing Zone (c/GTK)	Pricing Zone	Project 1	Project 2
xx/xx/20xx	xxx x	xxxx	xx	Op 1:xx	xxxx (unloaded) xxxx (loaded)	1	xxm (unloaded) xxm (loaded)	Zone x xx	$xx		x	xx	xx
						3	xxm (unloaded) xxm (loaded)	Zone 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.

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