

MODEL UNDERTAKING - COAL

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED
("ARTC")**

in favour of

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
("ACCC")**

ACCESS UNDERTAKING

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PART 1

HUNTER VALLEY COAL ACCESS UNDERTAKING dated

2006

BY

AUSTRALIAN RAIL TRACK CORPORATION LIMITED ABN 75 081 455 754 of Passenger Rail
Terminal Road, Mile End SA 5000 (“**ARTC**”)

IN FAVOUR OF

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

The purpose of this Model Undertaking - Coal is to set out a preferred model for an Access Undertaking for the ARTC standard gauge network excluding the Hunter Valley coal traffic.

This document is based on the approved ARTC Access Undertaking dated May 2002.

Annotations throughout this document will refer to the Model Undertaking - Coal as “**MUC**”. References specifically to clauses in the original ARTC document in the annotations will be to the “**AAU**” and shown in **this colour** to assist distinguishing from references to the MUC.

Throughout the MUC minor changes have been made to clarify or update wording from the AAU. No commentary is provided for such changes.

All comments enclosed in boxes such as this one are annotations provided for explanatory purposes only and do not form part of the MUC.

1. PREAMBLE

1.1 Introduction

Clause 1.1

The preamble from the AAU was directed substantially towards the genesis of ARTC and its role in promoting interstate rail. For the Hunter Valley Network much of this is peripheral or entirely irrelevant. The preamble in the MUC has been extensively remodelled to recognise the system nature of the Hunter Valley Coal Chain and to focus on the role of ARTC as a key component in that system.

- (a) ARTC is a company under the *Corporations Act 2001* (Cth) owned by the Commonwealth Government. The primary business of ARTC is to provide access to ARTC owned or leased rail infrastructure in Australia to Access Seekers.
- (b) The State Government of New South Wales has granted a 60 year lease to ARTC of the rail corridor, rail track and associated assets for the NSW interstate rail network and Hunter Valley Network, which took effect on 5th September 2004.
- (c) ARTC is responsible for the granting of access to the Hunter Valley Network to Access Seekers.
- (d) ARTC recognises that:
 - (i) the Hunter Valley Coal Chain is a system and that logistics service providers to that system are interdependent;

-
- (ii) the Hunter Valley Network forms one of a number of components of the Hunter Valley Coal Chain;
 - (iii) it is essential to the efficient operation of the Hunter Valley Coal Chain that ARTC provide access to the Hunter Valley Network in a manner that is consistent with the requirements of the Hunter Valley Coal Chain;
 - (iv) the optimal method for ARTC to provide access by Customers to the Hunter Valley Network is through integrated and coordinated planning with other logistics service providers to the Hunter Valley Coal Chain; and
 - (v) the most efficient and effective way to achieve integrated and coordinated planning is for all logistics service providers in the Hunter Valley Coal Chain, including ARTC, to become members of, and actively participate in, the Logistics Team.
- (e) ARTC has prepared and submitted this voluntary undertaking to provide a framework to manage negotiations with Applicants for Access taking into account the characteristics of the Hunter Valley Network and the requirements of the Hunter Valley Coal Chain.

AAU Clause 1.1(h)

This clause has been moved to 1.1(e) in the MUC.

- (f) As the manager of the Hunter Valley Network, ARTC has adopted the concepts of equity and transparency as key elements of its pricing policies and other terms and conditions for access to the Hunter Valley Network. ARTC will not discriminate on the basis of the identity of the Access Seeker. By doing so, ARTC seeks to stimulate customer confidence.

Clause 1.1(f)

The reference (formerly in AAU 1.1(f)) to “stimulating market growth in the rail industry” has been deleted. It is not relevant to coal as there is effectively no modal choice. The utilisation of rail transport services for the haulage of coal in the Hunter Valley, and therefore the utilisation of the rail network in that region is determined by market demand for coal and particularly export coal (though domestic movements continue to increase).

The non-discrimination between Access Seekers on the basis of identity has been extended to cover non-price matters. The same logic that sees equal and transparent treatment with regards pricing applies to all other aspects of the service that would be provided by ARTC. It is not the identity of the Access Seeker per se that is of importance, but criteria such as creditworthiness or ability to obtain accreditation that are the matters of substance that might lead to differences in prices, terms or conditions.

- (g) As an access provider, maintenance of the Hunter Valley Network is a large component of ARTC’s current cost structure. To the extent permissible under agreements entered into by ARTC and the Commonwealth and New South Wales Governments, it is the intention of ARTC that these services will be outsourced and managed under maintenance contracts entered into on commercial terms as a result of a contestable process. ARTC intends to adopt this practice with a view to ensuring that ARTC’s cost structure will reflect efficient infrastructure practice.

Clause 1.1(g)

The MUC includes an explicit reference to the use of efficient costs (see clause 4.9(a)). It is necessary to bring this concept explicitly into the MUC for three reasons;

- a) there will be at least a period of time during which ARTC will not acquire infrastructure maintenance services on a contestable basis, and

-
- b) ARTC, the Commonwealth and NSW Governments may have entered into confidential arrangements for the provision of infrastructure maintenance services that are not specifically aimed at achieving efficient cost outcomes.
 - c) As a matter of prudent economic regulation, it is necessary to place some safeguard against the adoption of inefficient practices where normal market disciplines are not available.

- (h) This Undertaking will be applied consistently to Access Applications where such applications are within the scope of this Undertaking as set out in Part 2.

1.2 Fundamental Objectives

Clause 1.2

The AAU does not contain a section specifying ARTC's fundamental objectives ie what is ARTC attempting to achieve. Although ARTC is ostensibly a private sector company, the objectives of its owners, the Commonwealth Government cannot be assumed to be the same objectives that might apply were the company to be in the private sector. Thus it is important to clearly state what the company's objectives are.

ARTC's purpose for being in business, relevant to this Undertaking is to:

- (a) Manage the Hunter Valley Network on behalf and in the interests of the Australian public;
- (b) Develop the Hunter Valley Network to meet future rail transport needs of the Hunter Valley Coal Chain, and
- (c) Provide access to the Hunter Valley Network to any party seeking to use it to provide rail transport services as part of the Hunter Valley Coal Chain.

1.3 Service Objectives

Clause 1.2

The AAU does not contain a section specifying ARTC's service objectives.

Service objectives are important for the Hunter Valley Coal Chain as they provide the context for what an access provider should be seeking to achieve in providing infrastructure services to that system.. Throughout the MUC, the emphasis is on the rail infrastructure provider acting in accordance with the needs of the Hunter Valley Coal Chain and the recognition of the interconnectedness of that system. ARTC will successfully perform its role in the Hunter Valley Coal Chain if it meets these objectives.

In seeking to fulfil the fundamental objectives stated in clause 1.2, ARTC will structure its activities with aim of achieving the following service objectives:

- (a) plan the availability of Coal Train Paths to Customers on a cooperative and integrated basis with other members of the Logistics Team, and in accordance with the System Rules, with the objective of maximising Capacity and, therefore, fulfilment of coal haulage requirements, consistent with the Forecast Demand;

Clause 1.3(a)

The first objective links the planning of availability of Coal Train Paths with the allocation processes of the Logistics Team. As set out in detail in Part 5, the basis for the management of

Train Paths is fundamentally different in the Hunter Valley to other parts of the rail network.

- (b) ensure that for each Financial Year during the Term there are sufficient Coal Train Paths available to be allocated to each Load-Point in order to move the Aggregate Load-Point Allocation for the relevant Financial Year;

Clause 1.3(b)

This objective links ARTC's capacity provision role with a requirement to meet the capacity allocation of the Hunter Valley Coal Chain as a whole. ARTC has an obligation to meet the system capacity that has previously been nominated annually through the Logistics Team (the determination of which ARTC has contributed to as a member of the Logistics Team).

- (c) make available Coal Train Paths to Customers in accordance with the Integrated Plan;

Clause 1.3(c)

This objective links the actual provision of access to the Integrated Plan prepared by the Logistics Team.

- (d) manage any ARTC Terminal forming part of the Hunter Valley Network to facilitate the achievement of planned Train movements;

Clause 1.3(d)

ARTC is the owner of key terminals within the Hunter Valley Coal Chain at Pt Waratah and Kooragang Island. These terminals need to be managed in a way that will assist in achieving the Integrated Plan. To that end, the planning process and the processes and procedures within the terminals must be consistent with the requirements of the wider coal chain. Note that these terminals also service non-coal traffic and this is covered in the MUG. For the sake of consistency, the objective is articulated in the same terms in both documents.

- (e) maintain the Hunter Valley Network to a standard such that:
 - (i) Trains are able to achieve sectional running times; and
 - (ii) the quality of the track meets Customer needs as identified from time to time;
- (f) adopt standards, rules and procedures consistent with the requirements of:
 - (i) safety;
 - (ii) efficiency;
 - (iii) maximising throughput for the Hunter Valley Coal Chain, consistent with meeting any obligations to non-coal related users of the Hunter Valley Network;
- (g) work closely with other infrastructure access providers to the Hunter Valley Coal Chain to ensure that, to the extent reasonably practicable:
 - (i) standards, rules and procedures are consistent between infrastructure access providers;
 - (ii) Coal Train Paths are made available seamlessly to the extent possible given the commercial relationships between the other infrastructure access providers and users of the Hunter Valley Network; and
 - (iii) where investment or changes to System Rules and/or procedures are required to

provide Capacity that impact more than one infrastructure access provider, these are managed to ensure that the planned increase in Capacity or change to System Rules and/or procedures is achieved.

Clause 1.3(g)

This objective recognises the need to coordinate with other infrastructure owners to achieve the most efficient outcomes. While this is not something that ARTC can mandate, ARTC does have a key influencing role to achieve this outcome.

- (h) achieve financial returns for ARTC’s shareholders commensurate with the risks undertaken and in accordance with regulation.

Clause 1.3(h)

Although mentioned in the next section as related to the objectives of the Undertaking, it is important in the broader context for ARTC’s financial viability to be a key service objective and it is therefore appropriate to include it in this section.

AAU Clauses 1.2(c)(ii)

Public interest is covered under the fundamental objectives.

1.4 Undertaking Objectives

Clause 1.4

The objectives of the undertaking have been modified from those contained in the AAU to recognise the contribution of the rail infrastructure to the operation of the Hunter Valley Coal Chain and the need for the rail infrastructure provider to act in a manner consistent with the needs of that system. References to objectives associated with modal choice have been removed as these are not relevant to the movement of coal.

This Undertaking is a voluntary undertaking submitted by ARTC under the *TPA* Part IIIA. The objectives of this Undertaking are to:

- (a) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing Access Applications;
- (b) use transparent and detailed methodologies, principles and processes for determining access price limits, terms and conditions;
- (c) reach an appropriate balance between:
 - (i) the legitimate business interest of ARTC:
 - (A) the recovery of the costs associated with the granting of Access to the Hunter Valley Network;

Clause 1.4(c)(i)(A)

The word “reasonable” has been deleted. The MUC recognises the use of efficient costs (see clause 4.9(a)).

- (B) a fair and reasonable return on ARTC’s investment in the Hunter Valley Network commensurate with its commercial risk; and

-
- (C) stimulate customer confidence;
 - (ii) the interest of the public:
 - (A) by providing appropriate and efficient rail infrastructure services, which contribute to maximising Capacity and therefore throughput of the Hunter Valley Coal Chain, thereby in turn maximising export revenue to Australia and facilitating domestic trade; and

AAU Clause 1.4(c)(ii)(A)

The AAU provision regarding competition has been removed as ARTC's charter does not mention an objective of increasing competition, nor is ARTC, through its own efforts, able to increase competition, unless it enters the market or seeks to distort the market in some way.

This has been replaced with a clearer exposition of the aspiration in the AAU for the efficient use of resources. The objective recognises the impact of the Hunter Valley rail system as part of the wider coal chain in facilitating exports and domestic trade.

- (B) by promoting other relevant social objectives;
- (iii) the interests of Access Seekers wanting Access to the Hunter Valley Network, including:
 - (A) providing Access in a manner consistent with the requirements of the Hunter Valley Coal Chain;
 - (B) providing sufficient Capacity to meet the Forecast Demand;
 - (C) providing Access on fair and reasonable terms; and
 - (D) providing Access in a open, efficient and non-discriminatory manner;
- (d) provide an efficient, effective and binding resolution process in the event that ARTC and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (e) operate consistently with the objectives and principles in the *TPA* Part IIIA and the Competition Principles Agreement.

PART 2

2. SCOPE AND ADMINISTRATION OF UNDERTAKING

2.1 Scope

Clause 2.1

The scope of the MUC includes both a geographic and traffic boundary. This is required to restrict its application to Hunter Valley coal trains. The model version of the general ARTC standard gauge Undertaking, the Model Undertaking - General (referred to as the MUG) will apply, in part, to the same geographic region but to different traffics. This is an unusual arrangement but is required to avoid discontinuities or unwarranted complexity for services that traverse both the Hunter Valley Network and other parts of the ARTC Network.

- (a) This Undertaking provides for:
- (i) the negotiation of Access required for the operation of Coal Trains and Ancillary Trains by Customers or Operators (as applicable) on the Hunter Valley Network;
 - (ii) investment by ARTC in the Hunter Valley Network to meet the demands of the Hunter Valley Coal Chain;
 - (iii) ensuring that there are sufficient Coal Train Paths available to move the Aggregate Load-Point Allocation in each relevant Financial Year;
 - (iv) the allocation of Coal Train Paths to Customers in accordance with the Integrated Plan;
 - (v) the provision of Ancillary Train Paths to Customers on an ad hoc basis;
 - (vi) the calculation of prices for Coal Trains in accordance with the principles set out in Part 4 of this Undertaking;
 - (vii) an Indicative Access Agreement (Schedule D);
 - (viii) the management of conflicts between Trains in accordance with the Network Management Principles (Schedule F); and
 - (ix) interaction with any other ARTC Undertaking that might impact on the provision of access to rail infrastructure covered by this Undertaking.

Clause 2.1(a)

This section has been expanded to accommodate the need to recognise the MUC and the specific requirements of the Hunter Valley Network such as the provision of capacity, the path allocation process and interaction with the MUG.

The AAU referred to Associated Facilities. In the MUC, the definition of the Network has been expanded to incorporate these and therefore there is no requirement to mention them separately.

- (b) This Undertaking does not extend to providing access to such parts of the ARTC Network not included in the definition of Hunter Valley Network nor to Trains that are not either;
- (i) Coal Trains; or

-
- (ii) Ancillary Trains.
 - (c) If ARTC:
 - (i) becomes a Provider with respect to rail services currently utilising Other Track; and
 - (ii) is permitted by the *TPA* to submit an access undertaking in respect of the provision of access to such Other Track,

ARTC will, as soon as is practicable after becoming such a Provider, submit an amendment to this Undertaking, or a separate access undertaking to the ACCC in respect of the Other Track.

Clause 2.1(c)

This differs from the AAU in that the MUC is to include any additional track not currently covered in this Undertaking through an amendment rather than through a separate Undertaking. This avoids the administrative difficulties that would arise from having to manage additional Undertakings by the same entity (including potentially requiring separate access contracts).

It is noted that there may be occasions when a separate Undertaking is more appropriate, despite the administrative difficulties, such as arise through the MUC and the MUG.

2.2 Grant And Duration Of Undertaking

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 to Customers to the Hunter Valley Network for Coal Trains and Ancillary Trains. This Undertaking takes effect one (1) month after it is accepted by the ACCC under the *TPA* s 44ZZA(3) and will continue until the earlier to occur of:

- (a) the expiry of the Term; or
- (b) withdrawal of this Undertaking in accordance with its terms or the *TPA*.

2.3 Term

This Undertaking will continue to be binding upon ARTC until:

- (a) the 10th anniversary of the Commencement Date; or

Clause 2.3(a)

A term of 10 years has been nominated to reflect the greater maturity and understanding of rail access arrangements than was in place at the time that the AAU was approved. This duration assumes that the concepts contained within the MUC are adopted. It is also appropriate that the term be consistent with the term of the MUG.

- (b) the date upon which the ACCC consents to the withdrawal of the Undertaking by ARTC, whichever is the earlier.

2.4 Relationship Of This Undertaking To Other Undertakings

Clause 2.4

The MUC contemplates a regulatory arrangement that will have trains in the Hunter Valley region operating on the same infrastructure under two different Undertakings. It is necessary

to provide for the potential conflict between them. The network management rules in each model undertaking are the same and recognise the priority of passenger trains and the interactions between various categories of trains. Other provisions in the MUG and the MUC provide for other matters that might lead to conflicting outcomes. This section of the MUC provides for the MUC to take precedence to the extent required to resolve any conflict that might arise between the two undertakings where the two undertakings have not dealt with the matter specifically.

Further the MUC places an obligation on ARTC to use reasonable endeavours to put in place arrangements with other access providers for the allocation of coordinated and efficient Train Paths.

- (a) ARTC recognises that there is a requirement to manage the potentially competing demands of Coal Trains, Ancillary Trains and other Trains working wholly within or transiting through the Hunter Valley Network in an appropriate and effective way.
- (b) In case of conflict between the outcomes from this Undertaking and any other approved ARTC undertaking for Trains other than Coal Trains or Ancillary Trains working wholly within or transiting through the Hunter Valley Network, this Undertaking will prevail to the extent required to resolve the conflict.
- (c) Where a Coal Train or Ancillary Trains is required to traverse a portion of the ARTC Network other than the Hunter Valley Network, to the extent that another approved ARTC undertaking would provide an outcome that is inconsistent or incompatible with this Undertaking had this Undertaking applied to the whole Train journey, this Undertaking is to apply to that Coal Train or Ancillary Train for the whole of its journey to the extent required to resolve the inconsistency or incompatibility.
- (d) In some instances, Coal Trains or Ancillary Trains will require paths that traverse rail infrastructure owned or managed by parties other than ARTC. ARTC will use reasonable endeavours to agree with those owners or managers (as the case may be) of Other Track such procedures and processes as are necessary to provide for the allocation of efficient and coordinated Coal Train Paths or Ancillary Train Paths (as applicable), including that portion of the path that traverses non-ARTC managed infrastructure.

2.5 Review of Undertaking

- (a) If, during the Term, a Material Change occurs, ARTC will seek the approval of the ACCC to vary this Undertaking to the extent necessary to address the Material Change.

Clause 2.5(a)

It is appropriate that the MUC provide for its variation where a material change in circumstances arises. In particular, the interrelated nature of above and below rail services requires that the MUC be capable of responding to change both for the benefit of ARTC and Customers.

Note that if an Access Seeker believes a Material Change has occurred and ARTC refuses to seek an appropriate variation of the Undertaking, it is open to the Access Seeker to raise a dispute under the general dispute resolution provision in clause 3.12.1(a)

- (b) If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC, ARTC may seek the approval of the ACCC to vary this Undertaking.
- (c) Prior to seeking the approval of the ACCC under clauses 2.5(a) or 2.5(b), ARTC shall first consult with Customers regarding the proposed variation.

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

2.6 Existing Contractual Agreements

- (a) This Undertaking applies only to the negotiations of new Access Agreements or the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Nothing in this Undertaking can require a party to an existing access agreement entered into in respect of the provision of Access to vary a term or provision of that Agreement.

Clause 2.6(a)

The MUC recognises that it cannot disturb an existing contractual right. However, it is highly desirable that any access contract for access by coal trains to the Hunter Valley Network be consistent with the MUC. If this cannot be achieved, there is the potential that one or more of the principles underpinning the MUC will be breached eg the pricing principles that govern the way in which prices should be determined or the allocation of paths.

AAU Clause 2.5(b)

This clause has been removed as there are no longer specific rights to specific paths contained in the MUC. This clause was required in the AAU to provide an opportunity for Customers to retain those rights through an extension of an existing agreement. In addition, it would be inimical to the operation of the Hunter Valley Coal Chain for an existing access contract that was inconsistent with the Undertaking to be extended.

- (b) Where this Undertaking is incompatible with an existing Access Agreement, ARTC will offer to negotiate with the relevant Customer, in good faith, a new Access Agreement that is:
- (i) in the main consistent with this Undertaking, but
 - (ii) may also contain transitional arrangements that are inconsistent with this Undertaking.

Clause 2.6(b)

It is highly desirable that Access Agreements are not incompatible with the new Undertaking. While 2.6(a) rightly protects existing Access Agreements, it is appropriate to flag that ARTC will endeavour to resolve such incompatibilities as might exist through negotiation with the relevant Customers. In order to do so, it may be necessary to provide for transitional arrangements that are not compatible with the new Undertaking.

2.7 Insurance

ARTC will take out and maintain:

- (a) a public liability insurance policy; and
- (b) a policy of insurance with respect to ARTC's liability to Customers and Operators (as applicable) under the indemnity provisions in its standard terms and conditions of access (to the extent coverable by insurance) with a reputable and solvent insurer for an amount of \$200 million in respect of each policy containing provisions which are standard industry terms for track owners.

2.8 Contact Details

Clause 2.8

AAU clause 2.7(b) has been relocated to a new sub-clause 2.9 to separate out contact details from the information that ARTC undertakes to make available to various parties.

Persons wishing to contact ARTC for further information or to apply for Access to the Hunter Valley Network to operate Coal Trains should contact ARTC at any of the following addresses:

- (a) The Secretary
Australian Rail Track Corporation Ltd
Keswick Passenger Terminal Road
(Off Sir Donald Bradman Drive)
MILE END SA 5031

Telephone: (08) 8217 4366
Facsimile: (08) 217 4190
- (b) The Secretary
Australian Rail Track Corporation Ltd
PO Box 10343
Gouger Street
ADELAIDE SA 5000
- (c) secretary@artc.com.au

2.9 Information Publicly Available

Clause 2.9

The information in AAU clause 2.7(b) has been relocated to a new sub-clause 2.9 to separate out contact details from the information that ARTC undertakes to make available to various parties.

ARTC will maintain an internet web-site at www.artc.com.au on which will be published various information regarding ARTC and this Undertaking, available to the general public, including:

- (a) a map containing a geographical description of the Hunter Valley Network;
- (b) a narrative description of the Hunter Valley Network;
- (c) the DORC valuation for each Segment of the Hunter Valley Network;
- (d) the Floor Limit and Combinatorial Ceiling Limit for each Segment;

Clause 2.9(c), (d)

In the interests of transparency, key components of access prices for should be publicly available. This replaces the former AAU Clause 2.7(b)(iii) which has been made redundant by the reformulation of what was formerly AAU clause 2.7(b)(iv) and dealt with in clause .

- (e) this Undertaking, containing (inter alia) an Indicative Access Agreement;
- (f) a copy of ARTC's most recent annual report;

AAU Clause 2.7(b)(v)

As the Network Management Principles are contained within the Undertaking, it is not necessary to separately list them.

- (g) a graphical representation by traffic of the existing allocation of Capacity on the Hunter Valley Network, including any Train Path (excluding track possessions for Hunter Valley Network maintenance);

Clause 2.9(g)

The MUC and its interaction with an Undertaking covering other traffics in the Hunter Valley require a more sophisticated graphical depiction of both capacity that is committed to other traffics and capacity that is available for coal trains.

- (h) indicative section running times for indicative Coal Trains by corridor;
- (i) a description of the rules of operation at any ARTC Terminal to which this Undertaking applies, together with any other relevant information;
- (j) agreed standards and rules for the operation of Coal Trains and Ancillary Trains, and
- (k) route standards by corridor.

AAU Clause 2.7(b)(xi)

The reference to performance indicators has been deleted as the MUC does not specify any such indications due to the complexity of interactions between 'above' and 'below' rail operators and the cyclic nature of coal trains. See also MUC Part 8.

2.10 Other Information

ARTC will make origin-destination Charges in respect of Coal Trains for which Access has been granted together with a description of the Coal Trains to which the Charges relate available to the following parties on request;

- (a) Access Seekers;
- (b) any party producing coal that is transported on the Hunter Valley Network; and
- (c) any party that receives coal for consumption within Australia, transported on the Hunter Valley Network.

Clause 2.10

It is important that the pricing of rail access be available to parties who are directly affected by them. However, it is also important to avoid the introduction of information to the public domain that might have an impact that is inimical to the national interest in the conduct of price negotiations for transported product. For this reason the MUC requires ARTC to make coal access pricing reasonably freely available within a constrained group that is directly affected by the information.

PART 3

3. NEGOTIATING FOR ACCESS

3.1 Introduction

ARTC will negotiate with any Applicant in good faith to provide access to the Hunter Valley Network for the purpose of providing rail transport services as part of the Hunter Valley Coal Chain. ARTC recognises that the negotiation process needs to be flexible to suit specific circumstances and is willing to tailor the process in consultation with each Applicant. However, ARTC also recognises that the provision of Access impacts on the capacity of the Hunter Valley Coal Chain. It is therefore appropriate that the negotiation process yields outcomes that are consistent with the objectives for the operation of the Hunter Valley Coal Chain as set out in clause 1.2. This Undertaking provides the framework to achieve these objectives.

Clause 3.1

Amendments to this clause reflect the system nature of the Hunter Valley Coal Chain and the need for the MUC to support the system objectives. References to encouraging utilisation of the network have been removed as not being applicable to the Hunter Valley Network.

3.2 Framework

This part of the Undertaking outlines the process which will be followed to enable an Applicant to obtain Access. It provides for:

- (a) preliminary meetings and exchanges of information;
- (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 Provision Of Information

Clause 3.3

This clause has been reoriented to reflect the information that an Access Seeker could reasonably be expected to require for coal train operations in the Hunter Valley.

- (a) Subject to clause 3.3(b), ARTC will, if requested by an Applicant, provide the following information to Applicants to assist with negotiations:
 - (i) Hunter Valley Network operating standards including as a minimum;
 - (A) axle load limitations;
 - (B) train length limitations;
 - (C) maximum allowable speeds;
 - (D) infrastructure characteristics;

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- (E) applicable safeworking requirements;
 - (F) section running times and required minimum power to mass ratios; and
 - (G) any System Rules relevant to the operation of Coal Trains or the Hunter Valley Network.
- (ii) a description of the rules of operation at any ARTC Terminal to which this Undertaking applies, together with any other relevant information and clarification of any specific issues raised by the Applicant with regard to any relevant ARTC Terminal;

Clause 3.3(a)(iii)

This repeats information available through the web-site (clause 2.9(i)) regarding terminal operations and rules. However, it is likely that an Applicant will want to clarify specific matters in this area as each Applicant may have specific needs that may or may not be accommodated within a common user terminal.

- (iii) DORC values in relation to the Segments to which Access is being sought;
- (iv) the Floor Limit, Mezzanine Limit, Combinatorial Ceiling Limit and Stand Alone Ceiling Limit applicable in the current Financial Year for Segments to which Access is being sought;

Clause 3.3(a)(iv)

This reflects the change in the revenue limits from the AAU and is more relevant to Coal Trains.

- (v) the Available Capacity for Coal Trains in a graphical format; and
 - (vi) any other information relating to Capacity, Coal Trains, Ancillary Trains or ARTC Terminal operations reasonably required by the Applicant in relation to the Access Application and which ARTC could reasonably be expected to provide.
- (b) ARTC's obligation under clause 3.3(a) is subject to:
- (i) ARTC not disclosing any information which would breach a confidentiality obligation binding on it;
 - (ii) the Applicant agreeing to pay the Standard Information Fee for the provision of the information.
 - (iii) the Applicant agreeing to pay, in addition to the Standard Information Fee, the reasonable costs incurred by ARTC in obtaining information that is not ordinarily and freely available to ARTC.
- (c) ARTC may, at its absolute discretion, waive its right to charge the Standard Information Fee to any Applicant.

Clause 3.3(b) & 3.3(c)

In order to collate, maintain and publish the standard information, ARTC will incur costs and it is reasonable that ARTC be allowed to charge a fee to defray those costs. Such a fee should have a limit to avoid the potential for discouraging genuine enquiries, hence the MUC sets the fee at \$1,000 (see Schedule J).

Charging a fee also serves the purpose of discouraging applications for the information from parties that are not genuinely seeking access (eg rail enthusiasts). There may be a legitimate

public interest served by providing information to such people, but that is not the purpose of an access undertaking and therefore the undertaking should not be used to further that purpose.

The costs claimed for the provision of additional information need to be reasonable and justifiable in order to prevent cost being used inappropriately as a mechanism to avoid the provision of information by ARTC.

3.4 Parties To Negotiation

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

Clause 3.4(b)

Clarifying that ARTC is obliged to negotiate with Accredited Operators. The drafting in the AAU left open the possibility (presumably unintentionally) that ARTC would only be obliged to negotiate with parties that were not Accredited Operators but who could secure the services of one.

- (c) ARTC will negotiate Access with an Applicant which is not an Accredited Operator provided that the Applicant, if it becomes a Customer:
 - (i) will ensure that the relevant Coal Trains and Ancillary Trains will be operated by an Accredited Operator in accordance with the Access Agreement; and
 - (ii) will be responsible for complying with all of the terms and conditions of the Access Agreement that are the responsibility of the Customer.

Clause 3.4(c)

The MUC provides that parties other than Accredited Operators may hold an Access Agreement and clarifies the responsibility of the Customer for fulfilling its obligations under the Access Agreement where the Customer and Accredited Operator are different entities.

- (d) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC's reasonable satisfaction that it is able to meet the prudential requirements set out in clause 3.4(e). In the event the Applicant cannot meet these prudential requirements, ARTC may refuse to commence negotiations or may cease negotiations with that Applicant.
- (e) For the purposes of clause 3.4(d), the Applicant will be required to meet the following prudential requirements:
 - (i) the Applicant must be Solvent;
 - (ii) the Applicant, must not be currently, or have been in the previous 2 years, in Material Default of any agreement with ARTC, except where such Material Default is disputed by the Applicant.

Clause 3.4(e)(ii)

References to disputes with other access providers have been deleted because the relationship between an Applicant and another access provider is not relevant to the relationship with

ARTC, nor, of itself, is it indicative of insolvency or inappropriate business practice. Similarly the reference to Related Party has been removed.

- (f) Notwithstanding any rights accorded to ARTC in clauses 3.4(a) – 3.4(d), ARTC undertakes not to unreasonably refuse to commence or continue to negotiate with an Applicant, nor to engage in conduct for the purpose of preventing or hindering an Applicant’s access to the Hunter Valley Network for the purpose of operating Coal Trains.

Clause 3.4(f)

The MUC explicitly obliges ARTC to engage in negotiations on a reasonable basis. This is required to balance ARTC’s rights not to negotiate under certain circumstances. It is an obligation based on reasonableness and prevents capricious or unreasonable behaviour.

It also contains the anti-hindrance requirement from the *TPA*.

AAU Clauses 3.4(f)

AAU clause 3.4(f) providing for the Applicant to seek dispute resolution where ARTC had not entered or otherwise ceased negotiations has been deleted from the MUC.

The MUC, like the AAU uses an inclusive dispute resolution process (ie any matter may be disputed unless expressly excluded). However, throughout the AAU, there are a number of instances where express reference is made to seeking dispute resolution. See AAU clauses 3.4(f), 3.8(b), 3.8(e), 3.8(g), 3.9(d), 3.10(e). The MUC has removed these references, which has the benefit of removing unnecessary complexity from a number of provisions. Instead, either party can rely on the general clause 3.12.1(a) to activate the dispute resolution process. An exception is made in clause 5.2(f) where specific reference to the dispute resolution process is made to avoid doubt.

- (g) If ARTC refuses to negotiate for any of the reasons as described in clauses 3.4(a) or 3.4(d), it must, within 5 Business Days of the decision to refuse to negotiate, explain in writing to the Applicant the reasons for such refusal.

Clause 3.4(g)

The time-frame for providing written notice to the applicant has been reduced from effectively two weeks to one, noting that the MUC refers to Business Days to make reasonable allowance for public holidays etc. It is appropriate to shorten the notice time-frame as there is no clear reason for delaying such notice once a decision not to negotiate has been taken.

- (h) If at any time ARTC is of the view that an Applicant’s request for Access is frivolous in nature, ARTC may issue the Applicant with a notice of intent to terminate its consideration of the Application, to become effective 10 Business Days after the issue of the notice.
- (i) A notice issued by ARTC under clause 3.4(h) must provide the Applicant with an opportunity to respond to the view that the Application is frivolous prior to the notice taking effect. If the Applicant provides ARTC with a response such that a reasonable person would conclude that the Application was a genuine attempt to secure Access in accordance with this Undertaking, ARTC will withdraw the notice and continue to consider the Application in accordance with this Undertaking.

Clauses 3.4(h), 3.4(i)

AAU clause 3.4(g) providing for ARTC to seek an arbitrator’s ruling to determine that an Application is frivolous has been modified in the MUG by providing ARTC with the right for ARTC to directly determine that an Application is frivolous. The mechanism provides an opportunity for the Applicant to respond and if the response demonstrates a genuine attempt

to secure access, then the Application will not fail. As ARTC's determination can be disputed via the general dispute resolution process, little is lost except that the onus to engage in dispute resolution falls to the Applicant rather than ARTC. On the other hand, the heavy burden on ARTC to seek an arbitrator's ruling to avoid a frivolous Application is removed. This position in the MUC is premised on it being to ARTC's advantage to want to progress Applications – which prima facie would appear to be the case. The position might be different if ARTC did not have an incentive to deal with third parties (eg if it was competing directly with those parties).

3.5 Confidentiality

- (a) ARTC and the Applicant will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged as part of the negotiation for Access under this Undertaking, without the approval of the party who provided it, except where disclosure is in accordance with clause 3.5(c). If required by either party, the parties shall enter in appropriate confidentiality arrangements to reflect this obligation.
- (b) Both ARTC and the Applicant will ensure that all Confidential Information provided by the other party is used only for the purposes for which the information was provided.
- (c) Clauses 3.5(a) and 3.5(b) shall not apply to disclosure of Confidential Information in any of the following circumstances:
 - (i) any disclosure required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority;
 - (ii) disclosure to recipient's advisers under a duty of confidentiality;
 - (iii) disclosure to the Logistics Team or advisors to the Logistics Team for the purpose of determining Available Capacity;

Clause 3.5(c)(iii)

This is necessary to allow for discussion of an Applicant's application with the Logistics Team for the determination of any system effects from the proposed operation.

- (iv) where such Confidential Information was obtained lawfully from a third party without restriction on use or disclosure;
- (v) where disclosure by ARTC is required by this Undertaking;

AAU clause 3.5(c)(v)

Given the MUC approach to path allocation in accordance with the Integrated Plan, there will not be any conflicting access applications. Accordingly, AAU clause 3.5(v) has been deleted.

- (vi) disclosure by Applicants of details of Available Capacity to their customers or Operators, or potential customers for the purpose of determining whether or not to accept the Access Rights offered by ARTC; or
- (vii) where ARTC and the Applicant agree the Confidential Information may be disclosed.

3.6 Access Application

Clause 3.6

The MUC does away with the AAU Schedule A as it did not contain any specific information

or facilitate any specific process that could not be achieved through a minor modification to the wording of the MUC. To assist comparison with the AAU, a blank Schedule A is retained.

- (a) Requests for Access must be in the form of an Access Application.
- (b) In order to be considered, an Access Application must at least include the information set out in Schedule B.
- (c) Prior to submitting an Access Application, an Applicant may seek initial meetings with ARTC to discuss the prospective Access Application and to seek clarification of the process as outlined in this Undertaking and in particular, the information requirements set out in Schedule B.

3.7 Acknowledgment

- (a) Upon receiving an Access Application from an Applicant, ARTC must acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within five (5) Business Days of its receipt, or such longer period as specified in accordance with clause 3.7(b).
- (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.

In such circumstances, ARTC will advise the Applicant of the additional information or the clarification required within 5 Business Days of receipt of the Access Application. Upon receiving the required information or clarification from the Applicant, ARTC must provide written acknowledgment of the receipt of the completed Access Application within 5 Business Days.

3.8 Indicative Access Proposal

- (a) Subject to clause 3.8(b), ARTC will use reasonable efforts to provide an Indicative Access Proposal to the Applicant within 20 Business Days of the acknowledgment given under clause 3.7.

AAU Clause 3.8(a)

The time allowed to provide the Indicative Access Proposal (IAP) has been reduced from 30 to 20 Business Days. The rationale for this is that many proposals ought to be able to be finalised quickly and that 20 Business Days allow a full month to achieve this. Where an IAP would take longer this can be covered by clause 3.8(b), but this should be the exception. Note that the QR and WA access regimes allow for 30 days (equivalent to 22 Business Days) to provide an IAP.

- (b) In assessing an Access Application, ARTC may consider that, due to the complexity of the Access Application or due to other extenuating circumstances, it is not reasonable for it to provide an Indicative Access Proposal within the 20 Business Days referred to in clause 3.8(a). In these circumstances, ARTC will advise of the delay and the reasons for it in its acknowledgment and within a further 5 Business Days will advise the Applicant of its estimate of the time required to deliver the Indicative Access Proposal. ARTC will use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by ARTC.

Clause 3.8(b)

The parts of clause 3.8(b) that in the AAU dealt with dispute resolution have been removed with reliance placed instead on the general dispute resolution provision in clause 3.12.1(a).

- (c) 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;

AAU Clause 3.8(c)(iii)

AAU clause 3.8(c)(iii) has been deleted because under the Hunter Valley Coal Chain capacity allocation arrangement contained in the MUC, ARTC will not have to manage conflicting access applications because they do not arise. See Part 5 for an explanation of how capacity is managed.

AAU Clause 3.8(c)(iv)

AAU clause 3.8(c)(iv) has been deleted as the standard terms and conditions are contained within the Indicative Access Agreement which is available from the ARTC web-site as noted in clause 2.9(e) and also forms part of the Undertaking.

- (iii) an initial estimate of the Charges for the Access Rights, based on the pricing principles set out in Part 4;
- (iv) details of the additional information required for ARTC to progress the proposal and further develop the Charges and terms and conditions for acceptance;
- (v) an explanation of the prevailing Coal Train Path planning process; and
- (vi) where relevant, any matter relating to the Applicant's intended use of any ARTC Terminal that it would be prudent to bring to the Applicant's attention.

Clause 3.8(c)(vi)

Given the variety of activities that might or might not be permitted at any particular terminal, it is difficult to specify any concise information that ARTC ought to provide. However, given that the Applicant will have specified in its application the activities it intends to perform at the ARTC Terminal, ARTC will be in a position to advise, for example, that a particular activity cannot be performed at the requested terminal or is restricted in some way. This may not be obvious to the Applicant at the time of the initial application and it is important that ARTC make clear whether there is any impediment before the Applicant engages in the negotiation process so that alternative arrangements can be considered without delay.

- (d) The Indicative Access Proposal, although not binding on either party, represents an indication of the terms and conditions on which ARTC is willing to provide Access. As such it will;
- (i) contain indicative arrangements;
 - (ii) be consistent with the principles outlined in the Indicative Access Agreement unless

otherwise discussed between ARTC and the Applicant; and

- (iii) address at least the matters set out in Schedule C;

Clause 3.8(d)

The Indicative Access Proposal ought to be reflective of the form and nature of Access that ARTC reasonably believes it will be willing to offer the Applicant on the basis of available information at the time. The form of caveat in the AAU was unnecessarily broad. The MUC takes a different approach while still retaining for ARTC the right to vary the final offer.

AAU Clause 3.8(e)

AAU clause 3.8(e) referring to dispute resolution has been removed.

AAU Clause 3.8(f)

This clause has been deleted as it is not relevant for access by coal trains to the Hunter Valley Network.

AAU Clause 3.8(g)

AAU clause 3.8(g) referring to dispute resolution has been removed.

3.9 Negotiation

Clause 3.9

The timeframes in clause 3.9 have been reduced to 20 Business Days, consistent with elsewhere in the MUG negotiation process. Given the nature of the matters dealt with this length of time should be ample.

- (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 must notify ARTC of its intention to do so within 20 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 clause 3.8 and the negotiation process outlined in this Part 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 shall notify ARTC of its concerns within 20 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 clause 3.9(b) within 20 Business Days of receipt of notification of the concerns. If ARTC is unable to address the concerns of the Applicant within such time frame, ARTC will notify the Applicant in writing as to the reasons why and advise an intended course of action, with indicative time frames, of how the concern is being addressed. If the Applicant is satisfied with the response received from ARTC, including any revision to the Indicative Access Proposal, it must notify ARTC of its intention to proceed with negotiations within 20 Business Days of receiving ARTC's response.

AAU Clause 3.9(d)

AAU clause 3.9(d) referring to dispute resolution has been removed.

3.10 Negotiation Process

- (a) If the Applicant indicates its willingness to progress negotiations under clause 3.9, then both parties shall commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The negotiation period shall commence upon the Applicant providing a notification pursuant to clause 3.9 and shall cease upon any of the following events:
 - (i) execution of an Access Agreement in respect of Access sought by the Applicant;
 - (ii) written or electronic notification by the Applicant that it no longer wishes to proceed with its Access Application;

AAU Clause 3.10(b)(iii)

AAU clause 3.10(b)(iii) has been deleted from the MUC. This placed a 3 months limit on negotiations unless extended by agreement. It is not at all clear that this is in either party's interest, and for the Applicant could require going through the entire process again from the start to force a reopening of negotiations. It is unlikely that the limit would have the presumably intended effect of speeding up negotiations and merely adds an element of uncertainty to the process.

- (iii) the arbitrator, as a result of an arbitration under clause 3.12, makes a determination that the negotiation period has or should cease; or

Clause 3.10(b)(iii)

In place of the AAU provision allowing ARTC to seek an arbitrator's ruling to cease negotiations where ARTC was of the view they were not progressing in good faith, the MUC makes a general provision for the arbitrator to end the negotiation period. This is in line with the removal of specific references to arbitration and a reliance on the general dispute resolution provision in clause 3.12.1(a).

- (iv) if ARTC receives evidence that the Applicant no longer satisfies the prudential requirements of clause 3.4(e); on receiving such evidence ARTC shall advise the Applicant of the evidence and issue a notice of intent to end the negotiation period, to become effective 10 Business Days after the issue of the notice and within that period the Applicant does not provide ARTC with reasonable evidence that it continues to satisfy the prudential requirements of clause 3.4(e).

Clause 3.10(b)(iv)

Provision has been made to allow the Applicant to show evidence of continued ability to meet the prudential requirements. This provides the Applicant with a safeguard against the possibility of ARTC acting on unsubstantiated evidence (eg rumour of insolvency) that are the result of a misunderstanding of the true facts. As the nature of the negotiation does not involve ARTC being required to allocate any specific capacity to the Applicant (as this is prior to agreement being reached and specific paths are not being allocated), ARTC bears no substantial cost from the inclusion of this safeguard.

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

AAU clause 3.10(d)

AAU clause 3.10(d) deleted because dealing with two or more Access Seekers' mutually exclusive rights is not necessary in the coal context – see explanation in Part 5.

AAU Clause 3.10(e)

AAU clause 3.10(e) referring to dispute resolution has been removed as reliance is placed on the general dispute resolution clause 3.12.1(a).

3.11 Access Agreement

Clause 3.11

The MUC clarifies that a party to an Access Agreement does not have to be an Accredited Operator, but specifies the obligations that fall to the Customer where it is not the Accredited Operator. The MUC removes the potential for a tri-part agreement that would otherwise complicate the relationships between the parties and confuse responsibilities (formerly in AAU clause 3.11(a)). Terminal Activities have also been added.

- (a) The granting of Access will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be ARTC and the Applicant (who, on execution of the Access Agreement, will become the Customer).
- (b) The Customer in an Access Agreement need not be the Operator for the relevant Trains or Terminal Activities, but the Access Agreement will contain a condition that the Trains and Terminal Activities must be operated by an Accredited Operator.

Clause 3.11(b)

The accreditation issue has been separated out – this was previously dealt with in AAU clause 3.11(a).

- (c) The Access Agreement must, unless otherwise agreed between ARTC and the Applicant, be consistent with the principles outlined in the Indicative Access Agreement and must address at least the matters set out in Schedule C. Schedule C does not provide an exhaustive list of the issues that may be included in an Access Agreement.
- (d) The Access Agreement will contain a requirement that where the Customer is not the Operator of any Coal Train, Ancillary Train or Terminal Activity, prior to the Operator engaging in any relevant operation, the Customer will;
 - (i) notify ARTC the identity of the Operator;
 - (ii) provide ARTC with evidence that the Operator is appropriately Accredited to perform the relevant operation; and
 - (iii) provide to ARTC any other information regarding the Operator that ARTC may reasonably require for it to safely manage the Hunter Valley Network.

Clause 3.11(d)

ARTC has a legitimate interest in ensuring that the Operator of the service is accredited. ARTC is entitled to know the identity of the Operator and have confidence in the Operator's ability to operate safely on the network – to this extent it is appropriate for ARTC to require the Customer to provide details of the Operator, its Accreditation and any operational safety related matters.

Day to day operational details ie relating to actual operation of Trains “on the day” are covered through detailed operating requirements contained in the Access Agreement and interface documentation provided for in that agreement and these will need to recognise that the Operator may not hold the Access Agreement but be operating as a sub-contractor.

It is not necessary for ARTC to require information on the commercial relationship between the Customer and the Operator.

- (e) Once the Applicant has notified ARTC that it is satisfied with the terms and conditions of the Access Agreement as drafted, ARTC will, as soon as reasonably practicable, provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (f) The parties will use reasonable endeavours to duly execute the final Access Agreement as soon as practicable after its completion by ARTC.

3.12 Dispute Resolution

3.12.1 Disputes

- (a) If any dispute arises under this Undertaking or in relation to the negotiation of Access between an Applicant and ARTC (“**Dispute**”) then, unless otherwise expressly agreed to the contrary by both parties, such Dispute shall be resolved in accordance with this clause 3.12 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 clause 3.12. The parties must use reasonable endeavours acting in good faith to settle the Dispute as soon as is practicable.
- (b) Disputes in relation to an Access Agreement once executed shall be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

3.12.2 Negotiation

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

3.12.3 Mediation

- (a) If the Dispute is not resolved under clause 3.12.2 within 10 Business Days after the date of the Dispute Notice then:
 - (i) if the parties agree, they shall attempt to resolve the Dispute by mediation pursuant to clauses 3.12.3(b), (c) and (d); or
 - (ii) if the parties do not wish to resolve the Dispute by mediation under clauses 3.12.3(b), (c) and (d), either party may by notice in writing to the other and the ACCC, refer the Dispute to be determined by arbitration under clause 3.12.5(b).
- (b) If this clause applies to the Dispute, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.
- (c) If the Dispute is not resolved within 10 Business Days after being referred to the chief executive officers under clause 3.12.3(b), the Dispute will be referred to formal mediation in South Australia to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within 10 Business Days, a mediator appointed by the President of the Law Society of South Australia acting on the request of either party.

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- (d) Unless the parties agree otherwise:
 - (i) the mediation shall be conducted by a mediator under the “Guidelines for Legal Practitioners Acting as Mediators” of the Law Society of South Australia (whether or not the mediator is a legal practitioner);
 - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
 - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
 - (iv) the costs of the mediator will be borne equally by the parties.

3.12.4 Conflict Manager

- (a) At any time prior to the commencement of arbitration proceedings under clause 3.12.5, the parties may agree to refer the Dispute to a conflict manager to facilitate the resolution of the Dispute.
- (b) Prior to the referral of the Dispute to the conflict manager, the parties must reach agreement on:
 - (i) the identity of the person or body to be appointed as the conflict manager; and
 - (ii) the role of the conflict manager; and
 - (iii) the duration, terms and conditions of appointment of the conflict manager; and
 - (iv) the payment of the costs of the conflict manager; and
 - (v) both parties indemnifying the conflict manager from any claims made against the conflict manager arising in connection with the performance of its duties, such indemnities excluding circumstances where the conduct of the conflict manager constitutes wilful negligence, dishonest or unlawful conduct; and
 - (vi) whether the process will operate concurrently with or terminate any negotiation or mediation proceedings that have commenced in relation to the Dispute (if any); and
 - (vii) the cessation of these proceedings; and
 - (viii) the mechanism for the referral of the Dispute to arbitration under clause 3.12.5.

3.12.5 Arbitration

- (a) At any time after the appointment of the mediator (if any) under clause 3.12.3(c) or as otherwise permitted by this Undertaking, either party may by notice in writing to the other and the ACCC terminate the mediation proceedings and notify the ACCC of a Dispute to be determined by arbitration under this clause 3.12.5(b). If the Applicant serves notice on the ACCC under this clause 3.12.5(a), that notice shall also include an acceptance by that Applicant of:
 - (i) the obligation to pay the costs (if any) described in clause 3.12.5(b)(xiii) and clause 3.12.5(b)(xiv) as determined by the ACCC under those clauses; and
 - (ii) the obligation to indemnify the ACCC from any claims made against the ACCC arising in connection with the performance by the ACCC of its duties under clause 3.12.5, such indemnity excluding circumstances where the conduct of the ACCC constitutes wilful negligence, dishonest or unlawful conduct.

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- (b) Where a Dispute is referred to arbitration under this clause 3.12.5(b) (whether under clauses 3.12.3(a)(ii) or 3.12.5(a)), the following shall apply:
- (i) subject to clause 3.12.6, the arbitrator shall be the ACCC. For the purposes of a particular arbitration, the ACCC is to be constituted by 2 or more members of the ACCC nominated in writing by the chairperson of the ACCC;
 - (ii) the ACCC shall not proceed with the arbitration unless and until the Applicant has accepted the obligation to pay the costs (if any) described in clause 3.12.5(b)(xiii) and clause 3.12.5(b)(xiv) as determined by the ACCC under those clauses;
 - (iii) the procedures of the arbitration will be determined by the *TPA* Part IIIA Division 3 Subdivision D except that:
 - (A) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
 - (B) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration; and
 - (C) the arbitrator must include in the determination findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
 - (iv) the arbitrator will when conducting the arbitration:
 - (A) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
 - (B) 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;
 - (C) call on any party the arbitrator believes necessary to give evidence;
 - (D) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
 - (E) present their determination in a draft form to the parties and hear argument from the parties before making a final determination; and
 - (F) hand down a final determination in writing which includes all their reasons for making the determination;
 - (v) the arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
 - (A) the notification of the Dispute is vexatious;
 - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
 - (C) the party who notified the Dispute has not engaged in negotiations in good faith;
 - (vi) in deciding a Dispute, the arbitrator must take into account:
 - (A) the principles, methodologies and provisions set out in this Undertaking;
 - (B) the objectives and principles enunciated in the *TPA* Part IIIA and the

Competition Principles Agreement;

- (C) ARTC's legitimate business interests and investment in the Hunter Valley Network;
- (D) the costs that ARTC incurs in providing Access, including any costs of extending the Hunter Valley Network, but not costs associated with losses arising from increased competition in upstream or downstream markets nor any costs incurred due to arrangements with any Government that require ARTC to incur costs above efficient costs;

Clause 3.12.5(b)(vi)(D)

Reference added regarding any costs imposed on ARTC due to the lease arrangements entered into between ARTC, the Commonwealth and NSW Governments. As these costs (to the extent that they exist) represent a non-transparent transfer of costs at the discretion of governments, it is inappropriate that they be included in any calculation of efficient cost of providing the network.

- (E) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;
- (F) the interests of all persons who have rights to use the Hunter Valley Network;
- (G) the operational and technical requirements necessary for the safe and reliable operation of the Hunter Valley Network;
- (H) the economically efficient operation of the Hunter Valley Network and the Hunter Valley Coal Chain;
- (I) the Applicant's legitimate business interests in having Access to the Network;

Clause 3.12.5(b)(vi)(I)

This is a new term. Given that the arbitrator is to take into account ARTC's legitimate business interests, it is appropriate that the arbitrator also consider the interests of the Applicant.

- (J) the benefit to the public from having competitive markets;
- (K) the efficient use of transport infrastructure and resources through promoting economically efficient movement of passengers and freight, particularly with regard to the efficient transport of exports to ports;

Clause 3.12.5(b)(vi)(K)

The amendment requires the arbitrator to have regard to public interest in the efficiency of any relevant transport modes for the movement of people and goods, but particularly with respect to delivery of export goods to ports.

- (L) promotion of any relevant social objectives, and

Clause 3.12.5(b)(vi)(L)

The proposed amendment requires the arbitrator to have regard for the public interest in the promotion of any relevant social objectives eg: the cost to the community of road accidents from heavy vehicles, the relative energy efficiency of various transport modes..

-
- (M) any other matters that the arbitrator thinks are appropriate to have regard to;
 - (vii) in making its determination, the ACCC:
 - (A) may deal with any matters referred to in the *TPA* s 44V;
 - (B) must not make a determination that would have any of the effects described in the *TPA* s 44W;
 - (C) must take into account the matters referred to in the *TPA* s 44X;
 - (D) comply with the procedures described in the *TPA* Part IIIA Division 3 Subdivision D; and
 - (E) must not make a determination that is inconsistent with the terms of this Undertaking;

Clause 3.12.5(b)(vii)(E)

Added to clarify that the determination by the arbitrator must be in conformance with the MUC.

- (viii) the arbitrator may publish its determination at its discretion subject to consideration of submissions by either party to the arbitration that information supplied by them contains commercially sensitive or 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;
- (ix) the arbitrator may join the conduct of separate arbitrations if the arbitrator considers that:
 - (A) there are one or more issues common to the arbitrations; and
 - (B) the joining of the arbitrations will not unreasonably delay the process, or unreasonably increase the costs, of the arbitrations.
- (x) the arbitrator may join one or more additional persons as a party to an arbitration if:
 - (A) 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
 - (B) 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;
- (xi) if the arbitrator joins the conduct of separate arbitrations or joins an additional person as a party to the arbitration, the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality in determining how it will conduct the arbitration;
- (xii) the determination of the arbitrator shall be final and binding on the parties subject to any rights of appeal;
- (xiii) the ACCC may charge for its costs in conducting an arbitration of a Dispute in the manner and up to the maximum amount prescribed by the regulations of the *TPA*;

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- (xiv) the costs of the parties to the arbitration shall 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;
 - (xv) except where the determination or direction has been appealed by the Applicant, 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 for that Applicant;
 - (xvi) except where the determination or direction by the arbitrator has been appealed by ARTC, ARTC will comply with the lawful directions or determinations of the arbitrator; and
 - (xvii) ARTC will indemnify the ACCC from any claims made against it arising in connection with the performance by the ACCC of its duties under clause 3.12.5, such indemnity excluding circumstances where the conduct of the ACCC constitutes wilful negligence, dishonest or unlawful conduct.

3.12.6 Alternative Arbitrator

In the event that the ACCC does not have power to act, or decides not to act, as arbitrator in respect of any Dispute:

- (a) the arbitrator shall be appointed by the parties, or where agreement cannot be reached by the parties within 10 Business Days from the date on which the Dispute is referred to arbitration, the arbitrator shall be appointed by the President at the relevant time of the South Australian Law Society;
- (b) the arbitrator must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as arbitrator, he or she being required to fully disclose any such intent or duty before his or her appointment; and
 - (iii) not be an employee, contractor, agent or advisor of the Applicant or ARTC or a Related Party of either of them; and
- (c) any reference to the ACCC in clause 3.12.5 shall be taken to be a reference to the arbitrator appointed pursuant to this clause 3.12.6.

Clause 3.12.6

These provisions are required as a fallback for the effectiveness of the dispute resolution provisions in the case that ACCC is not in a position to act as arbitrator.

PART 4

4. PRICING PRINCIPLES

Part 4

The MUC has, in the main, adopted the pricing principles and practices used under the NSW Rail Access Undertaking (3 September 2004). This requires substantial change to the equivalent section in the AAU. Broadly, the key changes are in the areas of:

- References to costs have been clarified as referring to efficient costs (see clause 4.9(a)).
- Prices for Coal Trains are on a net tonne basis (no multi-part pricing and no differentiation based on train characteristics).
- Matters relating to valuation of the Hunter Valley Network.
- Identification of overheads applicable to the Hunter Valley Network.
- Annual price determination.
- Use of an “Unders and Overs” account.

4.1 Objectives

ARTC will develop its Charges with a view to achieving the objective set out in clause 1.4(c). As part of achieving that objective, ARTC has a legitimate business interest in recovering its costs associated with granting Access to the Hunter Valley Network for the purpose of operating Coal Trains and obtaining a fair and reasonable return on ARTC’s investment in the Hunter Valley Network commensurate with its risk and its competitive environment.

4.2 Charge Differentiation

In formulating its Charges, ARTC will have regard to a range of factors which impact on its business including, but not limited to, the following:

- (a) the origin and destination of the relevant Coal Train;

Clause 4.2(a)

Unlike the AAU, the MUC does not discriminate on the basis of train characteristics. The key determinant of price is the distance travelled and therefore the origin and destination of the train. Introduction of train characteristics as a determinant of pricing would lead to substantial complexity and may inhibit efficient operation of the Hunter Valley Coal Chain by encouraging behaviours inimical to the overall performance of the coal chain.

AAU Clause 4.2(b)

Deleted. The MUC does not have Indicative Access Charges for Coal Trains.

- (b) the commercial impact on ARTC’s business, which without limitation includes factors such as:
 - (i) the term of the Access Agreement;
 - (ii) the potential for growth of the business;

-
- (iii) the opportunity costs to ARTC;
 - (iv) the consumption of ARTC's resources;
 - (v) the credit risk associated with the business;
 - (vi) the market value of the Train Path sought on the Unconstrained Network;

Clause 4.2(b)(vi)

Market value is not relevant to the Constrained Network as prices are at the Ceiling.

- (vii) the Segments of the Hunter Valley Network relevant to the Access being sought;
and
- (viii) previously negotiated access prices for substantially similar Coal Trains.

Clause 4.2(b)(viii)

The MUC recognises that most, if not all, coal movements pre-exist the Undertaking and that access prices have been negotiated under pre-existing arrangements. The MUC takes these existing prices into account and protects Access Seekers against unexpected price increases through the introduction of a new access regulatory regime.

- (c) logistical impacts on ARTC's business and the Hunter Valley Coal Chain which without limitation include:

Clause 4.2(c)

This clause has been broadened to recognise the impacts on the Hunter Valley Coal Chain as well as other coal trains and non-coal trains.

- (i) the impact on other Coal Trains, interaction with, and impacts on, other parts of the Hunter Valley Coal Chain and risk of failure of the Applicant (once it becomes a Customer) to perform;

Clause 4.2(c)(i)

Note that a Customer may have more than one Operator (or may be an Operator) and that the obligations in the access contract to perform will rest with the Customer, not with any sub-contractor.

- (ii) the impact of Trains which affect Coal Trains or which are affected by Coal Trains;
and
 - (iii) reduced Capacity and system flexibility.
- (d) capital or other contributions by the Applicant to ARTC's costs; and
 - (e) the cost of any Additional Capacity.

4.3 Limits on Charge Differentiations

- (a) In formulating its Charges, ARTC will not have regard to the identity or characteristics of the Access Seeker beyond those characteristics identified in clauses 4.2(b) and 4.2(c).

Clause 4.3(a)

Given the statement in what was previously AAU clause 4.3(a)(i) [ie identity is irrelevant], AAU clause 4.3(a)(ii) is redundant and has therefore been deleted.

It is necessary to allow discrimination having regard to those criteria in 4.2(b) and 4.2(c) eg 4.2(b)(iv), 4.2(c)(i) although these will have little relevance given the requirements for uniformity of charges under clause 4.3(b).

- (b) In formulating its Charges, ARTC will not differentiate between Access Seekers in circumstances where:
- (i) the origin and destination of the Coal Trains are alike; and
 - (ii) the Access Seekers are operating within the same end market.

Clause 4.3(b)

The AAU clause 4.3(b) contained an extended description regarding what constituted a similar service for the purpose of non-differentiation. The MUC does not provide for differentiation on the basis of train characteristics, nor are paths allocated exclusively to one coal train operator. Therefore there is no requirement for such a description.

4.4 Maximum Price On Transition For Unconstrained Trains

Clause 4.4

Clause 4.4 sets limits on how Charges for Unconstrained Trains might be increased in the transition from the NSW Rail Access Undertaking. There is no need to apply the limitations to Constrained Coal Trains as these services are subject to the limits imposed by the Ceiling tests.

ARTC will not increase any price previously agreed under the NSW Rail Access Undertaking in force immediately prior to the approval of this Undertaking by the ACCC for any Coal Trains that are Unconstrained Trains except where;

- (a) the increase is in accordance with an extant Access Agreement applicable to the Hunter Valley Network;

Clause 4.4(a)

Although technically prices in an Access Agreement and those provided for under the Access Undertaking could be different (eg because the Access Agreement was negotiated under a different Access regulatory instrument) it is expected that prices for Coal Trains for any origin – destination combination will be the same for all operators – indeed the effect of MUC clause 4.3(b) would be to require that where an existing price applies to a haul for an Unconstrained Train that price would be offered to any Applicant under the Undertaking (or some other price apply to all Access Seekers uniformly). It is therefore essential that any adjustments in price are also in step between any contract and the Undertaking.

- (b) the increase applies to an Unconstrained Train to incorporate an annual variation as provided for in clause 4.7(k);

Clause 4.4(b)

This is to allow for application of the annual price adjustment mechanism clause 4.7(k).

- (c) the increase is for the purpose of avoiding a breach of the Floor Limit;

Clause 4.4(c)

Consistent with the principle that any train must meet at least the short run incremental costs it imposes on the system, all prices must at least meet the Floor, even if the Floor increases disproportionately to any other measure.

- (d) the increase is proportionate with variations to the Mezzanine Limit;

Clause 4.4(d)

Similarly, as it is an objective that prices meet the Mezzanine Limit, ARTC should be allowed to increase the access price for a particular haul to contribute to the increase. The increase allowed is proportional to the contribution that the particular haul previously made towards achievement of the previous limit. For example, if Haul A paid charges of \$10 towards a Mezzanine Limit of \$100, an increase in the limit to \$110 would allow ARTC to raise Haul A's charge to a maximum of

$$\frac{\$10}{\$100} \times \$110 = \$11$$

This calculation would need to be performed after adjusting for any changes in volume between the various hauls to avoid introducing unintended bias.

- (e) the increase is required to facilitate the provision of Additional Capacity in accordance with clauses 4.7(l) and 5.2;

Clause 4.4(e)

Consistent with the intent of the MUC that users of the Hunter Valley Network are able to secure investment in the network, this provision allows an Access Seeker to negotiate an increase in access prices outside of the limits that might otherwise apply should the Access Seeker choose to so do. See also clauses 4.7(l) and 5.2.

- (f) on application to the ACCC by ARTC, the ACCC has approved the increase after taking into account all relevant matters in accordance with the processes for variation of an undertaking in the *TPA* Part IIIA; but

Clause 4.4(f)

Where ARTC is of the view that it has a case to raise Charges beyond the limits in this clause, it may seek ACCC approval.

nothing in this clause 4.4 prevents the operation of clause 2.5.

Clause 4.4 final part

Clarification that this clause 4.4 is not intended to prevent the operation of the Material Change clause 2.5.

4.5 Revenue Limits

Clause 4.5

Clause 4.5 defines the limits within which revenue is to be calculated. The revenue limits have been designed to reflect the current position in NSW ie there are 4 limits:

- A true ‘floor’ reflecting the incremental costs of a particular Train.
- An intermediate floor limit, termed the Mezzanine – this reflects the full incremental costs of the relevant line Segments and is similar to the floor limit in the AAU. This is set as an objective for price setting rather than a hard limit, similar to the current position in NSW.
- A combinatorial ceiling limit that is the maximum revenue from all Trains for the relevant Segments.
- A stand alone ceiling limit that is the maximum that can be charged for Trains operating between any two locations on the network.
 - (a) Notwithstanding that this Undertaking deals with the provision of Access to the Hunter Valley Network for the purpose of operating Coal Trains, the pricing of those Coal Trains and the revenue limits applicable to the Hunter Valley Network will take into account all of the Trains that use the Hunter Valley Network.

Clause 4.5(a) clarifies that all Trains, not just Coal Trains must be taken into account in determining the revenue limits. To maximise revenue to ARTC it is clarified that the allocation of revenues from Unconstrained Trains to Constrained Segments is at the Floor Limit (see Clause 4.7(f)). The consequence is that, prior to the calculation of the revenue limits applying to Coal Trains for the relevant Segments, the incremental costs of those other Trains would need to be deducted.

- (b) Notwithstanding any other clause within this Part 4, the Charges formulated by ARTC for Access to the Hunter Valley Network will be such that the revenue generated by ARTC on any relevant Segment or group of Segments will:
 - (i) for any group of Coal Trains and Terminal Activities for a particular origin and destination, not be lower than the Floor Limit;
 - (ii) for all Coal Trains and Terminal Activities, as an objective at least meet the Mezzanine Limit;
 - (iii) for all Coal Trains and Terminal Activities, not be higher than the Combinatorial Ceiling Limit.
 - (iv) for any group of Coal Trains and Terminal Activities for a particular origin and destination, not be higher than the Stand Alone Ceiling Limit.

Clause 4.5(b)

The limits are qualified differently than in the MUG through reference to a “group of Coal Trains” and Terminal Activities. This is necessary to reflect that Coal Trains do not operate on an individual “service” basis in the same way as some other types of Trains.

- (c) The Floor Limit means the Direct Cost to provide the Capacity for a group of Coal Trains for a particular origin and destination including any relevant Terminal Activities.

Clause 4.5(c)

The Floor Limit reflects the incremental economic costs to provide the relevant parts of the

Hunter Valley Network to any individual Train.

- (d) The Mezzanine Limit means the Full Incremental Cost of a Segment or group of Segments.

Clause 4.5(d)

The Mezzanine Limit reflects the incremental economic costs of providing the relevant parts of the Hunter Valley Network on a sustainable on-going basis.

- (e) The Combinatorial Ceiling Limit means the Economic Cost of a Segment or group of Segments.

Clause 4.5(e)

The Combinatorial Ceiling Limit represents the economic cost of providing the Hunter Valley Network to all Customers including a rate of return on the investment. It represents the combined revenue limit for all traffic using any combination of Segments.

- (f) The Stand Alone Ceiling Limit means the Economic Cost of a Segment or group of Segments required to provide the Capacity for a series of Coal Trains for a particular origin and destination including any relevant Terminal Activities in the absence of any other Trains or Terminal Activities.

Clause 4.5(f)

The Stand Alone Ceiling Limit is the economic cost (including returns) to provide the parts of the Hunter Valley Network required for a single group of Coal Trains between two points on the network. This represents the maximum a Customer can be charged for any particular Coal Train.

- (g) In calculating the Mezzanine Limit, Combinatorial Ceiling Limit and Stand Alone Ceiling Limit, ARTC will deduct any contributions received from any third party applicable to the Segment or group of Segments other than Access Charges.

Clause 4.5(g)

The Revenue Limits (except for the Floor) are to be reduced by any contributions by any third parties whether or a capital or revenue nature outside of access charges. This avoids the potential for double counting in the revenue limits. The types of contributions intended to be caught would include both government and private sector contributions whether as part of some scheme for funding investment or as a grant.

4.6 Calculation of Economic Costs

Clause 4.6

Clause 4.6 sets out how the economic cost of each segment is to be determined. This is based on efficient costs and the DORC valuation method. This approach is consistent with the IPART 1999 report with the exception that a Greenfields basis has been nominated rather than the dual Greenfields/Brownfields consideration suggested by IPART. In practice the valuation arrived at for the Hunter Valley by RIC and endorsed by IPART was based on a Greenfields approach. (Booz Allen & Hamilton report to IPART April 2002).

The current DORC valuation of the Constrained Network will apply initially to the Constrained Network ie the former RIC valuation to be rolled over, adjusted as it would have been under the RIC model to bring it up to date at the time of roll-over. Any contributed value to an asset is to be excluded from the regulated asset base.

The allocation of non-specific costs has been adjusted to avoid any bias that might arise due to the high concentration of activity in the Hunter Valley Network compared to the rest of the ARTC Network by the adoption of a Regional allocation with only genuinely ARTC Network-wide costs allocated across the whole ARTC Network.

The maximum rate of return is to be determined by the ACCC. The 2006 review by IPART to determine the maximum rate of return for the NSW rail network will provide a substantial framework of stakeholder views to assist the ACCC in its decision.

- (a) The determination of the Economic Cost of a Segment will take into account the matters raised in this clause 4.6 and clause 4.9.
- (b) Segment Specific Assets and Non-Segment Specific Assets, subject to clause 4.6(i) will be;
 - (i) valued using the DORC method of valuing assets;
 - (ii) revalued annually by CPI, applicable Depreciation; any additions and write-offs; and
 - (iii) revalued every five (5) years by estimating the DORC;

for the purpose of this clause 4.6(b), the optimised replacement cost, from which the DORC is derived, means the cost of replacement on a Greenfields basis by commercially efficient application of the most appropriate, industry accepted, currently available technology based on reasonably forecasted demand for the asset.

Clause 4.6(b)

New clause to specify the characteristics of the DORC. See also the head-note to this clause.

- (c) The DORC value will be adjusted to exclude any contributions by any party, other than ARTC, to the cost of construction of any asset included in Regulatory Asset Base after 5 September 2004.

Clause 4.6(c)

The value of other party contributions is deducted from the DORC valuation of any new construction to avoid ARTC charging for an investment which it has already recouped.

- (d) at the commencement of this Undertaking, the DORC value of Segment Specific Assets for the Constrained Network will be the DORC value used for the setting of prices under the NSW Rail Access Undertaking in force immediately prior to the approval of this Undertaking by the ACCC.

Clause 4.6(d)

This new clause provides for the roll-over of the existing asset base valuation at the commencement of the Undertaking.

- (e) ARTC will identify those Non-Segment Specific Costs and Non-Segment Specific Assets that are specifically related to the provision of Access to the Hunter Valley Network. Those Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets (“**Hunter Valley Regional Costs**”) will be allocated to Segments in the Hunter Valley Network in proportion to:
 - (i) the costs of track maintenance of each Segment with respect to Hunter Valley Regional Costs associated with track maintenance;
 - (ii) Train Kilometres with respect to Hunter Valley Regional Costs not associated with

track maintenance;

- (f) ARTC will identify those Non-Segment Specific Costs and Non-Segment Specific Assets that are specifically related to the provision of Access to the ARTC Network other than the Hunter Valley Network. These non-Hunter Valley Network Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets will be excluded from the calculation of Economic Costs for the Hunter Valley Network;
- (g) For those Non-Segment Specific Costs and Non-Segment Specific Assets that cannot be attributed specifically to the provision of Access to either the Hunter Valley Network or other parts of the ARTC Network, those Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets (“**Network-Wide Costs**”) will be allocated to segments of the ARTC Network in proportion to:
 - (i) the costs of track maintenance of each Segment with respect to Network-Wide Costs associated with track maintenance; and
 - (ii) Train Kilometres with respect to Network-Wide Costs not associated with track maintenance.

Clause 4.6(e), 4.6(f), 4.6(g)

Clauses 4.6(e), 4.6(f), 4.6(g) — these clauses have been revised to provide more specific identification of Hunter Valley and Non-Hunter Valley non-specific assets and costs. Although this adds a level of asset class and cost classification (Segment specific; regional; and general ARTC non-specific), it avoids any unnecessary pooling of Australia-wide costs that can be attributed to another region – eg if there is a regional management for track maintenance in South Australia, this ought not to be pooled with the Hunter Valley Network and vice versa.

A % mark-up on costs is used instead of GTK and Track Km. This provides a more direct and simpler allocation mechanism.

Clearly the Hunter Valley Region will need to be defined consistently between the MUC and the MUG but it is not anticipated that this would present any problem from an accounting system perspective.

- (h) The Rate of Return for the purposes of this Part 4 will be calculated by the ACCC at the commencement of this Undertaking and shall be equivalent to ARTC’s weighted average cost of capital (“**WACC**”) after consideration of all risks with the commercial environment in which ARTC operates in providing rail infrastructure services for the Hunter Valley Network, the elements of which shall 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 by reputable lenders; and
 - (iii) an adjustment (beta) factor to the equity risk margin appropriate for investment in the provision of rail infrastructure services for Coal Trains on the Hunter Valley Network.

Clause 4.6(h)(iii)

The MUC has made the beta factor specific to coal traffic on the Hunter Valley Network. This is appropriate as the MUC is specific to this traffic and network and the commercial risk to ARTC may well be different to that which applies to the rest of the ARTC Network.

- (i) Pursuant to the New South Wales Government Gazette No. 22 Office Notices, NSW Rail Access Regime 19 February 1999 and the IPART Review Report No 99-4 “Aspects of the

NSW Rail Access Regime Final Report” 28 April 1999, existing corridor formation assets (as at July, 1996), being assets which do not require future expenditures to retain the current Capacity of the Hunter Valley Network, will be valued at zero.

Clause 4.6(i)

For the purpose of clarification, the MUC references the IPART decision that existing formation assets are to be valued at zero for the purposes of calculating the DORC value of the Hunter Valley Network.

- (j) Where it is reasonable to do so,
 - (i) costs will be identified as Segment Specific Costs; and
 - (ii) assets will be identified as Segment Specific Assetsand ARTC will arrange its accounts to facilitate this outcome.

Clause 4.6(j)

AAU clause 4.4(f) has been redrafted with the majority of the terms now dealt with in clauses 4.6(e), 4.6(f), 4.6(g) and 4.6(j).

4.7 Structure Of Charges

Charges for Coal Trains will be determined annually prior to the commencement of each Financial Year, levied on the basis of a rate per net tonne of coal delivered to its discharge point for each origin - destination combination. The Charges shall be determined as follows:

- (a) for the purposes of determination of Charges under this clause 4.7, any export coal rail receival facilities within the vicinity of Carrington or Kooragang Island are deemed to be the same destination. If additional coal rail receival facilities connected to the Hunter Valley Network are constructed on or near Kooragang Island, these will also be regarded as the same destination for these purposes;

Clause 4.7(a)

This is consistent with current practice and is reflective of the fact that cargoes are assembled at either terminal at the discretion of the port operator. It would be counter-productive to have different charges apply to the different receival points.

- (b) the calculation of a Charge is independent of the characteristics of the Coal Train used for the movement;

Clause 4.7(b)

This is consistent with clause 4.3(b). The efficiency of the Hunter Valley Coal Chain could be compromised if Train Operator behaviour (eg train consist size) were to be influenced by Charges differentiated on the basis of train characteristics.

- (c) Charges will only be levied for the use of Coal Train Paths. Ancillary Train Paths will be provided by ARTC free of charge;

Clause 4.7(c)

Clause 4.7(c) provides for ancillary movements to be free of charge. This arises because Charges are based on tonnes of coal moved, not on the overall activity used to produce that outcome. To charge for ancillary movements would be to double charge for those movements

as their cost is already incorporated in the main charge for the Coal Train.

If Charges were to be set separately for these ancillary Trains, the Ceiling would need to be reduced accordingly.

- (d) Charges will increase with distance travelled but will include a distance taper such that a longer haul is charged more per net tonne but proportionately the same or less per ntk than a shorter haul.

Clause 4.7(d)

Clause 4.7(d) provides for the application of a distance taper and prevents a more distant haul costing more per ntk than a closer haul.

- (e) in applying the criteria in clause 4.7(d) to Coal Trains that travel over both the Hunter Valley Network and a rail network not subject to this Undertaking, the distance taper effect is to be calculated as though the full distance of the journey is covered by this Undertaking and the resulting rate per tonne is to be pro-rated to the actual distance travelled on the Hunter Valley Network;

Clause 4.7(e)

Clause 4.7(e) provides a means to avoid distortions being created where a Coal Train moves outside of the ARTC Hunter Valley Network. It provides that the distance taper is calculated as though it covered the entire journey with the resulting rate per tonne being pro-rated to the actual borders of the ARTC Network.

- (f) ARTC will set Charges for Unconstrained Trains using Segments within the Constrained Network such that the contribution of revenue to those Constrained Network Segments by the Unconstrained Trains is at the Floor Limit;

Clause 4.7(f)

This clause maximises ARTC's revenue by mandating that Unconstrained Trains (this includes both coal and non-coal trains) contribute only their direct costs to Constrained Segments. In this way their contribution to Unconstrained Segments is higher than it might otherwise be, and Constrained Coal Trains contribute the maximum allowable within the Constrained Network.

- (g) prior to the commencement of each Financial Year a Cusp Tonnage will be nominated as 85% of the Load-Point Allocations for those Load-Points serviced by Constrained Coal Trains;
- (h) a pre-cusp Charge will be calculated for each origin-destination combination annually prior to the commencement of each Financial Year and apply to each Constrained Train such that ARTC will receive revenue equal to the Combinatorial Ceiling Limit for the Constrained Network once the Cusp Tonnage has been railed;
- (i) a post-cusp Access Charge will be calculated for each origin-destination combination annually prior to the commencement of each Financial Year and apply to each Constrained Train for each tonne above the Cusp Tonnage. The post-cusp Access Charge will be based on the Direct Cost of operating each Constrained Coal Train;

Clause 4.7(g), 4.7(h), 4.7(i)

The adoption of this mechanism provides a strong risk mitigation to ARTC against lower than expected volumes. The mechanism provides an Access Charge for Constrained Coal Trains that covers the ceiling rate of return and all fixed costs at the Cusp Tonnage. In order to avoid

breaching the Ceiling Limit, Charges beyond the cusp fall to the marginal cost of service provision.

- (j) Charges for Coal Trains that are also Unconstrained Trains are determined in accordance with the following criteria;
 - (i) application of the previous pricing requirement of clause 4.4;
 - (ii) application of the revenue limits in clause 4.5;
 - (iii) application of the relativity and distance taper requirements in clauses 4.7(d), 4.7(e) and 4.7(f);
 - (iv) taking into account the benefit of any Community Service Obligation payments received by ARTC, and
 - (v) ability to pay;
- (k) Charges for Coal Trains that are also Unconstrained Trains and the Prescribed Fees may be varied annually by ARTC. If a variation is to occur, except where clause 4.7(l) applies, the maximum they may be varied is determined by multiplying the relevant rate used to calculate Charges by the greater of;
 - (i) 1;
 - (ii) $1 + (\text{CPI} - 2)$, where CPI is expressed as a percentage increase over the previous year); or
 - (iii) $1 + 2/3\text{rds of CPI}$;For the purpose of this clause;
 - (iv) such variations, if made, will be effective as from 1 July in each year the variation occurs or a date later than 1 July as advised by ARTC, provided that ARTC will not seek to backdate any increase to a date prior to the date of notification; and
 - (v) if ARTC varies the Charges by less than the maximum amount permitted by this Undertaking, it will not seek to include any shortfall for that Financial Year in any subsequent Financial Years;

Clause 4.7(k)

Annual charge variation formula is similar to that used in the AAU, but clarified.

The definition of CPI has been adjusted in Part 9 to avoid the need for a specific definition in this clause.

- (l) ARTC and Relevant Access Seekers may agree to a different variation to Charges in order to facilitate investment by ARTC in the Unconstrained Network;
- (m) at ARTC's discretion, having regard to existing practice, Charges for Coal Trains that are also Unconstrained Trains may be structured on a pre- and post-cusp basis with the Individual Cusp Tonnage set at the discretion of ARTC, noting that the post-cusp Access Charge may be more than the Direct Cost of additional movements expressed as a rate per tonne;

Clause 4.7(m)

Existing practice is that cusp pricing is provided for some Unconstrained Trains. This practice

provides some incentive to maximise railings, but it does not provide the volume risk mitigation that this mechanism provides for ARTC with Constrained Coal Trains. The MUC therefore leaves the determination of such pricing arrangements at the discretion of ARTC, albeit, requiring ARTC to have regard to existing practice.

- (n) if a pre- and post-cusp structure is used to derive Charges for Unconstrained Trains for an origin–destination combination, the forecast total revenue (based on the forecast tonnages) from the Unconstrained Trains through that structure must not exceed the revenue that would have been forecast to be received had the structure been a simple rate per tonne throughout that Financial Year for the forecast tonnage on which the Charges have been constructed;

Clause 4.7(n)

Given the discretion available to ARTC in clause 4.7(m), this provides protection that the cusp pricing for Unconstrained Trains is not used to generate greater revenue than would otherwise have been received from a simple flat rate per tonne through the same period.

- (o) notwithstanding clause 4.7(n), once pre- and post-cusp prices have been set for an Unconstrained Movement that meet the requirement of clause 4.7(n), the prices shall apply for the remainder of that Financial Year, regardless of the total revenue generated, except where such revenue would breach any revenue limit set-out in clause 4.5; and

Clause 4.7(o)

The limits set in clause 4.7(n) are based on forecast movements. Once the price is set, the intention is that those prices stand for the year and neither party should be able to claim an under or over recovery with the exception that the movement breaches one of the revenue limits – in which case the unders and overs mechanism would apply to rectify that breach.

- (p) ARTC will, at least 10 Business Days prior to the commencement of each Financial Year;
 - (i) provide to each Customer a certificate from an independent auditor stating that the Charges have been calculated in accordance with this Undertaking;
 - (ii) advise each Customer, the Charges applying for that Financial Year; and
 - (iii) provide the relevant Charges to any party who would qualify to receive such information under clause 2.10.

Clause 4.7(p)(i)

The provision of a certificate preserves ARTC's confidential arrangements, but provides Customers with comfort that Charges have been determined correctly.

In the interests of transparency, access prices will be available to interested industry participants.

4.8 Unders And Overs Account

Clause 4.8

The MUC provides a process for the management of the Unders And Overs account.

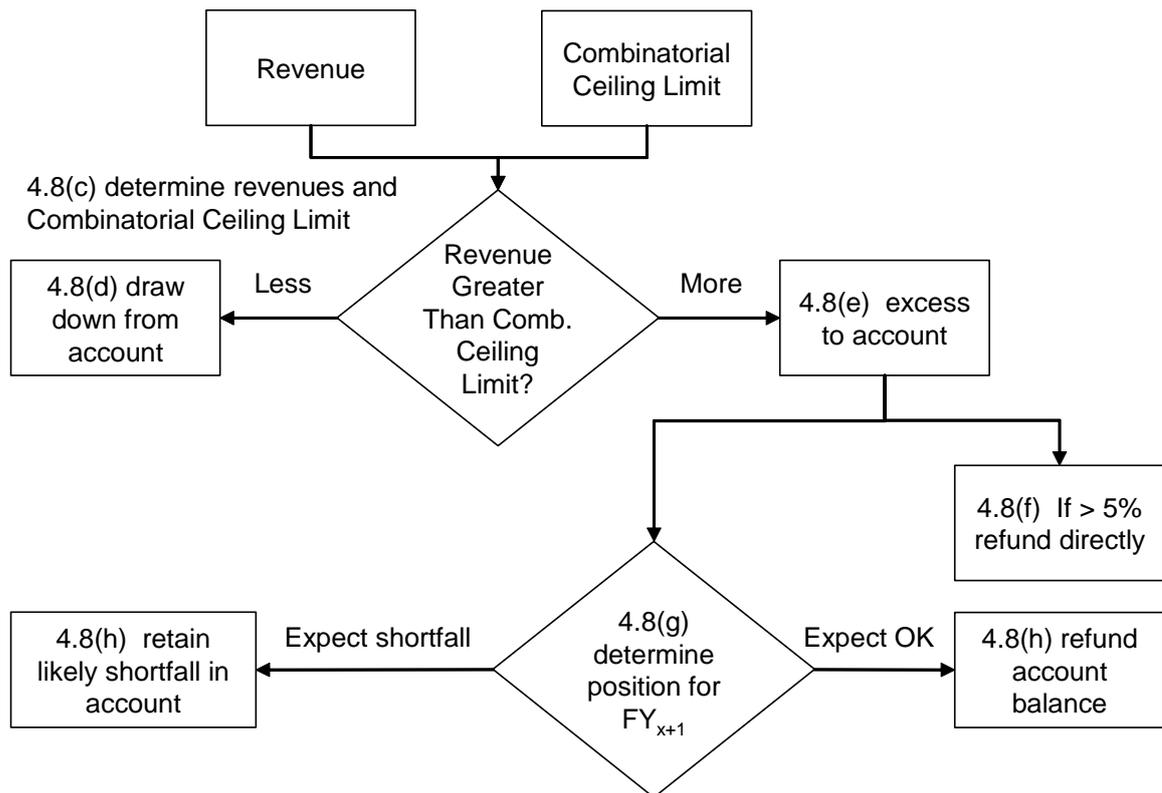
Figure 1 shows the process in schematic form.

The terms FY_x and FY_{x+1} are used to avoid confusion as to which Financial Year is being referred to – the accounting process for the Unders And Overs account must necessarily take

place after the completion of the Financial Year to which the relevant costs and revenues apply (FY_x) and the determination as to whether or not refunds should be made will take place in FY_{x+1} ie the current Financial Year at the time. Note that the test as to whether sufficient revenues will be received to meet the Combinatorial Ceiling Limit applies to FY_{x+1} and therefore the year will already be partially completed prior to the test being applied, which should provide ARTC with a high degree of confidence in its prediction.

Figure 1 shows the process for management of the Unders And Overs Account in schematic form.

FIGURE 1: PROCESS FOR MANAGEMENT OF UNDERS AND OVERS ACCOUNT (CLAUSE 4.8)



- (a) In this clause 4.8,
- (i) “ FY_x ” means the most recently completed Financial Year;
 - (ii) “ FY_{x+1} ” means the Financial Year following the most recently completed Financial Year; and
 - (iii) a reference to the Combinatorial Ceiling Limit of the Constrained Network refers to the Combinatorial Ceiling Limit of the Constrained Network in FY_x .
- (b) ARTC will manage an account for the purpose of accounting for the under or over recovery of revenue from the Constrained Network in each Financial Year with respect to the Combinatorial Ceiling Limit (“**Unders And Overs Account**”).
- (c) As soon as practicable after the completion of FY_x ARTC will determine the revenue received from, and the Combinatorial Ceiling Limit of, the Constrained Network.
- (d) If in FY_x the revenue received from the Constrained Network is less than the Combinatorial

Ceiling Limit of the Constrained Network, ARTC will draw down from the Unders And Overs Account and treat as revenue for FY_x an amount equal to the lesser of:

- (i) any positive balance of the account; and
 - (ii) the difference between the revenue received and the Combinatorial Ceiling Limit of the Constrained Network in FY_x.
- (e) If in FY_x the revenue received from the Constrained Network is greater than the Combinatorial Ceiling Limit of the Constrained Network, ARTC will allocate to the Unders And Overs Account, and not treat as revenue, an amount being the difference between the revenue received and the Combinatorial Ceiling Limit of the Constrained Network.
- (f) If, as a result of clause 4.8(e), the balance of the Unders And Overs Account exceeds the Combinatorial Ceiling Limit of the Constrained Network by more than 5% of the Combinatorial Ceiling Limit, ARTC will refund to Customers the amount in excess of 5% greater than the Combinatorial Ceiling Limit in proportion to the pre-cusp Charges paid or payable by each Customer in FY_x for use of the Constrained Network for Coal Trains.
- (g) If after the completion of the accounting processes in clauses 4.8(c), 4.8(d), 4.8(e) and 4.8(f), the Unders And Overs Account has a positive balance, ARTC will determine, in good faith, the risk of it not receiving sufficient revenue to at least reach the Combinatorial Ceiling Limit for the Constrained Network in FY_{x+1}.
- (h) If ARTC determines that it is more likely than not that it will not receive sufficient revenue to reach the Combinatorial Ceiling Limit for the Constrained Network in the current Financial Year, it may retain sufficient funds in the Unders And Overs Account to meet the expected shortfall up to the balance of the account. Otherwise, ARTC will refund to Customers the positive balance in the Unders And Overs Account in proportion to the pre-cusp Charges paid or payable by each Customer in the previously completed Financial Year for use of the Constrained Network for Coal Trains.
- (i) If ARTC is required to refund to a Customer any amount under this clauses 4.8(f) or 4.8(h) and the Customer owes an amount of Charges for the Financial Year to which the refund applies, ARTC is entitled to set-off as much of the refund to that Customer against the amount owing as is necessary to extinguish the debt except to the extent that the outstanding amount is subject to a dispute raised under the Customer's Access Agreement.

4.9 Efficient Costs

Clause 4.9

The MUC adopts the principle that all costs should reflect the efficient cost of providing access rather than the actual cost.

- (a) Any reference in this Undertaking to costs or to a term dealing with costs, whether as a defined term or otherwise, is to be interpreted as a reference to efficient forward looking costs.
- (b) In determining whether a cost is efficient in the resolution of any dispute under clause 3.12, the arbitrator will take into account at least the following factors:
 - (i) whether the activity is reasonably necessary or incidental to providing Access to the Hunter Valley Network to the standard required by this Undertaking;
 - (ii) the cost to achieve the same outcome by reference to any contestable market;
 - (iii) whether the scope and timing of the activity is consistent with any methodology generally accepted within the rail industry as appropriate for that activity;

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- (iv) the cost of compliance with any relevant legislation, regulation or standard;
 - (v) the requirements and expectations of Customers and other stakeholders with regard to the quality and quantum of Access to the Hunter Valley Network.
- (c) Where ARTC undertakes an activity in a way that incurs a higher cost than might otherwise have been incurred in order to meet the requirements of Customers, and the additional cost is not disproportionate to the benefit to Customers, ARTC is entitled to treat the cost of performing the activity in that way as efficient. By way of example, if ARTC maintains the Hunter Valley Network using a method that minimises disruption to Trains but is more expensive than a method that caused significant disruption to Trains, then provided the additional expense is not disproportionately greater than the benefit obtained, ARTC is entitled to treat such a cost as efficient.
- (d) Where the Relevant Access Seekers have specifically endorsed the cost and associated scope of activity, in the resolution of any dispute under clause 3.12 regarding that matter, the arbitrator is required to treat that cost as an efficient cost to achieve that scope of activity.

4.10 Charges For Terminal Activities

- (a) ARTC will not seek a separate Access Charge for any of the following Terminal Activities conducted within an ARTC Terminal;
- (i) Transiting of a Train between private rail infrastructure and the ARTC main line;
 - (ii) Queuing, staging, shunting, marshalling, provisioning or maintaining of a Train;
 - (iii) Movements of Rollingstock between different locations within the ARTC Terminal;
 - (iv) Performance of safety related activities associated with a Train or Rollingstock;
 - (v) Where the relevant Train is:
 - (A) engaged in the loading or discharge of a bulk product; or
 - (B) stowed waiting to depart on its next cycle.
- (b) Where an Applicant seeks to use an ARTC Terminal for a Terminal Activity other than described in 4.10(a) for a purpose permitted by ARTC, ARTC may levy a Charge for that Terminal Activity.

Clause 4.10

The existing ARTC Terminals are primarily for the discharge of bulk products, the servicing and holding of Trains engaged in bulk traffics or the transit of Trains between the main line and private infrastructure. The MUC provides that these traffics are not explicitly charged for these activities as they are currently included in existing main line access charges. However, it is possible that ARTC might provide a service for which it should be permitted to set a separate charge and this is provided for.

PART 5

5. MANAGEMENT OF CAPACITY

Part 5

The management of Capacity under the MUC is fundamentally different to the way it is managed under the AAU. In broad terms the differences are:

- Investment in the Hunter Valley Network is determined through several processes with ARTC committing to undertake an investment if certain criteria are met.
- ARTC is committed to Capacity to all Customers seeking Coal Train Paths rather than as individuals.
- Coal Train Paths are allocated through the Logistics team processes on a short term basis.

These differences are discussed below.

After receipt of an Access Application, ARTC will conduct a Capacity Analysis, in conjunction with the Logistics Team, to determine whether there is sufficient Available Capacity to meet the Applicant's requirements. Given the system nature of the Hunter Valley Coal Chain, it is essential that considerations of capacity take into account the capacity of the whole coal chain, not just the capacity of the rail network to move the coal. In the main, ARTC will participate with the Logistics Team to determine Forecast Demand, ie the demand over the foreseeable future. Once the Forecast Demand has been agreed by the Logistics Team and the implications for Additional Capacity determined, ARTC will provide that capacity to the HVCC through the mechanism outlined in clause 5.2. The MUC provides for 3 options which, if any are satisfied lead to investment in the network;

- consideration against a set of criteria,
- agreement amongst Relevant Access Seekers, or
- ARTC exercising its own discretion.

Clauses 5.3 & 5.4 provide for investments not associated with Additional Capacity ie replacement of life expired assets and enhancements to the network that do not directly add to capacity.

Prior to the commencement of each Financial Year, the Logistics Team will conduct the Annual Assessment of System Capacity, based on inputs from each service provider (including ARTC) and forecast demand for that year. The Logistics Team will then nominate the Load-Point Allocation for each Load-Point. The sum of all Load-Point allocations (the Aggregate Load-Point Allocation), is the level of Capacity that ARTC is committed to provide to all Customers for that Financial Year.

Specifically in the context of the Hunter Valley Network, Capacity refers to the pool of capacity available for coal trains not to specific paths. Capacity availability is determined but not allocated at the time of entering into the Access Agreement. The actual allocation of Coal Train Paths is in accordance with the Integrated Plan prepared through a process conducted by the Logistics Team. The Logistics Team will prepare the Integrated Plan in the 36 hour period prior to Train running. The Logistics Team notifies ARTC of the allocation and ARTC makes the paths available to Customers in accordance with the Integrated Plan. Thus the access rights given by ARTC to a Customer are associated with the rights to the allocation of paths gained through a specific process rather than rights to specific paths.

5.1 Capacity Analysis

- (a) ARTC will work closely with participants in the Hunter Valley Coal Chain by becoming a member of, and participating in, the Logistics Team with the objective of ensuring that the Hunter Valley Network will have sufficient Capacity to meet the Forecast Demand.

Clause 5.1(a)

In order for the capacity allocation process in the MUC to work, ARTC must be a member and active participant of the Logistics Team.

- (b) As part of the preparation of an Indicative Access Proposal, ARTC will conduct a Capacity Analysis in conjunction with the Logistics Team. The Capacity Analysis will identify whether there is sufficient Available Capacity to meet the Applicant's requirements and, if not, the extent to which Additional Capacity is required.
- (c) Where it is believed that there are major impediments to the provision of Additional Capacity to meet the requirements of the Applicant, and that the Capacity enhancement 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 (see clause 3.8(b)).

AAU Clause 5.1(c)

Given the changes in the MUC, the AAU clause 5.1(c) is otiose.

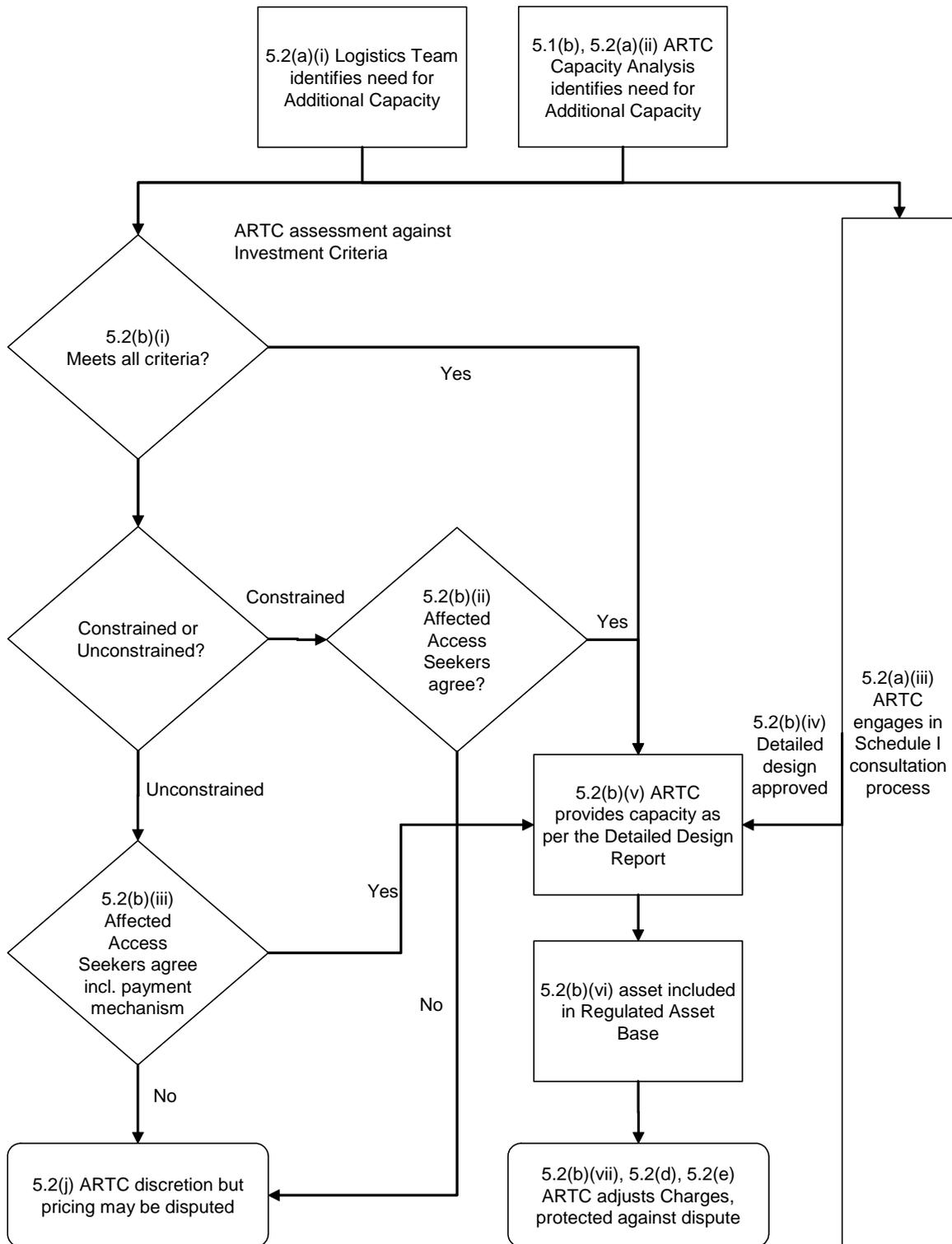
5.2 Provision Of Additional Capacity

Clause 5.2

In considering Additional Capacity, this may arise either through a particular Application for access through ARTC, or through the general forecasting procedures undertaken by the Logistics Team. Clause 5.2(a) is designed to provide for a consultation process to consider these requirements and clause 5.2(b) details the circumstances by which an investment will proceed, unless ARTC decides to invest¹ at its own discretion.

Figure 2 shows the process for investment in Additional Capacity contained in this clause 5.2 in schematic form.

FIGURE 2: PROCESS FOR INVESTMENT IN ADDITIONAL CAPACITY (CLAUSE 5.2)



- (a) If within the Hunter Valley Network;
- (i) the Logistics Team identifies a requirement for Additional Capacity and gives ARTC written notice of this requirement; or
 - (ii) ARTC, in conjunction with the Logistics Team, identifies a requirement for

Additional Capacity as part of a Capacity Analysis;

then,

(iii) ARTC will:

- (A) promptly give written notice to all Relevant Access Seekers of the requirement for Additional Capacity identified pursuant to clauses 5.2(a)(i) or 5.2(a)(ii) and invite each of them to participate in the Consultation Process, by giving notice of their intention to do so to ARTC within 5 Business Days from the date of the ARTC notice given pursuant to this clause;
- (B) commence the Consultation Process within 20 Business Days from the provision of the ARTC notice referred to in sub-clause (A); and
- (C) participate in good faith in the Consultation Process.

(b) If, whether during the conduct of the Consultation Process, or otherwise:

- (i) the Additional Capacity meets the Investment Criteria set out in Schedule H; or
- (ii) the investment is in the Constrained Network, the investment meets the criteria set out in paragraph H.1, H.5, H.6 and H.7 of Schedule H, and each Relevant Access Seeker has notified ARTC in writing that the proposed cost, method and timing as set out in the relevant Detailed Design Report to provide the Additional Capacity is acceptable and desirable; or
- (iii) the investment is in the Unconstrained Network, the investment meets the criteria set out in paragraphs H.1, H.5 and H.6 of Schedule H, and each Relevant Access Seeker has notified ARTC in writing that the proposed cost, method and timing as set out in the relevant Detailed Design Report to provide the Additional Capacity is acceptable and desirable and has agreed with ARTC an arrangement for an adjustment to Charges in accordance with clause 4.7(l), or other arrangement that is acceptable to, respectively, ARTC and each party; and
- (iv) the Participants (as defined in Schedule I) agree in writing that the investment should be undertaken in accordance with the relevant Detailed Design Report,

then:

- (v) ARTC will provide the Additional Capacity in accordance with the relevant Detailed Design Report prepared in accordance with Schedule I;
- (vi) ARTC is entitled to include the cost of the construction and placing into service of the Additional Capacity provided in accordance with the relevant Detailed Design Report, once operational, in the Regulated Asset Base except:
 - (A) to the extent the cost to provide the Additional Capacity has been paid for by a party other than ARTC through a mechanism other than Charges; and
 - (B) to the extent that the cost to provide the Additional Capacity exceeds the cost (including any contingency) agreed in writing by the Participants;

and:

- (vii) ARTC is entitled to take into account the on-going operation and maintenance costs of Additional Capacity provided in accordance with the Detailed Design Report, once operational, in the annual adjustment of Charges in accordance with Part 4 of this Undertaking.

(c) If ARTC assesses the conformance of an investment in Additional Capacity against the Investment Criteria, ARTC will provide a detailed report of the results of the assessment to

each Relevant Access Seeker and the Logistics Team within 10 Business Days of the completion of the assessment.

- (d) In determining any dispute regarding whether the cost of the construction and placing into service of the Additional Capacity provided in accordance with the Detailed Design Report should be included in the Regulated Asset Base for the economic life of that asset, the arbitrator will be required to allow the cost of that Additional Capacity in the Regulated Asset Base if ARTC is able to demonstrate that the requirements of clause 5.2(b) have been met.
- (e) In determining any dispute regarding the adjustment of Charges to take into account Additional Capacity provided in accordance with a Detailed Design Report, if ARTC is able to demonstrate that the requirements of clause 5.2(b) have been met, the arbitrator must allow such adjustment providing the adjustment is in accordance with the pricing principles set out in Part 4, or a specific agreement in accordance with clause 5.2(b)(iii).
- (f) For the purpose of clarification, if:
 - (i) the Logistics Team has identified a requirement for Additional Capacity;
 - (ii) the Additional Capacity meets the Investment Criteria or Relevant Access Seekers have notified ARTC of their desire for the Additional Capacity to be provided in accordance with clause 5.2(b)(ii) or 5.2(b)(iii); and
 - (iii) ARTC declines or otherwise fails to provide the Additional Capacity in the manner or timing proposed by the Logistics Team,

any one or more Relevant Access Seekers may seek resolution of the matter in accordance with the dispute resolution procedures in clause 3.12 of this Undertaking.

Clause 5.2(f)

Elsewhere in the MUC, special references to the activation of the dispute resolution process have been removed on the basis of reliance on the general process described in clause 3.12. In this instance the issue as to whether a dispute might be raised, and by whom is more complex as it may involve several interested parties. Therefore a specific clarification has been introduced to place the matter in context and beyond doubt.

- (g) Notwithstanding any requirements in this Undertaking to the contrary, any arbitrator making a determination with respect to the provision of Additional Capacity in the circumstances of clause 5.2(f) is required to seek the advice of Relevant Access Seekers with regard to the desirability of the Additional Capacity.
- (h) In an arbitration to resolve a dispute arising under this Undertaking, if each Relevant Access Seeker agrees that the proposed cost, method and timing to provide the Additional Capacity is acceptable and desirable for the efficient provision of sufficient Capacity to meet the Forecast Demand, the arbitrator, unless there are compelling reasons to the contrary, will determine that ARTC is required to provide the Additional Capacity in the manner proposed.
- (i) If, in accordance with clause 5.2(h), an arbitrator has made a determination that ARTC is required to provide Additional Capacity;
 - (i) ARTC will provide the Additional Capacity by way of the proposed method in as timely a manner as possible;
 - (ii) ARTC may include the cost of the construction and placing into service of the Additional Capacity, once in operation, in the Regulated Asset Base and impose any consequential increase (including on-going operation and maintenance costs) in Charges in accordance with the pricing principles set out in Part 4, or a specific agreement in accordance with clause 5.2(b)(iii);

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- (iii) ARTC is entitled to rely on the arbitrator's determination as justification for inclusion of the cost of the construction and placing into service of the Additional Capacity in the Regulated Asset Base and any consequential increase (including on-going operation and maintenance costs) in Charges in the resolution of any subsequent Dispute.
 - (j) In an arbitration to resolve a dispute arising under this Undertaking, in circumstances where the requirements of clause 5.2(b) have not been met and where the arbitrator is required to determine whether the cost of the construction and placing into service of the Additional Capacity should be included in the Regulated Asset Base and, if so, the amount which should be included, and any consequential adjustments to Charges, the arbitrator is required to take into account the reasons why the requirements of clause 5.2(b) have not been met.
 - (k) In an arbitration to resolve a dispute arising under this Undertaking that arises because ARTC has declined to provide any Additional Capacity because the proposal failed to meet any of the criteria in Schedule H, if, after reviewing evidence from a suitably qualified independent expert, the arbitrator is satisfied that the Additional Capacity meets the requirements of Schedule H, the arbitrator shall determine the ARTC must provide the relevant Additional Capacity.

5.3 Replacement Of Assets

- (a) If, as part of its major periodic maintenance program, ARTC has determined that a major asset requires replacement, ARTC will:
 - (i) promptly give written notice to all Relevant Access Seekers of the proposed replacement and invite each of them to participate in the Consultation Process by giving notice of their intention to do so to ARTC within 5 Business Days from the date of the ARTC notice given pursuant to this clause; and
 - (ii) commence the Consultation Process within 20 Business Days from the provision of the ARTC notice referred to in sub-clause (i); and
 - (iii) participate in good faith in the Consultation Process.
- (b) If after completion of the Consultation Process, ARTC and all of the Participants in that process determine that the relevant asset requires replacement, ARTC will replace the asset with a new asset that provides at least the same Capacity to the Hunter Valley Coal Chain as was provided by the asset being replaced and in accordance with the relevant Detailed Design Report.
- (c) If a general standard applicable to the asset type being replaced has previously been agreed with Customers or as part of the System Rules that is a higher standard than the asset being replaced, then the replacement asset shall be constructed to the higher standard in accordance with the relevant Detailed Design Report.

Clause 5.3(c)

This provision recognises that in some instances it is appropriate to incrementally increase the standard of the network by replacing life-expired assets with new assets at a higher standard albeit that, in isolation, that higher standard may not be able to be utilised, but that over time once sufficient assets have been replaced, it may be possible to take advantage of the higher standard. For example, the replacement of a bridge with larger clearances so that larger rollingstock might at some future period be used on the network. Obviously to achieve such a plan requires a strategic approach by all participants in the coal chain and would be part of an agreed strategic plan.

- (d) If the Participants in the Consultation Process approve the replacement of an asset of the kind described in clause 5.3(a):
 - (i) ARTC will be entitled to include the costs of any replacement asset in the Regulated

Asset Base and any revision of maintenance expenditure but will only be entitled to recover the cost of the replacement asset once;

- (ii) ARTC will ensure that it will not expense major periodic maintenance (past, present or future) or charge Depreciation in a way which may result in Customers paying for Access to the Hunter Valley Network more than once;
- (iii) any arbitrator making a determination regarding the inclusion of the cost of such replacement to the Hunter Valley Network in the Regulated Asset Base for the economic life of that replacement is required to allow its inclusion;
- (iv) any arbitrator making a determination regarding the valuation of such replacement asset, where the standard of the replacement asset is to an agreed higher standard as contemplated in clause 5.3(c), must not apply any optimisation to that asset merely because it has been constructed to the agreed higher standard; and
- (v) any arbitrator making a determination regarding the adjustment of Charges to take into account the cost of the construction and placing into service of the replacement asset and its on-going operation and maintenance, must allow such adjustment providing the adjustment is in conformance with the pricing principles set out in Part 4.

Clause 5.3(d)

This clause recognises that there is the potential for double counting where an asset is specifically included in the Regulated Asset Base while at the same time being provided for through the major periodic maintenance allowance.

The clause also provides various protections to ARTC against challenge where the costs of asset replacement have previously been agreed with the Participants in the Consultation Process.

5.4 Hunter Valley Network Enhancement

- (a) For the purposes of this clause 5.4 an enhancement to the Hunter Valley Network is a material investment, other than primarily for Additional Capacity, directed towards the purposes of one or more of:
 - (i) safety;
 - (ii) efficiency;
 - (iii) asset protection;
 - (iv) cost reduction; or
 - (v) collection, storage or dissemination of data.
- (b) If ARTC determines that it is to the advantage of ARTC, the Hunter Valley Coal Chain or otherwise to Access Seekers generally for ARTC to enhance the Hunter Valley Network, ARTC will:
 - (i) promptly give written notice to all Access Seekers of the proposed enhancement and invite each of them to participate in the Consultation Process by giving notice of their intention to do so to ARTC within 5 Business Days from the date of the ARTC notice given pursuant to this clause;
 - (ii) commence the Consultation Process within 20 Business Days from the provision of the ARTC notice referred to in sub-clause (i); and
 - (iii) participate in good faith in the Consultation Process.

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- (c) If after completion of the Consultation Process, ARTC and all of the Participants in the Consultation Process determine that the enhancement should be undertaken, ARTC will undertake the enhancement in accordance with the relevant Detailed Design Report:
- (i) ARTC will be entitled to include the costs of the enhancement in the Regulated Asset Base;
 - (ii) any arbitrator making a determination regarding the inclusion of the cost of such enhancement to the Hunter Valley Network in the Regulated Asset Base for the economic life of that enhancement is required to allow its inclusion; and
 - (iii) any arbitrator making a determination regarding the adjustment of Charges to take into account the cost of the enhancement and its on-going operation and maintenance, must allow such adjustment providing the adjustment is in conformance with the pricing principles set out in clause 4, or a specific agreement in accordance with clause 5.4(d)(i).
- (d) If an Access Seeker requests ARTC to undertake an enhancement as described in clause 5.4(a) to the Hunter Valley Network, ARTC will use its best endeavours to enhance the Hunter Valley Network in the manner requested, provided:
- (i) the requesting party agrees to pay the entire cost of the enhancement, or ARTC and the party otherwise agree to a scheme for the payment of the enhancement;
 - (ii) the enhancement is consistent with the System Rules and does not reduce the Capacity of the Hunter Valley Coal Chain;
 - (iii) the enhancement does not reduce the ability of other Access Seekers to use the Hunter Valley Network in a manner to which they are entitled to use it; and
 - (iv) the enhancement meets the criteria in paragraphs H.1 and H.5 of Schedule H.
- (e) If an enhancement is made in accordance with clause 5.4(d), and the requesting party requests ARTC to enter into an agreement that would allow the party bearing the burden of cost for the enhancement to recoup some of that cost from other Customers to the extent that those other Customers agree to do so, then ARTC will use its reasonable endeavours to enter into such an agreement. To the extent that such agreement requires ARTC to levy an additional charge on other Customers, the additional levy would not constitute part of any Charges.

Clauses 5.4(d) & 5.4(e)

There is the potential that an Access Seeker might need ARTC to modify its network (other than through a connection or other matter dealt with in Part 6) in order to facilitate its access to the network. The MUC places a best endeavours obligation (subject to certain criteria) on ARTC to facilitate investment on its network for enhancements where requested by an Access Seeker.

In some cases the investment might be solely to the benefit of a single Access Seeker, in which case it is appropriate that the Access Seeker pay the full cost. However, in other circumstances it may be that the investment results in benefit to a wider group, and clause 5.4(e) provides that the party bearing the cost burden may request ARTC to enter into an agreement that would allow for charging a wider group in some manner to recoup the costs. Clearly such an arrangement would need to the parties to voluntarily enter into such an arrangement, but the intended effect of clause 5.4(e) is that ARTC will enter such arrangements on request to facilitate the investment process.

5.5 Possession Planning Process

Clause 5.5

This clause provides for a process to manage maintenance of the Hunter Valley Network where it is required to close the track (known in the industry as “taking possession” of the network). Closing the track, whether in whole or in part, necessarily disrupts Train movements and therefore careful planning is required to minimise the negative effects. The clause formalises and extends a process that is currently carried out. The process is described in Schedule F.

A key feature of the requirements in the Hunter Valley is the coordination of maintenance shut-downs with other parts of the Hunter Valley Coal Chain and with adjoining rail infrastructure providers. This is managed through consultation with the Logistics Team as well as Customers. The emphasis is on cooperation with the aim of minimising disruption while allowing ARTC to carry out its maintenance task efficiently.

The MUC also recognises the importance of coordinating track possessions with adjoining track providers to minimise the cumulative impact of maintenance closures on different parts of the wider network.

- (a) ARTC recognises that:
 - (i) from time to time, it is necessary to close or restrict Access to a portion of the Hunter Valley Network in order to perform essential maintenance;
 - (ii) other logistics service providers to the Hunter Valley Coal Chain also need to cease or constrain their operations to perform maintenance; and
 - (iii) such closures of the Hunter Valley Network or other parts of the Hunter Valley Coal Chain are disruptive to Customers and the operation of the Hunter Valley Coal Chain.
- (b) With the objectives of;
 - (i) achieving efficient and effective maintenance of the Hunter Valley Network;
 - (ii) minimising disruption to the Hunter Valley Coal Chain; and
 - (iii) minimising disruption to Customers;

ARTC will agree a Possession Planning Process with Customers and the Logistics Team as described in Schedule F clause F.2.

- (c) In formulating its plans for maintenance of the Hunter Valley Network, ARTC will use its reasonable endeavours to coordinate maintenance possessions with adjoining rail infrastructure providers to minimise overall disruption to Customers.

5.6 Grant Of Access

Clause 5.6

The MUC has adopted the principle contained in both the AAU and the NSW Rail Access Undertaking in allocating access rights on a non-exclusive basis. (See also Schedule D, Indicative Access Agreement clause 2.4 and Schedule C). However, the form of Access that is sold is fundamentally different in that it is not Train Paths that are being sold, but the right to participate in a process for allocation of Train Paths through the Logistics Team. This is detailed in clause 5.8.

- (a) ARTC will grant access to the Hunter Valley Network on a non-exclusive basis.

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- (b) ARTC will not grant any exclusive right of use and/or occupancy of part of the Hunter Valley Network in favour of any person, including by way of sale, lease or assignment.

5.7 Determination Of Forecast Demand

Clause 5.7

This clause acknowledges that the Logistics Team will determine future demand for the Hunter Valley Coal Chain. ARTC will actively participate in, and cooperate with this process, noting that ARTC is itself a member of the Logistics Team.

- (a) ARTC acknowledges that the Logistics Team is responsible for determining the Forecast Demand.
- (b) ARTC will provide all reasonable co-operation to the Logistics Team in determining the Forecast Demand through the Annual Assessment Of System Capacity as requested by the Logistics Team.

5.8 Capacity Allocation – Coal Trains

- (a) In accordance with clause 5.1(a), each Financial Year during the Term, ARTC will use its best endeavours to provide sufficient Capacity within the Hunter Valley Network to provide efficient Coal Train Paths to meet the Forecast Demand.
- (b) Prior to the commencement of each Financial Year, ARTC will participate in the process described in Schedule F clause F.1.7 to determine the Load-Point Allocation for each Load-Point and the Aggregate Load-Point Allocation for that Financial Year.
- (c) In each Financial Year during the Term, ARTC will provide sufficient Coal Train Paths to each Load-Point in order to move the Aggregate Load-Point Allocation for that Financial Year.

Clauses 5.8(a), 5.8(b) and 5.8(c)

Clause 5.8(a) places a best endeavours obligation on ARTC to provide the capacity to meet the previously agreed Forecast Demand for that particular Financial Year. The Forecast Demand is determined through a process considering demand over a number of years with sufficient time for the provision of Additional Capacity where this is required.

Clause 5.8(b) sets up the process for agreeing the annual Capacity availability for Coal Train Paths through the Logistics Team.

Clause 5.8(c) sets ARTC's absolute obligation as providing the Capacity that it nominated to the Logistics Team in the determination of the system capacity for the determination of the Load-Point Allocations. In total these allocations are the Aggregate Load-Point Allocation. This is necessary in case ARTC has not been able, despite its best endeavours, to provide additional capacity – ARTC can nominate the Capacity that it is willing to commit to for that year.

- (d) ARTC recognises that the nature of operation of the Hunter Valley Coal Chain is such that the most efficient method for allocation of Coal Train Paths to Customers is on a daily basis in accordance with the Integrated Plan.
- (e) ARTC will make available Coal Train Paths to a Customer on a daily basis in accordance with the Integrated Plan and will not allocate or otherwise make available Coal Train Paths to any party other than in accordance with the Integrated Plan.
- (f) It will be a term of every Access Agreement for Access to the Hunter Valley Network for the purpose of operating Coal Trains that the entitlement of the Customer to any Coal Train Path will be as set out in clause 2 of the Indicative Access Agreement in Schedule D to this

Undertaking.

- (g) ARTC will use its reasonable endeavours to make available any additional Coal Train Paths requested on an ad hoc basis by one or more Customers provided that such Coal Train Paths are not inconsistent with the Integrated Plan.

5.9 Capacity Allocation – Non-Coal Train Paths

Clause 5.9

Clause 5.9 recognises that, while it is not necessary to review or modify Coal Train Paths as these remain effectively a Capacity and short term planning tool, it will be necessary to allow for changes in non-coal trains from time to time. This clause provides for this occurrence and ensures that Committed Capacity for Coal Trains is maintained.

- (a) ARTC will review the allocation of Non-Coal Train Paths from time to time but at least every twelve months. The review will:
- (i) not require any person who has a Capacity Entitlement to modify any existing Train Paths without that person's consent except to the extent required by law with respect to Passenger Trains;
 - (ii) be carried out in conjunction with any timetable review or consideration of any Access Application being carried out by ARTC;
 - (iii) provide any person who has a Capacity Entitlement with an opportunity to seek adjustment from ARTC to their existing Train Paths, provided the adjustment does not reduce the quantum or quality of Traffic Specific Capacity or Committed Capacity; and
 - (iv) be carried out in consultation with the Logistics Team with the objective of minimising any negative impact of Non-Coal Train Paths on the quality and quantum of Coal Train Paths; and
 - (v) conform with the process described in Schedule F.
- (b) Where, as part of the review carried out in accordance with clause 5.9(a), ARTC determines that Additional Capacity is required to provide additional or modified Non-Coal Train Paths without otherwise reducing the quantum or quality of Coal Train Paths, ARTC will:
- (i) undertake such processes for the consideration of investments as it would otherwise undertake for the ARTC Network that is not part of the Hunter Valley Network, and where such processes determine that ARTC should make the investment, provide the Additional Capacity required; but
 - (ii) ARTC will not reduce the quantum or quality of Coal Train Paths in order to provide the additional or modified Non-Coal Train Paths except where the Logistics Team agrees that the requirement for Committed Capacity is expected to permanently reduce such that the Capacity can be allocated to the additional or modified Non-Coal Train Paths without adversely affecting the operation of the Hunter Valley Coal Chain.
- (c) For the purposes of clause 5.9(b)(ii), the period for determining whether a permanent reduction in the requirement for Committed Capacity is expected to occur must be at least the following 5 Financial Years.

5.10 Allocation of Ancillary Trains Paths

Clause 5.10

New clause to provide specifically for Ancillary Trains.

At the request of a Customer, ARTC will use its reasonable endeavours to allocate an Ancillary Train Path for the purpose of the Customer operating an Ancillary Train providing that to do so is not inconsistent with the Integrated Plan.

5.11 Use of Terminals

Clause 5.11

New clause. This incorporates the Terminal Management Protocol formally into the Undertaking. The protocol sets out, at a high level, the rules for operation of the terminal and is contained in the Indicative Access Agreement.

It will be a term of every Access Agreement, that the use by the Customer of any ARTC Terminal, is subject to the Customer conforming with the Terminal Management Protocol.

5.12 Stowage of Rollingstock

Clause 0

New clause. Provides specifically for short term stowage. This includes medium term stowage of Rollingstock due to a temporary lack of demand eg lower than normal railings of coal.

It does not include longer term storage such as might be required for an entire season or longer; this is covered in clause 5.12(b).

- (a) ARTC will provide stowage on the Hunter Valley Network, free of charge, to a Customer as is required in the normal course of operations to carry out queuing, staging, shunting, Train marshalling, Rollingstock maintenance, provisioning or other operational requirements, provided that such stowage does not reduce the availability of the Hunter Valley Network otherwise required for the operation of Trains.
- (b) Where, due to short term or medium term system requirements, including where Rollingstock is not required due to a temporary reduction in business, but excluding any longer term requirement for storage of Rollingstock, it is necessary for a Customer or its Operator to stow Rollingstock on the Hunter Valley Network, ARTC will use its reasonable endeavours to provide such stowage to the Customer or Operator, free of charge, provided that such stowage does not reduce the availability of the Hunter Valley Network otherwise required for the operation of Trains.

5.13 Storage of Rollingstock

Clause 5.13

New clause. Provides specifically for long term storage.

- (a) ARTC will allow a Customer to store Rollingstock on the Hunter Valley Network provided that;
 - (i) the Customer conforms to any reasonable requirement by ARTC with regard to location, safety or environment.
 - (ii) the storage does not reduce the availability of the Hunter Valley Network otherwise required for the operation of Trains, including Trains that had not been planned at the time that the storage was permitted; and

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- (iii) the Customer warrants that it will remove the relevant Rollingstock on receipt of notice from ARTC in accordance with clause 5.13(d).
 - (b) The Customer is required to give ARTC at least 20 Business Days notice that it wishes to store Rollingstock on the Hunter Valley Network and identify the preferred location, quantity and type of Rollingstock and any other relevant details, including, if known, the expected duration of the storage.
 - (c) ARTC will use its reasonable endeavours to provide the storage as requested, but may, at its discretion, provide one or more alternative locations if the preferred location is not suitable or available.
 - (d) ARTC may require the Customer to remove the stored Rollingstock by giving the Customer at least 20 Business Days notice, in circumstances where the stored Rollingstock prevents or reduces the use of the Hunter Valley Network for the operation of any Train (including prospective Trains).
 - (e) Where ARTC provides storage to a Customer on the basis of this clause 5.13, it will be entitled to charge the Customer the Direct Cost of providing that storage.

PART 6

6. HUNTER VALLEY NETWORK CONNECTIONS & OTHER INVESTMENTS

6.1 Hunter Valley Network Connections

- (a) In the event that an Other Track owner, whether or not an Access Seeker, wishes to connect such track to the Hunter Valley 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 Hunter Valley Network is such that the connection will not, by virtue of its existence, materially reduce Capacity or contravene the System Rules;
 - (iii) procedural and physical interface arrangements comply with ARTC's existing interface arrangements and the connection is in accordance with applicable safety regulations;
 - (iv) the Other Track owner ensures that all users of such track comply with the directions of ARTC's Train controllers regarding entry to and exit from the Hunter Valley Network to the extent that this is within the legitimate authority of ARTC's Train controllers;
 - (v) the connection is not incompatible with ARTC's engineering and operational standards; and
 - (vi) the Other Track owner meets the initial and continued costs associated with constructing and maintaining the connection.
- (b) ARTC will provide all reasonable assistance to the Other Track owner to obtain any relevant approval required under clause 6.1(a)(i) and to comply with ARTC's requirements under clause 6.1(a)(iii) and 6.1(a)(v), and may recover the reasonable costs in providing such assistance.

Clause 6.1(b)

It is appropriate for ARTC to provide assurance of reasonable assistance to a track owner to make the connection. Often regulatory authorities will require a party in ARTC's position to participate in the approval process or give some undertaking with regard to the connection (eg amend ARTC's rail safety accreditation, environmental plans). Also, as ARTC is in the best position to know its own standards and requirements, it is appropriate that ARTC provide assistance in this area as well. It would be inappropriate for ARTC, through unreasonable inaction to delay or altogether avoid the connection where all the other criteria have been or could be met if cooperation was forthcoming.

- (c) If ARTC refuses to consent under clause 6.1(a)(ii), ARTC will, if requested to do so by the Other Track owner, notify the Other Track owner in writing of the reasons why the connection would, in its view, materially reduce Capacity or contravene the System Rules.

AAU Clauses 6.2 & 6.3

AAU Clause 6.2 regarding provision of additional capacity has been deleted as this is dealt with under MUC Clause 5.2.

AAU Clause 6.3 dealing with the Victorian Transport Act is redundant in the context of the

Hunter Valley Network and has been deleted.

6.2 Access Seeker Related Investments

Clause 6.2

This clause has been inserted to cover the situation where an Access Seeker needs to make an investment that requires some form of interaction with ARTC. An example of such a request would be the installation of a monitoring device for use by the Access Seeker that was required to be affixed to ARTC's infrastructure.

The intent is that ARTC will provide such assistance as is necessary to accommodate or facilitate the investment. Where ARTC incurs costs to do so, it is entitled to recover these.

- (a) On occasion, an Access Seeker may require assistance, accommodation or facilitation by ARTC in order to make an investment associated with the running of Coal Trains or Ancillary Trains.
- (b) Where ARTC receives a request from an Access Seeker to facilitate an investment of the type in clause 6.2(a), ARTC will provide the appropriate assistance, accommodation or facilitation provided that:
 - (i) the resulting asset;
 - (A) does not compromise the safe and reliable operation of the Hunter Valley Network;
 - (B) does not compromise ARTC's rail safety accreditation;
 - (C) meets any relevant ARTC engineering and operational standards; and
 - (D) does not interfere with ARTC's assets in a manner unacceptable to ARTC, acting reasonably;
 - (ii) ARTC is not required to engage disproportionate resources, time or expenditure;
 - (iii) the Access Seeker agrees to pay ARTC's reasonable costs associated with providing the assistance, accommodation or facilitation;
 - (iv) the Access Seeker agrees to indemnify ARTC against all liability with respect to any assistance, accommodation or facilitation provided for the purposes of Access Seeker's investment except to the extent that ARTC is negligent or engages in wilful misconduct; and
 - (v) where relevant, the Access Seeker agrees to pay ARTC's reasonable on-going costs associated with the physical accommodation of the asset on the ARTC's property.
- (c) Where ARTC agrees, it will provide the relevant assistance, accommodation or facilitation on the basis of this clause 6.2, notwithstanding that it may be required to amend its rail safety accreditation or modify existing engineering or operational standards. In any such case, ARTC will seek the relevant amendments and/or make the relevant modifications.
- (d) Where ARTC is required to create an engineering or operational standard to provide the relevant assistance, accommodation or facilitation, it will create the standard.
- (e) In providing the required assistance, accommodation or facilitation, ARTC will act in a timely manner.

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- (f) Where the resulting asset requires physical accommodation on ARTC's property,
 - (i) ARTC will not seek any lease or licence fee for such accommodation beyond any actual costs incurred by ARTC,
 - (ii) ARTC will provide, without cost, any permission, licence or authority required by the Access Seeker in order to gain access to the asset provided that such access is exercised by the Access Seeker in accordance with any reasonable safety requirements imposed by ARTC.
 - (g) The Access Seeker retains ownership of and responsibility for the asset at all times.
 - (h) The Access Seeker is responsible for removal of the asset once it is no longer required for operational purposes. In circumstances where the Access Seeker fails to become a Customer within a reasonable period after the installation of the asset, ARTC may require the Access Seeker to remove the asset.
 - (i) In considering any matter with regard to this clause 6.2 requiring ARTC's permission, approval, agreement, cooperation or assistance, ARTC will give the matter bona fide consideration and will not unreasonably refuse to give any permission, approval, agreement, cooperation or assistance as required.

PART 7

7. HUNTER VALLEY NETWORK TRANSIT MANAGEMENT

7.1 Objectives Of Coal And Other Trains

Clause 7.1

The MUC has substantially modified the AAU to take into account the different requirements of Coal Trains and the Hunter Valley Network. Schedule F containing the Network Management Principles has also been modestly modified.

- (a) ARTC recognises that, in general;
 - (i) the primary objective of a Coal Train is to arrive at the Discharge-Point in sequence in accordance with the Integrated Plan; and
 - (ii) the primary objective for each Ancillary Train and non-Coal Train is to arrive at its destination or exit the Hunter Valley Network (as the case may be) in the minimum transit time.
- (b) Notwithstanding clause 7.1 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 in accordance with the Integrated Plan and the Network Management Principles set out in Schedule F.

7.2 Recovery From Failure Of Integrated Plan

Clause 7.2

This is a new clause directed to recovery from a disruption to the Network. The only express references contained in the AAU to such matters are to be found in the Indicative Access Agreement. These tend to be brief and only tangential to the issue eg AAU Schedule D cl 8.1(c)(iii) contains the only reference to use of an Operator's locomotive and crew to assisting to alleviate a blockage to the network and this reference is in regard to obeying instructions.

The MUG deals with these issues in more detail and provision is made to address such matters as the cost involved and indemnities.

- (a) In the event there is a failure to achieve any component of the Integrated Plan necessitating a modification to the Integrated Plan (other than the mere early or late running of Trains), ARTC will modify its management of those elements of the Coal Train component of the Integrated Plan under its control so as to attempt to achieve the objectives of the Integrated Plan.
- (b) The elements of the Coal Train component of the Integrated Plan under ARTC's control or partial control include:
 - (i) safeworking of Coal Trains and infrastructure maintenance personnel and their equipment;
 - (ii) resequencing, repositioning and prioritisation of Coal Trains; and
 - (iii) allocation, cancellation and reprogramming of Train Paths.
- (c) In undertaking remedial action in accordance with clause 7.2(a), ARTC will liaise closely

with the Logistics Team 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.

- (d) In determining the optimum recovery strategy identified in clause 7.2(c), ARTC will take into account the preferences of Customers and make reasonable endeavours to minimise any negative consequences that arise to Customers from the implementation of the optimum recovery strategy.
- (e) It will be a term of every Access Agreement for Access to the Hunter Valley Network for the purpose of operating Coal Trains and Ancillary Trains, that ARTC may issue instructions to a Customer for the purpose of assisting with the recovery from disruption to normal operations and that the Customer will be required to comply with the instruction, or if the Customer is not the Operator, that the Customer will obligate its Operator to comply with an instruction provided the instruction is one that:
 - (i) the Operator is qualified to perform;
 - (ii) is within the terms of the Operator's safety accreditation; and
 - (iii) can be safely performed;
- (f) It will be a term of every Access Agreement, that where an instruction is issued requiring an Operator to aid a distressed Train under the management of another Operator;
 - (i) ARTC will pay to the Customer under whose Access Agreement the assistance is being provided the prescribed fee set out in Schedule J or, the Operator's actual reasonable Direct Costs, whichever is the greater;
 - (ii) ARTC will indemnify the assisting Customer against any liability for damage or negligence that arises in complying with the instruction except to the extent that the assisting Customer engages in wilful, dishonest or unlawful conduct and if the Operator providing the assistance is not the Customer, then the indemnity will extend to that Operator; and
 - (iii) the Customer whose Train is assisted will be required to indemnify ARTC against;
 - (A) the costs incurred in providing the assistance; and
 - (B) any liability for damage or negligence that arises from ARTC arranging assistance and the assisting Customer (or the Customer's Operator) complying with the instruction except to the extent that either ARTC, the assisting Customer or Operator engages in wilful, dishonest or unlawful conduct.

PART 8

8. PERFORMANCE INDICATORS

8.1 Commitment by ARTC

- (a) ARTC undertakes to maintain the Hunter Valley Network in a condition which is fit for use by Coal Trains and Ancillary Trains for the longer of;
 - (i) the Term; or
 - (ii) the term of any Access Agreement executed during the Term.
- (b) Where ARTC's obligation is governed by clause 8.1(a)(ii) the standard to which ARTC is required to maintain the Hunter Valley Network will be by reference to the terms of the relevant Access Agreement.

Clause 8.1

The formulation in the AAU was confusing as it committed ARTC to maintain the Network in fit condition during the term of the Undertaking but by reference back to Access Agreements negotiated under it. As the term of the Undertaking and an Access Agreement which might not necessarily coincide, this could create difficulties. The MUG therefore clarifies that ARTC's commitment is to the longer of either the term of any Access Agreement negotiated under the Undertaking or the Undertaking itself.

8.2 Creation Of Performance Indicators

To assist in maintaining an appropriate standard of performance from the Hunter Valley Network, ARTC will work with Customers to create a set of indicators that provide a useful measure of the performance of the Hunter Valley Network in the context of the requirements of the Hunter Valley Coal Chain as a whole.

Clause 8.2

The MUC does not propose a specific set of performance measures, recognising that in a complex and interrelated system such the Hunter Valley Coal Chain, such measures are difficult to derive. Instead, the MUC proposes that the parties should cooperate to create a set of performance measures that conform to a series of broad attributes.

8.3 Attributes of performance indicators

To be effective in assisting with the management of the Hunter Valley Network, performance indicators must have the following attributes:

- (a) predictable and beneficial behaviours – each indicator will encourage behaviour in a way that is predictable and desirable; further, the indicators will, together, be carefully constructed to avoid the rewarding of undesirable outcomes or the discouragement of beneficial outcomes.
- (b) relevance - each indicator should be an important and direct measure of the performance of a key aspect of the Hunter Valley Network;
- (c) easily measured - each indicator should be easy to measure and preferably the data will be inexpensive to collect and collate;

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- (d) simple – each indicator should be easy to report and interpret, in terms of both the effort required and consistency over time;
 - (e) sparse - there should only be a few performance indicators that are genuinely key to the management of the activities under review.

PART 9

9. DEFINITIONS AND INTERPRETATION

9.1 Meaning Of Terms

The following terms shall have the meaning set out below unless the context otherwise requires:

“**Access**” means access to use the Hunter Valley Network, or any part thereof, for the purpose of operating Coal Trains, Ancillary Trains or performing Terminal Activities;

“**Access Agreement**” means a contract between ARTC and a Customer, the current indicative terms and conditions of which are set out in Schedule D;

Definition: “Access Agreement”

Amended for clarity.

“**Access Application**” means an application for Access submitted by an Applicant to ARTC (by writing or electronically);

Definition: “Access Application”

Amended to remove the necessity for Schedule A.

“**Access Rights**” means the rights of Access granted to the Customer pursuant to the Access Agreement;

“**Access Seeker**” means a Customer or an Applicant;

Definition: “Access Seeker”

New definition. In places it is useful to include reference to both Applicants and Customers as a group.

“**Accredited**” means being accredited under the Rail Safety Act to operate the relevant Coal Trains, Ancillary Trains or Terminal Activities on the Hunter Valley Network and “Accreditation” bears a corresponding meaning;

“**Additional Capacity**” means the capability of the Hunter Valley Network to carry additional task;

“**Aggregate Load-Point Allocation**” means the sum of the Load-Point Allocations for all Load-Points;

Definition: “Aggregate Load-Point Allocation”

New definition.

“**Ancillary Train**” means a Train that is incidental to the purpose of operating Coal Trains and includes;

- (a) the movement of light engines;
- (b) repositioning movements for Rollingstock,
- (c) movements of Rollingstock to and from maintenance facilities;

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- (d) the testing of Rollingstock and Train consists; and
 - (e) the reclamation of Rollingstock from the Hunter Valley Network;

Definition: “Ancillary Train”

New definition. The separate definition of these Trains is necessary to capture movements that are paid for through the different pricing mechanism applied to coal traffic in the Hunter Valley.

“**Ancillary Train Path**” means the specification in terms of times and locations granted by ARTC to a Customer to access the Hunter Valley Network for the purpose of running of an Ancillary Train.

Definition: “Ancillary Train Path”

New definition.

“**Annual Allowance**” means, for each item of Major Periodic Maintenance, the current cost of the item divided by the life (in years) of the item;

Definition: “Annual Allowance”

New definition.

“**Annual Assessment Of System Capacity**” means the annual assessment carried out by the Logistics Team of the capacity of the Hunter Valley Coal Chain and the annual demand for the movement of coal through the Hunter Valley Coal Chain;

Definition: “Access Seeker”

New definition. In places it is useful to include reference to both Applicants and Customers as a group.

“**Applicant**” means a person seeking Access from ARTC to the Hunter Valley Network for the operation of Coal Trains and seeking to become a Customer, or an existing Customer seeking additional, renewed or modified Access;

Definition: “Applicant”

Modified to recognise that an existing Customer can be an Applicant when seeking to vary its Access Rights.

“**ARTC Network**” means the railway network and associated infrastructure under the control of ARTC and which ARTC has available for access by one or more Customers;

Definition: “ARTC Network”

New definition. This is used to refer ARTC’s network as a whole rather than just the Hunter Valley Network.

AAU Definition: “Associated Facilities”

The definition has been combined into the definition of the Hunter Valley Network and is therefore not required as a separate definition.

“**ARTC Terminal**” means infrastructure forming part of the Hunter Valley Network, the primary

purpose of which is to facilitate the performance of activities ancillary to the running of Trains on a main line, or loading, or discharging cargo as identified in Schedule E.

Definition: “ARTC Terminal”

New definition. This term has been combined into the definition of Network.

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

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

“**Capacity**” means the capability of the Hunter Valley Network to operate Coal Trains, including Additional Capacity, after taking the account:

- (f) any System Rules impacting the operation of Trains or the Hunter Valley Network;
- (g) the need to accommodate peaks in demand;
- (h) Hunter Valley Network track possessions reasonably required by ARTC for maintenance, repair or enhancements; and
- (i) the requirements of Trains other than Coal Trains;

Definition: “Capacity”

Modified to reflect the different needs of the Hunter Valley Network.

“**Capacity Analysis**” means the assessment by ARTC conducted in conjunction with the Logistics Team to determine the:

- (a) the Available Capacity of the Hunter Valley Network;
- (b) the impact on other parts of the Hunter Valley Coal Chain of providing Access; and
- (c) whether or not there is sufficient Available Capacity to accept the Access Application and, if not, an assessment of the Additional Capacity required to accept the Access Application as described in Part 5;

Definition: “Capacity Analysis”

Modified to reflect the different needs of the Hunter Valley Network.

“**Capacity Entitlement**” means the rights granted to a Customer for the operation of Trains under an access agreement in accordance with any other ARTC undertaking, in the form of Non-Coal Train Paths including the rights to participate in any the allocation of Non-Coal Train Paths that arise under Traffic Specific Capacity;

Definition: “Capacity Entitlement”

Modified to reflect that Capacity Entitlements will under a different access undertaking.

AAU Definition: “Ceiling Limit”

Deleted as now replaced by Combinatorial Ceiling Limit and Stand Alone Ceiling Limit.

“**Charges**” means the charges payable by the Customer to ARTC for the provision of Access under the Access Agreement, and, where the context so indicates, the unit rates used to determine such charges;

Definition: “Charges”

Amended to clarify that charges applies to both the revenue and the underlying prices depending on the context.

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

Definition: “Coal Train”

New definition.

“**Coal Train Path**” means the specification in terms of times and locations granted by ARTC in accordance with the Integrated Plan to a Customer to access the Hunter Valley Network for the purpose of running of a Coal Train;

Definition: “Coal Train Path”

New definition.

“**Combinatorial Ceiling Limit**” has the meaning described in clause 4.5(e);

Definition: “Combinatorial Ceiling Limit”

New definition.

“**Committed Capacity**” means that portion of the Capacity that is required to meet the Aggregate Load-Point Allocation;

Definition: “Committed Capacity”

Modified to reflect Capacity that is committed by ARTC for the provision of Coal Train Paths.

“**Community Service Obligation**” means an obligation from a Government Authority accepted by ARTC to maintain and provide Access to one or more specific Segments on terms agreed with the Government Authority in return for an identifiable set of recurrent payments intended to reduce the Charges payable by Access Seekers for Access to those Segments.

Definition: “Community Service Obligation”

New definition.

“**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;

“**Confidential Information**” means any commercially sensitive information or data (as reasonably determined) given by one party to the other together with information or data specifically marked confidential by a party when disclosed to the other;

Definition: “Confidential Information”

Modified to reflect the need to share information with the Logistics Team.

“**Constrained Coal Train**” means a Coal Train travelling wholly within the Constrained Network;

Definition: “Constrained Coal Train”

New definition.

“**Constrained Network**” means those Segments that, in combination, generate revenue at the Combinatorial Ceiling Limit;

Definition: “Constrained Network”

New definition.

“**Consultation Process**” means the process set out in Schedule I;

Definition: “Consultation Process”

New definition.

“**CPI**” means the annual percentage increase in Consumer Price Index determined by reference to the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics for each March quarter;

Definition: “CPI”

Clarified that the index number is the March quarter figure.

“**Cusp Tonnage**” is the proportion of forecast tonnage described in clause 4.7(g) used to determine the pre-cusp rates for the Constrained Network such that the aggregate revenue derived by ARTC will equal the Combinatorial Ceiling Limit for the Constrained Network;

Definition: “Cusp Tonnage”

New definition.

“**Customer**” means an entity which has entered into an Access Agreement and, where such Customer is also the Operator of the Trains or Terminal Activities relating to such Access, the expression “Customer” shall also mean “Operator”;

Definition: “Customer”

Modified to include Terminal Activities and remove ‘accredited’ as this is covered elsewhere.

“**Depreciation**” means the notional reduction in value on a straight line basis over the economic life (expressed in years) of the asset;

Definition: “Depreciation”

Modified to reflect accounting standards with a reference to ‘years’ for convenience.

“**Detailed Design Report**” means a report as described in paragraph I.4 of Schedule I;

Definition: “Detailed Design Report”

New definition.

“**DORC**” means depreciated optimised replacement cost determined in accordance with this Undertaking;

Definition: “DORC”

Previously in the [AAU clause 4.4\(d\)\(i\)](#). Relocated to the definitions section as it is also used elsewhere in the MUC.

“**Direct Cost**” means costs incurred by the relevant party which vary within a 12 month period, plus an Annual Allowance for variable Major Periodic Maintenance costs;

Definition: “Direct Cost”

New definition. This definition has been modelled on the NSW Rail Access Undertaking.

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

“**Economic Cost**” means, with respect to a Segment;

- (a) Segment Specific Costs;
- (b) Depreciation of Segment Specific Assets;
- (c) a return on Segment Specific Assets, being determined by applying the Rate of Return to the DORC value of Segment Specific Assets;
- (d) an allocation of Non-Segment Specific Costs;
- (e) an allocation of Depreciation of Non-Segment Specific Assets; and
- (f) an allocation of return of Non-Segment Specific Assets, being determined by applying Rate of Return to the DORC value of Non-Segment Specific Assets;

Definition: “Economic Cost”

Previously in the [AAU clause 4.4\(e\)](#). Relocated to the definitions section and augmented by clause 4.6.

“**Financial Year**” means the period between 1st July of any year and 30th June of the following year, both dates inclusive;

Definition: “Financial Year”

New definition.

“**Floor Limit**” has the meaning described in clause 4.5(c);

“**Forecast Demand**” means the aggregate demand for the haulage of coal from Load-Points to export and domestic terminals in each of the next five Financial Years, determined by the Logistics Team as part of the Annual Assessment Of System Capacity;

Definition: “Forecast Demand”

New definition.

“**Full Incremental Cost**” means the costs that could have been avoided if a Segment was removed from the Hunter Valley Network including Segment Specific Costs and Non-Segment Specific Costs relating to the following activities:

- (a) track and signalling and communication maintenance;

-
- (b) maintenance contract management and project management;
 - (c) train control and communication;
 - (d) train planning and operations administration;
 - (e) system management and administration;

but excluding Depreciation and return on assets relating to Segment Specific Assets and Non-Segment Specific Assets;

Definition: “Full Incremental Cost”

Previously Incremental Cost.

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

“**Greenfield**” means, in relation to the valuation of an asset, that the cost of construction of the asset is calculated under the assumption that the construction occurs across an area free of any existing development and no additional expense is incurred in working in the vicinity of an existing, on-going operation;

“**GST**” means [insert legal definition of Goods & Services Tax]

“**Hunter Valley Coal Chain**” means the system of moving coal from coal producers through a terminal in the Hunter Valley and Gunnedah basin areas of New South Wales 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 Hunter Valley and Gunnedah 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;

Definition: “Hunter Valley Coal Chain”

New definition.

“**Hunter Valley Network**” means the network of railway lines and ARTC Terminals defined in Schedule E and includes all associated track structures, rail terminals, yards, over and under track structures, supports (including support for equipment or items associated with the use of the railway lines), tunnels, bridges, buildings, facilities, train control systems, signalling systems, condition monitoring systems, communication systems and associated plant, machinery and equipment related to or connected with use of the railway lines that are owned or leased by, or under exclusive licence to, ARTC;

Definition: “Hunter Valley Network”

The definition of Network from the AAU has been modified to include ARTC Terminals, yards and what was previously separately defined as Associated Facilities. This has been done to recognise that ARTC provides access to terminals at the port and other station yards on its network for the purpose of operating coal trains. For clarity, the categories of buildings, facilities (as a general “catch-all”) and condition monitoring systems have also been added.

“**Hunter Valley Regional Costs**” means those costs described in clause 4.6(e);

Definition: “Hunter Valley Regional Costs”

New definition.

Definition: “Incremental Cost”

Changed to Full Incremental Cost and relocated.

“**Indicative Access Agreement**” means the indicative access agreement in Schedule D;

“**Indicative Access Proposal**” means the preliminary Access proposal provided by ARTC under clause 3.8;

“**Individual Cusp Tonnage**” is the tonnage of coal used to determine the point at which post-cusp rates are applied to a particular Unconstrained Train;

Definition: “Individual Cusp Tonnage”

New definition.

“**Integrated Plan**” means the plan prepared by the Logistics Team in accordance with the System Rules and provided to all logistics service providers in the Hunter Valley Coal Chain on a daily basis (or such other time frame as otherwise agreed by the members of the Logistics Team) setting out the plan for the running of Trains, assembly of cargoes and loading of vessels.

Definition: “Integrated Plan”

New definition.

“**Investment Criteria**” means the criteria set out in Schedule H;

Definition: “Investment Criteria”

New definition.

“**km**” means kilometres;

“**Load-Point**” means a facility connected to the Hunter Valley Network at which coal is loaded into Trains;

Definition “Load-Point”

New definition.

“**Load-Point Allocation**” means the coal tonnes allocated to the relevant Load-Point by the Logistics Team in accordance with the process carried out annually by the Logistics Team;

Definition “Load-Point Allocation”

New definition.

“**Logistics Team**” means the Hunter Valley Coal Chain Logistics Team which has as members representatives of each of the logistics service providers to the Hunter Valley Coal Chain;

Definition “Logistics Team”

New definition.

“**Major Periodic Maintenance**” means non-routine maintenance of track, structures and other parts of the Hunter Valley Network carried out irregularly over a span of years that is necessary to retain the asset to a standard of “fit for purpose”, but excludes any improvement in quality, capacity or standard exceeding that of the asset in its initial condition;

Definition “Major Periodic Maintenance”

New definition.

“**Material Change**” means a change in:

- (a) any taxes or charges levied by government;
- (b) any statute, ordinance, rule, regulation or other sub-ordinate legislation;
- (c) the operation of the Hunter Valley Coal Chain;
- (d) demand for Coal Trains on the Hunter Valley Network; or
- (e) in the constitution or operation of the Logistics Team, including the cessation of the Logistics Team,

which has a material effect on the grant of Access Rights, the legitimate business interests of ARTC or one or more Access Seekers;

“**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 clause 3.4(e)(ii);

“**Mezzanine Limit**” has the meaning described in clause 4.5(d);

Definition: “Mezzanine Limit”

New definition.

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

“**Network-Wide Costs**” has the meaning described in clause 4.6(g);

Definition: “Network-Wide Costs”

New definition.

“**Non-Coal Train Path**” means, with regard to the operation of a Train that traverses wholly or in part the Hunter Valley Network under an access agreement governed by an access undertaking or regime other than this Undertaking, the specification in terms of times and locations granted by ARTC to the customer under that access agreement for that Train;

Definition: “Non-Coal Train Path”

New definition.

“**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 Rail Access Undertaking**” means the undertaking made pursuant to Schedule 6AA of the *Transport Administration Act 1988* (NSW) in 2004;

Definition: “Network-Wide Costs”

New definition.

“**ntk**” means net tonne kilometre and is the measure of one tonne of payload moved one kilometre;

“**Operator**” means a party that will operate Trains in accordance with an Access Agreement, whether as the Customer or as a sub-contractor to the Customer, noting that, in order to operate Trains, the party will be required to be Accredited;

“**Other Track**” means rail track and associated infrastructure not part of the ARTC Network, owned or contemplated to be constructed, by any party other than ARTC;

Definition: “Other Track”

Modified to refer to track owned by any other entity, not just government entities and clarified that this extends to include potential rail infrastructure as well as that which currently exists.

“**Participant**” has the meaning given in Schedule I;

Definition: “Participant”

New definition.

“**Passenger Train**” means a Train for which the predominant purpose is the carriage of people;

Definition: “Passenger Train”

New definition.

“**Performance Indicators**” means the performance indicators described in Part 8;

“**Possession Planning Process**” means the process referred to in clause 5.5 and described in described in Schedule F clause F.2;

Definition: “Possession Planning Process”

New definition.

“**Prescribed Fee**” means a fee for the provision of incidental services as set out in Schedule J.

Definition: “Prescribed Fee”

New definition.

“**Provider**” means a provider as defined by the *TPA* s 44B;

“**Rail Safety Act**” means the *Rail Safety Act 1993* (NSW);

Definition: “Rail Safety Act”

Modified as only necessary to refer to the NSW legislation.

“**Rate of Return**” has the meaning described in clause 4.6(h);

Definition: “Rate of Return”

Modified reference.

“**Regulated Asset Base**” means the asset value, at the time, attributed to a Segment or group of Segments and may include Segment Specific Assets and Non-Segment Specific Assets;

“**Related Party**” has the meaning given to Related Body Corporate in section 50 of the *Corporations Act 2001* (Cth);

“**Relevant Access Seeker**” means an Access Seeker, at the time relevant to the context, whose interests relating to Access are likely to be directly affected by the matter under consideration;

Definition: “Relevant Access Seeker”

New definition. The term is used to reflect a subset of Access Seekers at a particular point in time that have an interest in the relevant matter.

“**Rollingstock**” means a locomotive, carriage, wagon or other vehicle for use on a railway but excludes any self-propelled track maintenance vehicle;

Definition: “Rollingstock”

Replaced “Rolling Stock” and amended to excluded track maintenance vehicles.

“**Segment**” means a component of the Hunter Valley Network as defined in Schedule E and is the smallest component for which the revenue limits in clause 4.5 apply;

“**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 and, for the avoidance of doubt, shall include both routine maintenance and the Annual Allowance of any items of Major Periodic Maintenance;

Definition: “Segment Specific Costs”

Modified to clarify that this includes an Annual Allowance for Major Periodic Maintenance.

“**Solvent**” means none of the following events have happened to the Applicant:

- (f) the Applicant is unable to pay all its debts as and when they become due or it has failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);
- (g) a meeting is convened to place the Applicant in voluntary liquidation or to appoint an administrator;
- (h) an application is made to a court for the Applicant to be wound up and that application is not dismissed within one month;
- (i) the appointment of a controller (as defined in the *Corporations Act 2001* (Cth)) of any of the Applicant’s assets; or

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- (j) the Applicant proposes to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement;

“**Stand Alone Ceiling Limit**” has the meaning described in clause 4.5(f);

Definition: “Stand Alone Ceiling Limit”

New definition.

“**Standard Information Fee**” means the fee nominated in Schedule J for the provision of information to an Applicant under clause 3.3(a);

Definition: “Standard Information Fee”

New definition.

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

Definition: “System Rules”

New definition.

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

“**Terminal Activities**” means operational activities in an ARTC Terminal requiring the party performing the activities to be Accredited under the relevant Rail Safety Act.

Definition: “Terminal Activities”

New definition.

“**Terminal Management Protocol**” means the terminal management protocol contained in the Indicative Access Agreement (Schedule D).

Definition: “Terminal Management Protocol”

New definition.

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

“**Traffic Specific Capacity**” means capacity on the Hunter Valley Network that has been reserved under another undertaking or regime for use by non-Coal Trains hauling a specific type of commodity (eg bulk grain, coal or minerals).

Definition: “Train Specific Capacity”

New definition.

“**Train**” means a single unit of Rollingstock or two or more units coupled together, at least one of which is a locomotive or other self-propelling unit;

“**Train Path**” means any Coal Train Path, Ancillary Train Path or Non-Coal Train Path.

Definition: “Train Path”

Modified to recognise that Train Paths include all Train types and under any relevant access undertaking.

“**Unconstrained Train**” means a Train including any Coal Train that is not a Constrained Train;

Definition: “Unconstrained Train”

New definition.

“**Unconstrained Network**” means those Segments that, in combination, do not generate revenue at the Combinatorial Ceiling Limit;

Definition: “Unconstrained Network”

New definition.

“**Unders And Overs Account**” means an account as described in clause 4.8(b);

Definition: “Unders And Overs Account”

New definition.

“**Undertaking**” means this undertaking as amended from time to time in accordance with clauses 2.1(c) or 2.5; and

“**Work Train**” means a Train that has the primary purpose of facilitating maintenance of the rail infrastructure.

Definition: “Work train”

New definition.

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 one gender includes all genders;
- (c) a reference to a person includes companies and associations;
- (d) a reference to a consent of a party means the prior written consent of that party;
- (e) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (f) a reference to a clause, Part or a Schedule is a reference to a clause, Part or Schedule of this Undertaking;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to ARTC may, if so agreed by ARTC, be provided in electronic form.

DATED the day of 2007.

SIGNED for and on behalf of **AUSTRALIAN RAIL TRACK CORPORATION LIMITED** by its duly authorised Officer:

.....
(Signature)

.....
(Name)

.....
(Position)

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 44ZZA OF THE *TRADE PRACTICES ACT 1974* (CTH) ON

.....2007

.....
Graeme Samuels
Chairperson
For and on behalf of the Australian Competition and
Consumer Commission

SCHEDULE A

ACCESS APPLICATION

[Deleted]

This schedule has been deleted and is retained solely to assist in maintaining comparison to the AAU.

SCHEDULE B

INFORMATION TO ACCOMPANY ACCESS APPLICATION

The Applicant shall include the following information when making an Application for Access in accordance with this Undertaking:

B.1 Applicant's Details

- (a) Business Name of Applicant;
- (b) ACN and ABN of Applicant;
- (c) Business Address of Applicant;
- (d) Telephone contact details;
- (e) Fax contact details;
- (f) Email contact details;
- (g) Contact person for progression of Access Application.

B.2 Access Requirements

Schedule B Clause B.2

This is substantially changed from the requirements in the AAU to reflect the different nature of the access rights being acquired. The focus is on the operational requirements and the locations between which trains will run.

- (a) Combination of Load-Points and Discharge-Points between which Access is required.
- (b) Term for which Access is required including approximate commencement date and, where Access to some combination of movements is required for a period other than the full term, separate commencement and termination dates as applicable.
- (c) Expected annual coal tonnages from each Load-Point to each Discharge-Point and any known variability of task within each Financial Year or part thereof for which Access is required.
- (d) Identification as to whether the tonnages represent new or existing traffic.
- (e) Terminal Activities expected to be performed within an ARTC Terminal.
- (f) Location of servicing facilities.
- (g) Description of intended Coal Trains, including for each Load-Point and Discharge-Point combination;
 - (i) Frequency;
 - (ii) Load, discharge and provisioning times;
 - (iii) Details of any intermediate activity (eg servicing of the Coal Train),

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- (iv) Sectional running times (if different from ARTC's published standards); and
 - (v) Total cycle time.
 - (h) Description of any known Ancillary Trains that the Applicant intends to operate on a regular basis.
 - (i) Proposed Train characteristics including:
 - (i) Maximum intended axle load of the Train(s);
 - (ii) Power to weight ratio of the Train(s);
 - (iii) Make-up of the Train; and
 - (iv) Physical length of the Train(s) in metres.

Schedule B clause B.2(h)

Amended numbering. Included power-to-weight ratio and also Train make-up (ie the location of different components in the Train) as this is an important determinant of Train performance.

B.3 Rollingstock Details

Details of all Rollingstock to be used to provide the Coal Trains (and if relevant, Ancillary Trains), sufficient to allow ARTC to reasonably assess the application.

Schedule B Clause B.3

It is important that only a reasonable level of information is sought from Applicants. It is not necessary to require substantial Rollingstock information at the time of application for ARTC to make a reasonable assessment of whether there is Available Capacity. It is sufficient that the Applicant is able to describe in broad terms the capability of the Rollingstock. More detail, if required, can be forthcoming through the negotiation process.

SCHEDULE C

ESSENTIAL ELEMENTS OF AN ACCESS AGREEMENT

Any Access Agreement must, as a minimum, cover the following matters;

- non-exclusive Access to the Hunter Valley Network for Coal Trains and Ancillary Trains;

Reference to associated facilities removed as these are now rolled into the definition of Hunter Valley Network. Reference is necessarily made to Coal Train Access.

- contracted Access subject to matters outside ARTC's control, safety and Network Management Principles;

Reference to Train Paths modified to Access to reflect that Train Paths are not specifically contracted.

- an entitlement to;

- operate Coal Trains on Coal Train Paths allocated in accordance with the Integrated Plan;
- operate Ancillary Trains on Ancillary Train Paths allocated on an ad hoc basis; and
- where relevant, use of ARTC Terminals for permitted activities in accordance with the Terminal Management Protocol.

The use of ARTC Terminals is subject to the Terminal Management Protocol.

- each party warranting the accuracy of information provided;

- the Customer paying Access Charges based on a rate per tonne of coal hauled;

Access charges on a rate per net tonne hauled.

- a mechanism for the annual variation of Charges in accordance with this Undertaking;

Generalisation of the annual price variation process.

AAU requirement to pay premiums to Victorian Transport Accident Commission deleted as not relevant to the MUC.

- the right of ARTC to seek security from the Customer;

- ARTC to conduct Train Control and issue Instructions in a non-discriminatory manner;

Maintenance and operation deleted (see below) to aid clarity.

- ARTC to maintain and operate the Hunter Valley Network:

- (a) to a fit for purpose standard; and
- (b) in a non-discriminatory manner;

Maintenance and operation separated out from Train Control and inclusion of reference to Hunter Valley Network standard.

- the Customer providing warranties regarding Rollingstock, complying with the Code of Practice and Instructions issued by ARTC;

- a condition that the Coal Trains, Ancillary Trains and Terminal Activities are operated by an Accredited Operator;

Separated out from insurance condition and inclusion of Terminal Activities.

- the Customer having insurance with a reputable and solvent insurer for an amount of \$200 million and, where the Customer uses the services of an Operator other than the Customer, an obligation to ensure that the Operator carries insurance of the same standard and amount;

More specific delineation of the insurance condition, taking into account the relationship between the Customer and Operator.

- the right of ARTC to vary (temporarily or permanently), remove and review contracted Access in appropriate circumstances and to take possession of the Hunter Valley Network for repairs, maintenance and upgrades;

Changed Train Paths to Access and scope of network.

- the right for ARTC to issue instructions to an Operator for the purpose of assisting with the recovery from disruption to normal operations and an obligation on the Operator to comply with the instruction, or if the Operator is not a Customer, a requirement that the Customer will obligate its Operator to comply with a valid instruction as set out in clause 7.2(e);

New term incorporating the requirement to assist in the recovery from disruption to normal operations.

- payments in accordance with clause 7.2(f) relating to the provision of assistance by one Operator to another;

New term incorporating payment/charge for providing assistance and indemnities.

- the right of ARTC to conduct audits on the Customer;
- compliance by the Customer with plans dealing with Incidents and environmental requirements;
- compliance by the Customer with applicable and appropriate safety standards;

AAU 'use it or lose it' provisions deleted as Customer is not allocated any Coal Train Path until it is required.

- appropriate termination and suspension provisions;
- indemnities by the Customer and ARTC including the requirements of clause 7.2(f);

Amended to include requirement in clause 7.2(f).

- obligation of Customer to ensure compliance with requirements of the Access Agreement by its Operator where the Customer is not the Operator;

New term.

- a requirement that where the Customer is not the Operator of any Train or Terminal Activities, prior to the Operator engaging in any relevant operation, the Customer will:
 - (c) notify ARTC the identity of the Operator;
 - (d) provide ARTC with evidence that the Operator is appropriately Accredited to perform the relevant operations; and
 - (e) provide to ARTC any other information regarding the Operator that ARTC may reasonably require for it to safely manage the Hunter Valley Network.

New term.

- treatment of Confidential Information, and

New term.

- dispute resolution procedures.

SCHEDULE D

INDICATIVE ACCESS AGREEMENT

Schedule D is contained as a separate file.

SCHEDULE E

HUNTER VALLEY NETWORK

Schedule E

To be reworked by ARTC to better reflect the new network boundaries delineating the MUC. A suggested structure is provided below.

This Schedule E describes the boundaries of the Hunter Valley Network to which this Undertaking applies.

E.1 Infrastructure Forming The Hunter Valley Network

E.1.1 Description Of Boundaries

The Hunter Valley Network includes all railway infrastructure leased or owned by ARTC bounded by:

- (a) Islington Junction (163.920km from Woodville and 164.045km from Hamilton Junction)
- (b) Gulgong (460.1 km via Ulan Line)
- (c) The Gap (416.0 km Narrabri Line)
- (d) Werris Creek (411.2 km Armidale Line)
- (e) Merrygoen (562.6 km via Dubbo)
- (f) Stratford Junction (291.5 km North Coast Line)

E.1.2 Authority Points

All other railway lines connecting with those running lines forming part of the Hunter Valley Network as described above between the running lines and the last signal, derail or other point of authority on that railway line protecting access to the running line.

E.2 ARTC Terminals

[ARTC owned or leased infrastructure, or infrastructure for which ARTC has exclusive licence to provide Access to other parties within the rail terminals at Port Waratah, Bullock Island, Kooragang Island and Walsh Point.]

Schedule E clause E.2 ARTC Terminals

Note that an ARTC Terminal is defined as ARTC “owned” infrastructure and therefore excludes privately owned infrastructure within the “terminal”. Thus the terminal is a more extensive set of infrastructure than just the ARTC portion of it.

Given the nature of the terminals in which ARTC currently owns infrastructure, it is possible that ownership of various parts of that infrastructure may change over time and it is preferable not to closely define this within the Undertaking, as any change would require a formal amendment to the Undertaking, which might not be desirable where the change does not have a material impact on the operation of the Hunter Valley Network or the availability of the

E.3 Rail Infrastructure Specifically Excluded From The Hunter Valley Network

Schedule E clause E.3

It is useful to identify adjoining infrastructure that does not form part of the HVRN.

For the purpose of clarity, the following railway lines do not form part of the Hunter Valley Network:

- (a) ARTC leased infrastructure:
 - (i) North Coast Line beyond Stratford Junction to NSW Border
 - (ii) West beyond Merrygoen
 - (iii) Gulgong to Merrygoen
 - (iv) South beyond Gulgong
- (b) RailCorp infrastructure south of Islington junction
- (c) Rail Infrastructure Corporation owned railway infrastructure managed but not leased by ARTC
- (d) Ardglen Quarry Siding (from 363.9km Werris Creek Line)
- (e) Martins Creek Quarry Siding (from 218.7km North Coast Line)
- (f) Merriwa Line (from Ulan Line at Sandy Hollow 332.2km)

E.4 Segments Included In The Hunter Valley Network

Schedule E clause E.4

This section is intended to identify the Segments that do go to make up the 'virtual' HVRN.

Segments were previously contained in [AAU Schedule G](#). Note provision for both a nominal description and a kilometre identifier plus route length and allocation to a region.

[ARTC to define. These need to be consistent with any definitions contained in the MUG.]

Segment Identifier	From	Km Point	To	Km Point	Route Length (km)	Region
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SCHEDULE F

NETWORK MANAGEMENT PRINCIPLES

Schedule F

The Network Management Principles have been substantially modified to cater for:

- (a) the incompatible requirements of coal trains compared with intermodal and other trains traversing the Hunter Valley Network;
- (b) a mechanism for the allocation of train paths;
- (c) a description of key requirements for a possessions planning process, and
- (d) enhancement of the ARTC concept of allowing the Customer to determine priorities where the trains in conflict are operating under the Customer's Access Agreement.

Where possible, Network Management Principles in the MUC and MUG have been made equivalent to ensure compatibility.

F.1 MANAGEMENT OF TIMETABLING & CAPACITY ALLOCATION PROCESS

F.1.1 Periodic Review Of Capacity & Train Path Allocation

ARTC will engage in a process of reviewing Capacity and Non-Coal Train Path allocation as often as required, but at least every 12 months, in accordance with Undertaking clause 5.9, for the purpose of:

- (a) efficient allocation of Non-Coal Train Paths and Capacity given Hunter Valley Network constraints with the objective of minimising overall transit times on each corridor, and, in the case of Coal Trains, taking into account the requirements of the Hunter Valley Coal Chain, subject to Customer requirements;
- (b) minimise loss of Capacity; and
- (c) allow for adjustment of Non-Coal Train Paths and allocations of capacity both internal to the Hunter Valley Network and any other relevant network to meet Customer requirements.

F.1.2 Adjustment Of Capacity Entitlement

In respect of any existing Non-Coal Train Path which is part of a Capacity Entitlement, if ARTC determines that the Non-Coal Train Path may be allocated in a more efficient way to achieve the purposes set out in clause F.1.1 or would otherwise allow for ARTC to fulfil a request for a Non-Coal Train Path from an Applicant:

- (a) ARTC may request the relevant Customer to agree to amend its Capacity Entitlement with respect to that Non-Coal Train Path, including, but not restricted to, undertaking the following activities;
 - (i) convene meetings with the Customer and other Access Seekers either separately or jointly;
 - (ii) make formal or informal proposals regarding amendments to Non-Coal Train Paths, alternative Non-Coal Train Paths or operational changes to one or more Access Seekers;

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- (iii) formally request a Customer to consent to amending its Capacity Entitlement to accommodate an Access Application.
 - (b) If the relevant Customer agrees, the parties will amend the relevant Access Agreement to reflect the agreed alterations.
 - (c) ARTC will amend the Non-Coal Train Path as required to reflect the agreement referred to in clause F.1.2(b).

F.1.3 Allocation Of Non-Coal Train Paths

Non-Coal Train Paths will be allocated on a “first come first served” basis provided that:

- (a) Passenger Trains will be allocated in accordance with the requirements of legislation.
- (b) Non-Coal Train Paths forming part of an existing Capacity Entitlement will not be available for allocation to any Applicant except;
 - (i) where the Customer has agreed to a modification to one or more Non-Coal Train Paths in accordance with the process outlined in clause F.1.2;
 - (ii) the allocation is for purposes of transferring the Non-Coal Train Paths to the same Customer’s Capacity Entitlement under a new Access Agreement in accordance any other ARTC undertaking; or
 - (iii) the Non-Coal Train Paths have been withdrawn by ARTC or otherwise relinquished by the Customer in accordance under any other ARTC undertaking.
- (c) Non-Coal Train Paths forming part of Traffic Specific Capacity will not be available for allocation to any Applicant as general Non-Coal Train Paths except where;
 - (i) the Customers who have an interest in accessing the relevant sub-category of Traffic Specific Capacity and ARTC can agree that such Non-Coal Train Paths are no longer required to be designated as Traffic Specific Capacity, or
 - (ii) the provisions of any other ARTC undertaking apply to this effect.
- (d) Committed Capacity will not be allocated as Non-Coal Train Paths except in accordance with Undertaking clause 5.9.

F.1.4 Circumstance Where Schedule F Does Not Apply

This Schedule F does not apply to the resolution of conflicts in the allocation of Non-Coal Train Paths that are subject to any other ARTC undertaking except to the extent that any resolution involves adjustment of Coal Train Paths.

F.1.5 Shortfall Of Capacity

Any shortfall of Capacity will be identified and dealt with in accordance with Undertaking clause 5.2

F.1.6 Temporary Adjustment Of Train Paths

From time to time as required, ARTC will adjust any or all Non-Coal Train Paths and Committed Capacity on a temporary basis in accordance with Possession Planning Process to meet the requirements to maintain the Hunter Valley Network.

F.1.7 Annual Assessment Of System Capacity

Prior to the commencement of each Financial Year, ARTC will participate in a process with the Logistics Team to make the Annual Assessment Of System Capacity. An output from the assessment will be that the members of the Logistics Team will agree on:

- (a) Forecast Demand;
- (b) the Load-Point Allocation for each Load-Point;
- (c) the Aggregate Load-Point Allocation;
- (d) the availability of Coal Train Paths to transport the Aggregate Load-Point Allocation; and
- (e) the Committed Capacity of the Hunter Valley Network for the relevant Financial Year.

F.1.8 ARTC To Advise Daily Capacity Availability To Logistics Team

ARTC will communicate Coal Train Capacity availability to the Logistics Team for the day-to-day allocation of Coal Train Paths, taking into account any adjustments required to accommodate maintenance or other special arrangements and the allocation processes of Traffic Specific Capacity.

F.2 Possession Planning Process

F.2.1 Requirement To Adjust Train Paths Temporarily

From time to time as required, it will be necessary for ARTC to adjust any or all Coal Train Paths, Ancillary Train Paths and Non-Coal Train Paths on a temporary basis to efficiently maintain the Hunter Valley Network.

F.2.2 Possession Planning Process

In order to plan maintenance of the Hunter Valley Network effectively and minimise the disruption to Customers, ARTC will agree with Customers and the Logistics Team a Possession Planning Process that will determine, at least on a quarterly basis, for the following year;

- (a) the scope of work requiring possession of the Hunter Valley Network;
- (b) options for aligning track possessions with shut-downs in other parts of the Hunter Valley Coal Chain;
- (c) the impact of the work on any Capacity Entitlement, Traffic Specific Capacity, and Committed Capacity;
- (d) the priority for allocation of Non-Coal Train Paths and Committed Capacity under any alternative temporary arrangements;
- (e) the opportunities for aligning possessions with maintenance closures of other Track Owners and any other parties that will impact on the ability of Customers to operate Trains; and
- (f) the opportunities for mitigation of any disruptive effects on Customers.

F.2.3 Determination Of Priority

In determining the priority for allocation of Ancillary Train Paths, Non-Coal Train Paths and Committed Capacity in the Possession Planning Process:

- (a) ARTC will attempt, in good faith, to minimise the disruption to each Customer's business,

recognising that it may not be able to satisfy all Customer demands.

- (b) ARTC will, to the extent it is practical to do so, implement any preferences for priority determined by each Customer for its own Trains.
- (c) A Train will not be given low priority merely because it is a Train that would use;
 - (i) a Non-Coal Train Path allocated from Traffic Specific Capacity,
 - (ii) a Coal Train Path; or
 - (iii) an Ancillary Train Path.

F.2.4 Requirement For Consultation & Cooperation

The Possession Planning Process will involve extensive consultation with Customers and will provide opportunity for close cooperation between ARTC, the Logistics Team and Customers to minimise disruption to Customers while allowing ARTC to maintain the Hunter Valley Network with reasonable efficiency.

F.3 NETWORK MANAGEMENT PRINCIPLES

F.3.1 Train Conflict Resolution Matrix

Table F1 applies to resolve the competing interests of Customer's Trains using the Hunter Valley Network.

F.3.2 Train Management Principles

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) ARTC is responsible for managing the Hunter Valley Network on behalf of Train Operators;
 - (i) the general objective of train control is to manage Non-Coal Trains and Ancillary Trains to minimise the overall transit time on the Hunter Valley Network;
 - (ii) the general objective of train control is to manage Coal Trains to arrive at their destination in the sequence identified in the Integrated Plan; and
- (d) Train 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.

1 TABLE F1: GENERAL PRINCIPLES FOR TRAIN MANAGEMENT

- a) In an emergency, ARTC will manage Trains on the Hunter Valley Network in the first instance to ensure safety to people and property, and to secondly to minimise disruption to Trains.
- b) Where a train control decision is required to be made regarding a conflict between Trains managed by a single Customer, ARTC will seek direction from the Customer regarding the priorities of the respective trains. Where it is practical to do so, ARTC will implement the Customer’s stated preference.
- c) Where there is a conflict between one or more Coal Trains destined for an export port, priority will be given so that the Trains arrive at the destination port in the sequence in which they were planned.
- d) For the purposes of this Table F1, all Trains conveying passengers will be designated as “Premium”.
- e) For the purposes of this Table F1, Trains that are not specifically designated as “Premium” or “High” will be designated as “Standard”.
- f) For all other train control decisions regarding the priority of Trains, including where a Customer has not stated a preference, this Table F1 will apply.

AGREED NETWORK ENTRY/EXIT TIMES

TRAIN PLAN	1.1 TRAIN A	AGREED NETWORK ENTRY/EXIT TIMES									
Train B	TRAIN RUN	ACTUAL Performance	OT running Premium	Running ahead Premium	Late running Premium	OT running High	Running ahead High	Late running High	OT running Standard	Running ahead Standard	Late running Standard
	Actual Performance	TC OBJECTIVE	OT Exit	OT Exit	1 No more time lost 2 Make up time 3 Hold the gain	OT Exit	OT Exit	1. No more time lost 2. Make up time 3. Hold the gain	OT Exit	OT Exit	1 No more time lost 2 Make up time 3 Hold the gain
	OT running Premium	OT Exit	Scheduled Cross	A or B Rule 2	B Rule 3	Scheduled Cross	B or A Rule 2	B Rule 3	Scheduled Cross	B or A Rule 2	B Rule 3
	Running ahead Premium	OT Exit	A or B Rule 2	A or B Rule 2	B Rule 3	B or A Rule 2	B or A Rule 2	B Rule 3	B or A Rule 2	B or A Rule 2	B Rule 3
	Late running Premium	1 No more time lost 2 Make up time 3 Hold the gain	A Rule 1	A Rule 1	A or B Rule 4	A Rule 1	A Rule 1	B Rule 6	A Rule 1	A Rule 1	B Rule 6
	OT running High	OT Exit	Scheduled Cross	A or B Rule 2	B Rule 3	Scheduled Cross	A or B Rule 2	B Rule 3	Scheduled Cross	B or A Rule 2	B Rule 3
	Running ahead High	OT Exit	A or B Rule 2	A or B Rule 2	B Rule 3	B or A Rule 2	A or B Rule 2	B Rule 3	B or A Rule 2	B or A Rule 2	B Rule 3
	Late running High	1 No more time lost 2 Make up time 3 Hold the gain	A Rule 1	A Rule 1	A Rule 5	A Rule 1	A Rule 1	A or B Rule 4	A Rule 1	A Rule 1	B Rule 6
	OT running Standard	OT Exit	Scheduled Cross	A or B Rule 2	B Rule 3	Scheduled Cross	A or B Rule 2	B Rule 3	Scheduled Cross	B or A Rule 2	B Rule 3
	Running ahead Standard	OT Exit	A or B Rule 2	A or B Rule 2	B Rule 3	A or B Rule 2	A or B Rule 2	B Rule 3	B or A Rule 2	B or A Rule 2	B Rule 3
	Late running Standard	1 No more time lost 2 Make up time 3 Hold the gain	A Rule 1	A Rule 1	A Rule 5	A Rule 1	A Rule 1	A Rule 5	A Rule 1	A Rule 1	A or B Rule 4

Rule 1 – Train B may be given preference on condition Train A will still meet OT exit objective
 Rule 2 – Both trains must meet OT exit objective
 Rule 3 – Train A may be given preference on condition Train B will still meet OT exit objective
 Rule 4 – Give priority to train where performance indicates it will lose least or no more time and even make up time and hold the gain
 Rule 5 – Train B may be given preference if Train A will continue to lose time and any gains made cannot be held
 Rule 6 – Train A may be given preference if Train B will continue to lose time and any gains made cannot be held
 Note: For the purposes of this Table F1, “OT” means “on time”.

SCHEDULE G

SEGMENTS

[Deleted]

This schedule has been deleted and is retained solely to assist in maintaining comparison to the AAU. The information in this schedule should be rolled into Schedule E.

SCHEDULE H

INVESTMENT CRITERIA

H.1 Safety And Technical Requirements

In the opinion of ARTC (acting reasonably) the provision of the Additional Capacity:

- (a) is technically feasible;
- (b) is consistent with the safe and reliable operation of the Hunter Valley Network; and
- (c) meets ARTC's relevant engineering and operational standards.

H.2 Demand

Where the intention is that an investment provides Additional Capacity, there is an identified level of Additional Capacity required to provide for a level of traffic task that:

- (a) is forecast on a reasonable basis by the Logistics Team; and
- (b) it can reasonably be expected that demand for the Additional Capacity is likely to be sustained for at least 5 years after the completion of the investment; or
- (c) where the predicted demand is not expected to be sustained for at least 5 years after the completion of the investment, then the demand is expected to be maintained for the period over which ARTC intends reasonably to depreciate the investment where this is less than 5 years.

H.3 Capacity Created

The investment will provide sufficient Additional Capacity to meet the additional demand for which it is designed.

H.4 Efficiency

The investment is the most efficient method of providing the Additional Capacity, taking into account:

- (a) timeliness of providing the Additional Capacity to meet demand;
- (b) cost of providing the Additional Capacity;
- (c) appropriateness of the investment for facilitating future expansions of Capacity; and
- (d) impact on other service providers (including Operators) to the Hunter Valley Coal Chain both during and after construction,

or, if the investment is not the most efficient, it is otherwise the most desirable method taking into account the criteria in paragraphs (a) to (d) above

H.5 Standards

As a minimum, the investment meets the standards for rail infrastructure in the Hunter Valley Coal Chain where such standards are set by ARTC in accordance with the System Rules.

H.6 Maintenance Of Existing Capacity

The investment does not materially reduce;

- (a) the Capacity of the Hunter Valley Coal Chain; or
- (b) the ability of any party to use any existing facility that is not made redundant by the investment.

H.7 Return On Investment

Either:

- (a) ARTC can reasonably expect to earn a return on the investment at the Combinatorial Ceiling Limit (for that investment) over the relevant Segments over the life of the asset created taking into account;
 - (i) the efficient incremental costs and revenues forecast to be generated by the investment; and
 - (ii) any capital contributions made by other parties to the investment;

or

- (b) regardless of the expected investment return, the investment otherwise meets the requirements of ARTC's Board of Directors.

SCHEDULE I

INVESTMENT CONSULTATION PROCESS

I.1 Purpose

- (a) This Schedule I documents the Consultation Process in which ARTC will engage with Participants at each stage of the planning process before proceeding with any investment in the Hunter Valley Network as referred to in clauses 5.2, 5.3 and 5.4 of the Undertaking.
- (b) In this Schedule I, the term “Participant” refers to any Access Seeker that participates in the Consultation Process.

I.2 Scope And Participation

- (a) ARTC and each Participant will act in good faith when engaging in this Consultation Process.
- (b) Where it is convenient to do so, ARTC and Customers will establish a regular monthly meeting (“Standing Meeting”) for the purpose of facilitating this Consultation Process. Where such arrangements have been made, ARTC will invite all Participants to the Standing Meeting.
- (c) The Consultation Process will be followed sequentially. If a particular project has an obvious solution or requires an expedient solution, then the Concept and/or Feasibility Stages can be omitted on agreement of all of the Participants.
- (d) Where an Access Seeker has accepted ARTC’s invitation to participate in this Consultation Process, or is party to the Standing Meeting, but fails to actively participate in the Consultation Process, if after ARTC has taken reasonable steps to obtain that person’s active participation, ARTC is of the view that that person is unlikely to actively participate in the Consultation Process, ARTC is entitled to exclude that person from its considerations and that person is deemed to give its approval to the ARTC recommendations with regard to the relevant project.

I.3 Stages Of Approval

I.3.1 Concept Stage

- (a) For each proposed investment in the Hunter Valley Network proposed pursuant to clauses 5.2, 5.3 or 5.4 of the Undertaking, ARTC will produce and provide to each Participant a Concept Report that will include:
 - (i) definition of the problem;
 - (ii) options for alternative solutions;
 - (iii) indicative estimates (+/- 30%) of the costs of each option;
 - (iv) estimated operating and maintenance benefits of each option categorised into:
 - (A) cost and/or time savings;
 - (B) performance improvements;

-
- (C) Capacity improvements; and
 - (D) safety;
 - and
 - (v) recommendations.
- (b) ARTC will provide a forum for Participants to review and discuss the Concept Report. In the review of the Concept Report, the Participants will be required to vote on whether they:
- (i) agree to one or more options moving forward to Feasibility Stage; or
 - (ii) agree that the investment in the Hunter Valley Network is not required.
- (c) All decisions will be made by unanimous vote of the Participants.

I.3.2 Feasibility Stage

- (a) If the Participants agree to one or more of the options pursuant to paragraph I.3.1, ARTC will produce and provide to each Participant a Feasibility Report for each option agreed to in paragraph I.3.1 that will include:
- (i) revised estimates (+/- 15%) of the costs of each option;
 - (ii) revised estimates of operating and maintenance benefits from the option categorised into:
 - (A) cost and/or time savings;
 - (B) performance improvements;
 - (C) Capacity improvements; and
 - (D) safety;
 - (iii) financial evaluation;
 - (iv) project timing; and
 - (v) recommendations.
- (b) ARTC will provide a forum for Participants to review and discuss the Feasibility Report. In the review of the Feasibility Report, Participants will be required to vote on whether they:
- (i) agree to one or more options moving forward to Detail Design Stage, or
 - (ii) agree to terminate the project.
- (c) All decisions will be made by unanimous vote of the Participants.

I.4 Detailed Design Stage

- (a) If the Participants agree to one or more of the options pursuant to paragraph I.3.2, ARTC will produce and provide to each Participant a Detailed Design Report, for each option agreed to in paragraph I.3.2. The Detailed Design Report will include:
- (i) detailed project costs (+/- 10%);

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- (ii) detailed estimates of operating and maintenance benefits from the option categorised into:
 - (A) cost and/or time savings;
 - (B) performance improvements;
 - (C) Capacity improvements; and
 - (D) safety;
 - (iii) financial justification of the project;
 - (iv) detailed project timings;
 - (v) track possessions plan (including details of the effect on the capacity of the relevant logistics chain);
 - (vi) any timetable modifications required; and
 - (vii) details of method of providing the Additional Capacity.
- (b) ARTC will provide a forum for Participants to review the Detailed Design Report and vote on whether the relevant investment should be undertaken in accordance with the Detailed Design Report. The Participants will determine by unanimous vote whether:
- (i) the investment should be undertaken in accordance with the Detailed Design Report and, if so, the maximum cost of the project (including any agreed contingency allowance) that may be added to the Regulated Asset Base, on project completion;
 - (ii) they will request ARTC to make amendments to the project; or
 - (iii) they will terminate the project.
- (c) If the Participants request ARTC to make any amendment to the project, ARTC will amend the Detailed Design Report as agreed by ARTC and all of the Participants and the amended report will, from thereon, become the Detailed Design Report.
- (d) If the Participants agree in writing that the investment should be undertaken in accordance with the Detailed Design Report, ARTC will undertake the investment in accordance with the Detailed Design Report.

I.5 Post Construction Audit

Approximately 6 months after a new asset comes into operation. ARTC and the Participants are to:

- (a) review final construction costs;
- (b) review identified benefits in areas of:
 - (i) cost and/or time savings;
 - (ii) performance improvements;
 - (iii) Capacity improvements; and
 - (iv) safety;

-
- (c) ensure that all timetable improvements have been captured in any new timetable release;
and
 - (d) ensure that operations staff are making use of the operational benefits provided by the project.

I.6 Recoupment Of Costs

- (a) Where ARTC has engaged in this Consultation Process and the Participants have agreed to terminate a project, ARTC is entitled to recoup, through future Charges, the costs it has incurred in producing the reports required in this Consultation Process and any other costs reasonably incurred in progressing a project to the point at which Participants have terminated the project.
- (b) Where the Participants have agreed to ARTC undertaking the investment and inclusion of the project cost in the Regulated Asset Base, ARTC will include the costs of producing the reports required in this Consultation Process and any other costs reasonably incurred in progressing a project to the point of receiving the approval of Participants as part of the capital cost of undertaking the project.

I.7 Revival Of A Project

Where ARTC has engaged in this Consultation Process and the Participants have agreed to terminate a project, ARTC will not seek to undertake this Consultation Process with regard to that project without the prior written request from all Relevant Access Seekers.

SCHEDULE J

PRESCRIBED FEES

Schedule J

The MUC provides explicitly for fees to be charged for certain services. Note that, in general, Coal Trains are charged access fees on an output measure ie net tonnes delivered and this necessarily incorporates ancillary movements and services associated with delivering that outcome eg the empty train movement, storage on the network, wagon repositioning and maintenance movements. However, some services would fall outside the description of ancillary activities and it is appropriate that fees be charged for such services.

J.1 Prices Are Exclusive Of GST

All prices in this are exclusive of GST.

J.2 Standard Information Fee

The Standard Information Fee is \$1,000 for each occasion ARTC is required to provide the information.

J.3 Assisting A Distressed Train

- (a) Fee for Customer (or Customer's Operator) assisting a distressed Train: \$ XXX per hour per locomotive used.
- (b) The time the assistance is provided will be:
 - (i) If assistance is provided by a locomotive from a Train, from the time that the assisting locomotive commences to be detached from its Train until the assisting Train departs the point from which the Train was held to provide the assistance to resume its normal operation,
 - (i) If a light engine only is used, from the time the light engine departs its point of origin until the lesser of:
 - (A) the light engine returns to the point of departure, or
 - (B) if for the convenience of the assisting Customer, the engine is taken to another depot, then the time that the engine arrives at that alternative depot.
- (c) For the purpose of calculating the fee payable, the time will be rounded up to the nearest quarter hour and the hourly rate will be applied on a pro-rata basis to part hours.

J.4 Escalation Of Prescribed Fees

The Prescribed Fees in this Schedule J may be varied annually by ARTC in accordance with the process described in clause 4.7(k).