



NSWMC Comments: 10 March 2010

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Hunter Valley Coal Network Access Undertaking

Dated

BY

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

IN FAVOUR OF

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

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1 Preamble

1.1 Introduction

Australian Rail Track Corporation Limited ("**ARTC**") gives this undertaking to the **ACCC** pursuant to ~~Part IIIA of the TPA~~. This undertaking reflects the following characteristics of ARTC's commercial environment specific to the Hunter Valley **rail** Network:

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

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confidence, competition and market growth in the rail and Hunter Valley export coal industries in an evolving environment.

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

1.2 Objectives

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

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

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

1.3 Coal chain principles

ARTC recognises the desirability of achieving the following coal chain principles in relation to Applicants for and Access Holders of Coal Access Rights, being principles which are set out Implementation Memorandum submitted to the ACCC on 6 April 2009 and accepted by it ("IM") and will seek to give effect to them through this Undertaking and the Access Agreements it enters into:

- (a) establishing and adhering to the System Assumptions;
- (b) defining Capacity, including ensuring that:
 - (i) contracted Access Rights do not exceed the lesser of Track System Capacity or Terminal System Capacity (as defined in the IM); and
 - (ii) ad hoc Access Rights do not contribute to ship queues or infringe on contracted access rights;

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- (c) operating an access queue that aligns track access with access queues for port services and that operates in accordance with the proposed Access Protocols and Process document contemplated by the IM; *[Note to ARTC: this provision is intended to allow for priority of access where there is a queue so that port capacity can be utilised as contracted. See also section 3.8(g)]*
- (d) ensuring that if an Access Holder fails to comply with the System Assumptions, it is the relevant Access Holder that will be liable rather than other participants in the Hunter Valley Coal Chain;
- (e) establishing a contract performance management system which operates in accordance with the Contract Performance Management document contemplated by the IM;
- (f) establishing principles, criteria and processes for the initial grant of access rights in accordance with the Hunter Valley Coal Chain Starting Point document contemplated by the IM;
- (g) granting equivalent rail access rights to producers that already have contracted port terminal capacity (provided pricing and services descriptions can be agreed), and ARTC further recognises the desirability of following and seeking to give effect in this Undertaking and the Access Agreements to the further principles that:
- (h) existing coal producers should have certainty of access to the existing coal chain capacity which is utilised by them in accordance with their existing contractual rights (subject to those coal producers being able to demonstrate Network Exist Capability);
- (i) new and expanding producers have access to a process by which they can reliably negotiate access to coal chain capacity, whether existing or new;
- (j) coal chain capacity should be contracted for on the basis of a single set of System Assumptions such that if those System Assumptions are achieved, the port and track capacity contracted for on the basis of those System Assumptions can be provided;
- (k) the allocation of coal chain capacity should be on the basis of contracts which are consistent with each other and workable together having regard to the totality of the arrangements, including with respect to:
 - (i) allocation periods;
 - (ii) flexibility provisions;
 - (iii) trading mechanisms; and
 - (iv) adjustments to the coal chain capacity provided;
- (l) the duration of access rights from a load point is a minimum of ten years or the remaining life of the mine, whichever is the shorter and that Indicative

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Services are priced in the same manner, irrespective of whether or not the remaining life of a mine is less than 10 years; and

- (m) where there is a mis-alignment between Capacity and the capacity available at the ports, ARTC will liaise with the ports and the HVCCC in order to resolve the mis-alignment as soon as reasonably practicable.

[Note to ARTC: A clause is required setting out the process for reviewing efficiencies and principles for implementing arrangements to resolve efficiency issues]

1.4 Contract structure

- (a) In recognition of interests pertaining to coal traffic, identified in section 1.1(e) and 1.1(f), ARTC will, on request, enter into a direct agreement with a Coal Customer for Coal Access Rights to the Network (an Access Holder Agreement) subject to the following terms:
- (i) the Coal Customer may only utilise those Access Rights through an Accredited Operator who has been nominated by the Access Holder for that purpose;
- (ii) and that Operator must have an Operator Sub-Agreement with ARTC which has been endorsed by the Access Holder.
- (b) An Accredited Operator may also enter into an Access Holder Agreement with ARTC under which it will hold Coal Access Rights. The Accredited Operator will also need an Operator Sub-Agreement with ARTC to utilise those Coal Access Rights.
- (c) For non-coal traffic, ARTC will enter into a single Access Agreement for Non-Coal Access Rights with an Accredited Operator which will provide for both an entitlement to Train Paths and a right to operate Non-Coal Trains on those Train Paths, or with an Applicant who is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the Trains on those Train Paths provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.

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2 SCOPE AND ADMINISTRATION OF THE UNDERTAKING

2.1 Scope

- (a) This Undertaking provides for the negotiation of Access Rights to the Network, with details of the specified services and sections of the Network defined during Access negotiations. Access will include, in addition to the track, the benefit of Associated Facilities required to facilitate such Access.
- (b) Other than as set out in section 2.1(c), this Undertaking does not extend to any Extension to the Network nor to the track and infrastructure not part of the Network that may connect to the Network.
- (c) ARTC and an Access Holder will enter into an agreement setting out the Access Holder's terms of access to the Extension. ARTC may charge an Access Holder (either as a separate charge over time or as an increase to

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TOP Charges) for access to an Extension as a term of it agreeing to build the Extension. ARTC may charge the Access Holder such amount it determines as being reasonable after taking into account:

- (i) the reasonable costs incurred by it in constructing the Extension and the recovery of such costs over the time such Extension can be utilised by Access Holders;
- (ii) the location of the Extensions;
- (iii) the number of Access Holders that ARTC estimates will use the Extension; and
- (iv) any other legitimate commercial factors which ARTC might reasonably consider.

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and section 3.16 does not apply to ARTC's determination in relation to an Extension.

2.2 Grant and Duration of Undertaking

- (a) ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking in relation to the grant of Access Rights to the Network. This Undertaking takes effect twenty one (21) days after it is accepted by the ACCC under section 44ZZA(3) of the TPA (“Commencement Date”) and will continue until the earlier to occur of:
 - (i) the expiry of the Term; or
 - (ii) withdrawal of this Undertaking in accordance with its terms or the TPA.
- (b) Not later than three (3) months prior to the expiry of the Term of the Undertaking ARTC will submit to the ACCC a written statement outlining whether or not it intends to submit a new voluntary undertaking to the ACCC for its consideration.
- (c) If ARTC intends to submit a new voluntary undertaking to the ACCC for its consideration, ARTC will also apply to the ACCC for an extension of the expiring Undertaking.
- (d) The application for extension would include a proposed extension period which, in ARTC’s view, reasonably estimates the time it would take for ARTC to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.
- (e) If ARTC does not propose to submit to the ACCC a new voluntary undertaking then sections 2.2(c), and (d) would not be applicable. Nothing in this section would prevent ARTC from submitting a voluntary undertaking to the ACCC at any time during the Term of this Undertaking.

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2.3 Term

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- (a) This Undertaking will continue to be binding upon ARTC until the earlier of:
- (b) the tenth (10th) anniversary of the Commencement Date; or
- (c) the date upon which the ACCC consents to the withdrawal of the Undertaking by ARTC.

2.4 Review of Undertaking

- (a) If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC or becomes inconsistent with the objectives prescribed at section 1.2, ARTC may seek the approval of the ACCC to vary this Undertaking.
- (b) Prior to seeking the approval of the ACCC under section 2.4(a), ARTC will first consult with Access Holders and Operators regarding the proposed variation.
- (c) ARTC may only vary the Undertaking with the consent of the ACCC under section 44ZZA(7) of the TPA.
- (d) As soon as practicable after the fifth (5th) anniversary of the Commencement Date, ARTC will undertake a review of the Undertaking, in consultation with Access Holders and other stakeholders. The review will consider any material impact that changes to industry circumstances or Government legislation, rules or regulations may have on the extent to which the Undertaking reasonably meets its intent as prescribed at section 1.2.
- (e) If, during the Term, the ACCC approves a revised Undertaking under this section 2.4, the parties agree that all Access Agreements for Coal Access Rights will be automatically varied in the manner set out in section 2.5.

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2.5 Existing agreements and rights

- (a) This Undertaking applies only to the negotiation of new Access Agreements and the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Except as set out in section 2.5(b) or an Access Agreement, nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.
- (b) Where there is an existing Access Agreement for Coal Access Rights, ARTC acknowledges that all of the provisions of the relevant Access Agreement should be consistent with the provisions of the Indicative Access Holder Agreement and agrees that all provisions of existing Access Agreements for Coal Access Rights will be automatically varied to reflect the equivalent provisions in the Indicative Access Holder Agreement. Any changes required to the relevant Access Agreement will be incorporated with effect on and from the date of acceptance as follows:
 - (i) if there is any inconsistency between the relevant Access Agreement and the Indicative Access Holder Agreement, the Access Agreement will be automatically varied to the extent of the inconsistency in order to reflect the equivalent provisions in the Indicative Access Holder Agreement;

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- (ii) if the Access Agreement contains a provision which is not contained in the Indicative Access Holder Agreement and is not inconsistent with any provision of the Indicative Access Holder Agreement, that provision will be retained unless the parties agree otherwise; and
 - (iii) if the Indicative Access Holder Agreement contains a provision which is not contained in the Access Agreement, that provision will be automatically incorporated into the Access Agreement.
- (c) ARTC will reserve, at no charge, existing train paths used for non-coal traffic under agreements existing immediately before the Commencement Date. ARTC will reserve the existing train paths for the purpose of making them available to Applicants who submit an Access Application for Non-Coal Access Rights, to be used for substantially the same purpose and in respect of the same end-market as the existing train paths, within 30 Business Days from the Commencement Date. To avoid doubt, the reserved train paths will (subject to section 2.5(e)) be contracted on the terms and conditions applicable to Indicative Services or non-Indicative Services (as the case may be), applicable at the time of the Access Application.
- (d) Subject to the Applicant demonstrating sufficient Network Exit Capability, ARTC will reserve, at no charge, existing train paths and capacity used by the Applicant for coal traffic under agreements existing immediately before the Commencement Date (and ARTC acknowledges that, as at 23 April 2009 [insert] Train Paths were normally made available by ARTC for coal haulage). ARTC will reserve the existing coal train paths and capacity used by the Applicant for the purpose of making them available to the relevant Applicant who submits an Access Application for Coal Access Rights, to be used for substantially the same purpose and in respect of the same [end-market] as the existing train paths, within 30 Business Days from the Commencement Date. To avoid doubt, the reserved train paths will (subject to section 2.5(e)) be contracted on the terms and conditions applicable to Indicative Services or non-Indicative Services (as the case may be) at the time of the Access Application. [Note to ARTC: the term 'end market' requires further definition]
- (e) Where an Access Application has been lodged and the Indicative Access Holder Agreement is approved by the ACCC prior to the Access Application being approved by ARTC, the terms of the Indicative Access Holder Agreement will apply to the grant of any Access Rights unless the parties agree otherwise.

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2.6 Insurance

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

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

2.7 Contact details

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

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

Attention: Chief Executive Officer
Telephone: (08) 8217 4366
Facsimile: (08) 8217 4578
 - (ii) Australian Rail Track Corporation Limited

PO Box 10343
Gouger Street
ADELAIDE SA 5000

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

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

3 NEGOTIATING FOR ACCESS

3.1 Introduction

(a) ARTC will negotiate with an Applicant in good faith. This section of the Undertaking will form the framework for ARTC's negotiations with an Applicant for Access Rights. However, ARTC recognises that the process needs to be flexible and ARTC will be willing to tailor the process in consultation with the Applicant.

(b) For Coal Access Rights:

(i) ARTC recognises the importance of the role performed by the HVCCC in providing advice on the operating requirements needed to deliver Coal Chain Capacity, as well as the role of the other Hunter Valley Coal Chain Service Providers. In particular, ARTC recognises the importance of the Applicant and ARTC consulting with the HVCCC and the Hunter Valley Coal Chain Service Providers to determine the impact on Coal Chain Capacity of the Access Rights sought by the Applicant and undertakes to consult with the HVCCC in respect of each Access Application. This consultation may occur before the submission of an Access Application, but, for the avoidance of doubt, the consultation must take place in accordance with sections 5.3 and 5.4; and.

(ii) ARTC undertakes that, whenever reasonably practicable, it will allocate to Applicants any Capacity which becomes available as a result of the termination or expiry of an Access Agreement prior to proposing to construct Additional Capacity.

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3.2 Framework

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

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- (a) preliminary meetings and exchanges of information, including, in relation to Coal Access Rights, consultation with the HVCCC and other Hunter Valley Coal Chain Service Providers;
- (b) submission of an Access Application by the Applicant;
- (c) preparation of an Indicative Access Proposal by ARTC;
- (d) negotiations to develop an Access Agreement for execution;
- (e) dispute resolution procedures; and
- (f) both ARTC and the Applicant to negotiate in good faith.

3.3 Information Provision

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

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3.4 Parties to Negotiation

- (a) ARTC reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and ARTC

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considers (acting reasonably) that such non-compliance is material, ARTC will not be obliged to continue negotiations regarding the provision of Access Rights for that Applicant.

- (b) Where an Applicant seeks Coal Access Rights, ARTC will negotiate an Access Holder Agreement with an Applicant who is not an Accredited Operator on the following basis:
 - (i) the Applicant will nominate an Accredited Operator prior to utilising the Coal Access Rights sought;
 - (ii) that Operator will enter into an Operator Sub-Agreement agreed to by ARTC and the Access Holder and included as an annexure to the Access Holder Agreement; and
 - (iii) the Applicant will endorse the signed Operator Sub-Agreement (but for the avoidance of doubt, in endorsing the signed Operator Sub-Agreement, the Applicant will not become liable under the Operator Sub-Agreement).

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

- (c) Where an Applicant seeks Non-Coal Access Rights, ARTC will negotiate an Access Agreement with an Applicant who is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the Trains on the contracted Train Paths provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.

- (d) Where an Applicant seeks Coal Access Rights, ARTC may require the Applicant to provide sufficient evidence to the reasonable satisfaction of ARTC that it will have sufficient Network Exit Capability for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may require the Applicant to provide a copy of its contract with the relevant port company establishing the Applicant's ability to offload the anticipated coal at the Port of Newcastle.

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- (e) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC that it is able to meet the following prudential requirements:

- (i) the Applicant must be Solvent;
- (ii) the Applicant, or a Related Party of the Applicant, must not be currently, or have been in the previous (2) years, in Material Default of any agreement with ARTC; and
- (iii) the Applicant has an Acceptable Credit Rating or will agree to provide credit support in the form of a Security or a Parent Guarantee before the Access Agreement becomes effective.

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- (f) If ARTC refuses to negotiate for any reasons as described in section 3.4(a), 3.4(b), 3.4(c) or 3.4(d), it will, within ten (10) Business Days of the decision to refuse to negotiate, explain in writing to the Applicant the reasons for such refusal.
- (g) If the Applicant considers that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations in accordance with section 3.4, then the Applicant may refer the matter to the arbitrator in accordance with section 3.16(c). If the arbitrator determines that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations, ARTC will recommence negotiations immediately.
- (h) If at any time, ARTC is of the view that an Applicant's request for Access Rights is frivolous in nature, ARTC may refer the request to the arbitrator in accordance with section 3.16(c) for determination. If the arbitrator determines that the request is in fact frivolous, then ARTC will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

Deleted: the Applicant must be able to demonstrate to ARTC that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance.

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3.5 Confidentiality

- (a) Each party acknowledges, subject to sections 3.5(d) and 3.5(d), that all information provided by one party ("Provider") to the other ("Receiver") as part of the negotiation process for Access Rights under this Undertaking and a party's ongoing Access Rights that is designated or indicated, either orally or in writing, as being the confidential information of the Provider or any of its related body corporates,

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<#>the Applicant's future market strategies and business strategies; and ¶
the strategies of ARTC's or the Applicant's customers;

("Confidential Information") is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider and not use that Confidential Information for any purpose other than the provisions of this Undertaking allow.

- (b) 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 an Access Holder is Confidential Information.

- (c) For the purposes of this section 3.5, Confidential Information does not include information which is:

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

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

(d) Either party may disclose Confidential Information:

(i) necessary for the provision of advice by the Receiver's legal advisers, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party);

(ii) to a Related Party (provided they are under a legal obligation not to disclose the Confidential Information to any third party);

(iii) 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 (including, where necessary, under sections 3.8, 5.2, 5.3, 5.4, 6.2, 6.3 and 6.4).

(iv) to an Operator to the extent that it is necessary or desirable for the parties to do so for the purposes of complying with contractual obligations under an Access Agreement or Operator Sub-Agreement;

(v) to the ACCC pursuant to this Undertaking; or

(vi) to the lessor of the Network (subject to the lessor of the Network being under an obligation of confidentiality no less onerous than the obligation of confidentiality contained in this Undertaking) where required under the NSW Lease.

[Note to ARTC: Old section 3.6 appears to be redundant considering the Capacity Analysis which takes place under section 3.8 and we have therefore deleted it.]

3.6 Access Application

(a) Requests for Access Rights are to be submitted to ARTC prepared in written form and clearly state that the Access Application is made in accordance with this Undertaking and is accompanied by the following information:

(i) Applicant details, including business name, ABN, ACN, business address and contact details;

(ii) Capacity requirements such as mode of operation, locations and time of entry and exit to the Network, or combination of load and discharge points for which Access Rights are required. For cyclic traffic, the number of monthly and annual train services required;

(iii) any requirements for Additional Capacity (subject to **section 5**);

(iv) additional above rail requirements;

(v) duration of the Access Rights sought (subject to section 3.14);

(vi) the type of Service intended to utilise the Access Rights sought, contract requirements including (where applicable) Train speed, axle load and

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length, annual tonnages between load and discharge points, and task variability;

- (vii) where applicable and available, details of the Operator or Operators likely to be nominated for each Train Path sought;
- (viii) indication of Rolling Stock to be used; and
- (ix) where an Applicant is seeking Coal Access Rights:

(A) subject to **section 3.6(b)**, confirmation that the Applicant will have sufficient Network Exit Capability, for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle or other Network exit points, ARTC may require the Applicant to provide a copy of its contract with the relevant port company (or other company, as relevant) establishing the Applicant's ability to offload the anticipated coal at the Port of Newcastle or at other Network exit points. In order to satisfy the requirements of this section, the Applicant must show that its Network Exit Capability is sufficient to offload the anticipated coal based on the operation of the Train services using the Train Paths and, where relevant, the port facilities in accordance with the System Assumptions;

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(B) advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, and on the operating requirements needed to deliver Coal Chain Capacity and on whether the Applicant's Network Exit Capability is sufficient; and

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(C) the Applicant's proposed Allocation Period.

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(b) If the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle or other Network exit points, ARTC may accept an Access Application which does not meet the requirements of section 3.6(a)(ix)(A) provided the Applicant is able to establish to ARTC's reasonable satisfaction that it is negotiating with the relevant entity providing an exit from the Network to obtain sufficient Network Exit Capability to offload the anticipated coal volumes at the Port of Newcastle or other Network exit points in order to satisfy the requirements of section 3.6(a)(ix)(A).

(c) Prior to submitting an Access Application, an Applicant may, in addition to the initial review where an Applicant is seeking Coal Access Rights, seek initial meetings with ARTC to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and, in particular, the information to be included as part of an Access Application.

3.7 Acknowledgment

(a) Upon receiving an Access Application from an Applicant, ARTC will acknowledge receipt of the Access Application in writing (or electronically)

to the Applicant within ten (10) Business Days of its receipt, or such longer period as specified in accordance with section 3.7(c).

- (b) Prior to acknowledging the Access Application ARTC may seek:
 - (i) additional information where ARTC can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal; or
 - (ii) clarification of the information that has been provided in the Access Application.
- (c) If ARTC seeks additional information or clarification in accordance with section 3.7(b), it will advise the Applicant of the additional information or the clarification required within ten (10) Business Days of receipt of the Access Application. Upon receiving the required information or clarification from the Applicant, ARTC will provide written acknowledgement of the receipt of the completed Access Application within ten (10) Business Days.

3.8 Determination of Capacity

- (a) Subject to section 3.8(b), ARTC will use reasonable efforts to provide the Indicative Access Proposal to the Applicant within sixty (60) Business Days of the acknowledgment given under section 3.7.
- (b) In assessing an Access Application, ARTC may consider that due to the complexity of the Access Application, a delay in the time taken to obtain information from the HVCCC or the Applicant relevant to the assessment of the Access Application, or other extenuating circumstances it is not reasonable to provide an Indicative Access Proposal within sixty (60) Business Days. In these circumstances, ARTC will inform the Applicant in its acknowledgment of the Access Application that ARTC does not expect to provide an Indicative Access Proposal within sixty (60) Business Days and within a further ten (10) Business Days will advise the Applicant of its estimate of the time required to deliver the Indicative Access Proposal. Where the Applicant is of the view that the time estimated for preparation of the Indicative Access Proposal under this section 3.8(b) is excessive, then the Applicant may refer the matter to the arbitrator in accordance with section 3.16(c).
- (c) ARTC may also extend the time for the preparation of the Indicative Access Proposal where section 5.2(b) applies.
- (d) Where an Applicant seeks Coal Access Rights, ARTC will conduct a Capacity Analysis. Whilst undertaking the Capacity Analysis, ARTC will have regard to:
 - (i) any advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, and on the operating requirements needed to deliver Coal Chain Capacity;
 - (ii) the Applicant's ability (where applicable) to fully utilise its contracted rights to port terminal capacity (subject to the provision by the Applicant

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to ARTC of a copy of its contract with the relevant port company establishing the Applicant's rights to port terminal capacity or confirmation reasonably acceptable to ARTC that the Applicant is negotiating with respect to such contracted rights);

(iii) the System Assumptions; and

(iv) the rules for priority of allocation set out in section 3.9.

(e) ARTC will determine whether there is sufficient Available Capacity to accommodate the Access Rights sought by the Applicant. Where ARTC disagrees with the advice provided by the HVCCC to the Applicant, ARTC may request that the HVCCC further review the impact of the Access Rights sought on Coal Chain Capacity and on the operating requirements needed to deliver Coal Chain Capacity. While ARTC will have regard to the further advice provided by the HVCCC, ARTC will have the sole right to determine whether there is sufficient Available Capacity to grant the Access Rights sought by the Applicant.

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

(g) The Applicant shall be entitled to appoint the HVCCC to review any decision of ARTC under this section 3.8 and, if the HVCCC is of the opinion that ARTC has made an incorrect decision under this section 3.8, the Applicant shall be entitled to proceed to dispute resolution in accordance with section 3.16.

(h) [Note to ARTC: Provisions are required, in relation to coal access to the Port of Newcastle, to deal with the annual issuance of capacity (similar to the port contracts)]

3.9 Priority of Allocation for Coal Access Rights

[Note to ARTC: These provisions have been adapted from the port contracts. If a producer has port terminal capacity, they should be able to obtain rail capacity. Corresponding provisions will need to be included to resolve how Coal and Non-Coal Applications are dealt with in priority to each other]

(a) In respect of an Access Application for Coal Access Rights, the priority rules are as follows:

(i) first, Access Applications made in a particular year in respect of which Train Paths are granted will take priority over all Access Applications made in any subsequent year;

For example, all Access Applications submitted in 2010 in respect of which Train Paths are granted will take priority over Access Applications submitted in 2011.

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(ii) secondly, Access Applications made in the same year will be ranked according to the nominated commencement date so that earlier nominated commencement dates take priority over later nominated commencement dates provided that:

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(A) where there is no available Capacity in the first year after the Access Application is submitted then Access Applications with a nominated commencement date in the first year and second year will have a deemed nominated commencement date in the second year for the purpose of **section 3.9(a)(iii)**; and

(B) where there is no available Capacity in the first or second year after the Access Application is submitted then Access Applications with a nominated commencement date in the first, second and third year will have a deemed nominated commencement date in the third year for the purpose of **section 3.9(a)(iii)**.

For example, Applicants A and B both submit Access Applications in 2010. Applicant A has nominated a commencement date in 2011 and Applicant B has nominated a commencement date in 2012. Applicant A's Access Application will take priority over Applicant B's Access Application, unless there is no available Capacity in 2011. If there is no such capacity in 2011, Applicant A's Access Application will be deemed to have nominated to commence in 2012 along with Applicant B's Access Application thereby giving the Access Applications equal priority. In circumstances where there is also no available Capacity in 2012, both Applicant A's and Applicant B's Access Applications will be deemed to have nominated to commence in 2013 and will have equal priority with other Access Applications with a nominated commencement date of 2013.

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(iii) thirdly, Access Applications made in the same year and with the same nominated commencement date will be ranked so that:

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(A) Access Applications will be prioritised into four categories by the relevant mine's development status at the time of Access Application such that category A mines will take priority over category B mines, which will, in turn, take priority over category C mines, which in turn will take priority over category D mines. The categories are as follows:

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(aa) **Category A** - the mine has all approvals to operate and has commenced or is able to demonstrate it can commence production by the nominated commencement date;

(ab) **Category B** - the mine has been granted a Mining Lease;

(ac) **Category C** - the mine has lodged an Environmental Assessment Report with the Department of Planning; and

(ad) **Category D** - all other mines, and

(B) for Access Applications starting in the first year after the Access Application is submitted, first coal production in the first half of

the year will be prioritised over first coal production in the second half of the year; and

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(iv) fourthly, in the event two or more Access Applications equally satisfy the above criteria and have an equal priority then the available Capacity will be allocated to the Applicants who submitted those Access Applications pro-rata in the proportion that their Access Application bears to the aggregate of all Applicants' Access Applications with that equal priority.

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(b) ARTC may engage an independent expert to assist ARTC to rank Access Applications in accordance with the priority rules in this clause. Either ARTC or any such independent expert may seek further relevant information from the relevant Applicant for the purposes of performing the ranking of Access Applications and the Applicant will supply that information to ARTC.

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3.10 Indicative Access Proposal

- (a) The Indicative Access Proposal will set out, amongst other things:
- (i) the results of a Capacity Analysis determining whether there is sufficient Available Capacity to accommodate the requested Access Rights;
 - (ii) in the event the Access Application requires the Applicant to have recourse to Additional Capacity, an outline of the works and an indicative estimate of the cost of such works required to provide the Additional Capacity or an outline of the requirements for an investigation into the provision of Additional Capacity for the requested Access Rights;
 - (iii) advice in respect of the existence of other Applicants who have submitted an Access Application (where negotiations are continuing in accordance with this Undertaking) in respect of Access Rights which, if they were to be provided, would limit the ability of ARTC to provide Access Rights in accordance with the Indicative Access Proposal (but subject always to ARTC's obligations of confidentiality to the other Applicants);
 - (iv) where the application is for Coal Access Rights, a statement referring the Applicant to the HVCCC for any additional information in relation to Coal Chain Capacity;
 - (v) a reference to the Indicative Access Holder Agreement and a reference to the current available market terms and conditions as published on ARTC's website;
 - (vi) an initial estimate of the Charges for the Access Rights, based on the pricing principles set out in **section 4**;
 - (vii) proposed Base Path Usages and Tolerance to be applicable to the Access Rights (when granted) for the first year of the contract;
 - (viii) ARTC's determination regarding the Allocation Period; and

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- (ix) details of the additional information required for ARTC to progress the proposal and further develop the Charges and terms and conditions for acceptance.
- (b) The Indicative Access Proposal will, unless it contains specific provisions to the contrary, contain indicative arrangements only and does not oblige ARTC to provide Access Rights in accordance with specific terms and conditions, including Charges, contained within it.
- (c) If, after sixty (60) Business Days following ARTC's acknowledgment of the Access Application, or if applicable, after expiration of the time estimated by ARTC or determined by the arbitrator in accordance with section 3.8(b), the Applicant believes that ARTC is not making reasonable progress in the preparation of the proposal, then the Applicant may refer the matter to the arbitrator for a determination in relation to the progress of the Indicative Access Proposal in accordance with section 3.16(c).
- (d) In the event that ARTC is unable to provide an Indicative Access Proposal based on the Access Application, ARTC will, if possible, submit to the Applicant an Indicative Access Proposal offering alternative Access Rights which it reasonably believes may meet the Applicant's requirements.
- (e) [ARTC will make a determination regarding the Allocation Period in accordance with section 5.8.](#)
- (f) Disputes arising from the process described in this section 3.10 will be resolved in accordance with section 3.16(c).

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3.11 Negotiation

- (a) If the Applicant intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the Indicative Access Proposal, the Applicant will notify ARTC of its intention to do so within thirty (30) Business Days of the date it receives the Indicative Access Proposal (or such other period of time that the parties agree). In the event that a notification is given after this period of time, ARTC will review the Indicative Access Proposal and, if considered necessary by ARTC, prepare a revised Indicative Access Proposal in accordance with section 3.9 and the negotiation process outlined in this section 3 will recommence from that point.
- (b) If the Applicant is of the view that the Indicative Access Proposal has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, then the Applicant will notify ARTC of its concerns within thirty (30) Business Days of the date of receipt of the Indicative Access Proposal.
- (c) ARTC will take all reasonable steps to respond to the concerns raised by the Applicant in relation to the Indicative Access Proposal under section 3.11, within thirty (30) Business Days of receipt of notification of the concerns. If ARTC is unable to address the concerns of the Applicant within such time frame, ARTC will notify the Applicant in writing as to the reasons why and

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advise an intended course of action, with indicative time frames, of how the concern is being addressed. If the Applicant is satisfied with the response received from ARTC, including any revision to the Indicative Access Proposal, it will notify ARTC of its intention to proceed with negotiations within thirty (30) Business Days of receiving ARTC's response.

- (d) If the Applicant is not satisfied with the response from ARTC, including any revision to the Indicative Access Proposal, the Applicant may seek to resolve the dispute in accordance with the dispute resolution process outlined in section 3.16. The Applicant will commence this dispute resolution process within thirty (30) Business Days of receiving ARTC's response.

3.12 Negotiation Process

- (a) If the Access Applicant indicates its willingness to progress negotiations under this section 3.12, then both parties will commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The negotiation period will commence upon the Applicant providing a notification to ARTC of its intention to proceed pursuant to section 3.12(a) and will cease upon the earlier of:
 - (i) execution of an Access Agreement in respect of the Access Rights sought by the Applicant;
 - (ii) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
 - (iii) the expiration of six (6) months from the commencement of the negotiation period, or if both parties agree to extend the negotiation period, the expiration of the agreed extended period;
 - (iv) subject to sub-section 3.12(b)(iv), if either party believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period, and either party issues a notice to the other party informing the other party that it does not believe the negotiations are progressing in good faith towards the development of an Access Agreement within a reasonable time period and that the party intends to end the negotiation period, the timeframe for ending the negotiating period (which must be reasonable);
 - (v) if **sub-section 3.12(b)(iv)** applies and either party refers the matter to the arbitrator under **section 3.16(c)** for a determination on this issue and such determination is found in favour of the referring party, the date of issue of the determination;
 - (vi) where:
 - (A) an Applicant is seeking Coal Access Rights; and
 - (B) ARTC receives evidence confirming that the Applicant no longer satisfies the Network Exit Capability requirement in **section 3.6(a)(ix); and**

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(C) ARTC issues a notice of intent to end the negotiation period, the date which is ten (10) Business Days after the issue of the notice. Where ARTC issues a notice of intent, ARTC will provide to the Applicant written reasons for its decision to end the negotiation period; or

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(vii) if ARTC receives evidence confirming that the Applicant no longer satisfies the prudential requirements of section 3.4(e), and

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(A) on receiving such evidence ARTC advises the Applicant of such evidence but the Applicant is not willing to provide Security or a Parent Guarantee; and

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(B) ARTC issues a notice of intent to end the negotiation period,

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the date which is ten (10) Business Days after the issue of the notice. Where ARTC issues a notice of intent, ARTC will provide to the Applicant written reasons for its decision to end the negotiation period.

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(c) Upon cessation of the negotiation period, ARTC will be entitled to cease negotiations with the Applicant.

3.13 Application for mutually exclusive Access Rights

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[Note to ARTC: Coal Access Rights are now dealt with under section 3.9. Again, how will priorities between Coal and non-Coal Access Rights be dealt with?]

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(a) Where two or more Applicants have submitted an Access Application for mutually exclusive Access Rights each Applicant will be notified as soon as practicable after ARTC has identified that the Access Rights sought are mutually exclusive Access Rights.

(b) Subject to section 3.13(c), where two or more Applicants have submitted an Access Application for mutually exclusive Non-Coal Access Rights, ARTC must consider what alternative options are available to each Applicant and will allocate the Non-Coal Access Rights to the Applicant who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.

(c) An Applicant for a mutually exclusive Access Right will not be allocated Coal Access Rights unless it is able to satisfy the Network Exit Capability requirement in section 3.6(a)(ix).

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(d) If, at any time during the negotiation period, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in section 3.16.

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3.14 Duration of Coal Access Rights

- (a) In relation to the duration of Coal Access Rights, ARTC acknowledges that the minimum duration shall be aligned with the terms of the port terminal contract(s) held by the Applicant. ← **Formatted: Heading 3**

- (b) For Indicative Services, the following provisions with respect to a minimum term shall apply in respect of relevant Train Path Schedules:
 - (i) subject to **section 3.14(c)**, the Access Holder Agreement will be granted for an initial term of 10 years (subject to the termination provisions contained in the Access Holder Agreement) (**Initial Term**); ← **Formatted: Bullets and Numbering**
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 - (ii) the Initial Term will be automatically extended by one year at the end of each year of the term, unless the Access Holder gives notice during that year that the Initial Term is not to be so extended; and ← **Formatted: Heading 4, Indent: Left: 2.64 cm, Hanging: 1.22 cm, Tabs: 3.85 cm, List tab**
 - (iii) if the Access Holder does not give notice extending the Initial Term during each year of the Initial Term: ← **Formatted: Bullets and Numbering**
 - (A) the right to continue extending the Initial Term will cease to apply; and ← **Formatted: Heading 5, Indent: Left: 3.85 cm, Hanging: 1.42 cm, Tabs: 5.27 cm, List tab**
 - (B) during the period which is five years prior to the Train Path Schedule expiring, the Access Holder will be entitled on one occasion to extend the Train Path Schedule for a period of between one and three years.

- (c) Where an Applicant is able to demonstrate, based on the life of the relevant mine, that it requires an initial term of less than 10 years for its load points, then: ← **Formatted: Heading 3**
 - (i) ARTC must provide the Train Path schedules on the terms specified in **section 3.14(b)** but the Initial Term shall be equal to the remaining life of the mine; ← **Formatted: Bullets and Numbering**
 - (ii) there will be no right of annual extension; and ← **Formatted: Heading 4, Indent: Left: 2.64 cm, Hanging: 1.22 cm, Tabs: 3.85 cm, List tab**
 - (iii) the Access Holder shall be entitled to extend the "Initial Term" on one (1) occasion for a period of not less than one (1) year and not more than three (3) years provided it gives written notice of the extension to ARTC at least two (2) years prior to the expiry of the Train Path Schedule *[Note to ARTC: Coal Access Rights for mines with less than 10 years of life should be Indicative Services and should be subject to the same Charges as longer-life mines.]* ← **Formatted: Highlight**

3.15 Access Agreement

- (a) The granting of Access Rights will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be ARTC and the Applicant.
- (b) Subject to section 3.15(c), ARTC may offer any of the following as an Access Agreement:
 - (i) for Applicants seeking Coal Access Rights :
 - ← **Deleted: 3.14(c)**
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(A) the Indicative Access Holder Agreement subject to the Applicant satisfying the Network Exit Capability requirement in **section 3.6(a)(ix)**, the prudential requirements in **section 3.4(e)** and seeking Access Rights intended for the operation of Indicative Services;

(B) the current available market terms and conditions in the form of an Access Holder Agreement as published on ARTC's website, as applicable; or

(C) an updated Access Holder Agreement to reflect agreed amendments to the Indicative Access Holder Agreement. A negotiated Access Holder Agreement will, (unless otherwise agreed between ARTC and the Applicant) at least address certain essential elements set out in **Schedule A**. The details of **Schedule A** do not provide an exhaustive list of the issues that may be included in an Access Holder Agreement.

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(ii) for Applicants seeking Non-Coal Access Rights:

(A) the current available market terms and conditions in some other form as published on ARTC's website, as applicable; or

(B) an updated Access Agreement to reflect agreed amendments to the applicable Access Agreement. A negotiated Access Agreement will, unless otherwise agreed between ARTC and the Applicant, at least address certain essential elements set out in **Schedule A** as applicable. The details of **Schedule A** do not provide an exhaustive list of the issues that may be included in an Access Agreement.

(c) ARTC must offer the Indicative Access Holder Agreement to an Applicant for Coal Access Rights if the Applicant:

(i) seeks Access Rights for the operation of Indicative Services;

(ii) meets the Network Exit Capability requirement in **section 3.6(a)(ix)** and the prudential requirements in **section 3.4(e)**;

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(iii) either:

(A) the Network has sufficient Available Capacity to meet the Applicant's needs; or

(B) ARTC consents to provide Additional Capacity to meet the Applicant's needs in accordance with **section 6.2** or **section 6.3**; and

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- (d) Once the Applicant has notified ARTC that it is satisfied with the terms and conditions of the Access Holder Agreement as drafted, ARTC will, as soon as reasonably practicable, provide a final Access Holder Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (e) Where ARTC offers an Access Holder Agreement and the Applicant accepts the terms and conditions offered in that Access Holder Agreement, both ARTC and the Applicant will execute the Access Holder Agreement. The parties will use reasonable endeavours to comply with this sub-section 3.4(e) as soon as practicable.
- (f) For the avoidance of doubt, an Applicant is entitled to negotiate with ARTC in relation to the terms of its Access Holder Agreement.

3.16 Dispute resolution

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If any dispute arises under this Undertaking or in relation to the negotiation of Access Rights between an Applicant and ARTC (“**Dispute**”) then, unless otherwise expressly agreed to the contrary by both parties, such Dispute will be resolved in accordance with this **section 3.16** and either party may give to the other party to the Dispute notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with in the manner set out in this **section 3.16**. The parties will use reasonable endeavours acting in good faith to settle the Dispute as soon as is practicable.

Disputes in relation to an Access Agreement, once executed, will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking. To avoid doubt, disputes raised in accordance with **sections 4.14(c), and 4.17(d)**, will be dealt with in accordance with the **section 3.16(c)** of the Undertaking.

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- (a) Negotiation

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

- (b) Mediation

- (i) If the Dispute is not resolved under **section 3.16(a)** within ten (10) Business Days after the date of the Dispute Notice then:

- (A) if the parties agree, they will attempt to resolve the Dispute by mediation pursuant to this **section 3.16(b)**; or
- (B) if the parties do not wish to resolve the Dispute by mediation, under **section 3.16(b)**, either party may by notice in writing to the other and the arbitrator, refer the Dispute to be determined by arbitration under **section 3.16(c)**.

- (ii) If the parties agree to attempt to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.

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- (iii) If the Dispute is not resolved within a further ten (10) Business Days after being referred to the chief executive officers under **section 3.16(b)(ii)**, the Dispute will be referred to formal mediation in New South Wales by a single mediator appointed by agreement of the parties, or if they fail to agree within ten (10) Business Days, appointed by the President of the Law Society of New South Wales acting on the request of either party.
- (iv) Unless the parties agree otherwise:
 - (A) the mediation will be conducted by a mediator under the “The Law Society Guidelines for those involved in Mediations of the Law Society of New South Wales”;
 - (B) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
 - (C) each party will bear own costs relating to the preparation for and attendance at the mediation; and
 - (D) the costs of a mediator will be borne equally by the parties.
- (c) Arbitration
 - (i) If the Dispute is not resolved under **section 3.16(a)**, or at any time after the appointment of the mediator (if any) under [this section 3.16\(b\)](#), either party may by notice in writing to the other and the arbitrator terminate the mediation proceedings and notify the arbitrator of a Dispute to be determined by arbitration under this **section 3.16(c)**. If the Applicant serves notice on the arbitrator under this **section 3.16(c)**, that notice will also include an agreement by that Applicant to:
 - (A) pay the amounts and rates described in **section 3.16(c)(ii)(M)**; and
 - (B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under **section 3.16(c)**, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.
 - (ii) Where a Dispute is referred to arbitration in accordance with this **section 3.16(c)**, the following will apply:
 - (A) The arbitrator will be the ACCC. For the purposes of a particular arbitration, the arbitrator is to be constituted by two (2) or more members of the ACCC nominated in writing by the chairperson of the ACCC.
 - (B) The arbitrator will not proceed with the arbitration unless and until the Applicant has agreed to pay costs in accordance with the amounts or rates described in **section 3.16(c)(ii)(M)** as determined by the arbitrator under that section.

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- (C) ARTC and the Applicant agree to adopt the arbitration procedures in Division 3 Subdivision D of Part IIIA of the TPA, except that:
- (i) the arbitrator will observe the rules of natural justice but is not required to observe the rules of evidence;
 - (ii) a party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration; and
 - (iii) the arbitrator will include in the determination findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
- (D) The arbitrator will when conducting the arbitration:
- (i) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
 - (ii) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
 - (iii) call on any party the arbitrator believes necessary to give evidence;
 - (iv) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
 - (v) present their determination in a draft form to the parties and hear argument from the parties before making a final determination; and
 - (vi) hand down a final determination in writing which includes all their reasons for making the determination.
- (E) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
- (i) the notification of the dispute is vexatious;
 - (ii) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (iii) the party who notified the dispute has not engaged in negotiations in good faith.
- (F) In deciding a dispute, the arbitrator will take into account:
- (i) the principles, methodologies and provisions set out in this Undertaking;

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- (ii) the objectives and principles enunciated in Part IIIA of the TPA and the Competition Principles Agreement;
- (iii) ARTC's legitimate business interests and investment in the Network;
- (iv) all costs that ARTC incurs in providing Access Rights, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (v) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;
- (vi) the interests of all persons who have rights to use the Network;
- (vii) the operational and technical requirements necessary for the safe and reliable operation of the Network;
- (viii) the economically efficient operation of the Network;
- (ix) the benefit to the public from having competitive markets; and
- (x) any other matters that the arbitrator thinks are appropriate to have regard to.

(G) In making its determination, the arbitrator:

- (i) may deal with any matters referred to in **section 44V** of the TPA; Formatted: Font: Bold
- (ii) will not make a determination that would have any of the effects described in **section 44W** of the TPA; Formatted: Font: Bold
- (iii) will take into account the matters referred to in **section 44X** of the TPA; and Formatted: Font: Bold
- (iv) otherwise comply with **section 3.16(c)(ii)(B)**.

(H) The arbitrator may publish its determination at its discretion subject to consideration of submissions by either party to the arbitration which are commercially sensitive or contain confidential information. At any time prior to the making of the determination, either party may give notice to the arbitrator of the information supplied by it which is either commercially sensitive to it or subject to confidentiality obligations, including the reasons why such information is commercially sensitive or confidential. After considering such submissions, the arbitrator may decide not to publish as part of its determination, the information that is commercially sensitive or confidential to either party to the arbitration.

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- (I) The arbitrator may join the conduct of separate arbitrations if the arbitrator considers that:
- (i) there are one or more issues common to the arbitrations; and
 - (ii) the joining of the arbitrations will not unreasonably delay the process, or unreasonably increase the costs, of the arbitrations.
- (J) The arbitrator may join one or more additional persons as a party to an arbitration if:
- (i) the person applies in writing to be made a party and can demonstrate to the arbitrator an interest which is significant enough to reasonably warrant being made a party; and
 - (ii) the arbitrator considers that making the additional person a party to the arbitration will not unreasonably delay the process, or unreasonably increase the costs, of the arbitration.
- (K) If the arbitrator joins the conduct of separate arbitrations or joins an additional person as a party to the arbitration, the arbitrator will have regard to the wishes of the parties and the need for commercial confidentiality in determining how it will conduct the arbitration.
- (L) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
- (M) The arbitrator may charge for its costs of conducting an arbitration of a dispute the amounts and rates (if any) prescribed by the *Trade Practices Regulations 1974* (Cth). If the *Trade Practices Regulation 1974* (Cth) do not prescribe such amounts or rates, the arbitrator may charge the amounts and rates mentioned in regulation 6F of those regulations as amended from time to time.
- (N) The costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.
- (O) Except where the determination or direction is subject to a review by a court of law, if an Applicant does not comply with a determination or direction of the arbitrator, then ARTC will no longer be obliged to continue negotiations regarding the provision of Access Rights to that Applicant.
- (P) Except where the determination or direction is subject to a review by a court of law, ARTC will comply with the lawful directions or determinations of the arbitrator.

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- (Q) ARTC will indemnify the arbitrator from any claims made against it arising in connection with the performance by the arbitrator of its duties under this section, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.

4 ACCESS PRICING PRINCIPLES

4.1 Price

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

4.2 Floor and Ceiling Price and Revenue Limits

- (a) Access revenue from every Access Holder must at least meet the Direct Cost imposed by that Access Holder and be set at levels which fully recover all avoidable costs (in addition to Direct Costs).
- (b) For each Segment or group of Segments, Access revenue from Access Holders should, as an objective, meet the Incremental Cost of those Segments (“Floor Limit”).
- (c) For any Access Holder, or group of Access Holders, Access revenue must not exceed the Economic Cost of the Segments which are required on a stand alone basis for the Access Holder or group of Access Holders (“Ceiling Limit”) where the RAB for those Segments is equal to, or falls below, the RAB Floor Limit for those Segments at the end of the relevant calendar year. [Note to ARTC: Clarity, possibly, in the form of definition, is required regarding what is meant by "group of Access Holders".]

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4.3 Regulatory Asset Base

[Note to ARTC: NSWMC considers that the "loss capitalisation" approach is not appropriate. The mechanism should be deleted].

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

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

- (i) in relation to those Segments that have been ascribed a regulatory asset value in accordance with the NSW Rail Access Undertaking in force at the time immediately preceding the Commencement Date, will be set at the value of those Segments determined in accordance with the NSW Rail Access Undertaking as at the Commencement Date. This part of the Initial ERAB will be rolled forward in accordance with the formula below to determine an opening Initial ERAB;
- (ii) in relation to other Segments, initially valued using the depreciated optimised replacement cost method of valuing assets. The optimised

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replacement cost means the cost of replacement by commercially efficient application of best known currently available technology based on existing capacity and performance characteristics of the asset.

[Note to ARTC: For Pricing Zone 3, the starting DORC is not justified and should be determined considering the cost of ARTC's investment and the economic value based on continuation of existing pricing policies. ARTC should provide information on the existing pricing policies.]

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ERAB will be rolled forward annually according to the following methodology:

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

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

where

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

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

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

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

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

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

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

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

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

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

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

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

where

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

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

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

$WACC_1$ is the approved nominal Rate of Return for assets commissioned during the Term or as revised from time to time in accordance with **section 4.7**.

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

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

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

(c) RAB for Segments

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

(d) RAB Floor Limit

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

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

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

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

where:

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

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

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

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

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

Depreciation_{t-1} is Depreciation applicable to the RAB Floor Limit in the preceding calendar year (t-1).

4.4 Economic cost

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

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

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

4.5 Cost allocation

- (a) For the purposes of section 4.4, Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets will be allocated to Segments in accordance with the following principles:
 - (i) where possible, costs will be directly attributed to a Segment;
 - (ii) where possible, Non-Segment Specific Costs and Non-Segment Specific Assets will be identified with the Hunter Valley corridor, other ARTC corridors or identified as system-wide;
 - (iii) Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets identified with the Hunter Valley corridor or other ARTC corridors, or identified as system-wide, will be allocated to those parts of Segments in the Hunter Valley corridor or in other ARTC corridors, or, where identified as system wide, to Segments owned, leased or licensed by ARTC respectively, in proportion to:

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- (A) gtkm with respect to Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets associated with track maintenance; and
 - (B) Train kilometres with respect to Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets not associated with track maintenance.
- (b) All costs will comprise ARTC's reasonably anticipated costs over a reasonable future timeframe.

4.6 Depreciation

[Note to ARTC: NSWMC to provide updated drafting]

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

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

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The initial average remaining mine life of Hunter Valley coal mines utilising a Pricing Zone may vary between Pricing Zones to apply for the first 5 years of the Undertaking will be an average remaining mine life approved by the ACCC for each Pricing Zone.

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(c) The estimate of remaining mine life will be reviewed by ARTC five years from the Commencement Date and revised estimates must be proposed for ACCC approval.

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(d) Depreciation is to be charged each year on the opening balance of the RAB, and on 100% of the Prudent Capital Expenditure of assets commissioned for a period of half the year.

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4.7 Rate of return

(a) The Rate of Return will be equivalent to ARTC's weighted average cost of capital ("WACC") as accepted by the ACCC after consideration of all risks with the commercial environment in which ARTC operates on the Network, the elements of which will comprise:

- (i) a capital asset pricing model ("CAPM") method of determining the cost of equity;
- (ii) a debt to equity ratio which would be considered prudent for ARTC's business in relation to the Network by reputable lenders; and
- (iii) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure forming part of the Network.

(b) The initial Rate of Return (to apply for the first 5 years of the Undertaking, subject to section 2.4) will be the percentage accepted by the ACCC applied on a post tax nominal basis.

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(c) The Rate of Return will be reviewed by ARTC five years from the Commencement Date and a revised Rate of Return must be proposed for ACCC approval.

(d) The Rate of Return will be revised on 1 January in each year of the Term to reflect changes in the following elements:

- (i) risk free rate; and
- (ii) debt margin.

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(e) The basis of the determination of the risk free rate and debt margin will be:

- (i) consistent with the basis of determination approved by the ACCC as at the Commencement Date or, where applicable, as approved by the ACCC under sub-section (c) above; and
- (ii) relevant to a time frame for measurement immediately preceding 1 January of the relevant year.

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4.8 Unders and overs accounting

[Note to ARTC: The accounting regime for unders and overs in sections 4.8 and 4.9 should include a specific provision which states that the TOP Charges for unsupplied Path Usages (determined under clause 5.4 of the AHA) should be deducted from ARTC's actual

access revenue for the relevant period. This should be included in sections 4.3, 4.8 and 4.9 where appropriate.

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

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~~Deleted: <#>ARTC bringing the closing balance of each Constrained Coal Customer Account back to zero by refunding or collecting the applicable amount to or from, respectively, each Constrained Coal Customer; or a mutual agreement between the parties, which must result in an outcome that is equitable for all Constrained Coal Customers.~~

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[Notes to ARTC:

- The initial Rate of Return must be accepted by the ACCC.
- The Undertaking should include appropriate treatment of assets funded by third parties, built and gifted to ARTC as well as government contributions and grants.

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4.9 Annual ACCC compliance assessment

- (a) ARTC will submit to the ACCC by 30 April each year in respect of the previous calendar year:
- (i) documentation detailing roll-forward of the RAB and the RAB Floor Limit, and comparisons between RAB and RAB Floor Limit; and
 - (ii) where documentation in **(i)** above demonstrates that RAB is at or below RAB Floor Limit, documentation detailing calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any allocation of the total unders and overs amount, and shall make a copy of this information available to Access Holders for review.

(b) The ACCC will determine whether ARTC has undertaken:

[Note to ARTC: The ACCC should also determine whether costs recovered through Access Charges have been incurred efficiently, having regard to standard industry practice.]

- (i) roll-forward of the RAB and RAB Floor Limit in accordance with the Undertaking and, where the roll forward is not in accordance with the Undertaking, determine what closing RAB or RAB Floor Limit would be in accordance with the Undertaking;
 - (ii) when required, the calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any allocation of the total unders and overs amount in accordance with the Undertaking, and where the calculations are not in accordance with the Undertaking, determine what total unders and overs amount or allocation would be in accordance with the Undertaking having regard to the operation of its unders and overs account;
 - (iii) in determining whether ARTC has complied with the provisions of **section 4.3** in rolling forward IRAB, ERAB, RAB or the RAB Floor Limit, the ACCC may have regard to the submissions of relevant industry participants to the consultation process in **section 6.4** in relation to any Capital Expenditure not endorsed by the RCG in accordance with **section 6.4(h)**;
 - (iv) the ACCC will publish its findings on its website and/or circulate to Access Holders in relation to the matters for its determination; and
 - (v) ARTC will revise the closing RAB and manage Constrained Coal Customer Accounts in accordance with any determination by the ACCC.
- (c) In addition to section 4.9(b)(iii) Access Holders shall be entitled to make submissions to the ACCC regarding the information provided to the ACCC under this section 4.9 and the ACCC may have regard to such submission in its discretion (or as required by law).

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4.10 Structure of Charges - Coal Access Rights

[Notes to ARTC: Sections 4.10-4.17 are not sufficiently transparent or certain. Further detail needs to be incorporated setting out the specific principles, methodologies, bases and forecasts upon which Indicative Access Charges will be calculated so that the determination is well defined, certain and transparent and it is clear that they are economically efficient.]

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For Coal Access Rights:

- (a) Charges may be on the basis of a combination of:
 - (i) actual usage (being a function of distance and gross mass (\$/gtkm) for a Pricing Zone); and
 - (ii) a take or pay component for the Access Rights contracted for under the Access Holder Agreement, irrespective of whether the Access Holder uses all or any of the Access Rights.

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- (b) Notwithstanding a commitment by the Access Holder to pay the take or pay component of the Charge for Access Rights contracted for under the Access Holder Agreement, the Access Holder may be entitled to a rebate of the take or pay component of the Charges paid following the application of monthly Pricing Zone-wide true-up tests and an annual individual reconciliation.

4.11 Structure of Charges - Non-Coal Access Rights

For Non-Coal Access Rights:

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

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

- (c) Subject to sub-section (d), the application of the excess network occupancy component relates only to the contracted Train Path, and not the utilisation of the Train Path.
- (d) In determining the excess network occupancy component, ARTC will prorate the flagfall component back to an amount per hour by reference to

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the total of section run times applicable to the relevant Segment to which the flagfall component applies.

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

4.12 Pricing Objectives

- (a) In determining Charges, ARTC will have regard to separate cost elements as follows:
 - (i) variable component of costs (“**VCC**”) being Direct Costs; Formatted: Font: Bold
 - (ii) fixed component of costs (“**FCC**”) being fixed operating costs and Depreciation of, and return on, assets existing as at the Commencement Date; and Formatted: Font: Bold
 - (iii) new capital component of costs (“**NCC**”) being Depreciation of, and return on, assets commissioned during the Term. Formatted: Font: Bold
- (b) In determining Charges, ARTC will have regard to the following objectives:
 - (i) achieving full recovery of VCC from all Access Holders on the basis of actual network usage;
 - (ii) achieving maximum recovery of (or contribution to) FCC and NCC from all users; Deleted: 1 April 2010
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(iii) providing certainty to ARTC through the application of a take or pay (“**TOP**”) component to fully recover NCC over the economic life of new investments, and recover some or all of FCC from applicable Access Holders (coal users) on the basis of forecasted network usage, or otherwise recover some or all of FCC on the basis of actual network usage. In relation to all services, access revenue will be set at levels which fully recover all avoidable costs (in addition to Direct Costs) of those non-coal services;

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(iv) the proportion of FCC recovered through a TOP component being consistently applied to all Access Holders holding Coal Access Rights within a Pricing Zone; and

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(v) providing for an open and equitable mechanism for the application of TOP Charges.

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(c) Except as required by under relevant legislation, those rail services which are not paying the full economic costs of providing such services will be given lower priority than those rail services that are contributing the full amounts of those costs.

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[Note to ARTC: ARTC should specify in advance the circumstances in which it will seek to recover a portion of FCC as a TOP component and the relevant portion to be recovered.]

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4.13 Indicative Access Charge

[Notes to ARTC: In relation to sections 4.12, 4.16 and 4.17, further amendment is required so that:

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- the characteristics of the Interim Indicative Services and Indicative Services are specified in the Undertaking and will remain in the same from year-to-year for the life of either the Undertaking or an Access Holder Agreement;
- the Indicative Access Charges applicable for 1 July 2009 are specified; and
- the period during which Indicative Interim Services and Indicative Access Charges will apply is specified (and, if the characteristics and charges cannot be determined within a specified period (such as 1 year), they should apply for the duration of the Undertaking).

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Further, in relation to sections 4.13-4.17 ARTC should include the forecasts and access charge models in the HVAU (or alternatively make these available to Applicants and Access Holders) and should also include forecasts (including the models) for the next 5 and 10 years.]

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(a) ARTC will determine for each year Indicative Access Charges for Coal Access Rights with certain characteristics (“Indicative Services”) established in consultation with the HVCCC having regard to delivery of optimal Coal Chain Capacity, given certain coal chain assumptions agreed with the HVCCC. Coal chain assumptions applicable to the Indicative Service will include the following:

- (i) maximum axle load;
- (ii) maximum speed;

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- (iii) Train length; and
 - (iv) section run times.
- (b) There may be more than one Indicative Service and Indicative Access Charge within a Pricing Zone. Indicative Service assumptions and Indicative Access Charges would apply to all Segments within a Pricing Zone. Indicative Service assumptions and Indicative Access Charges may both vary between Pricing Zones.
- (c) Once Indicative Access Charges for Indicative Services are finalised in accordance with section 4.17, ARTC will publish Indicative Access Charges on its website in the following format:

Note: These Charges are exclusive of GST.

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

*Pricing Zones contain Segments as specified at **Schedule E**

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

4.14 Charge differentiation

[Note to ARTC: this section requires revision to include a more detailed description of the principles, criteria, methodologies and limits that will be applied in determining whether charge differentiation between Indicative Services and non-Indicative Services will occur.]

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Alternatively, the ACCC could be required to approve this description prior to ARTC commencing any price differentiation.

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- (a) In formulating its Charges, ARTC will have regard to a range of factors which impact on its business and Coal Chain Capacity including:
- (i) the particular characteristics of the relevant Service intended to utilise the Access Rights sought, which include axle load, speed, wheel diameter, Train length, origin and destination (including number and length of intermediate stops), departure and arrival times and days of the week;
 - (ii) in relation to Coal Access Rights, the Indicative Access Charges for Indicative Services as applicable;
 - (iii) the commercial impact on ARTC's business comprising:
 - (A) the consumption of ARTC's resources, including Capacity;
 - (B) in relation to Coal Access Rights, the consumption of Coal Chain Capacity;
 - (C) the Segments of the Network relevant to the Access Rights being sought; and
 - (D) previously negotiated Charges agreed under the terms of this Undertaking, where relevant, as published by ARTC as set out in **section 2.7(b)**;
 - (iv) logistical impacts on ARTC's business which includes:
 - (A) the impact on other Services and risk of failure of the endorsed Operator to perform its obligations under the Operator Sub-Agreement; and
 - (B) reduced Capacity and, in relation to Coal Access Rights, reduced Coal Chain Capacity and system flexibility;
 - (v) capital or other contributions by the Applicant to ARTC's costs;
 - (vi) the cost of any Additional Capacity; and
 - (vii) in relation to non-Indicative Services, the Charges applicable to Indicative Services and any difference in cost in providing Indicative Services or non-Indicative Services.

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<#>the potential for growth of the business;¶
<#>the opportunity costs to ARTC;¶

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Deleted: <#>the credit risk associated with the business;¶
<#>the market value of the Train Path sought;¶

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- (b) For the purposes of sections 4.14(a)(iii)(A) and (B) and section 4.14(a)(iv)(B) above, ARTC will have regard to the optimal use of the Network for Indicative Services with the objective of optimising Coal Chain Capacity. As such, ARTC will determine the Capacity and the Coal Chain Capacity consumption associated with the utilisation of Coal Access Rights with characteristics other than that of Indicative Services (including the cost difference in providing access to non-Indicative Services) having regard to the Capacity and Coal Chain Capacity consumption of Indicative Services on the Network.
- (c) If an Access Holder disagrees with a Charge formulated by ARTC, other than an Indicative Access Charge, then the Access Holder may give ARTC a Dispute Notice within twenty (20) Business Days of being notified of the Charge and the dispute will be resolved by arbitration in accordance with section 3.16(c) of the Undertaking.
- (d) If the Dispute Notice given under section 4.14(c) concerns Coal Access Rights in a Pricing Zone and ARTC receives Dispute Notices from Access Holders holding two thirds or more of the contracted gtkm for Indicative Services in that Pricing Zone in accordance with the requirements in section 4.17(d), then a dispute notified under section 4.14(c) will be stayed pending the arbitrator's determination of the dispute notified under section 4.17(d).

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4.15 Limits on Charge differentiation

- (a) Subject to sections 4.14(a) and (b) above, [and to ARTC having an obligation under clause 3.4 of the Indicative Access Holder Agreement], ARTC will not, in formulating its Charges, have regard to: [Note to ARTC: This clause reference appears to be incorrect]
- (i) the identity of the Applicant; and
- (ii) whether or not the Applicant is a Government Authority.
- (b) Subject to sections 4.14(a) and (b), in formulating its Charges, ARTC will not differentiate between Applicants;
- (i) in circumstances where the characteristics of the Access Rights sought are alike;
- (ii) in circumstances where the Applicants are operating within the same [end market]; and [Note to ARTC: The term "end market" is not sufficiently certain]
- (iii) in any case, between coal railed to the Port of Newcastle and coal railed to domestic customers.

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ARTC will determine whether the characteristics of Access Rights are alike having regard to the following matters:

- (iv) in relation to Coal Access Rights, the characteristics of the Indicative Services and the impact on the Hunter Valley Coal Chain of granting those Access Rights; and

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(v) in relation to Non-Coal Access Rights, location, duration and quality of the Train Path, nature of Train consist, characteristics of the Service intended to use the Access Rights sought, arrival and departure times of the day and week.

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4.16 Interim Indicative Access Charges

- (a) ARTC recognises that at the Commencement Date it may be unable to determine Indicative Services and Indicative Access Charges, and Charges applicable to other Services associated with Coal Access Rights, in accordance with sections 4.13, 4.14 and 4.15, due to current institutional arrangements, available modelling tools, and timing constraints.
- (b) During the period between the Commencement Date and the time when ARTC is satisfied it is able to determine Indicative Services, Indicative Access Charges, and Charges applicable to other Services associated with Coal Access Rights, in accordance with sections 4.13, 4.14 and 4.15 (“the Interim Period”), ARTC will, using reasonable endeavours, and having regard to available information, determine:
 - (i) Indicative Services (“**Interim Indicative Services**”) and Indicative Access Charges (“**Interim Indicative Access Charges**”) applicable during the Interim Period; and
 - (ii) Charges for other Services associated with Coal Access Rights applicable during the Interim Period.
- (c) In determining Interim Indicative Access Charges and Charges for other Services associated with Coal Access Rights during the Interim Period under section 4.16(b), ARTC will have regard to the following constraints:
 - (i) the institutional arrangements in place for the management and development of Coal Chain Capacity;
 - (ii) the availability of appropriate modelling tools, and necessary input information for such tools, enabling the determination of Coal Chain Capacity and optimum utilisation of Coal Chain Capacity; and
 - (iii) the availability, cost of obtaining, and quality of information reasonably required by ARTC for the purpose of determining Interim Indicative Services and Interim Indicative Access Charges and Charges for other Services associated with Coal Access Rights applicable during the Interim Period.

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- (d) Interim Indicative Access Charges for Coal Access Rights with Interim Indicative Service characteristics as described in section 4.14(e) will be determined by ARTC each calendar year of the Interim Period.
- (e) The following Interim Indicative Access Charges for Interim Indicative Services will apply as at 1 July 2009.

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

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Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Indicative Service Assumptions
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Service 1			72 wagon train length section run times as per applicable Hunter Valley standard working timetable
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- (f) ARTC will offer the Interim Indicative Access Charges to Applicants seeking Coal Access Rights with applicable Interim Indicative Services during the Interim Period.
- (g) At least three (3) months prior to the termination of the Interim Period, ARTC will submit to the ACCC for approval, Indicative Access Charges for Indicative Services to apply in the year following the Interim Period.
- (h) The Indicative Access Charges for Indicative Services will apply in the year following the Interim Period when accepted by the ACCC.
- (i) [ARTC must use its best endeavours to determine the Indicative Services and the Indicative Access Charges as soon as reasonably practicable after the Commencement Date.](#)
- (j) [If the Interim Indicative Access Charge if it has not been approved by the ACCC, an Access Holder or Applicant shall be entitled to dispute the Interim Indicative Access Charge in accordance with section 3.16.](#)

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4.17 Process for finalising Indicative Access Charges

- (a) Before the start of each calendar year:
 - (i) ARTC will seek forecast coal volumes and likely distribution of volumes across its Operators from each Access Holder for Coal Access Rights. ARTC will have regard to this information (to the extent provided) to forecast actual gross tonnes for Coal Trains in the next calendar year for each Pricing Zone; and
 - (ii) ARTC will determine its annual forecast of costs for the Network in each Pricing Zone which are to be recovered by ARTC in the next calendar year;
- (b) The Indicative Access Charges determined by ARTC under section 4.13 will be based on the forecasts under paragraph (a).
- (c) ARTC will notify forecasts under paragraph (a) and the Indicative Access Charges to those Access Holders holding Coal Access Rights for Indicative Services at least twenty (20) Business Days before the Indicative Access Charges are due to take effect. [ARTC must also fully disclose the manner in which it has calculated and set the Indicative Access Charges, including details of the relevant forecasts and factual assumptions upon which the Indicative Access Charges have been based. In addition, ARTC must also post, for the following 10 years, this information on its website and update it annually \(for the following 10 years\) so that all existing Access Holders and](#)

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Access Applicants have a reasonable estimate and a reasonable expectation of potential Access Charges for the following 10 years.

- (d) If an Access Holder gives ARTC a Dispute Notice within forty (40) Business Days of being notified of the Indicative Access Charges setting out that they disagree with the Indicative Access Charges for that Pricing Zone, then the dispute will be resolved by arbitration under section 3.16(c). If less than two thirds of those Access Holders give a Dispute Notice within the required time for a Pricing Zone, the Indicative Access Charges as notified for that Pricing Zone are final and not subject to arbitration under section 3.16(c). Additional Capacity in the Pricing Zone which has been contracted on a conditional basis and which will not be commissioned in the next calendar year will not count towards the two thirds test.
- (e) ARTC will promptly publish the final Indicative Access Charges on its website in the format set out in section 4.13(c):
- (i) if there is no arbitration - following the end of the thirty (30) Business Day dispute period; or
 - (ii) if there is an arbitration - following the determination by the arbitrator.
- (f) For the Interim Period, all references to Indicative Services and Indicative Access Charges in this section 4.17 will be read as Interim Indicative Services and Interim Access Charges respectively and all references to section 4.13 will be read as references to section 4.16 as appropriate.

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5 CAPACITY MANAGEMENT

[Note to ARTC: This Undertaking will need to address the establishment of operational terms relating to matters such as allocation periods (section 5.8), allocation units, flexibility and tolerance (section 5.7), consumption measurement, capacity trades and transfers (section 5.12), capacity variation and resumption, adjustment for capacity shortfalls (section 5.9), daily planning (section 5.13), capacity modelling and adjustments for under-delivery of Additional Capacity.]

5.1 System Assumptions

- (a) ARTC must work with the Terminal Operators at the Port of Newcastle and must use its reasonable endeavours to agree with those Terminal Operators a common set of System Assumptions for the Hunter Valley Coal Chain to be used as a single consistent basis for the allocation of capacity on the Network and at each coal terminal at the Port of Newcastle.
- (b) The development of the System Assumptions may be undertaken through the HVCCC.
- (c) The System Assumptions must set out reasonable and realistic assumptions for the performance of each element of the Hunter Valley Coal Chain, including:
- (i) interface and live run losses between each element in the Hunter Valley Coal Chain;

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(ii) agreed operating mode of the Hunter Valley Coal Chain;

(iii) surge and tolerance requirements;

(iv) capacities of fixed infrastructure;

(v) rolling stock requirements;

(vi) vessel requirements;

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

(i) train lengths;

(ii) train speeds;

(iii) train axle loads; and

(iv) section run times;

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5.2 Capacity Analysis

[Note to ARTC: we have amended this clause in order to ensure consistency with section 3.8. ARTC may wish to consider incorporating the provisions of this section into sections 3.7 and 6.2, rather than incorporating a separate section 5.2]

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- (a) A Capacity Analysis will be undertaken by ARTC in accordance with section 3.8(d) as part of the preparation of the Indicative Access Proposal. The purpose of the Capacity Analysis is to ensure that Capacity is appropriately allocated and that, in relation to Applicants seeking Coal Access Rights, the coal chain principles contained in section 1.3 are followed.
- (b) Where ARTC believes that there are major impediments to the provision of Additional Capacity to meet an Applicant's request, and that the Additional Capacity that might be necessary would have a significant bearing on the economics of the proposed operation, the Capacity Analysis may be done in more detail which may require more time for the preparation of the Indicative Access Proposal (section 3.9). Where a Capacity Analysis is to be done in more detail pursuant to this section, ARTC may charge a fee that is based on reasonable cost and agreed with the Applicant.
- (c) The finalisation of the Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, Train Paths, Charges and terms and conditions of the resultant Access Agreement.
- (d) As part of undertaking its Capacity Analysis, ARTC will consult the HVCCC and will take into account the HVCCC's comments on the availability of Coal Chain Capacity.

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5.3 HVCCC reviews of Capacity Analysis

- (a) ARTC must provide the HVCCC with at least 30 Business Days' notice of each Capacity Analysis which it carries out to enable HVCCC to participate in the process in accordance with section 5.2(d).
- (b) The HVCCC may participate in each Capacity Analysis and ARTC must provide such access, information and assistance as the HVCCC reasonably requires for the purposes of such participation, including access to all Access Agreements, at no cost to the HVCCC.
- (c) ARTC must have regard to the HVCCC's recommendations in respect to its Capacity Analyses. [Note to ARTC: This section must be updated to ensure alignment with the charter of the HVCCC and the proposed HVCCC-ARTC SLA]
- (d) ARTC must provide the results of its review to the HVCCC and the RCG.

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5.4 HVCCC Half-Yearly Reviews

- (a) ARTC must request that the HVCCC carry out a review of the Committed Capacity and the Available Capacity at least every 6 months.
- (b) The HVCCC may participate in a review of the Committed Capacity and the Available Capacity, and ARTC must provide such access, information and assistance as the HVCCC reasonably requires for the purposes of such review, including access to all Access Agreements, at no cost to the HVCCC.

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- (c) The purpose of the HVCCC's review is to:
 - (i) ensure that Capacity on the Network is being appropriately allocated; and
 - (ii) ensure that ARTC can fully carry out its functions pursuant to section 6.4 and in particular section 6.4(d).
- (d) ARTC must have regard to the HVCCC's recommendations in respect to its review of the Committed Capacity, the Available Capacity and Additional Capacity sought under sections 6.2 and 6.3.
- (e) ARTC must provide the results of any review to the RCG and must further make the results of a review under this section 5.4 public by promptly publishing those results on its website. [Note to ARTC: This section must be updated to ensure alignment with the charter of the HVCCC and the proposed HVCCC-ARTC SLA]

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5.5 Capacity Reservation

[Note to ARTC: Reservation of capacity seems to be inconsistent with the objective of expanding capacity endorsed by the industry in time to meet additional demand. ARTC should specify the traffics and circumstances in which this provision would apply. Costs of expansion can be recovered from existing users through Access Charges, rather than through capacity reservation. Further, there should be a statement of intent included that capacity should be expanded as endorsed by the industry.]

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

5.6 Determination of Base Path Usages

[Note to ARTC: The provisions of this section should mirror those contained in clause 3.2 of the AHA (Base Path Usages), once agreed. The section should deal with the method for initial and annual determination of Base Path Usages under Access Agreements for Coal Access Rights.]

5.7 Determination of Tolerance

[Note to ARTC: The provisions of this section should mirror those contained in clause 3.3 of the AHA (Tolerance), once agreed. The section should:]

- deal with the determination of Tolerance for the first year of the Undertaking and then be reviewed as currently proposed under the AHA for all Access Agreements for Coal Access Rights; and*
- cross-refer to the minimum endorsement c set out under section 6.4(b)(vii)]*

5.8 Allocation Periods

[Note to ARTC: The provisions of this section should mirror those contained in clause 3.5 of the AHA (Identification of Allocation Periods), once agreed, in relation to all Access Agreements for Coal Access Rights.]

5.9 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

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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 (which is dealt with in each Access Holder Agreement), (“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 **section 5.9(b)** and **section 5.9(c)**, consult with the HVCCC with the objective of coordinating its response to the Capacity Shortfall with the Terminal Operators (including any rules applicable to the allocation of capacity by the Terminal Operators) and above rail providers.

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(b) If ARTC expects that an event resulting in a Capacity Shortfall, will be for a duration of **five (5) 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:

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- (i) Capacity will be allocated first to passenger services in accordance with ARTC’s obligations under **section 88L** of the *Transport Administration Act 1988 (NSW)*, where the Network has sufficient capacity to meet those Access Holders’ Capacity Entitlements;
- (ii) Capacity remaining after the allocation of Capacity under **sub-section (i)** will be allocated to Access Holders at ARTC’s discretion taking into account ARTC’s contractual obligations under Access Agreements and any impact on the efficient utilisation of Capacity and Coal Chain Capacity.

(c) If ARTC expects that an event resulting in a Capacity Shortfall, will be for a duration of more than **five (5) 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:

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- (i) Capacity will be allocated first to passenger services in accordance with ARTC’s obligations under **section 88L** of the *Transport Administration Act 1988 (NSW)*, where the Network has sufficient capacity to meet those Access Holders’ Capacity Entitlements;

(ii) to the extent practicable:

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(A) contracted path usages from load points not affected by the Capacity Shortfall (for example, load points east of a constraint in the Network), will not be reduced by the Capacity Shortfall and Access Holders should continue to be able to use contracted path usages originating from unaffected load points; and

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(B) an access holder who has been affected by the Capacity Shortfall shall be entitled to make-up its lost path usages from its unaffected load points (if any) and/or from future ad hoc path usages.

(iii) ARTC will, to the extent practicable, reduce the number of Path Usages for each affected load point with the objective that each affected load point will at the end of the Month have borne an equitable pro-rata share of the Capacity Shortfall.

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(d) For the purposes of sub-sections (b) and (c), the Capacity Entitlement held by an Access Holder will be considered an unconditional Capacity Entitlement if all conditions precedent to the conferral of that Capacity Entitlement on the Access Holder under the terms of the relevant Access Agreement, including the completion of designated projects, have been satisfied, or waived by ARTC.

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5.10 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, that Capacity will be allocated among the Access Holders who have Capacity Entitlements to the Additional Capacity on an equitable prorate basis. By way of example, if one Access Holder had 60% of all contracted Capacity Entitlements to the Additional Capacity created by that project, then 60% of the available Additional Capacity will be allocated to that Access Holder.

5.11 Capacity resumption, relinquishment and transfer

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- (a) The terms of the Access Agreement will provide that ARTC may reduce the Capacity Entitlement of an Access Holder where an Access Holder has under-utilised the Capacity Entitlement granted to it under that Access Agreement. Any decision by ARTC in this regard is subject to the dispute resolution provision in the Access Agreement.
- (b) An Access Holder may also reduce its Capacity Entitlement in accordance with the terms of the Access Agreement.
- (c) A Capacity Entitlement may be assigned or traded by an Access Holder to a third party in accordance with the assignment or trading provisions of the Indicative Access Holder Agreement.

5.12 Capacity Transfer Working Group

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- (a) At the date of acceptance of this Undertaking, the participants in the Hunter Valley Coal Chain have developed a system for the temporary trade of capacity on the Network between Access Holders. In implementing the temporary trading system, ARTC will consult with the HVCCC and the Terminal Operators with the objective of aligning the temporary trade of Path Usages on the Network with the trading of capacity at the coal terminals at the Port of Newcastle. ARTC undertakes that:
- (i) the HVCCC will be administrator of the capacity trading system;
- (ii) the HVCCC will facilitate the transfer of capacity by providing advice as to potential Capacity impacts to the transferor and transferee of the Path Usages and to ARTC;
- (iii) in relation to short-term transfers, where loss to Capacity occurs, the HVCCC will provide reports as to the cause of that loss to all relevant participants in the Hunter Valley Coal Chain;

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

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(v) the system for the temporary trade of capacity on the Network, and any accompanying rules regarding the treatment of traded Path Usages for the purpose of the true-up test attached to the Indicative Access Holder Agreement will be binding ARTC and each Access Holder of Coal Access Rights.

(b) ARTC and the Access Holder agree that the HVCCC's advice as to the amount of Capacity which will be lost due to a temporary trade will be binding in the absence of manifest error.

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(c) ARTC must notify each Applicant and each Access Holder in writing when the system for the temporary trade of capacity on the Network is finalised and available for use by Access Holders. Until the Access Holder is so notified, a temporary trade must take place in accordance with the provisions of the Indicative Access Holder Agreement.

(d) ARTC must update its Access Holder Agreements to be consistent with the capacity transfer system developed, provided it is acceptable to ARTC and the relevant Access Holder (each acting reasonably). [Note to ARTC: This section must be updated to ensure alignment with the charter of the HVCCC and the proposed HVCCC-ARTC SLA. In addition, provisions of the AHA dealing with *Permanent assignment and trades (clause 16.3); Treatment of traded Path Usages (clause 16.5 of AHA); HVCCC recommendations (clause 16.6); Reduction in notice periods (clause 16.8).*]

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5.13 Provision of information to the HVCCC

(a) ARTC will provide the HVCCC with a copy of each Access Holder's train path schedules, as amended from time to time, for the purpose of enabling the HVCCC to determine whether an Access Holder has an entitlement to a Path Usage before scheduling a Service.

(b) ARTC will promptly confirm to the HVCCC (as and when requested by the HVCCC from time to time to enable the HVCCC to assist the Terminal Operators in determining cargo assembly requirements and vessel loading items) whether it has sufficient Train Paths to satisfy each access holder's entitlements to Path Usages, having regard to any Capacity constraints at that time.

5.14 Inefficient use of Access Rights

[Note to ARTC: The provisions of this section should mirror those contained in clauses 11.4 (Removal of Path Usages for under-utilisation), 11.5 (Non-compliance with Service Assumptions) and 11.6 (Cancellation of Services) of the AHA.]

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6 NETWORK CONNECTIONS AND ADDITIONS

6.1 Network connections

- (a) In the event that other owners of track not part of the Network wish to connect such track to the Network, ARTC will consent to such a connection provided:
- (i) all relevant approvals from all relevant Government Authorities have been obtained;
 - (ii) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity);
 - (iii) procedural and physical interface arrangements comply with ARTC's existing interface arrangements and there is no impact on safety;
 - (iv) the owners of track not part of the Network ensure that all users of such track comply with the directions of ARTC's Network controllers regarding entry to and exit from the Network;
 - (v) the connection meets ARTC's engineering and operational standards; and
 - (vi) the owners of track not part of the Network meet the initial and continued costs associated with constructing and maintaining the connection.
- (b) If ARTC has refused consent under section ~~6.1(a)(ii)~~, ARTC will, if requested to do so by the Applicant, notify the Applicant in writing of the reasons why the connection would, in its view or the view of the HVCCC, reduce Capacity or Coal Chain Capacity.

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6.2 Additional Capacity sought by Applicants

[Note to ARTC: Sections 6.2 and 6.3 should align with the port terminal access arrangements in relation to the commitment of additional capacity, the implementation of expansions or upgrades and the making of additional capacity available to coal producers. There is potential for significant overlap in these provisions between Additional Capacity sought by individual Applicants and Additional Capacity recommended by the HVCCC.]

- (a) As provided in sections 3.8 and ~~5.2~~, ARTC will consider, as part of the negotiation process with an Applicant, any requests for Additional Capacity. ARTC must consent to the provision of Additional Capacity if:
- (i) in ARTC's opinion (acting reasonably), such provision is Commercially Viable to ARTC; or
 - (ii) the Applicant agrees to meet the cost of the Additional Capacity;
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(iii) ARTC has complied with clause 6.4; and

(iv) the Additional Capacity of the Network is, in the opinion of ARTC (acting reasonably), technically and economically feasible, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and must have regard to the HVCCC's comments on any reduction of Coal Chain Capacity), and meets ARTC's engineering and operational standards, [Note to ARTC: this would be captured in the definition of Commercially Viable]

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(b) In the event ARTC agrees to the creation of Additional Capacity, ARTC's costs of providing that Additional Capacity will be met:

(i) where section 6.2(a)(ii) applies, by the Applicant reimbursing the relevant costs as and when they are incurred by ARTC;

(ii) through increased Charges, or making other periodic payments, reimbursing ARTC for recurring costs, plus an annuity in advance calculated by application of the relevant Rate of Return to ARTC's capital outlay; or

(iii) by such other way that ARTC and the Applicant agree, including take or pay arrangements requiring financial commitment by the Applicant to the Additional Capacity over the economic life of that Additional Capacity.

[Note to ARTC: This section (in conjunction with subsections (f) and (g)), does not adequately address the equitable distribution of capital contributions made by an Applicant. As drafted, if an Applicant is granted rights to Additional Capacity, it could be required to meet the capital costs over the full economic life of the Additional Capacity. Provisions are required to require a refund to the initial holder of rights where subsequent users are granted access to that Additional Capacity]

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- (c) The option of increasing Charges or making periodic payments including an annuity as set out in sub-section (b)(ii), or some other arrangement as agreed under sub-section (b)(iii) is only available to an Applicant if arrangements are made which satisfy ARTC that the risk of the Applicant failing to make such payments is commercially acceptable and is at ARTC's discretion (subject to ARTC first asking the Applicant to provide a reasonably suitable form of security).
- (d) Any Additional Capacity, once created, will be owned and managed by ARTC.
- (e) Where requested to do so by an Applicant, ARTC will provide the Applicant written reasons for the basis of decisions made by it in relation to Additional Capacity.
- (f) If Additional Capacity is subsequently used by another Access Holder, ongoing maintenance and capital cost will be shared from the time of the subsequent use and on the basis of the relative beneficial use of the additional capacity.
- (g) Where the Additional Capacity is initially funded by a capital contribution as contemplated in sub-section (b)(i), an equitable form of reconciliation between a subsequent user and the Applicant or Access Holder may apply.
- (h) Additional Capacity sought by Applicants may be governed by separate agreements outside of the Indicative Access Holder Agreement forming part of the Undertaking.

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6.3 Additional Capacity recommended by the HVCCC

- (a) ARTC will cooperate with the HVCCC in planning expansions of Capacity and Coal Chain Capacity.
- (b) Where the HVCCC recommends an investment to provide Additional Capacity to the Network, ARTC will consent to the provision of Additional Capacity if:
 - (i) in ARTC's opinion (acting reasonably), such provision is Commercially Viable to ARTC; and
 - (ii) the Additional Capacity of the Network is, in the opinion of ARTC (acting reasonably), technically and economically feasible, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity or Coal Chain Capacity, and meets ARTC's engineering and operational standards.

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6.4 Industry consultation

[Notes to ARTC:

- The approach taken to delivery of Additional Capacity on time and on budget in the HVAU is unacceptable. ARTC should accept the risk of schedule and cost overruns. Incentives to deliver Additional Capacity on time and on budget should also be considered.

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- In relation to subsections (d)-(g), ARTC should define the circumstances in which costs will be included in the RAB and the circumstances in which they will be expensed.

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(a) Overview

- (i) In relation to Additional Capacity sought under **section 6.2** or Additional Capacity identified by ARTC, ARTC will undertake the stages of consultation set out in **sections 6.4(e), to (i)** below. In relation to Additional Capacity sought under **section 6.3**, ARTC will undertake the stages of consultation set out in **sections 6.4(d), to (h)** below.

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- (ii) The objectives of the consultation process are to:

- (A) inform Hunter Valley Coal Chain participants of Additional Capacity requirements and investment strategies;
- (B) provide a process for Hunter Valley Coal Chain participant input; and
- (C) provide a process for the applicable industry participants to endorse Capital Expenditure incurred by ARTC in providing Additional Capacity as Prudent.

- (iii) The depth of analysis and documentation prepared at each stage of consultation will reflect the cost, benefits and risks of that option or project.

- (iv) ARTC will set and meet a schedule for progressing projects to provide Additional Capacity through the stages of consultation as set out in sections 6.4(e) to (h) below.

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- (v) Where ARTC considers that the process set out below would unjustifiably compromise timely delivery of the project, ARTC may adopt a modified consultation process for that project and advise the RCG accordingly. In particular, where ARTC considers that a project is minor in its scope or cost, that project may be considered with other minor projects and ARTC will consult on the group of minor projects rather than each minor project individually.

- (vi) Any endorsed costs incurred in complying with the provisions of this **section 6.4** will normally be included in the RAB where an option or project is commissioned, or otherwise expensed in the year incurred.

- (vii) ARTC will reasonably endeavour, to the extent within its control, undertake the stages of consultation set out in **sub-sections (b) to (c)** below as applicable, having regard to the objective of delivering Capacity in line with demand as forecasted by the industry, or as sought by an Applicant.

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(b) The RCG

(i) ARTC will convene, and conduct, regular monthly meetings with the RCG for the purpose of consulting with applicable industry representatives and obtaining endorsement of Additional Capacity. ARTC will prepare an agenda for meetings and provide a secretariat. ARTC may seek to consult or seek endorsement from the RCG outside of regular monthly meetings where ARTC considers this will assist project development and delivery.

(ii) At the commencement of this Undertaking, the RCG will comprise the following membership (as selected by the industry):

(A) one (1) representative of each Access Holder with more than 10% of contracted coal gtkm on the Network;

(B) three (3) representatives of all Access Holders with less 10% of contracted coal gtkm on the Network such that, among the three representatives referred to in this sub-section (B) and the representatives referred to in sub-section (A), there is at least one representative associated with an Access Holder using one or more of:

(aa) sections of the Network in Pricing Zone 2;

(ab) sections of the Network in Pricing Zone 3;

(ac) the Port Waratah Coal Services Ltd coal terminals at Newcastle; and

(ad) the Newcastle Coal Infrastructure Group coal terminals at Newcastle;

(C) one (1) representative of each Operator, in its capacity as an Operator, with more than 10% of contracted coal gtkm on the Network who is not an Access Holder with more than 10% of contracted coal gtkm on the Network (in a non-voting capacity); and

(D) one (1) representative of the HVCCC (which representative is intended to act solely in an advisory capacity).

(iii) The composition of the RCG may change from time to time as agreed by ARTC and the current members of the RCG at the time. RCG members may or may not be participants in the HVCCC.

(iv) Only those RCG members who represent Access Holders will be entitled to vote and each RCG member will vote in accordance with the wishes of Access Holders that it is representing, or, where the Access Holder is an Operator, those Coal Customers on whose behalf the Access Rights are held. RCG member voting will be weighted on the basis of contracted coal gtkm, in the Pricing Zone in which a project is proposed to occur, and coal gtkm expected to be generated in the Pricing Zone following completion of the proposed project.

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(v) The RCG will be involved at each stage of project development and will have the opportunity to endorse each stage before ARTC proceeds to the next stage. Endorsement will occur as follows:

(A) subject to **sub-section 6.4(b)(v)(B)** the endorsement of coal producers that hold Coal Access Rights under an Access Holder Agreement, either directly or through RCG representatives, with over 50% of contracted coal gtkm in that Pricing Zone will constitute endorsement by the RCG.

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

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(vi) ARTC may elect to continue to the next stage of project development without RCG endorsement. Where this occurs, any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC.

(vii) Where the RCG's endorsement is sought in relation to a change to Tolerance pursuant to **section 5.7**, the endorsement of Coal Customers that hold Coal Access Rights under an Access Holder Agreement, either directly or through RCG representatives, with over [70%] of contracted coal gtkm in that Pricing Zone, will constitute endorsement by the RCG.
[Note: NSWMC is considering the 70% threshold]

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(c) HVCCC

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

(i) reducing delivery times;

(ii) reducing adverse impact on Hunter Valley Coal Chain Capacity;

(iii) reducing risk; and

(iv) reducing cost,

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

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(d) Hunter Valley corridor capacity strategy

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- (i) ARTC will develop a Hunter Valley corridor capacity strategy annually.
- (ii) In developing the Hunter Valley corridor capacity strategy, ARTC will base the strategy on the rolling annual capacity forecast developed by the RCG, which will:
 - (A) be based on demand forecasts by existing and prospective coal producers;
 - (B) be aligned with Newcastle port terminal capacity forecasts; and
 - (C) identify maximum future capacity requirement.
- (iii) The Hunter Valley corridor capacity strategy will include capacity expansion options which:

(A) seek to ensure sufficient Capacity to meet coal producers' combined demand forecasts;

(B) seek to ensure alignment with expansion projects undertaken at the Port of Newcastle;

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(C) take into consideration preferred outcomes of the Coal Chain Master Plan existing capability and future investment commitments in other parts of the coal supply chain, and a reasonable assessment of sunk assets and the costs and risks associated with fluctuations in coal demand and volumes;

(D) include a preliminary high level assessment of objectives, and an indicative cost estimate and benefits;

(E) include an estimate of cost to be incurred in the concept assessment stage; and

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(F) recommend the preferred options.

- (iv) ARTC will seek formal endorsement from the RCG of identified preferred options in the Hunter Valley corridor capacity strategy to proceed to concept assessment and for the reasonable costs of undertaking the concept assessment to be included in the RAB or expensed in the year incurred.

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(e) Concept Assessment

- (i) For each option endorsed above at **section 6.4(d)(iv)**, and each project creating Additional Capacity accepted by ARTC under **section 6.2(a)**, ARTC will provide a concept assessment report to the RCG.

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- (ii) The objective of the concept assessment report will be to enable a preliminary assessment of the potential costs, benefits and risk involved and may include an indicative assessment of:

(A) project objectives;

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- (B) broad cost estimates and associated benefits;
 - (C) preliminary financial analysis; and
 - (D) preliminary risk assessment.
- (iii) ARTC will seek endorsement from the RCG under section 6.4(b)(v) to proceed to project feasibility. Endorsement to proceed to project feasibility would include:
- (A) endorsement of ARTC's actual costs incurred in undertaking concept assessment;
 - (B) endorsement for ARTC's estimated costs to undertake project feasibility,
- to be included in the RAB or expensed in the year incurred.

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(f) Project Feasibility

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- (i) For each option endorsed at the concept assessment stage, ARTC will provide a project feasibility report to the RCG.
- (ii) The project feasibility report may include:
 - (A) confirmation of project objectives, including a preliminary functional specification;
 - (B) brief outline of scope;
 - (C) identification of estimated project costs (with a +/-20% range);
 - (D) potential benefits, including capacity, maintenance and operating benefits;
 - (E) preliminary risk assessment;
 - (F) preliminary project management plan, including initial estimate of timeline for milestones;
 - (G) details of any variation to the budgeted costs to undertake project feasibility;
 - (H) outline of project assessment stage, including an estimate of budget.
- (iii) ARTC will seek formal endorsement from the RCG under section 6.4(b)(v) to proceed to project assessment. Endorsement to proceed to project assessment would include:
 - (A) endorsement of ARTC's actual costs incurred in undertaking project feasibility;

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

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

(g) Project Assessment

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- (i) For each option endorsed at the project feasibility stage, ARTC will provide a project assessment report for endorsement to the RCG under section 6.4(b)(v).
- (ii) The project assessment report will include:
 - (A) project objectives report, including functional specification;
 - (B) scope of work report, including:
 - (i) assessment of technical and operating requirements;
 - (ii) developed concept design, with survey if required; and
 - (iii) independent design verification if required;
 - (C) project budget with a +/-10% margin or a larger margin where appropriate for larger projects, an estimate of contingency supported by risk assessment, cost analysis, and basis for contingency;
 - (D) financial evaluation, including estimated impact on access pricing;
 - (E) developed project management plan which may include:
 - (i) project configuration management plan;
 - (ii) project delivery strategy;
 - (iii) resource management plan;
 - (iv) cost management plan;
 - (v) quality management plan;
 - (vi) safety management plan;
 - (vii) procurement management plan;
 - (viii) interface management plan;
 - (ix) scope and budget change management plan; and
 - (x) environmental plan;

(F) a firm project construction schedule with a specified delivery date (which, where reasonably practicable and relevant will align with

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the completion of expansions to terminals at the Port of Newcastle);

(G) project risk assessment report; and

(H) regulators's notification, if needed.

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(iii) ARTC will seek formal endorsement from the RCG under section 6.4(b)(v) to proceed to project implementation. Endorsement to proceed to project implementation would include:

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(A) endorsement of ARTC's actual costs incurred in undertaking project assessment;

(B) endorsement of any variation between the endorsed estimated cost range identified during project assessment and the project budget identified during project feasibility, and

(C) endorsement of ARTC's estimated costs to comply with the provisions of project implementation, including costs incurred in obtaining independent expert determination as applicable.

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

(h) Project Implementation

(i) **Procurement**

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

(B) For each project endorsed at the project assessment stage, ARTC will undertake, through a tender process, alliance or internal evaluation, detailed confirmation of project scope and cost.

(C) Where a cost outside of the range or contingency endorsed in the project assessment stage is confirmed, ARTC will seek the endorsement of the RCG for that variation under section 6.4(b)(v).

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(D) Where ARTC undertakes confirmation of scope and cost through an alliance or internal evaluation, the ARTC will seek the endorsement of the RCG under section 6.4(b)(v) for the scope and cost.

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(E) Where the RCG endorses less than the cost confirmed at **section 6.4(h)(i)(C)**, ARTC may refer the matter to an agreed independent expert for a determination as to whether the variation is Prudent, in accordance with **section 6.4(h)(v)**.

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(F) Upon the independent expert deciding on cost to be taken as Prudent in accordance with **section 6.4(h)(i)(E)**, ARTC will proceed with project implementation.

(G) Any cost of delay resulting from following this process will be deemed a Prudent direct cost to the project.

(ii) **Project initiation**

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

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(iii) **Alignment**

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

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(iv) **Project delivery**

(A) ARTC will implement the project management plan.

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(B) ARTC will provide progress reports to the RCG at RCG meetings, the nature and frequency of which will be agreed with the RCG. A progress report may include

- (i) a report on the physical status of work commenced;
- (ii) an assessment of remaining time and required resources to complete the project;
- (iii) an assessment of expected resource availability;
- (iv) identification of any issues; and
- (v) exceptions, where ARTC would advise the RCG that the project will deviate outside of its planned cost or the firm project construction schedule and specified delivery date.

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(C) Where a variation to the endorsed project budget identified at **section 6.4(g)(iii)(C)**, including contingency, or an endorsed variation at **section 6.4(h)(i)(C)**, or arising from a review by an independent expert at **section 6.4(h)(i)(E)**, arises:

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(i) ARTC may submit a revised costing to the RCG for endorsement under section 6.4(b)(v) having regard to the prudence of the variation but must continue with the project implementation whilst a decision in respect of such endorsement is pending.

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(ii) The RCG may endorse all or part of the variation.

(iii) Where the RCG endorses less than the full variation, ARTC may refer the matter to an agreed independent expert for review in accordance with **section 6.4(h)(v)**. Where the independent expert is not agreed, the ACCC shall nominate an independent expert.

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(iv) The review of the independent expert will have regard to whether the variation is Prudent.

(v) If the independent expert determines that the extent of the variation to be taken is not Prudent, ARTC must complete construction of the project but may not include the cost of completing the project as a Prudent direct cost of the project.

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(vi) If the independent expert determines that the extent of the variation to be taken is Prudent, ARTC must complete construction of the project and may include the cost of completing the project as a Prudent direct cost of the project.

(vii) Any cost of delays resulting from following this process will be deemed a Prudent direct cost to the project.

(v) Independent expert review

(A) Unless the parties agree otherwise, where ARTC refers a matter to an agreed independent expert under **section 6.4(h)(i)(E)** or **section 6.4(h)(iv)(C)(iii)**, the independent expert will:

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

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

(C) The costs of the independent expert shall be paid by the ARTC and, where the project cost or variation is deemed to be Prudent, the cost may be recovered as a Prudent direct cost of the project.

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(vi) Commissioning

- (A) ARTC will commission the project into operation upon completion of project delivery.
- (B) Where the project is large and an extended delivery time frame is considered necessary, ARTC may propose to a staged delivery of the project where, upon commissioning of any stage, ARTC may expense financing costs in the year of that commissioning.
- (C) If subsequent sections of the project are delivered after scheduled delivery times, previously expensed financing costs will be deducted from the costs of the subsequent sections that are added to the RAB.

For the purpose of section 6.4(h)(vi)(B), a "large" project means a project that has a total project cost of greater than \$100 million and an "extended delivery time frame" means a total scheduled project delivery time of greater than 18 months.

(i) Project close-out

- (i) Upon completion of project implementation, ARTC will provide a project close-out report for the RCG. A project close-out report will include:
 - (A) formal acceptance of works;
 - (B) outstanding works and if necessary a completion plan;
 - (C) cost report; and
 - (D) verification of benefits delivered.
- (ii) Any Capital Expenditure incurred by ARTC in providing Additional Capacity that is within the cost range, including any contingency endorsed at the project assessment stage, or endorsed by the RCG under section 6.4(b)(v) or determined by the independent expert at the project implementation stage, will be taken as Prudent.

6.5 ACCC Review

The terms of sections 6.2, 6.3 and 6.4 shall be reviewed (and if found to be necessary, amended) by the ACCC (in consultation with relevant industry participants) every two (2) years during the Term.

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7 NETWORK TRANSIT MANAGEMENT

7.1 Medium Term Capacity Management

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

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7.2 Short Term Capacity Management

- (a) ARTC will undertake short term capacity planning, including the development of the Daily Train Plan (“DTP”), having regard to:
 - (i) the MTP;
 - (ii) any relevant input provided by the HVCCC; and
 - (iii) the Network Management Principles (“NMPs”).
- (b) Train movements from a coal terminal at the Port of Newcastle to coal mines (or vice versa) must not be planned in the DTP unless ARTC (taking account of the advice of the HVCCC) is satisfied that there is in place in respect of that Train each of the following:
 - (i) sufficient Access Rights;
 - (ii) sufficient Network Exit Capability (in respect of the outward journey from the Network exit point to the mine, there must be Network Exit Capability in respect of the coal to be hauled to the Network exit point on the return journey); and
 - (iii) a contractual obligation in favour of the person for whom the coal is being hauled obliging the relevant Operator to run the Train.
- (c) Where the Train movements specified by the HVCCC are in accordance with the relevant Access Agreements, the Network Management Principles and the other reasonable and relevant ARTC requirements, ARTC must include those Train movements in the DTP.

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7.3 Network Transit Management

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

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8 KEY PERFORMANCE INDICATORS

8.1 Network Key Performance Indicators

- (a) Within 6 months of the Commencement Date, ARTC will develop, in consultation with Access Holders and, where relevant, Applicants, Operators and, in relation to Hunter Valley Coal Chain specific matters, the HVCCC reasonable and appropriate key performance indicators for the Network (Network Key Performance Indicators). ARTC must also develop timeframes for the review of the Network Key Performance Indicators and performance monitoring processes. ARTC will propose the Network Key Performance Indicators to the ACCC for consideration and acceptance.
- (b) The Network Key Performance Indicators proposed by ARTC must be reviewed, in relation to Coal Access Rights, annually or for each expansion of the Hunter Valley Coal Chain (whichever occurs sooner).
- (c) It is intended that any amendments to the Network Key Performance Indicators or minimum levels of performance arising out a review of the Network Key Performance Indicators will not reduce the overall efficiency of the Hunter Valley Coal Chain or the Network.
- (d) Where any amendments to the Network Key Performance Indicators is reasonably likely to have a material impact on ARTC, an Access Holder or an Operator's operations or infrastructure, the affected party or parties will have up to 2 years to fully implement the change.
- (e) If the ACCC has not at any time accepted a review process for the Network Key Performance Indicators, ARTC will review the key performance indicators agreed between the parties to an Access Agreement at least once every year or sooner where there is an expansion of the Hunter Valley Coal Chain.

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Deleted: and report on its website performance indicators for the Network. This will include performance indicators developed by ARTC Customers

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8.2 Key Performance Indicators under an Access Agreement

In developing the key performance indicators for an Access Agreement the ARTC and an Access Holder will have regard to the provisions of the Indicative Access Holder Agreement.

9 DEFINITIONS

9.1 Definitions

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

“ACCC” means the Australian Competition and Consumer Commission;

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

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

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

“**Access Application**” means an application for Access Rights as described in **section 3.6**;

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

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

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

“**Accredited**” means in relation to an Operator, having accreditation as an operator as defined under the Rail Safety Act [2008 \(NSW\)](#), and “**Accreditation**” bears a corresponding meaning;

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“**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 or](#) associated with the Network;

“**Allocation Period**” means [the Period over which contracted Path Usages are made available to an Access Holder in a each year of an Access Agreement](#);

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

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

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

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

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

“**Base Path Usages**” means [the number of Path Usages to be made available each Period as determined in accordance with section 5.6](#);

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

“**Capacity**” means the capability of the Network for Services, including Additional Capacity based on:

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(a) track related System Assumptions, including:

(i) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements; and

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(ii) the operation of work Trains;

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(iii) the requirement for surge capacity reasonably required to deliver reliable operations where demand varies, in an efficient manner; and

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(iv) forecast members’ losses; and

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(b) other assumptions related to operating the Network for non-coal services as reasonably determined by ARTC;

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

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“**Capacity Entitlement**” means the Capacity granted to the Access Holder under the Access 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;

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

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

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

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

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

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

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

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“**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;

“**Commercially Viable**” means Additional Capacity which will produce a return on investment which is reasonable in the circumstances having regard to:

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(a) relevant Access Agreements;

(b) whether there are sufficient take or pay commitments contracted by applicable Access Holders to recover NCC associated with the Additional Capacity over the economic life of the Additional Capacity; and

(c) ARTC’s total business activity.

and, in the case of HVCCC recommended investment under section 6.3, whether the RCG has endorsed the Additional Capacity as contemplated in section 6.4;

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

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

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

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

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

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

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

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

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the Economic Cost for the Constrained Network;

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

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

“Credit Support” means either:

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

“Depreciation” has the meaning described in section 4.6;

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

“Dispute” has the meaning given to it in section 3.16;

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

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“Existing Regulatory Asset Base” or “ERAB” has the meaning given to it in section 4.3(a);

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“Extension” means the addition of infrastructure not forming part of the Network;

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“Floor Limit” has the meaning described in section 4.2(b);

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“gtkm” means gross tonnes multiplied by kilometres;

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

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“GST” has the meaning given to that term in the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

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

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“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:

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(a) in relation to coal exported through an export terminal at Newcastle, includes those persons:

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- (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

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

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

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

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

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

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“**Indicative Access Proposal**” means the preliminary Access proposal submitted by ARTC under **section 3.8**;

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

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

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

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

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

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

“**KPI Management Plan**” means a plan to be prepared by the party who has received a notice under an Access Agreement for Coal Access Rights to remedy a material failure to meet one or more key performance indicators which details:

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(a) the reason for the material failure; and

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(b) a management plan:

(i) setting out each step or task to be undertaken to prevent a future breach of the key performance indicators; and

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(ii) a program setting out the time for each step or task to be commenced and completed.

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

“**Month**” means a calendar month;

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

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

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

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

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

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

“**NSW Lease**” means the Deed of Lease over the interstate 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;

“**NSW Rail Access Undertaking**” means the access undertaking, given by Rail Infrastructure Corporation and Rail Corporation New South Wales pursuant to Schedule 6AA of the Transport Administration Act 1988 (NSW);

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“**Operator**” means an Accredited Operator seeking to operate Trains in accordance with the relevant Access Agreement and, where applicable, 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 entered into between ARTC and an Operator, the standard terms and conditions of which are set out in the Standard Operator Sub-Agreement;

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

“**Path Usage**” means a right granted under an Access Holder Agreement to an Access Holder to utilise a Train Path through the operation of a Service by a nominated Operator on the Train Path;

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

“Period” means a Month or a Quarter;

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

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

- (a) taken as prudent in accordance with **section 6.4(h)(ii)**; and
- (b) otherwise, prudent having regard to:
 - (i) need to meet market demand for Capacity and performance of the Network, or the need to extend the economic life of the Network;
 - (ii) whether the scope of works is consistent with that identified in the Hunter Valley corridor capacity strategy, where applicable, current as at the Commencement Date or as varied from time to time;
 - (iii) what is considered to represent an efficient means to achieve that demand or extend that economic life;
 - (iv) what is consistent with existing standard and configuration of adjacent and/or existing infrastructure with similar utilisation and market requirements, or its modern engineering equivalent;
 - (v) expenditure incurred efficiently in implementing the project, in the context of prevailing access and operating requirements, and input costs recognising broader benefits that may arise from delivery through alliance or internally, provided those broader benefits are directly connected to the Hunter Valley Coal Chain and the Hunter Valley Network;
 - (vi) adjustments in relation to the timing of commencement and/or commissioning of projects;
 - (vii) the importance to the industry of anticipated timing for completion of projects having regard to the impact on Coal Chain Capacity and commercial arrangements save that, expenditure related to: (a) delays in project delivery (to the extent that such delays are due in whole or part to the actions of ARTC); and (b) engineering and construction costs that were initially underestimated or not adequately provided for by ARTC, will not be considered Prudent; and
 - (viii) where applicable, support by the relevant industry participants

[Note to ARTC: The definition of "Prudent" requires further consideration]

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

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

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

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“RCG” means the HVCCC's Rail Capacity Group;

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“Receiver” has the meaning given to it in section 3.5(a);

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

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

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

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

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

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

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

“Services” means a Train run by the Operator using the Network which provides railway freight or passenger services, as the case may be, including work Trains;

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“Solvent” means that;

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

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

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

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

“Terminal Operators” means an operator of a coal terminal at the Port of Newcastle;

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

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“Tolerance” means the additional Path Usages available to an Access Holder in addition to the Base Path Usage as determined in accordance with section 5.7;

“TOP” has the meaning given to it in section 4.12(b)(iii);

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

“Train” means one or more units of Rolling Stock coupled together, at least one of which is a locomotive or other self-propelled unit;

“Train Path” means:

(a) the entitlement of the Access Holder to use, through an Accredited 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 a Train Path Schedule from time to time; and

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

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“Train Path Schedule” has the meaning given to that term in the Indicative Access Holder Agreement.

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

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9.2 Interpretation

In this Undertaking, unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (e) a reference to a section, clause, Part or a Schedule is a reference to a section, clause, Part or Schedule of this Undertaking;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) notices that are required to be given in writing to ARTC may, if so agreed by ARTC, be provided in electronic form;

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- (h) a reference to any Act includes all statutes regulations codes by-laws or ordinances and any notice demand order direction requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations amendments re-enactments or replacements from time to time of that Act and a reference to “law” includes a reference to any Act and the common law;
- (i) the words “including”, “for example” or “such as” when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind; and
- (j) a reference to \$ and dollars is to Australian currency.

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SCHEDULES

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

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SCHEDULE A - Essential Elements of the Access Agreement

Access Holder Agreement (Coal Access Rights for non-Indicative Services)

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Access Holder Agreements dealing with non-Indicative Services shall be based on the Access Holder Agreement attached as Annexure A, except that ARTC and the Access Holder must agree:

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- the characteristics of the non-Indicative Services; and
- the Access Charges payable for the non-Indicative Services.

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Where an Access Holder wishes to negotiate other provisions of the Access Holder Agreement for non-Indicative Services, it shall be entitled to do so in its discretion, provided that the essential elements set out below are incorporated into the Access Holder Agreement.

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Unless otherwise defined in this Undertaking, capitalised terms used in this Schedule A have the meaning given in the Indicative Access Holder Agreement.

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Essential elements of an Access Holder Agreement for non-Indicative Coal Access Rights:

- 1 provisions consistent with clause 3.1 of the Indicative Access Holder Agreement (“Grant of Coal Train Paths for the transport of Coal”);
- 2 trading provisions consistent with clause 16.3 (“Permanent Assignments and Trades”), clause 16.4 (“Temporary trade of Train Paths”) and clause 16.5 (“Treatment of Traded Path Usages”) of the Indicative Access Holder Agreement;
- 3 provisions providing for a rebate of take or pay charges consistent with clause 5.4 (“Calculation of TOP Rebate”); and schedule 2 (“System Monthly True-up”) of the Indicative Access Holder Agreement
- 4 provisions providing for ARTC to allocate existing Capacity and Additional Capacity consistent with clause 6.2 (“Shortfall in existing Capacity”) and clause 6.3 (“Shortfall in creation of Additional Capacity”) of the Indicative Access Holder Agreement;
- 5 provisions allowing ARTC to require, at any time during the term of the Access Holder Agreement that the Access Holder has an Acceptable Credit Rating or delivers Credit Support to ARTC;
- 6 Access Holder’s non-exclusive access to Network;
- 7 Access Holder’s entitlement to Train Paths subject to the matters outside ARTC’s control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator’s trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 8 each party warranting the accuracy of information provided;
- 9 an Access Holder can only utilise its access rights through an Accredited Operator who has entered into an Operator-Sub Agreement with ARTC which has been endorsed by the Access Holder, a copy of which is to be included as an Annexure to the Access Holder Agreement;

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- 10 Access Holders paying a Charge for Coal Access Rights based on a combination of actual usage (being a function of distance and gross mass (\$/gtkm) for a Pricing Zone) and on a take or pay basis
- 11 charges to be determined in accordance with **section 4.13** and **section 4.16** of the Undertaking, as applicable;
- 12 ARTC may charge for access to Extensions and Additional Capacity;
- 13 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- 14 ARTC having the ability to vary (temporarily or permanently), remove and review contracted Capacity Entitlements in appropriate circumstances and to take possession of the Network for repairs, maintenance, new works and upgrades;
- 15 under-utilised capacity may be withdrawn by ARTC;
- 16 provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
- (a) the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
 - (b) the train decision factors which detail the allocation of train priority in real time train control;
- 17 implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 18 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 19 payment of, if payable, legal costs of execution (including any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on the Access Holder Agreement and any document contemplated or allowed by the Access Holder Agreement;
- 20 termination of Access Holder Agreements on termination or cessation of ARTC's leasehold rights;
- 21 appropriate termination and suspension provisions;
- 22 indemnities by the Access Holder and ARTC;
- 23 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 24 the parties agree that any changes in law which materially affects the parties' rights under the Access Holder Agreement is excluded to the extent permitted by law;
- 25 the parties agree to renegotiate the Access Holder Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- 26 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Holder Agreement;

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27 dispute resolution procedures;

28 a requirement that the Access Holder endorse each Operator Sub-Agreement (and any amendments thereto) prior to the Operator carrying out Services; and

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29 an Operator Sub-Agreement including the following elements:

- (a) a clause enabling ARTC to request the Operator to provide Credit Support if the Operator is unable to demonstrate to ARTC that it meets appropriate prudential requirements;
- (b) ARTC and Operator holding appropriate Accreditation;
- (c) ARTC and Operator holding appropriate insurance;
- (d) Operator's entitlement to operate Coal Trains on the Network for the Access Holder is limited to the Access Holder's Coal Access Rights;
- (e) Operator has a non-exclusive access to Network;
- (f) Operator's entitlement to operate Coal Trains on a Train Path is subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator's Trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- (g) provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
 - the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
 - the train decision factors which detail the allocation of train priority in real time train control;
- (h) contracted Train Paths subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, any lawful requirement given by a Governmental Authority and Network Management Principles;
- (i) each party warranting the accuracy of information provided;
- (j) the Operator providing warranties regarding Rolling Stock;
- (k) ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- (l) Operator complying with plans dealing with Incidents, preservation of evidence and implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- (m) Operator complying with the Codes of Practice as published by ARTC from time to time and Instructions issued by ARTC;

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- (n) Operator to ensure use of the Network minimises obstruction to the Network, complies with any laws and does not materially affect or damage any part of the Network or ARTC’s property;
- (o) Operator to provide and maintain communications equipment compatible with equipment used in the Network Control Centre and provide information to ARTC regarding the provision of train services;
- (p) Operator to provide ARTC with a train manifest for each train service and inform ARTC of any cancellations;
- (q) Operator to ensure that any item hauled is secured and does not become deposited on or adjacent to the Network;
- (r) Operator to comply with applicable and appropriate safety standards;
- (s) the ability of ARTC to temporarily vary the Train Paths by Instruction to the Operator;
- (t) mechanism to change the Operator’s Operator Rights due to changes in the Access Holder Agreements or Access Holder nominations;
- (u) the ability of ARTC to inspect and conduct audits on the Operator;
- (v) appropriate termination and suspension provisions;
- (w) the parties agree that any changes in law which materially affects the parties’ rights under the Operator Sub-Agreement is excluded to the extent permitted by law;
- (x) the parties agree to renegotiate the Operator Sub-Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- (y) indemnities by the Operator and ARTC in relation to Incidents;
- (z) dispute resolution procedures; and
- (aa) a requirement that the Operator Sub-Agreement be endorsed by the Access Holder.

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Access Agreement (for Non-Coal Access Rights)

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

- 1 provisions providing for ARTC to allocate existing Capacity and Additional Capacity consistent with **section 5.6** (“Shortfall in existing Capacity”) and **section 5.10** (“Shortfall in creation of Additional Capacity) of the Undertaking.
- 2 the right of ARTC to require that Access Holders have an Acceptable Credit Rating or delivery of a Security or Parent Guarantee;
- 3 Access Holder’s non-exclusive access to Network;

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- 4 Access Holder's entitlement to contracted Train Paths are subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator's trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 5 each party warranting the accuracy of information provided;
- 6 Access Holders paying a Charge based on a variable component (a function of distance and gross mass \$/gtkm), a flagfall component and an excess network occupancy component;
- 7 ARTC may charge for access to Extensions and Additional Capacity;
- 8 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- 9 ARTC having the ability to vary (temporarily or permanently), remove and review contracted Capacity Entitlements in appropriate circumstances and to take possession of the Network for repairs, maintenance, new works and upgrades;
- 10 under-utilised capacity may be withdrawn by ARTC;
- 11 provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
 - (a) the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
 - (b) the train decision factors which detail the allocation of train priority in real time train control;
- 12 implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 13 contracted Train Paths subject to matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 14 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 15 payment of, if payable, legal costs of execution (including any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on the Access Agreement and any document contemplated or allowed by the Access Agreement;
- 16 termination of Access Agreements on termination or cessation of ARTC's leasehold rights;
- 17 indemnities by the Access Holder and ARTC including in relation to Incidents;
- 18 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 19 the parties agree that any change in law which materially affects the parties' rights under the Access Agreement is excluded to the extent permitted by law;

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- 20 the parties agree to renegotiate the Access Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- 21 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Agreement;
- 22 where the Access Holder is an Operator, the Operator holds appropriate Accreditation;
- 23 where the Access Holder is not an Accredited Operator, an obligation on the Accredited Operator to procure the services of an Accredited Operator to operate the Trains on the contracted Train Paths;
- 24 the Access Holder, and where relevant, the Operator holds appropriate insurance;
- 25 the Access Holder or, where relevant, the Operator provides a warranty regarding Rolling Stock;
- 26 the Access Holder and, where relevant, the Operator complies with plans dealing with Incidents, preservation of evidence and implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 27 the Access Holder and, where relevant, the Operator complies with Codes of Practice as published by ARTC from time to time and Instructions issued by ARTC;
- 28 the Access Holder and, where relevant, the Operator, ensures use of the Network minimises obstruction to the Network, complies with any laws and does not materially affect or damage any part of the Network or ARTC's property;
- 29 the Access Holder and, where relevant, the Operator provides and maintains communications equipment compatible with equipment used in the Network Control Centre and provide information to ARTC regarding the provision of train services;
- 30 the Access Holder and, where relevant, the Operator provides ARTC with a train manifest for each train service and inform ARTC of any cancellations;
- 31 the Access Holder and, where relevant, the Operator ensures that any item hauled is secured and does not become deposited on or adjacent to the Network;
- 32 the Access Holder and, where relevant, the Operator complies with applicable and appropriate safety standards;
- 33 the ability of ARTC to inspect and conduct audits on the Access Holder;
- 34 appropriate termination and suspension provisions; and
- 35 dispute resolution procedures.

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SCHEDULE B - Network

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

1. Newcastle (Islington Junction) 164.400 km to Port Waratah
 2. Scholey Street Junction (Via Coal) 164.900 to Muswellbrook 288.900 km
 3. Hanbury Junction 168.800 to Kooragang Island
 4. Kooragang East Junction 169.3 km to Sandgate 170.500 km¹
 5. Muswellbrook 288.900 km to Ulan 435.300 km
 6. Muswellbrook 288.900 km to Gap² 416.000 km
- * Includes Sandgate Flyover (for the purposes of **section 4** Pricing Principles only) which forms part of ARTC Sector 938 Sandgate – Maitland (via Main)
- ¹ To the extent where the railway line joins the rail network owned by Rail Infrastructure Corporation.

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ANNEXURE 1 TO SCHEDULE B

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

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

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SCHEDULE C - Network Management Principles

The following definitions apply in this Schedule. *[Note to ARTC: as per the AHA, these principles should be those contained in the NSW Lease, subject to ARTC providing a copy to coal producer for their review and comment]*

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

“**Commuter Peak Services**” means RailCorp’s commuter rail passenger services arriving at Newcastle Station between 0600 and 0900 hours and departing Newcastle Station between 1600 and 1800 hours and continuing until they reach their destination point. “**Discharge Point**” means a facility connected to the Hunter Valley Network at which coal is discharged from Trains.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Objectives of Coal Trains and Non-Coal Trains

In general,

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

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

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

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

Train Decision Factors

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

General principles guiding train management are:

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

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

Table D1 – Train Priority Matrix

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

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Table D2 – Decision Matrix

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

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Rule 1:

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

Rule 2:

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

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

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

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

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

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

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

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SCHEDULE D: KEY Performance Indicators

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

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SCHEDULE E - Segments

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

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

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SCHEDULE F - Parent Guarantee

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Parent Guarantee and Indemnity

Dated

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

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

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- 4.15 Limits on Charge differentiation
- 4.16 Interim Indicative Access Charges
- 4.17 Process for finalising Indicative Access Charges

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Parent Guarantee and Indemnity

Details

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

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Governing law New South Wales

Date of deed See Signing page

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Parent Guarantee and Indemnity

General terms

1 Interpretation

1.1 Definitions

These meanings apply unless the contrary intention appears:

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

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

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

Corporations Act means the Corporations Act 2001 ([Cth](#)).

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

Details means the section of this guarantee and indemnity headed “Details”.

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

[Indicative Services has the meaning given to that term in the Access Undertaking accepted by the Australian Competition and Consumer Commission in respect of the Hunter Valley rail network.](#)

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

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

1.2 References to certain general terms

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

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

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

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1.3 Number

The singular includes the plural and vice versa.

1.4 Headings

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

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2 Guarantee and indemnity

2.1 Consideration

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

2.2 Guarantee

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

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

2.3 Indemnity

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

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

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

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

2.4 Extent of guarantee and indemnity

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

2.5 Variations and replacements

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

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

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

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

2.6 Acknowledgment

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

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

2.7 Obligation to pay interest

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

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

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

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

2.8 Compounding

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

2.9 Payments

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

- (a) in full without set-off or counterclaim, and without any deduction in respect of Taxes unless prohibited by law; and

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- (b) in the currency in which the payment is due, and otherwise in Australian dollars, in immediately available funds

2.10 No merger

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

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

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

2.11 Rights of the Beneficiary are protected

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

- (a) any act or omission:
 - (i) varying or replacing in any way and for any reason any agreement or arrangement under which the obligations guaranteed under **clause 2.2** ("Guarantee") are expressed to be owing;
 - (ii) releasing the Obligor or giving the Obligor a concession (such as more time to pay);
 - (iii) releasing any person who gives a guarantee or indemnity in connection with any of the Obligor's obligations;
 - (iv) by which a person becomes a Guarantor after the date of this guarantee and indemnity;
 - (v) by which the obligations of any person who guarantees any of the Obligor's obligations (including obligations under this guarantee and indemnity) may become unenforceable;
 - (vi) by which any person who was intended to guarantee any of the Obligor's obligations does not do so, or does not do so effectively;
 - (vii) by which a person who is co-surety or co-indemnifier is discharged under an agreement or by operation of law;
- (b) a person dealing in any way with the Agreement or this guarantee;
- (c) the death, mental or physical disability, or liquidation, administration or insolvency of any person including the Guarantor or the Obligor;
- (d) changes in the membership, name or business of any person; or

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- (e) acquiescence or delay by the Beneficiary or any other person.

2.12 Guarantor's rights are suspended

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

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

This clause continues after this guarantee and indemnity ends.

2.13 Reinstatement of rights

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

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

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

2.14 Costs

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

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

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3 Notices and other communications

3.1 Form - all communications

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

3.2 Form - communications sent by email

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

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

3.3 Delivery

Communications must be:

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

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

3.4 When effective

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

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3.5 When taken to be received

Communications are taken to be received:

- (a) if sent by post, three days after posting (or seven days after posting if sent from one country to another); or
- (b) if sent by fax, at the time shown in the transmission report as the time that the whole fax was sent; or
- (c) if sent by email:
 - (i) when the sender receives an automated message confirming delivery; or

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- (ii) four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered,

whichever happens first.

4 General

4.1 Set-off

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

4.2 Indemnities

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

4.3 Partial exercising of rights

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

4.4 Remedies cumulative

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

4.5 Each signatory bound

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

4.6 Counterparts

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

4.7 Governing law

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

EXECUTED as a deed

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Signing page

DATED: _____

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

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.....)
Signature of director)

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

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

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

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

Deleted: Cwlth

.....)
Signature of director)

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

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

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

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

.....)
Signature of director)

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

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

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

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Annexure A - Indicative Access Holder Agreement

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Where an Applicant intends to seek Coal Access Rights and the Applicant has requested that ARTC take part in an initial review of Capacity requirements, ARTC will effectively and reasonably participate in that initial review subject to section 3.6(c).

The purpose of the initial review is to assist the Applicant to provide sufficient information to the HVCCC to enable the HVCCC to determine the impact on Coal Chain Capacity of the Access Rights sought, and to provide advice to the Applicant on that impact and on the operating requirements needed to deliver Coal Chain Capacity and for the Applicant to determine how many Train Paths may be required.

If the other Hunter Valley Coal Chain Participants do not participate reasonably and effectively in the initial review of Capacity, ARTC will not consider itself bound to participate in the review.

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