

RAILWAY (ROY HILL INFRASTRUCTURE PTY LTD) AGREEMENT BILL 2010

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) come into operation on the day after 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 (The Roy Hill Infrastructure Pty Ltd) Agreement 2010 (**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 15(2)(a)(i) of the Agreement.

PART 2

Section 3

Contains definitions of the phrases “scheduled agreement” (the agreement a copy of which is set out in Schedule 1 to the Act) and “the Agreement” (the scheduled agreement as varied from time to time) 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 20 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 *Trade Practices Act 1974* (Commonwealth) (**the TPA**). 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) (as was the case in the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*) 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 section 44ZZBA of the TPA (see especially sections 9, 10 and 15 of the Act and applicable commentary below).

Section 8

Subsection (1) inserts the definition of “Railway (Roy Hill Infrastructure) Agreement” into section 3(1) of RAA.

Subsection (2) inserts a new paragraph (ca) in the definition of “railways network” in section 3(1) of RAA so as to include the railway constructed pursuant to the Railway (Roy Hill Infrastructure) Agreement.

Subsection (3) inserts a new subsection (5) 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 (Roy Hill Infrastructure) 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 12A into RAA.

Section 12A(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 (Roy Hill Infrastructure) Agreement.

Since proposed section 12A 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 12A(2) provides that, if after section 9 of the Act is operative the railway constructed pursuant to the Railway (Roy Hill Infrastructure) 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 15(2)(a)(ii) 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 12A(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 12A.

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

Section 12A(5) provides that modifications for the purposes of section 12A(2) are not amendments of the Code for the purposes of sections 9(2) – (6) of RAA. This means that all modifications under section 12A 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 12A(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 12A(2) gives effect to the intention in clause 15(2)(a)(ii) 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 (Roy Hill Infrastructure) Agreement” into section 3 of the Code.

Subsection (2) inserts a new paragraph (ca) in the definition of “railways network” in section 3 of the Code so as to include the railway constructed pursuant to the Railway (Roy Hill Infrastructure) Agreement.

Section 12

Inserts a new section 54 into the Code providing that until the Regulator publishes in the Government Gazette notice of a determination under clause 3(1)(a)(iia) (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 53 declaring “All tracks that are part of the railway constructed pursuant to the Railway (Roy Hill Infrastructure) 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 15(2)(a)(i) of the Agreement) of the railway (including any spur lines) the subject of detailed proposals submitted under clause 10 and approved under clause 11 of the Agreement) but before the Railway Operation Date (as defined in clause 1 of the Agreement).

Section 14

Inserts a new paragraph (iia) 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 53 in Schedule 1 (see commentary in respect of Section 13 above).

Division 3 – Expiry of Part 3

Section 15

Subsection (1) defines the phrase “TPA Undertaking Acceptance Date” as having the same meaning as it is given in clause 15(1) of the Agreement (namely, the date on which, under section 44ZZBA of the TPA, the decision of the ACCC to accept under Division 6 of Part IIIA of the TPA the Company’s proposed undertaking for the provision of haulage services as referred to in clause 15(6)(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 TPA Undertaking Acceptance Date.

Subsection (4) provides that, subject to clause 15(6)(d) of the Agreement, section 37 of the *Interpretation Act 1984* (WA) applies, under section 39 of that Act. Section

15(6)(d) of the Agreement provides that from the TPI Undertaking Acceptance Date the Company is released from various outstanding obligations under clause 15 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 15(6)(d) 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 (THE ROY HILL INFRASTRUCTURE PTY LTD) AGREEMENT 2010

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"), Roy Hill Infrastructure Pty Ltd ("the Company") and Roy Hill Holdings Pty Ltd and Roy Hill Iron Ore Pty Ltd (together "the Guarantors").

Recitals

- A. Advises that Roy Hill Holdings Pty Ltd is investigating the feasibility of Roy Hill Iron Ore Pty Ltd developing under the provisions of the *Mining Act 1978* (WA) an iron ore mining project in the Roy Hill mining area in the Pilbara region of Western Australia.
- B. Advises that Roy Hill Holdings Pty Ltd is investigating the feasibility of the Company constructing and operating a railway from the Roy Hill mining area to the Port of Port Hedland together with facilities within the Port primarily for the transport and export of iron ore from the Roy Hill mining area.
- C. Advises that the State has agreed to assist the development of the railway, port and associated facilities upon the terms of the Agreement for the purposes of promoting development of the iron ore industry and employment opportunity generally in Western Australia and for the purpose of promoting multi-user infrastructure facilities in the Pilbara region of Western Australia.

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 State commits to introduce and sponsor a Bill into Parliament prior to 31 December 2010 or such later date as the parties may agree to ratify the Agreement.

Subclause (2)

States that the Agreement, other than clauses 1, 2 and 3, will not come into operation until the Bill is passed and comes into operation as an Act.

Subclause (3)

Provides, unless the parties otherwise agree, for the determination of the Agreement if the Bill has not commenced to operate as an Act by 30 June 2011.

Subclause (4)

Provides that on the Bill commencing to operate as an Act all the provisions of the Agreement will operate and take effect despite any enactment or other law.

Clause 4 – Initial obligations of the State

Obliges the State, subject to certain conditions, to arrange the issue of requisite authority under 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 10.

Subclause (2)

Obliges the Company to keep the State fully informed, from the date specified in subclause 3(4), 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 32 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 27, 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(b) and (c) are required by clause 10(5)(b) to be submitted to the Minister together with the Company's clause 10 proposals.

Clause 8 – 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) that can be leased and licensed to the Company as referred to in this clause and the nature and characteristics including capacity of the relevant Port Facilities and Port Railway (both as defined) to be constructed by the Company within those areas.

Subclause (2)

The Port Facilities to be constructed by the Company are to include 2 berths with a total handling capacity of up to but not exceeding 55 million tonnes per annum and a train unloader with a design capacity which enables the unloading within the Port of not less than 55 million tonnes of iron ore products per annum from the Railway.

Subclause (3)

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 27, 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 (4)

Provides that none of the State, the Minister, the Port Authorities Minister or the Port Hedland Port Authority has any obligation to ensure that the Boodarie multi-user stockyard area (as defined) is vested in the Port Authority or is liable to any person (including the Company) for any loss or damage arising out of or in connection with any failure or refusal to so vest that land or any delay in vesting that land or any part of it.

Subclause (5)

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 Port Hedland Port Authority to grant to the Company or any other person tenure or other rights including the Port Facilities Lease and Licence or the Port Railway Lease and Licence.

Subclause (6)

Provides that the arbitration provision of clause 32 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 detailed Project proposals, to consult with local governments and prepare a plan which describes the Company's proposed strategies for achieving social and community benefits from the Project, and to submit the plan to the Minister. Requires the plan to include provision for the Company to undertake regular consultation with local government.

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 to the Minister the results of its regular consultation with local government.

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

Provides for the Company, subject to the matters referred to in this subclause, to submit detailed proposals for its Project by 31 December 2011. In particular unless otherwise agreed with the State the vesting of the Boodarie multi-user stockyard in the Port Hedland Port Authority 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 55 million tonnes of iron ore products per annum over it and a railway track configuration which enables:

- (a) the SRL Railway to be connected outside the Port (as defined) to any one or more of the other railways currently operating in the Pilbara that have been constructed under Government agreements; and
- (b) rail operations of the kind carried out on those Pilbara railways to be carried out on the SRL Railway and vice versa.

Proposals have to be consistent with the agreement reached under clauses 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 the proposals have been approved.

Subclause (4)

Requires the Company to submit to and 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)

Requires the Company to submit to the Minister additional information on the financial capability of the Company, accreditations under the *Rail Safety Act 1998* (WA), the readiness of the project proponent for the Roy Hill mining area to embark upon and to proceed to carry out that project in a timeframe consistent with the commencement of the Project, the Company having a binding agreement for the transport upon the Railway and ship loading at the Port Facilities over the term of the Agreement of the iron ore from the Roy Hill mining area, arrangements and agreements in respect of the Railway, evidence of the Company's readiness to embark on the operations referred to in the proposals, the written consents referred to in clauses 7(3)(b) and (c) and evidence of the grant of the Port Facilities Lease and Licence and the Port Railway Lease and Licence with their term commencing within 3 months after approval of proposals.

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 11 – Consideration of proposals**Subclause (1)**

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

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 27) if all proposals and matters required pursuant to clause 10 are not approved or determined by 30 June 2012 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 vest the Boodarie multi-user stockyard area in the Port Hedland Port Authority and the Company's right to submit proposals pursuant to clause 10(1) is still subject to such vesting having first occurred.

Determination can take place even if agreement has not been reached in relation to matters required by clauses 7(1) and 8(1) to be agreed or the community development plan required by clause 9 has not been approved.

Subclause (7)

Requires the implementation of approved proposals and the SRL Railway, access roads and Lateral Access Roads (if any) to be constructed and operational within 3 years of approval of proposals.

Subclause (8)

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

Subclause (9)

Gives the Minister authority to extend periods in subclauses (1) and (7) to enable the Company to comply with native title laws.

Clause 12 –Expansion of Project outside the Port

Enables the Company to expand its activities under the Agreement as referred to by:

Subclause (1) – giving notice to the Minister;

Subclause (2) – if the additional proposal is in relation to a SRL Railway spur line (as defined), the Minister giving in-principle approval to such construction and the Company complying with the provisions for defining the spur line route and for a community development plan; and

Subclause (3) and (4) – submitting detailed proposals to the Minister, which would be assessed under the same provisions (with minor exceptions) as for the Company's initial Project proposals.

Clause 13 – Grant of Tenure

Subclause (1)

Details procedures for the grant of the Special Railway Licence and initial Lateral Access Road Licences. The intended forms of those licences are set out in Schedules 1 and 2 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 intended form of that licence is set out in Schedule 3 to the Agreement.

Subclause (3) and (4)

Sets the term for the Special Railway Licence at 30 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 4 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 Rail 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 14 – Construction and operation of Railway and retention of Port Facilities

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 and other matters, 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 in an operable state, to ensure that the Railway 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 1998* (WA) 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 1998* (WA) and, from and during such time as they apply as referred to in clause 15(2) the *Railways (Access) Act 1998* (WA) or the *Railways (Access) Code 2000* (WA) or limit 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.

Subclause (4)

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

Subclause (5)

Provides that the Company shall at all times be the holder of the Special Railway Licence and Lateral Access Road Licences and (without limiting clause 31) own, manage and control the use of the Railway.

Subclause (6) and (7)

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. The Company's ownership of the SRL Railway 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 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) the SRL Railway to be connected outside the Port (as defined) to any one or more of the other railways currently operating in the Pilbara that have been constructed under Government agreements; and
- (b) rail operations of the kind carried out on those Pilbara railways to be carried out on the SRL Railway and vice versa.

Subclauses (10)

Obliges the company to at all times hold the Port Facilities Lease and Licence and (without limiting clause 31) to manage and control the use of the Port Facilities.

Subclause (11)

Provides that the Company can only dismantle, sell or dispose of any part of the Port Facilities with the prior consent of the Minister (acting with the concurrence of the Port Authorities Minister).

Subclause (12)

Prohibits the Company from surrendering the Port Facilities Lease and Licence or the Port Railway Lease and licence without the prior consent of the Minister.

Subclause (13)

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

Subclause (14)

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

Subclause (15)

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

Clause 15 – 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 until the TPA Undertaking Acceptance Date (as defined), 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 *Trade Practices Act 1974* (Commonwealth).

Subclause (1)

Defines terms for the purposes of this clause.

Subclause (2)

Confirms that the *Railways (Access Act) 1998* (WA) and the *Railway (Access Code) 2000* (WA) shall apply until the TPA Undertaking Acceptance Date (as defined).

Obliges the Company to keep the Minister fully informed about the progress of construction of the SRL Railway and the likely Railway Operation Date (as defined).

Obliges the Company to notify the Minister on the Railway Operation Date of that date having occurred.

Contains similar notification provisions relating to SRL Railway spur lines.

Subclause (3)

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 and the Company's access roads within the Railway Corridor until the TPA 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 (4)

Subclause (4)(a) prohibits, subject to subclause (4)(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 (5)

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 (5) to apply to any expansions or extensions of the Railway including spur lines.

Subclause (6)

- (a) Obliges the Company to consult with and inform the State about any steps or proposed steps of the Company or other persons to make the Railway subject to Part IIIA of the *Trade Practices Act 1974* (Commonwealth).
- (b) Notifies the Company's intention to give a written undertaking to the Australian Competition and Consumer Commission under Division 6 of Part IIIA of the Trade Practices Act that it intends to provide a haulage service over the Railway and obtain the Commission's acceptance of the undertaking by the Railway Operation Date.
- (c) Obliges the Company to keep the State fully informed in relation to the provisions of such access undertaking.
- (d) From and including the TPA Undertaking Acceptance Date the Company shall be released from its obligations under the 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).

- (e) Provides that this clause shall not be taken to limit the rights of the State to make under the Trade Practices Act or otherwise submissions in respect of any access undertaking application by the Company.
- (f) Obliges the Company, from the TPA Undertaking Acceptance Date, to have in place an undertaking under the Trade Practices Act for the provision of haulage services over the Railway.

Subclause (7)

Obliges the Company to use after the Railway Operation Date all reasonable endeavours to promote access to, and attract customers for, the Railway. Prohibits the making of particular arrangements or agreements or the adoption of particular practices in connection with the Railway without the prior consent of the Minister.

Subclause (8)

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 clause 15(8) 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 (9)

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 (10)

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 16 – Compliance with Laws

Subclause (1)

Requires the Company during the currency of the Agreement as provided therein, to comply with and observe the provisions of the Agreement and subject thereto with 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 its activities.

Clause 17 – Maintenance

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

Clause 18 – 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 opportunities to tender or quote for works and with respect to giving 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.

Subclause (3)

Obliges the Company to submit reports to the Minister concerning the implementation of the local content requirements.

Subclause (4)

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

Clause 19 – 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 any local government or any agency, instrumentality or other authority of the State. The conferral of rights upon parties to other Government agreements is to be disregarded in applying this clause.

Clause 20 – Taking of land for the purposes of this Agreement**Subclause (1) and (2)**

Empowers the State to take land, other than any part of the Port (as defined) or land the taking of which would be contrary to the provisions of a Government agreement as referred to therein, for the Project as if for a public work, 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 21 – 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 14(3), against resumption of its works, installations, plant, equipment or other property the subject of or used for the purposes of the Agreement.

Clause 22 – 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 23 – 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 24 – 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 approve a release 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 25 – 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 how the variation Agreement may come into operation.

Subclause (4)

Enables the Agreement to be determined by mutual agreement.

Clause 26 – 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 27 – 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 10(1) for submission of proposals may only be extended once and for a period not exceeding 6 months unless the reason is a delay in vesting the Boodarie multi-user stockyard area in the Port Hedland Port Authority in which case the period may not exceed 2 years.

Clause 28 – 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.

Clause 29 – 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 30 – 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 31 – 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 32 – 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 33 – 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 34 – Notices

Specifies how notices are to be given under the Agreement.

Clause 35 – Guarantee of the Company's performance

Provides for the Guarantors to guarantee the Company's performance of its obligations under the Agreement. Provides for the Minister to release the Guarantors from the guarantee if satisfied that the Company has the necessary financial capacity to perform its obligations under the Agreement. Provides for the guarantee to continue even if the Agreement ceases or is determined.

Clause 36 – Term of Agreement**Subclause (1)**

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

Subclause (2)

- (a) The Minister is to carry out a review of the operation of the Agreement as soon as practicable after the expiration of the 27th year of the initial term and the 7th year of the first renewal (if made) of that initial term. In undertaking the review the Minister will be required to have regard to certain matters including the need for the continuation of the Agreement from the perspective of both the State and of the Company. During the process of the review, the Minister will also consult with the Port Authorities Minister.
- (b) The Minister is to prepare a report based on the review within 18 months of the commencement of the review.
- (c) The Company and the Guarantors will have an opportunity to make submissions to the Minister and to consult with the Minister in respect of the Minister's proposed report.
- (d) If following the review the State forms the view that this Agreement should not continue, it may be determined by mutual agreement.
- (e) The arbitration provisions of clause 32 shall not apply to the undertaking of the review, to any forming by the State of the view that the Agreement should not continue or to any matter in connection with a failure by the parties to reach agreement to determine the Agreement.
- (f) Provides that nothing in this clause shall prejudice the rights of the State that are outlined in clause 28.

Clause 37 – Applicable law

The Agreement is subject to the laws of Western Australia.