

RAILWAY (BBI RAIL AUS PTY LTD) AGREEMENT BILL 2017

EXPLANATORY MEMORANDUM

PART 1

Section 1

Contains the short title of the Act.

Section 2

Paragraph (a) provides that sections 1 and 2 of the Act (Part 1) come into operation on the day on which the Act receives Royal Assent.

Paragraph (b) provides that sections 3 – 6 of the Act (Part 2) and Schedule 1 come into operation on the day after the day the Act receives Royal Assent.

Paragraph (c) provides that sections 7 – 15 of the Act (Part 3) come into operation on a day fixed by proclamation (and different days may be fixed for different provisions). This allows for the provisions of Part 3 to be proclaimed to be operative as soon as possible after the railway to be constructed pursuant to the Railway (BBI Aus Rail Pty Ltd) Agreement 2017 (the Agreement) is constructed and commissioned but before the Railway Operation Date (as defined in clause 1 of the Agreement) in accordance with the intention expressed in clause 16(2)(a) of the Agreement.

PART 2

Section 3

Contains definitions of the phrases “Agreement” (the scheduled agreement as varied from time to time) and “scheduled agreement” (the agreement a copy of which is set out in Schedule 1 to the Act) for the purposes of Part 2.

Section 4

Provides that the scheduled agreement is ratified and the implementation of the Agreement is authorised.

Section 5

Provides that the State has power in accordance with clause 21 of the Agreement to take land for the purposes of the Agreement as and for a public work under Parts 9 and 10 of the *Land Administration Act 1997* (WA).

Section 6

Subsection (1) provides that the Agreement operates and takes effect despite any enactment or other law.

Subsection (2) provides that if a provision of the scheduled agreement purports to expressly or by implication modify or exclude the application or operation of an enactment for a purpose or in relation to a person or thing, the application or operation is modified or excluded for that purpose or in relation to the person or thing to the extent or for the period mentioned in the provision or necessary for the provision to have effect.

Subsection (3) clarifies that section 96 of the *Public Works Act 1902* (WA) (and the requirements therein) do not apply to the railway to be constructed under the Agreement.

Subsection (4) provides that section 6 does not limit or otherwise affect the application of the *Government Agreements Act 1979* (WA).

PART 3

Division 1 – Modification of *Railways (Access) Act 1998* (WA) (RAA)

Section 7

Provides that RAA is to be applied as if amended as set out in Division 1 (i.e. RAA is to be read as if amended in accordance with Division 1).

In accordance with the terms of the Agreement, it is envisaged that the RAA (and the *Railways (Access) Code 2000* (WA) (**the Code**) may apply for a limited period of time. It is envisaged that the Company may submit an undertaking for the provision of haulage services under Division 6 of Part IIIA of the *Australian Consumer Law* (Commonwealth) (**the ACL**). In that case, if the undertaking is accepted and operative, the RAA (and the Code) will need to cease to apply to the railway constructed pursuant to the Agreement.

Instead of making textual amendments to the RAA (and the Code) Part 3 sets out modifications of the RAA and Code which have the same effect as if the RAA and Code had been textually amended. The modification approach means that the RAA and Code can easily cease to apply to the railway if and when an undertaking for the provision of haulage services is accepted and operative under the ACL (see especially sections 9, 10 and 15 of the Act and applicable commentary below).

Section 8

Subsection (1) inserts the definition of “Railway (BBI Rail Aus Pty Ltd) Agreement” into section 3(1) of RAA.

Subsection (2) inserts a new paragraph (cb) in the definition of “railways network” in section 3(1) of RAA so as to include the railway constructed pursuant to the Railway (BBI Rail Aus Pty Ltd) Agreement.

Subsection (3) inserts a new subsection (5A) into section 3 of RAA to provide that the exclusions from “railway infrastructure” in sections 3(3) and 3(4) relating to sidings and

spur lines respectively do not apply to sidings or spur lines associated with the railway constructed pursuant to the Railway (BBI Rail Aus Pty Ltd) Agreement. This is to make clear that all sidings and spur lines associated with the railway constructed pursuant to the Agreement constitute “railway infrastructure” that is subject to RAA.

Section 9

Section 9 inserts a new section 12B into RAA.

Section 12B(1) provides that the Minister responsible for the administration of RAA (the Minister) may under the section modify (as opposed to textually amending) the Code for the purposes of its application to the railway constructed pursuant to the Railway (BBI Rail Aus Pty Ltd) Agreement.

Since proposed section 12B is in the context of modifications to RAA (rather than textual amendments) an express power to modify the Code is given to the Minister under this subclause for the limited purposes of its application to the railway constructed pursuant to the Agreement. In the usual context of textual amendments to the Code, the Minister has a general power to amend the Code.

Section 12B(2) provides that, if after section 9 of the Act is operative the railway constructed pursuant to the Railway (BBI Rail Aus Pty Ltd) Agreement is expanded or extended (including by addition of a spur line), the Minister is required to modify the Code so that it applies to the expansion or extension. This is to give effect to the intention expressed in clause 16(2)(b) of the Agreement (namely, that RAA and the Code shall (through with the making of required modifications) apply to any expansion or extension as soon as possible after such expansion or extension is constructed).

Section 12B(3) provides that section 5 of RAA (which would otherwise apply to a modification of the Code so as to extend it to a new route) and sections 10 – 11A of RAA (which would otherwise ordinarily provide for public comment and railway owner consultation requirements for amendments to the Code) do not apply in relation to a modification under section 12B.

Section 12B(4) provides that modifications under section 12B are to be made by order published in the Government Gazette.

Section 12B(5) provides that modifications for the purposes of section 12B(2) are not amendments of the Code for the purposes of sections 9(2) – (6) of RAA. This means that all modifications under section 12B are subsidiary legislation within the meaning of the *Interpretation Act 1984* (WA) (see section 9(1) of RAA), however modifications for the purposes of section 12B(2) are not required to be laid before each House of Parliament and are not subject to disallowance by Parliament. This is because this section 12B(2) gives effect to the intention in clause 16(2)(b) of the Agreement that the RAA and Code are to apply to any expansion or extension of railway constructed pursuant to the Agreement.

Division 2 – Modifications of the Code

Section 10

Provides that the Code is to be applied as if amended as set out in Division 2 (i.e. the Code is to be read as if amended in accordance with Division 2).

Section 11

Subsection (1) inserts the definition of “Railway (BBI Rail Aus Pty Ltd) Agreement” into section 3 of the Code.

Subsection (2) inserts a new paragraph (cb) in the definition of “railways network” in section 3 of the Code so as to include the railway constructed pursuant to the Railway (BBI Rail Aus) Agreement.

Section 12

Inserts a new section 55 into the Code providing that until the Regulator publishes in the Government Gazette notice of a determination under clause 3(1)(a)(iib) (i.e. for railway infrastructure associated with all tracks being part of the railway then constructed pursuant to the Agreement) of Schedule 4 of the Code, the weighted average cost of capital for the railway infrastructure referred to in that subparagraph is such percentage as the Regulator fixes by notice published in the Gazette under this new section.

Section 13

Inserts in Schedule 1 of the Code a new item 54 declaring “All tracks that are part of the railway constructed pursuant to the Railway (BBI Rail Aus Pty Ltd) Agreement” to be routes to which the Code applies. This means that the Code will apply to all tracks comprising the railway constructed pursuant to the Agreement at the time section 13 is operative (i.e. after construction and commissioning (see clause 16(2) of the Agreement) of the railway (including any spur lines) the subject of detailed proposals submitted under clause 11 and approved under clause 12 of the Agreement) but before the Railway Operation Date (as defined in clause 1 of the Agreement).

Section 14

Inserts a new paragraph (iib) into clause 3(1)(a) of Schedule 4 of the Code providing for the Regulator to determine, as at 30 June in each year, the weighted average cost of capital for the railway infrastructure associated with that part of the railways network described in item 54 in Schedule 1 (see commentary in respect of Section 13 above).

Division 3 – Expiry of Part 3

Section 15

Subsection (1) defines the phrase “ACL Undertaking Acceptance Date” as having the same meaning as it is given in clause 16(1) of the Agreement (namely, the date on which, under section 44ZZBA of the ACL, the decision of the Commission to accept under Division 6 of Part IIIA of the ACL the Company’s proposed undertaking for the provision of haulage services as referred to in clause 16(11)(b) of the Agreement is operative).

Subsection (2) provides that Part 3 expires at the end of the day immediately before the TPA Undertaking Acceptance Date.

Subsection (3) provides that the Minister must publish in the Government Gazette notice of the ACL Undertaking Acceptance Date.

Subsection (4) provides that, subject to clause 16(11)(d)(i) of the Agreement, section 37 of the *Interpretation Act 1984* (WA) applies, under section 39 of that Act. Section 16(11)(d)(i) of the Agreement provides that from the ACL Undertaking Acceptance Date the Company is released from various outstanding obligations under clause 16 referable to the application of RAA and the Code.

Section 37 of the Interpretation Act contains various general savings provisions relating to the repeal of all or part of a written law. Section 39 of the Interpretation Act applies section 37 to the expiry of all or part of a written law.

Clause 16(11)(d)(i) of the Agreement makes provision in relation to the ending of the application of the RAA and the Code, which needs to prevail over the general provisions of section 37.

SCHEDULE 1

RAILWAY (BBI RAIL AUS PTY LTD) AGREEMENT 2017

Parties

The Honourable Colin James Barnett, Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time ("**the State**"), BBI Rail Aus Pty Ltd ("**the Company**") and Todd Petroleum Mining Company Limited, Todd Offshore Limited and Todd Minerals Limited (together "**the Guarantors**").

Recitals

- A. Advises that Guarantors and the Company are investigating the feasibility the Company constructing and operating a railway from the PIOP mining area loading point to within the proposed Port of Balla Balla ("Port") on the Pilbara coast of Western Australia for the transport of iron ore products to the Port with such railway having an initial design capacity of not less than 50 million tonnes per annum.
- B. Advises that the Company and associated companies are also investigating the feasibility of constructing and operating iron ore train unloading, materials handling, stockpiling and transshipment facilities at the Port with such facilities having an initial design capacity of not less than 50 million tonnes per annum.
- C. Advises that the State for the purposes of promoting development of the iron ore industry and employment opportunity generally in Western Australia and for the purpose of promoting the development of multi-user infrastructure facilities in the Pilbara region of Western Australia has agreed to assist the development of the abovementioned railway and associated facilities upon and subject to the terms of this Agreement.
- D. For illustrative purposes, not limiting the terms of the Agreement, a plan is provided in Schedule 1 showing the anticipated route and corridor for the railway and associated facilities from the PIOP mining area loading point to the Port.

Clause 1 – Definitions

Defines the terms used in the Agreement.

Clause 2 - Interpretation

Subclause (1)

Sets out principles for interpreting the Agreement.

Subclauses (2) and (3)

Provides that nothing in the Agreement shall be construed to exempt the State or the Company from compliance with laws relating to native title or to exempt the Company from compliance with the *Environmental Protection Act 1986* (WA).

Clause 3 - Ratification and operation

Subclause (1)

The Agreement, other than this clause and clauses 1 and 2, does not come into operation except in accordance with subclause (2).

Subclause (2)

States that the Agreement, other than clauses 1, 2 and 3, comes into operation on the day after the date on which it is ratified by an Act of Parliament, unless, before that day, it terminates under subclause (4).

Subclause (3)

Provides that the State must introduce in the Parliament of Western Australia before 30 September 2017, or a later date agreed between parties to the Agreement, a ratifying Bill.

Subclause (4)

Provides that if by 30 March 2018, or a later date agreed to by parties to the Agreement, the Agreement has not been ratified by an Act of Parliament, then unless agreed otherwise by the parties, the Agreement terminates on that date and no claims may be made by or against any party to the Agreement in relation to any matter arising from the Agreement.

Clause 4 – Initial obligations of the State

Obliges the State, subject to certain conditions, including the Company obtaining necessary consents, to arrange the issue of requisite authority under section 91 or section 182 of the *Land Administration Act 1997* (WA) to allow the Company to enter upon Crown land, (excluding Port land), to carry out all works to the extent reasonably necessary for the purpose of undertaking its obligations under clause 5(1).

Clause 5 – Initial obligations of the Company

Subclause (1)

Obliges the Company to continue the studies and investigations necessary for the purposes of clauses 7 and 8 and to finalise and submit proposals under clause 11.

Subclause (2)

Obliges the Company to keep the State fully informed from the Operative Date about the progress and result of its investigations and studies under subclause (1) and to supply the Minister such information in relation thereto as may be requested from time to time.

Subclause (3)

Obliges the Company to co-operate and consult with the State about matters referred to in subclauses (1) and (2) and any other relevant studies in relation to those subclauses that the Minister may wish the Company to undertake.

Clause 6 – Aboriginal Heritage Act 1972

Modifies the *Aboriginal Heritage Act 1972* (WA) for the purposes of the Agreement to enable the Company to obtain clearances under section 18 of that Act.

Clause 7 – Railway Corridor

Subclause (1)

Requires the Company during its studies under clause 5 to consult with the Minister to seek the Minister's agreement as to a corridor, up to the Port (as defined) boundary, within which the SRL Railway, access roads and associated infrastructure to be located outside the Port are to be constructed and the routes of any Lateral Access Roads. The arbitration provisions contained in clause 33 of the Agreement will not apply to this subclause.

In agreeing the Railway Corridor the Company and the Minister have to balance engineering matters including costs, the nature and use of any lands concerned and interests therein and all costs of acquiring the land (all of which shall be borne by the Company).

Subclause (2)

Provides that any agreement pursuant to subclause (1) shall lapse if the date for submission of detailed proposals is extended or varied by the Minister pursuant to clause 28, unless the Minister notifies the Company otherwise.

This gives the Company a strong incentive to submit proposals by the due date and is intended to ensure that at the time the Minister considers whether or not to extend the date for submission of proposals, proper consideration can be given to whether or not land previously allocated to the Company should continue to be so allocated in the particular circumstances.

Subclause (3)

Requires the Company to liaise with all relevant title holders to obtain their consents to, and also to obtain all statutory consents required for, the issue of authority to enter land as referred to in clause 4 and to the grant of the Special Railway Licence and any Lateral Access Road Licences.

The consents referred to in subclauses 3(a) and (b) are required by clause 11(5)(b) to be submitted to the Minister together with the Company's clause 11 proposals.

Clause 8 – Port Railway and Port Facilities

Subclause (1)

Requires the Company during its studies under clause 5 to consult with the Minister to seek agreement of the Minister (acting with the concurrence of the Port Authorities Minister (as defined)) as to the areas of the Port (as defined) within which the Port

Railway and the access roads to be used by the Company in constructing, operating and maintaining the Port Railway are to be constructed and the nature and characteristics of the Port Railway (as defined) to be constructed by the Company. Design capacity shall enable the transport of not less than 50 million tonnes of iron ore products per annum over the Port Railway.

In considering the above matters, the Minister (acting with the concurrence of the Port Authorities Minister) may make his agreement conditional upon the Port Facilities (as defined) having specified nature and characteristics, including a specified transshipment design capacity of not less than 50 million tonnes per annum.

Subclause (2)

Provides that any agreement pursuant to subclause (1) shall lapse if the date for submission of detailed proposals is extended or varied by the Minister pursuant to clause 28, unless the Minister notifies the Company otherwise.

This gives the Company a strong incentive to submit proposals by the due date and is intended to ensure that at the time the Minister considers whether or not to extend the date for submission of proposals, proper consideration can be given to whether or not land previously allocated to the Company should continue to be so allocated in the particular circumstances.

Subclause (3)

Provides that none of the State, the Minister, the Port Authorities Minister or the Port Authority has any obligation to ensure that the Port is established as a port under the Port Authorities Act or is liable to any person (including the Company, the Guarantor or the PIOP mining area proponent) for any loss or damage arising out of or in connection with the failure of the Port to be established.

Subclause (4)

Provides that nothing in the Agreement shall be construed to oblige the State or any Minister in the Government of the State to cause the grant to the Company or any other person tenure or other rights including Port Railway Lease.

Subclause (5)

Provides that the arbitration provisions of clause 33 shall not apply to this clause.

Clause 9 – Community development plan

This clause provides for the Company to produce a community development plan for approval by the Minister. The intent of the clause is to meet the Government's sustainability objective and ensure that the Project to be developed under the Agreement will give rise to benefits for the community in which it is located.

Subclause (1)

Defines "community and social" benefits.

Subclause (2)

The Company acknowledges the need for community and social benefits to flow from this Agreement.

Subclause (3)

Provides for the Company, prior to submission of proposals pursuant to clause 11 and, if required by the Minister, prior to the submission of additional proposals under clause 13, to prepare a plan which describes the Company's proposed strategies for achieving social and community benefits from the developments proposed, and to submit the plan to the Minister.

Subclause (4)

Provides for the Minister to either approve the plan, within one month of receipt, or to notify the Company of any changes required. Provides for either party to refer the plan to arbitration if the Company is unwilling to accept the changes required by the Minister.

Subclause (5)

Provides that the plan resulting from a determination made by the arbitrator shall become the approved plan.

Subclause (6)

Obliges the Company to implement the approved plan.

Subclause (7)

Requires the Company to report at least annually to the Minister about its implementation of the plan.

Subclause (8)

Provides for the Minister and the Company at the request of either of them from time to time to confer and agree to amend the plan or to adopt a new plan, which would then become the approved plan under this clause.

Clause 10 - Local Industry Participation Plan**Subclause (1)**

Defines "local industry participation benefits".

Subclause (2)

States that the Company acknowledges the need for local industry participation benefits to flow from the Agreement.

Subclause (3)

Obliges the Company to prepare and provide to the Minister, within 3 months after the Operative Date, a plan which contains in connection with the development proposed pursuant to clause 11 the matters listed in paragraphs (a) – (d) of the subclause.

Subclause (4)

Obliges the Company to implement the plan provided in compliance with this clause.

Subclause (5)

Provides for the Minister and the Company at the request of either of them from time to time to confer and agree to amend the plan or to substitute a new plan for the one previously provided.

Subclause (6)

States that the provision of subclauses (3) and (4) shall apply to any development proposed or to be proposed pursuant to clause 13.

Clause 11 – Company to submit proposals**Subclause (1)**

Provides for the Company, subject to the EP Act and a number of matters referred to in this subclause, to submit detailed proposals for its Project (as defined) by 31 March 2019. In particular unless otherwise agreed with the State, the establishment of the Port under the Port Authorities Act must occur before the Company submits its proposals.

Subclause (2)

Proposals must provide for the SRL Railway to have a design capacity which enables the transport of not less than 50 million tonnes of iron ore products per annum over it and a railway track configuration which enables:

- (a) rail operations of the kind carried out on the Pilbara Iron Ore Railways (as defined) to be carried out on the Railway and vice versa: and
- (b) connection of the SRL Railway outside the Port to any one or more of the Pilbara Iron Ore Railways.

Proposals have to be consistent with the agreement reached under clause 7(1).

Subclause (3)

Provides that proposals may, with the Minister's approval, be submitted separately and in any order and enables the Company to withdraw and resubmit proposals at any time up until all the proposals have been approved.

Subclause (4)

Requires the Company to submit details to and, if required, consult with the Minister about any services, works, materials, plant, equipment and supplies that it proposes to consider obtaining from or having carried out outside of Australia, and to provide reasons for this.

Subclause (5)

At the time of the Company submits the last of its proposals under this clause, the Company is required to submit to the Minister evidence of:

- the financial capability of the Company;
- accreditations under the *Rail Safety National Law (WA) Act 2015*;

- the Company having a binding agreement(s) for the transport of iron ore by the Company upon the Railway to the Port for not less than 20 years and for no less than 25 million tonnes of iron ore per annum from the PIOP mining area;
- the PIOP mining area proponent(s) being ready to carry out their mining projects in a timeframe consistent with the Company's Project, including evidence as to specified matters;
- capacity within the Port being available over the term of the Agreement and in a timeframe consistent with the commencement and undertaking of the Project;
- all other arrangements for access (as defined in clause 16) to the Railway or in respect of transport of iron ore products over the Railway;
- the Company's readiness to embark on the operations referred to in the proposals;
- the Company holding, or the readiness of relevant authorities to grant, upon the Minister's approval of the proposals, all other approvals and rights required to implement the proposals.

At that time the Company is also furnish to the Minister the written consents referred to in clauses 7(3)(a) and (b) and evidence that the Company and the Port Authority have a binding agreement for the grant of the Port Railway Lease.

The submission of detailed proposals for the Project is a standard feature of State agreements and it gives the Minister detailed oversight of the Project plans.

Clause 12 – Consideration of proposals

Subclause (1)

Details the procedure for consideration of proposals, subject to the *Environmental Protection Act 1986* (WA).

In addition to the usual procedure, paragraph (e) provides that the Minister shall not consider a purported proposal or proposal (as the case may be) if the Minister is of the opinion that the proposal does not comply with clause 11 or this Agreement generally. In that case, the Minister shall afford the Company an opportunity to consult and to submit a new or revised proposal. The Minister's opinion as to non-compliance is not subject to arbitration under clause 33.

Subclause (2)

Requires the Minister to give notice of his decision to the Company within 2 months of

- receiving proposals;
- authority to proceed under the *Environmental Protection Act 1986* (WA); and
- completion of all native title processes,

whichever is later.

Subclause (3)

Requires the Minister to consult with the Company if he defers his decision or requires changes to a proposal.

Subclause (4)

Provides for the Company to refer certain decisions of the Minister to arbitration within 2 months if it considers such decision to be unreasonable.

Subclause (5)

Details how an arbitration decision on a proposal is to be implemented.

Subclause (6)

Provides that notwithstanding any provisions of the Agreement (other than clause 28) if all matters required to be agreed under clauses 7(1) and 8(1) have not been agreed, or the plan required under clause 9 has not been approved, or the plan required under clause 10 has not been provided, or that the Port has not been established under the Port Authorities Act, then unless all proposals required under clause 11 are not approved or determined by 1 October 2019, the Agreement may be determined on (a) 12 months notice from the Minister; or (b) immediately on notice from the Minister if the State has determined or determines that it will not establish the Port.

Subclause (7)

Requires the implementation of approved proposals to be made in accordance with and subject to the terms and conditions of the EP Act.

Subclause (8)

Provides that the Minister may approve a variation to approved proposals during their implementation.

Subclause (9)

Gives the Minister authority to extend periods in subclauses (1) and (6) (in addition to any extension granted under clauses 27 and 28) to enable the Company to comply with laws relating to native title.

Clause 13 - Expansion of Project outside the Port

Enables the Company to expand its activities under the Agreement and outside the Port (including by constructing and operating a SRL Railway spur line or Additional Infrastructure (each as defined)).

Subclause (1) – Requires the Company to give notice of such desire to the Minister together with specified information and details relevant to the desired expansion.

Subclause (2)

Minister to provide advice within one month of receipt of such notice whether or not he approves the desired expansion in-principle.

Subclause (3) and (4) – Subject to the EP Act and specified matters, provides for the submission of detailed proposals to the Minister in relation to the proposed expansion by reference to the requirements of clause 11, which are to be considered by the Minister by reference to the procedure under clause 12, with minor exceptions.

Subject to the EP Act, the Company is to implement approved proposals pursuant to this clause in accordance with their terms.

Clause 14 – Grant of Tenure

Subclause (1)

Details procedures for the grant of the Special Railway Licence and initial Lateral Access Road Licences. The forms of those licences are set out in Schedules 2 and 3 to the Agreement.

Subclause (2)

Details the procedure for the grant of Lateral Access Road Licences for the construction of an SRL Railway spur line. The form of that licence is set out in Schedule 4 to the Agreement.

Subclause (3) and (4)

Sets the term for the Special Railway Licence at 20 years from grant with the right as provided in the Agreement for the Company to take 2 successive renewals each of 10 years, and of any Lateral Access Road Licences at 5 years from grant.

Subclause (5)

Prohibits the surrender of the Special Railway Licence or any Lateral Access Road Licence or any parts thereof (except as required by the terms thereof) without the prior consent of the Minister.

Subclause (6)

Provides for the Company to take in accordance with approved proposals stone, sand, clay and gravel from the Railway Corridor (as defined) for the construction of the SRL Railway, including any spur lines and that no royalty shall be paid under the *Mining Act 1978* (WA) for the taking of that material.

Subclause (7)

Provides for the purposes of the Agreement specific modifications of the *Mining Act 1978* (WA) to facilitate the grant of the Special Railway Licence and any Lateral Access Road Licences.

Subclause (8)

Provides for land approved for the construction of an SRL Railway spur line outside the then Rail Corridor (as defined) to be included in the Special Railway Licence by endorsement.

Clause 15 – Construction and operation of Railway

This clause deals with how the SRL Railway is to be constructed and the Railway operated and sets out provisions relating to Private Roads.

Subclause (1)

Obliges the Company, subject to approved proposals, the Rail Safety Act and the State having assured to the Company all necessary rights over Crown Land, to construct the SRL Railway and associated access roads in accordance with approved proposals and with recognised standards for railways of a similar nature operating under similar conditions and with other requirements, emphasising safety requirements. Also obliges the Company to construct infrastructure related to the Railway.

Subclause (2)

Obliges the Company to keep the Railway and Additional Infrastructure in an operable state, to ensure that the Railway and Additional Infrastructure is operated in a safe and proper manner in compliance with all applicable laws. In particular obliges the Company to ensure compliance with the Rail Safety Act and from such time as they apply, the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) in connection with the Railway.

Confirms that nothing in the Agreement shall be construed to exempt the Company or any other person from compliance with the Rail Safety Act and, from and during such time as they apply, the *Railways (Access) Act 1998* (WA) or the *Railways (Access) Code 2000* (WA) or as limiting their application to the Company's operations generally.

Subclause (3)

Obliges the Company to provide crossings for livestock and for existing roads, other railways, conveyors, pipelines and other utilities and to allow crossings for roads, railways, conveyors, pipelines and other utilities constructed for future needs on reasonable terms and conditions. Further, the Company is to, if applicable, consent to and otherwise facilitate the grant by the State of any lease, licence or other title to support the new crossing so long as such grant does not in the Minister's opinion unduly prejudice the activities of the Company under the Agreement.

Subclause (4)

States that the Company shall not be deemed to be a common carrier when transporting passengers or carrying iron ore products.

Subclause (5)

Provides that the Company shall at all times be the holder of the Special Railway Licence, the Port Railway Lease and Lateral Access Road Licences and (without limiting clause 32) shall, subject to any temporary emergency and statutory rights of a relevant authority, at all times own, manage and control the use of the Railway and Additional Infrastructure.

Subclause (6)

Provides that the Special Railway Licence and each Lateral Access Road Licence do not entitle the Company to exclusive possession of the land which is the subject of them.

Provides for a right of access to that land for the State, the Minister, the Minister for Mines and any persons authorised by them from time to time, on certain conditions.

Subclause (7)

The Company's ownership of the SRL Railway and Additional Infrastructure does not give it an interest in the land underlying it.

Subclause (8)

Provides that the Company shall not without the prior consent of the Minister dismantle, sell or otherwise dispose of any part of the Railway or Additional Infrastructure or permit this to occur, other than for purposes of maintenance, repair, upgrade or renewal.

Subclause (9)

Obliges the Company to use all reasonable endeavours to ensure that the SRL Railway has a railway track configuration which enables:

- (a) rail operations of the kind carried out on any one or more of the Pilbara Iron Ore Railways (as defined) to be carried out on the Railway, and vice versa; and
- (b) connection of the SRL Railway to any one or more of the Pilbara Iron Ore Railways.

Subclauses (10)

Obliges the Company to not surrender the Port Railway Lease or any parts of it without prior consent of the Minister (acting with the concurrence of the Port Authorities Minister).

Subclause (11)

Provides for the Company to construct access roads, Lateral Access Roads and other works approved in accordance with approved proposals.

Subclause (12)

Obliges the Company to be responsible for the cost of construction and maintenance of all Private Roads (as defined) and to ensure safe conduct on those roads.

Subclause (13)

Prohibits the Company from trading in iron ore products during the currency of the Agreement.

Clause 16 – Access Obligations for Railway

This clause sets out the intention of the State and the Company that the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) apply to the Railway), sets out related provisions and imposes a range of obligations on the Company in respect of access by persons to the Railway. It also foreshadows the

Company's intention to seek acceptance of a haulage service undertaking under the provisions of the *Australian Consumer Law* (Commonwealth).

Subclause (1)

Defines terms for the purposes of this clause.

Subclause (2)

Acknowledges that unless the Company submits a written undertaking to the Commission under Part IIIA of the Australian Consumer Law for the provision of haulage services over the Railway and the Commission accepts the proposed undertaking, the *Railways (Access Act) 1998* (WA) and the *Railway (Access Code) 2000* (WA) shall apply to the Railway and any expansion or extension thereof (including spur line).

Subclause (3)

The Company acknowledges that from 6 months before the date for completion of construction of the SRL Railway, it shall keep the Minister fully informed of progress of construction, likely completion and commissioning and the likely Railway Operation Date.

Subclause (4)

Obliges the Company to notify the Minister on Railway Operation Date that the first carriage of iron ore product over the Railway between the PIOP and the Port Facilities has occurred.

Obliges the Company 6 months before the completion of construction of any SRL Railway spur line to inform the Minister of progress towards completion of construction and the likely SRL Railway spur line Railway Operation Date (as defined).

Subclause (6)

Obliges the Company to notify the Minister on the respective SRL Railway spur line Operation Date that the carriage of iron ore product over that spur line has occurred.

Subclause (7)

Prohibits, unless the Minister's prior consent is given, an agreement for the transport of or access to the Railway for the transport of Government Agreement Product (as defined).

Subclause (8)

The Company acknowledges the State's intention that the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) apply to and in respect of the Railway (but not rolling stock and other specified infrastructure) and the Company's access roads within the Railway Corridor until the ACL Undertaking Acceptance Date (as defined).

The Company acknowledges that the State shall from time to time be entitled to make any legislative changes necessary to enable that legislation to so apply.

Obliges the Company to do all such things as the Minister reasonably requests for the purposes of the *Railways (Access Code) 2000* (WA) so applying, which are not inconsistent with the Agreement.

Subclause (9)

Subclause (9)(a) prohibits, subject to subclause (9)(b), any agreement for access to the Railway, or provision of rail transport services over the Railway, being made during the period prior to the "Access Date" (as defined) without the prior consent of the Minister.

Subclause (10)

Sets out requirements in respect of each agreement for access to the Railway or provision of rail transport services over the Railway which is entered into prior to the Access Date, and in particular, obliges the Company to ensure that each agreement:

- (a) does not and will not in any way prevent alteration of practices or methods of operation in relation to control and management of the Railway and its use to the extent necessary to comply with obligations of a railway owner in connection with the Railway under the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) after the Access Date;
- (b) does not and will not in any way limit the discretion of the Regulator (as defined in the *Railways (Access) Act 1998* (WA) in exercising certain functions under the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA);
- (c) does not impose obligations on the Company or create in favour of anyone in relation to the Railway any interest that may preclude other entities from access to the Railway in accordance with the *Railways (Access) Act 1998* (WA) or the *Railways (Access) Code 2000* (WA);
- (d) if the agreement were an "access arrangement" within the meaning of the *Railways (Access) Code 2000* (WA) that it would comply with various provisions of that Code; and
- (e) will operate as from the Access Date under the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) as if the agreement were an access agreement.

Provides for the provisions of subclause (10) to apply to any expansions or extensions of the Railway including spur lines.

Subclause (11)

- (a) Obliges the Company to consult with and keep informed the State about any steps or proposed steps of the Company or other persons to make the Railway subject to Part IIIA of the Australian Consumer Law.
- (b) Requires the Company to give 12 months' notice to the State of its intention to give a written undertaking to the Commission under Division 6 of Australian Consumer Law (ACL) to provide a haulage service over the Railway.

- (c) Obliges the Company to keep the State fully informed in relation to the provisions of such access undertaking.
- (d) From and including the ACL Undertaking Acceptance Date the Company shall be released from any outstanding obligations under specified provisions of the Agreement including to promote the use of the Railway under the *Railways (Access Act) 1998* (WA) and *Railways (Access Code) 2000* (WA). From and including the ACL Undertaking Acceptance Date, the Company must at all times have in place during the currency of the Agreement an undertaking under Division 6 Part IIIA of the ACL for the provision of haulage services over the Railway.
- (e) Provides that this clause shall not be taken to limit the rights of the State to make under the Australian Consumer Law or otherwise submissions in respect of any access undertaking application by the Company.

Subclause (12)

Obliges the Company to use, after the Railway Operation Date, all reasonable endeavours to promote access to, and attract customers for, the Railway.

Subclause (13)

Sets out required timeframes for submission to the Regulator (as defined in the *Railways (Access) Act 1998* (WA)) or publication (as the case may be) of documentation and matters required to be submitted to the Regulator or published by a railway owner under the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA).

Obliges the Company conduct itself in such a manner as to, and to do all such things as are reasonable to, facilitate the approval or determination of the documents and matters listed in subclause (13)(c) as soon as possible after the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) apply to the Railway.

Obliges the Company to submit to the Regulator within 3 months of the *Railway (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) applying to any expansion or extension of the Railway new or amended documents and matters.

Subclause (14)

Clarifies that nothing in its provisions shall be taken to exempt the railway owner in respect of the Railway from any obligation or requirement of the railway owner under the *Railways (Access) Act 1998* (WA) or the *Railways (Access) Code 2000* (WA).

Subclause (15)

Provides that nothing in the Agreement shall be taken to limit the rights of the State to regulate access to the Port and to the Port Facilities in the future or the Company's obligation to comply with those regulations.

Clause 17 – Compliance with Laws

Subclause (1)

Requires the Company during the currency of the Agreement to comply with and observe the provisions of the Agreement and subject thereto the laws for the time being in force in Western Australia.

Subclause (2)

Makes the Company responsible (except as otherwise provided in the Agreement) for obtaining any authority necessary to allow it to obtain stone, sand, clay or gravel for the construction of the Railway and the Lateral Access Roads.

Clause 18 - Maintenance

Makes the Company responsible for maintenance of the Railway, Additional Infrastructure, access roads and other works installations plant machinery and equipment the subject of the Agreement.

Clause 19 - Use of local labour professional services and materials**Subclause (1)**

Details the obligations of the Company with respect to the use of labour, professionals and services within Western Australia and Australia, giving suitably qualified Western Australian and Australian suppliers, manufacturers and contractors fair and reasonable opportunity to tender or quote for works and with respect to giving, where possible, preference to contracts and orders that include participation by Western Australian or Australian suppliers, manufacturers and contractors.

Subclause (2)

Obliges the Company, except as otherwise agreed by the Minister, to include the same local content obligations, as in subclause (1), in contracts with third parties, as well the undertaking of procurement activities in accordance with the Local Industry Participation Plan under clause 10.

Subclause (3)

Obliges the Company to submit reports to the Minister concerning the implementation of the local content requirements and of the Local Industry Participation Plan.

Subclause (4)

Obliges the Company to keep the Minister informed on elements of the Project proposed to be sourced overseas, including as to reasons, and to consult with the Minister as and when required with respect thereto.

Clause 20 – No discriminatory charges

Obliges the State, except as otherwise provided in the Agreement, to ensure the titles, property or other assets, products, materials or services used or produced by the Company by or through its activities under the Agreement are not subjected to discriminatory rates, taxes or charges by the State or any local government or any agency, instrumentality or other authority of the State. Further, the State is not to take or permit a State agency, instrumentality or other authority to take any other discriminatory action against the Company which would deprive it of the enjoyment of

rights granted under this Agreement. The conferral of rights upon parties to other Government agreements is to be disregarded in applying this clause.

Clause 21 – Taking of land for the purposes of this Agreement

Subclause (1) and (2)

Empowers the State to take, as and for a public work under Parts 9 and 10 of the *Land Administration Act 1997* and the *Public Works Act 1902*, land (other than any part of the Port or land the taking of which would be contrary to the provisions of a Government agreement) for the Project, if the Company considers it necessary for the Project and the Minister determines it is appropriate to be taken.

Subclause (3)

Provides for the Company to pay all compensation in respect of any land taken for the purposes of this Agreement.

Clause 22 – No taking of land

Provides assurance to the Company, subject to the performance by it of its obligations under the Agreement and without limiting clause 15(3), that the State will not, without the consent of the Company, resume its works, installations, plant, equipment or other property the subject of or used for the purposes of the Agreement. Further, the State will not create or permit an agency, instrumentality or other authority of the State to create a road, right-of-way, water right or easement of any kind over the lands of the Company which may unduly prejudice the Company's activities under this Agreement.

Clause 23 – Commonwealth licences and consents

Obliges the Company to apply for licences and consents from the Commonwealth or any agency, authority or instrumentality thereof necessary to enable or permit the Company to enter into the Agreement and to perform its obligations thereunder. Provides for the State on request by the Company to make representations for the grant to the Company of such licences and consents.

Clause 24 – Zoning

Obliges the State to ensure after consultation with the relevant local government that any lands the subject of the Special Railway Licence or Lateral Access Road Licences shall be and remain zoned for use or otherwise protected during the currency of the Agreement so that the Company's activities under the Agreement can be carried on without interference or interruption on the ground of being contrary to any zoning by-law, regulation or order.

Clause 25 – Assignment

Subclause (1)

Provides for the assignment, mortgaging, charging, subletting or disposition by the Company of rights under the Agreement, with the prior consent of the Minister

Subclause (2)

Provides for the Company, notwithstanding anything in or done under subclause (1), to remain liable for the performance of all covenants and agreements on its part under the Agreement unless the Minister agrees to release the Company from such liability where the Minister considers such release will not be contrary to the interests of the State.

Subclause (3)

Notwithstanding the *Mining Act 1978* (WA) no assignment, mortgaging, charging, subletting or disposition by the Company of rights under the Agreement shall require any approval or consent other than under subclause (1) and no equitable mortgage or charge shall be rendered ineffectual by the absence of any approval or consent (otherwise than as required by this clause) or because it is not registered under the provisions of the *Mining Act 1978* (WA).

Clause 26 – Variation or determination**Subclause (1)**

Enables the Agreement to be varied from time to time by agreement in writing between the parties for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of the Agreement.

Subclause (2)

Requires any variation to the Agreement to be tabled in both Houses of Parliament.

Subclause (3)

Details when the variation will come into operation.

Subclause (4)

Enables the Agreement to be determined by mutual agreement.

Clause 27 – Force majeure

Provides for the temporary suspension of the Agreement obligations as a result of a range of circumstances beyond the control of the Company or the State.

Clause 28 – Power to extend periods**Subclause (1)**

Subject to subclause (2), allows the Minister, at the request of the Company, to extend dates or periods referred to in the Agreement.

Subclause (2)

Provides that the date specified in clause 11(1) for submission of proposals may only be extended once and for a period not exceeding 18 months.

Clause 29 – Determination of Agreement

Subclause (1)

Specifies the events that can result in determination of the Agreement.

Subclause (2)

Requires specified details to be given in a notice of determination.

Subclause (3)

Enables the Company to contest a notice of default and allows the matter to be decided by arbitration. Where the arbitration decision is against the Company and the arbitrator finds there was a genuine dispute, the time for complying with such a decision shall be not less than 90 days.

Subclause (4)

Enables the State to remedy a default and recover costs of so doing from the Company.

Subclause (5)

Provides that the State waives its rights to seek specific performance to compel the Company to submit proposals pursuant to clause 11 in the event that before approval of proposals under clause 12, the Company repudiates the Agreement.

Clause 30 – Effect of cessation or determination of Agreement

Details the effect of determination of the Agreement, requires payment of money payable or accrued due and provides that, other than as provided in the Agreement, no party has any claim against the others in respect of anything arising out of the Agreement. Also contains provisions regarding whether improvements to the land are to become the property of the State or are to be removed by the Company.

Clause 31 – Indemnity

Requires the Company to indemnify the State in respect of actions, costs or demands of third parties resulting from activities undertaken by the Company under the Agreement or by third parties on their behalf, except where the State (or its agents) has been negligent in carrying out work for the Company pursuant to the Agreement.

Clause 32 – Subcontracting

The State and the Company may subcontract to third parties any activity they are authorised or obliged to carry out under the Agreement.

Clause 33 – Arbitration

Subclause (1)

Defines the arbitration process applicable to the Agreement.

Subclause (2)

Arbitration will not apply where the State, the Minister or any other Minister has discretionary power.

Subclause (3)

Empowers the arbitrator to grant interim extensions to any date or period in the Agreement to preserve rights while a matter is before arbitration.

Clause 34 – Consultation

Requires the Company to consult with and keep the State informed on any action that it proposes to take with any third party, including the Commonwealth, which is likely to significantly affect the overall interest of the State under the Agreement.

Clause 35 – Notices

Specifies how notices are to be given under the Agreement.

Clause 36 – Guarantee of the Company's performance

Provides that the Guarantors guarantee to the State the Company's performance of its obligations under the Agreement. The Minister may release the Guarantors or a Guarantor from the guarantee if reasonably satisfied that the Company has the necessary financial capacity to perform its obligations under the Agreement or one or more companies with the requisite financial capacity have assumed the obligations of the released Guarantors or Guarantor.

Clause 37 – Term of Agreement**Subclause (1)**

Unless determined earlier, the Agreement will expire when the Special Railway Licence expires, is determined or surrendered.

Subclause (2)

Unless already determined, at any time within 5 years prior to the expiry of the Special Railway Licence, the State shall, at the request of the Company, confer with the Company with respect to agreeing to commence negotiations for a new agreement or a variation of the Agreement involving an extension of the Special Railway Licence. The arbitration provisions of clause 33 shall not apply to this clause.

Clause 38 – Applicable law and Submission to Jurisdiction

The Agreement is to be interpreted according to the laws from time to time of Western Australia and the parties submit to the jurisdiction of the courts of Western Australia in relation to any action or proceeding in connection with the Agreement.

Schedule 1 – Indicative Plan of Anticipated Rail Route and Corridor

Schedule 2 – Form of Miscellaneous Licence for a Railway and Other Purposes

Schedule 3 – Form of Miscellaneous Licence for a Lateral Access Road

Schedule 4 – Form of Miscellaneous Licence for a Lateral Access Road Licence