

Aurizon Network Pty Ltd

[Independent Trustee] as trustee for the [Name of Trust]

[Unit Holder]

User Funding – Umbrella Agreement

*[insert Extension
name]*

QRC Industry Notes

This document contains a number of industry notes. These notes provide further explanation about certain (but not all) of the changes that the QRC submits should be made to the User Funding – Umbrella Agreement (referred to as the **UA** in all notes).

The mark up does not include tax or stamp duty changes.

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Date

Parties

Aurizon Network Pty Ltd ABN 78 132 181 116 of Level 14, Railcentre 1, 305 Edward Street, Brisbane, Queensland (**Aurizon Network**)

[Independent Trustee] [ACN] as trustee for the **[Name of Trust]** of [insert] (Trustee)

The party whose name, ABN and address are contained in item 1 of schedule 1 (Unit Holder)

Background

- A The Trustee will procure the design, supply, procurement, construction, testing and commissioning and completion of the Extension under the Project Management Agreement.
 - B The Trustee will lease and sublease the Extension Infrastructure to Aurizon Network under the Extension Infrastructure Sub-Lease.
 - C The Extension Infrastructure will be regulated as part of Aurizon Network's Railway Network under the Access Undertaking and the Access Legislation.
 - D The Unit Holder wishes to secure rights to access parts of Aurizon Network's Railway Network (including the Extension Infrastructure).
 - E Under this Agreement, the Unit Holder and Aurizon Network agree to enter into an access agreement under which Aurizon Network will grant the Unit Holder access to Aurizon Network's Railway Network (including the Extension Infrastructure).
-

Agreed terms

1 Interpretation

1.1 Definitions

In this Agreement:

Access Agreement means an Access Holder Access Agreement or an Operator Access Agreement.

Access Agreement Term for an Access Agreement entered into, or deemed to be entered into, under **clause 3** means a term ending ten years after the

Commitment Date for the Access Agreement (or other period agreed in writing between Aurizon Network and the Unit Holder).

[Drafting note: This definition may need to be updated depending upon the types of standard access agreements in place at the time this Agreement is entered into.]

Access Charges means access charges invoiced by Aurizon Network under an Access Agreement.

Access Holder Access Agreement means Aurizon Network's standard access agreement titled "Access Holder Access Agreement – Coal", as approved by the Access Regulator as at the time that the access agreement is entered into, or deemed to be entered into, under **clause 3**, as completed and modified by Aurizon Network in accordance with **clause 3**.

[Drafting note: This definition may need to be updated depending upon the types of standard access agreements in place at the time this Agreement is entered into.]

Access Legislation has the meaning given in the Unit Holders Deed.

Access Period means each year (or part year) specified in **part 1 of schedule 2**.

[Drafting note: The Access Periods specified in part 1 of schedule 2 will typically be yearly periods during the Access Agreement Term but shorter Access Periods may be specified (most likely to during a ramp-up phase at the start of the Access Agreement Term).]

Access Regulator has the meaning given in the Unit Holders Deed.

Access Rights means the rights of access to the Railway Network granted, or to be granted, by Aurizon Network under an access agreement.

Access Undertaking has the meaning given in the Unit Holders Deed.

Access Utilisation Determination Notice has the meaning given in **clause 4.4(a)**.

Access Utilisation Notice has the meaning given in **clause 4.2(a)**.

Access Utilisation Notice Date means the date on which the Unit Holder gives, or is deemed to give, an Access Utilisation Notice to Aurizon Network under **clause 4.2**.

Agreement means this document, including the **schedules**.

Aurizon Network Land Acquisition Costs means costs incurred by Aurizon Network (in its own capacity) in acquiring land or an interest in land for the purposes of the Extension (whether before or after the date of this Agreement).

Business Day means a day which is not a Saturday, Sunday or public holiday in Brisbane, Queensland.

Capital Costs has the meaning given in **clauses 6.1(a)(i) and 6.1(a)(ii)**.

Change in Control means a change (whether direct or indirect) in the party or parties that “Controlled” (as defined in the Corporations Act 2001 (Cth)) (whether directly or indirectly) the relevant Party from the party or parties that “Controlled” (whether directly or indirectly) the relevant Party as at the date of this Agreement (other than for a change in ownership of an entity which is listed (and remains listed) on the Australian Securities Exchange).

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Claim includes any claim, demand, liability, cost, expense, damage, loss, proceeding, suit, litigation, ~~investigation, audit,~~ action or cause of action, whether judicial, ~~administrative, investigative~~ or otherwise and whether arising in contract, tort (including negligence), under statute or otherwise, of whatever nature, ~~known or unknown~~, liquidated or unliquidated.

Commencement Date means the date on which the Trustee first issues a Preference Unit in accordance with the terms of the Trust Deed and Unit Holders Deed.

Commitment Date has the meaning given in **item 4 of part 2 of schedule 2**.

Confidential Information of a Disclosing Party means:

- (a) the terms of this Agreement; and
- (b) information disclosed (whether before or after the date of this Agreement) by, or on behalf of, the Disclosing Party to the Recipient under or in connection with this Agreement which:
 - (i) is by its nature confidential or commercially sensitive;
 - (ii) is identified by the Disclosing Party as confidential or commercially sensitive;
 - (iii) the Recipient knows, or ought reasonably to know, is confidential or commercially sensitive; or
 - (iv) relates to the business, operations or financial affairs of the Disclosing Party or a Related Body Corporate of it,

but does not include those terms of this Agreement, or any other information, which:

- (c) are or become public knowledge other than by:
 - (i) breach of this Agreement or by a breach of confidentiality by the Recipient or any third party to whom the Recipient has disclosed the information; or
 - (ii) breach of confidentiality by a Preference Unit Holder, the “Independent Engineer” (as defined in the Project Management Agreement), the “PUH Engineer” (as defined in the Project Management Agreement) or an “Auditor” or “Expert” (as defined in each Transaction Document);
- (d) are in the possession of the Recipient or a Related Body Corporate of it (or, where the Recipient is the Trustee, any Preference Unit Holder or

Related Body Corporate of a Preference Unit Holder without restriction in relation to disclosure before the date of receipt; or

- (e) have been independently developed or acquired by the Recipient or a Related Body Corporate of it (or, where the Recipient is the Trustee, any Preference Unit Holder or Related Body Corporate of a Preference Unit Holder).

Consequential Loss means, subject to paragraphs (e) and (f) of this definition:

- (a) ~~any special, indirect or consequential loss;~~
 - (b) ~~any economic loss in respect of any Claim in tort;~~
 - (c) ~~any loss of profits, loss of production, loss of revenue, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill or wasted overheads whatsoever; and~~
 - (d) ~~any loss arising out of any Claim by a third party;~~
- but does not include:
- (e) ~~a loss (including a loss arising out of a Claim by a third party) in respect of:~~
 - (i) ~~the cost of repairing, replacing or reinstating any real or personal property of any person (including a Party) that has been lost, damaged or destroyed; or~~
 - (ii) ~~personal injury to or death of any person; or~~
 - (f) ~~in respect of any personal injury Claim, special loss or economic loss as those terms are used in the context of personal injury Claims.~~

Industry Note: Consequential loss

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Whilst it is common to include an exclusion of consequential loss in commercial agreements, it is not appropriate to include it in the UA. There are very few obligations in the UA and the loss that would be suffered by Unit Holders in the case of breach can predominantly be characterised as consequential loss (e.g. failure to receive rent or other income).

Consolidated Group has the meaning given to that expression in Part 3-90 of the Tax Act.

Construction Interest on the Capital Costs means the amount calculated in accordance with the formula in **clause 6.2**.

Construction Period has the meaning given in the Project Management Agreement.

Default Access Agreement has the meaning given in **clause 3.3(b)**.

Disclosee has the meaning given in **clause 10.3**.

Disclosing Party has the meaning given in **clause 10.1(a)**.

Dispute has the meaning given in **clause 8.1(a)** and includes:

- (a) a matter referred to an Expert for determination under this Agreement; and
- (b) a “Dispute” (as defined in an Other Umbrella Agreement) if Aurizon Network and/or the Trustee joins the Unit Holder and all of the Other Unit Holders to the dispute resolution process under the Other Umbrella Agreement in accordance with **clause 8.9**.

Dispute Notice has the meaning given in **clause 8.1(a)**.

Dispute Resolution Process means:

- (a) the dispute resolution process under **clause 8**; and
- (b) if Aurizon Network and/or the Trustee joins the Unit Holder and all of the Other Unit Holders to the dispute resolution process under an Other Umbrella Agreement in accordance with **clause 8.9**, the dispute resolution process under the Other Umbrella Agreement.

Disputing Action has the meaning given in **clause 5.2(b)(ii)**.

Due Date means the date which is the last of the Estimated Available Dates for all of the Unit Holder’s Segments.

Effective Date means:

- (a) the date on which Aurizon Network gives the Unit Holder an Access Utilisation Determination Notice; or
- (b) if the Unit Holder gives Aurizon Network a Dispute Notice referred to in **clause 4.5(a)**, the date on which the Dispute which is the subject of that Dispute Notice is resolved under the Dispute Resolution Process.

Estimated Available Date for a Segment means the date which is the “Estimated Available Date” for that Segment under the Project Management Agreement.

Expert has the meaning given in **clause 8.2(b)**.

Extension has the meaning given in the Unit Holders Deed.

Extension Infrastructure means “Total Extension Infrastructure” (as defined in the Extension Infrastructure Sub-Lease).

Extension Infrastructure Head-Lease has the meaning given in the Unit Holders Deed.

Extension Infrastructure Sub-Lease has the meaning given in the Unit Holders Deed.

Extension Structure means the arrangements contemplated by the Project Management Agreement, the Unit Holders Deed, the Trust Deed, the Rail Corridor Agreement, the Extension Infrastructure Sub-Lease, Extension Infrastructure Head-Lease and Integrated Network Deed.

Extension Structure Tax Benefit has the meaning given in **clause 5.1(d)**.

Extension Structure Tax Cost means an amount calculated in accordance with **clause 5.1(c)**.

Governmental Agency means any government, whether Federal, State or Territory, municipal or local, and any agency, authority, commission, department, instrumentality, regulator or tribunal thereof, including the Commissioner of Taxation and Australian Taxation Office.

GST has the meaning given to that expression in the GST Law.

GST Law has the meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Gross Negligence means any negligence committed by Aurizon Network in connection with this Agreement involving such wanton and reckless conduct as constitutes an utter disregard for the ~~harmful, foreseeable and avoidable~~ consequences which result from such conduct.

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Industry Note: Gross Negligence

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The additional words included above are not necessary. To constitute gross negligence, it is sufficient that behaviour be negligent and involve a wanton/reckless disregard for the consequences. No additional criteria are required.

Head Company means the head company of any Consolidated Group of which Aurizon Network is a subsidiary member.

Indemnified Entity has the meaning given to that expression in **clause 5.1(b)**.

Insolvency Event in respect of Aurizon Network means:

- (a) it stops or suspends payment of all or a class of its debts (other than in accordance with a right of it to do so);
- (b) it is insolvent within the meaning of section 95A of the Corporations Act 2001 (Cth);
- (c) a court is required by reason of section 459C(2) of the Corporations Act 2001 (Cth) to presume that Aurizon Network is insolvent;
- (d) an administrator is appointed over all or any of Aurizon Network's material assets or undertaking;
- (e) a controller within the meaning of section 9 of the Corporations Act 2001 (Cth) or similar officer is appointed to all or any of Aurizon Network's material assets or undertaking;
- (f) an application or order is made (and, in the case of an application, is not stayed, withdrawn or dismissed within 30 Business Days), proceedings are commenced (and are not stayed, withdrawn or dismissed within 30 Business Days), a resolution is passed or proposed in a notice of meeting or an application to a court or other steps are taken (other than frivolous or vexatious applications, proceedings, notices or steps) for Aurizon Network's winding up or dissolution or for Aurizon Network to enter into an arrangement, compromise or composition with or

assignment for the benefit of its creditors, a class of them or any of them (in each case other than to carry out a reconstruction or amalgamation while Aurizon Network is solvent);

(g) a liquidator is appointed to Aurizon Network and is not removed or withdrawn within 20 Business Days;

(h) Aurizon Network is deregistered under the Corporations Act 2001 (Cth); or

(i) any event occurs which, under the laws of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above.

Interest Rate means, for any day in a Month, the annual interest rate that is the sum of:

- (a) 2%; and
- (b) the Commonwealth Bank of Australia's "Corporate Overdraft Reference Rate" (monthly charging cycle) quoted by the Commonwealth Bank of Australia on its public website for the last trading day of the previous Month (or in the event that such a rate is not so quoted at or in respect of any relevant date, such other similar rate as is quoted by a major commercial bank as agreed by the Parties or, failing agreement, as determined by an Expert under **clause 8.3**).

Landholder means the party that is the "Landholder" under the Rail Corridor Agreement.

Law includes any law or legal requirement, including at common law, in equity, under any statute, regulation or by-law, any condition of any authorisation, and any decision, directive, guidance, guideline or requirements of any Governmental Agency.

Liability means any liability (whether actual, contingent or prospective), Loss, damage, cost and expense of whatsoever description and howsoever arising.

Linked Unit Holder means a Preference Unit Holder that holds Linked Preference Units.

Linked Preference Units for the Unit Holder means:

- (a) Preference Units which, following a transfer from the Unit Holder (or from the Trustee exercising a power of sale of the Unit Holder's Preference Units), are held by an entity that, immediately following such transfer, is not:
 - (i) a party to an agreement; or
 - (ii) bound by obligations under an agreement, with Aurizon Network and the Trustee which is on substantially the same terms as this Agreement;
- (b) Preference Units referred to in **paragraph (a)** of this definition which, following one or more further transfers, are held by an entity that, immediately following such transfers, is not:

- (i) a party to an agreement; or
- (ii) bound by obligations under an agreement,
with Aurizon Network and the Trustee which is on substantially the same terms as this Agreement;
- (c) Preference Units which are held by an entity from whom the Unit Holder assumed all of its obligations under this Agreement;
- (d) Preference Units which are held by an entity from whom another entity that was previously the “Unit Holder” under this Agreement, assumed all of its obligations under this Agreement; or
- (e) Preference Units referred to in **paragraphs (c) or (d)** of this definition which are held by an entity (other than the entity referred to **paragraphs (c) or (d)**, as applicable) following one or more transfers of those Preference Units.

Loss means any Liability, loss, damage, judgment, cost, charge, expense, diminution in value or deficiency of any kind or character which a Party pays, suffers or incurs or is liable for, however arising.

Maximum Utilised Nominated Access Rights means the maximum of the Nominated Access Rights (expressed as an even number of one-way train services) for any Access Period which:

- (a) Aurizon Network determines under **clause 4.4(a)(i)**; and
- (b) if the Unit Holder gives Aurizon Network a Dispute Notice referred to in **clause 4.5(a)**, it is agreed or determined under the Dispute Resolution Process,

the Unit Holder has a reasonable likelihood of utilising.

Month means a calendar month.

Nominated Access Rights for an Access Period means the Access Rights specified in **part 1 of schedule 2** for that Access Period.

Notice has the meaning given in **clause 13.1**.

Operator Access Agreement means Aurizon Network’s standard access agreement titled “*Operator Access Agreement – Coal*”, as approved by the Access Regulator as at the time that the access agreement is entered into (or deemed to be entered into) under **clause 3**, as completed and modified by Aurizon Network in accordance with **clause 3**.

[Drafting note: This definition may need to be updated depending upon the types of standard access agreements in place at the time this Agreement is entered into.]

Ordinary Unit has the meaning given in the Trust Deed.

Other Umbrella Agreement means an agreement on terms substantially similar to this Agreement and titled “*User Funding – Umbrella Agreement: [insert Extension name]*”.

Other Unit Holder means a party which is the “Unit Holder” under an Other Umbrella Agreement.

Parties means collectively Aurizon Network, the Trustee and the Unit Holder, and **Party** means any one of them.

Preference Unit has the meaning given in the Trust Deed.

Preference Unit Holder has the meaning given in the Unit Holders Deed.

Price Sensitive Information means any information which Aurizon Network is under a contractual or other obligation (including an equitable obligation of confidence) not to disclose.

Pro Forma Access Agreement means an Access Holder Access Agreement between Aurizon Network and the Unit Holder which is taken to be modified and completed in accordance with **clause 3.2**, provided that:

- (a) the date of the Access Holder Access Agreement which is taken to be completed under **clause 3.2** will be the Due Date; and
- (b) the Nominated Access Rights which are taken to be included in the Access Holder Access Agreement under **clause 3.2** will be the Nominated Access Rights for each Access Period during the Access Agreement Term to the extent that the Nominated Access Rights for each Access Period during the Access Agreement Term are not otherwise the subject of an Access Holder Access Agreement or an Operator Access Agreement referred to in **clause 3.1**.

Proceedings has the meaning given in **clause 8.7(b)(i)**.

Project Management Agreement has the meaning given in the Unit Holders Deed.

Project Manager means the party that is the “Project Manager” under the Project Management Agreement.

~~**Aurizon Network Land Acquisition Costs** means costs incurred by Aurizon Network (in its own capacity) in acquiring land or an interest in land for the purposes of the Extension (whether before or after the date of this Agreement).~~

Rail Corridor Agreement has the meaning given in the Unit Holders Deed.

Railway Network has the meaning given in the Unit Holders Deed.

Railway Operator means a person who:

- (a) is a “rolling stock operator” and is an “accredited person” (each as defined in the Rail Safety Act); or
- (b) holds a “TIA accreditation” (as defined in the Rail Safety Act) that:
 - (i) continues in force in accordance with section 290 of the Rail Safety Act; and
 - (ii) was granted to that person as a “railway operator” (as defined under the “unamended TIA”) under section 126 of the “unamended TIA” (as defined in the Rail Safety Act).

Rail Safety Act means the *Transport (Rail Safety) Act 2010* (Qld).

Recipient has the meaning given in **clause 10.1**.

Regulatory Asset Base has the meaning given in the Access Undertaking.

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Security Documentation has the meaning given in the Unit Holders Deed.

Segment has the meaning given in the Unit Holders Deed.

Stamp Duty includes any duty or stamp duty and any transaction or registration duty or similar charge imposed by any Governmental Agency, and includes any interest, fine, penalty, charge or other amount in respect of the above but excludes GST.

State means the State of Queensland.

Supplier has the meaning given in **clause 11.3**.

Tax includes:

- (a) any tax, levy, impost, deduction, charge, rate, compulsory loan, withholding or duty by whatever name called levied, imposed or assessed under the Tax Act or any other Law in Australia or elsewhere;
- (b) unless the context otherwise requires, Stamp Duty or GST; and
- (c) any interest, penalty, charge, fine or fee or other amount of any kind assessed, charge or imposed on or in respect of anything listed in **paragraph (a) or (b)** of this definition.

Tax Act means the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**), the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) or both the 1936 Act and the 1997 Act, as appropriate, and, to the extent applicable, the *Taxation Administration Act 1953* (Cth) and includes tax laws having a similar or corresponding object or effect in any jurisdiction.

Tax Adjustment Notice has the meaning given to that expression in **clause 5.2(b)(i)**.

Tax Claim Notice has the meaning given to that expression in **clause 5.2(a)**.

Tax Dispute Notice means a notice given by a Preference Unit Holder to an Indemnified Entity in relation to a Disputing Action pursuant to **clause 5.2(b)(ii)**.

Tax Expert means an independent Tax expert appointed in accordance with **clause 5.7**.

Tax Indemnity means the indemnity provided in **clause 5.1**.

Tax Indemnity Amount means any amount payable by the Unit Holder under **clause 5**.

Tax Law has the meaning given in the Trust Deed.

Tax Loss means a tax loss of an Indemnified Entity (calculated in accordance with section 36-10 of the Tax Act) and includes a carry forward loss referred to in section 36-15(7) of the Tax Act.

Tax Relief means any refund, credit, offset, relief, allowance, deduction, rebate, recoupment, compensation, penalty, damages, restitution, right to repayment or other benefit or saving in relation to Tax, but does not include a Tax Loss.

Transfer Date means:

- (a) if the rights and obligations of the Unit Holder under this Agreement have been transferred or novated to the Unit Holder – the date on which such transfer or novation took effect; or
- (b) otherwise, the date on which the Unit Holder and other Parties entered into this Agreement.

Transferee Umbrella Agreement has the meaning given in **clause 12.2(c)**.

Transaction Document has the meaning given in the Unit Holders Deed.

Trust has the meaning given in the Trust Deed.

Trust Capital Costs has the meaning given in the Unit Holders Deed.

Trust Deed means the trust deed made by the Trustee entitled “*User Funding – Trust Deed of [Name of Trust]*”.

Unit Holder’s Segment means a Segment for which the Unit Holder is a “Segment Unit Holder” (as defined in **item 1 of schedule 7** of the Unit Holders Deed) for that Segment.

Unit Holder Representative has the meaning given in **clause 5.2(f)**.

Unit Holders Deed has the meaning given in the Trust Deed.

Unit has the meaning given in the Trust Deed.

Under-utilised Access Period means each Access Period for which the Nominated Access Rights for the Access Period are greater than the Maximum Utilised Nominated Access Rights.

Unpaid Amount has the meaning given in **clause 5.8**.

Wilful Default means an intentional breach of the terms of this Agreement.

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) where the day on or by which any thing is to be done is not a Business Day, it must be done on or by the preceding Business Day;
- (c) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;

- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (e) "includes" means includes without limitation;
- (f) no rule of construction will apply to the disadvantage of one Party on the basis that that Party put forward the documents comprising this Agreement;
- (g) if the documents comprising this Agreement contain any ambiguity, discrepancy or inconsistency, then the following order of precedence will apply to resolve that ambiguity, discrepancy or inconsistency:
 - (i) this Agreement excluding the schedules; and
 - (ii) the schedules;
- (h) words in the singular include the plural and vice versa;
- (i) words importing one gender will include every gender;
- (j) references to clauses and schedules are references to clauses of, and schedules to, this Agreement;
- (k) a requirement for a Party to obtain the consent or approval of another Party requires that Party to obtain the consent or approval in writing; and
- (l) a reference to:
 - (i) a person includes any company, partnership, joint venture, unincorporated association, corporation or other body corporate and a government or statutory body or authority;
 - (ii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified, consolidated, re-enacted or replaced;
 - (iii) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
 - (iv) a right includes a benefit, remedy, discretion and power;
 - (v) time is to local time in Brisbane, Queensland;
 - (vi) \$ or dollars is a reference to Australian currency;
 - (vii) this or any other document includes the document as novated, varied or replaced and despite any change in the identity of the Parties;
 - (viii) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmission; and
 - (ix) a Party includes that Party's successors according to law and permitted assigns and any person to whom it novates its rights and obligations.

2 Term

This Agreement commences on the Commencement Date and will continue until the date of winding up of the Trust in accordance with the Trust Deed.

3 Access Agreement

3.1 Entry into Access Agreement

- (a) Within the six month period ending on the Due Date:
- (i) the Unit Holder (or its nominee) must enter into an Access Holder Access Agreement with Aurizon Network for the Access Agreement Term for the whole of the Nominated Access Rights for each Access Period during the Access Agreement Term;
 - (ii) the Unit Holder must procure a Railway Operator, ~~acceptable to Aurizon Network,~~ to enter into an Operator Access Agreement with Aurizon Network for the Access Agreement Term for the whole of the Nominated Access Rights for each Access Period during the Access Agreement Term; or
 - (iii) the Unit Holder must ensure that any number or combination of Access Agreements ~~(provided that, in the case of an Operator Access Agreement, the Railway Operator is acceptable to Aurizon Network)~~ are entered into with Aurizon Network for the Access Agreement Term which together are for the whole of the Nominated Access Rights for each Access Period during the Access Agreement Term.

~~For the purposes of clauses 3.1(a)(ii) and 3.1(a)(iii), Aurizon Network may only decide that a Railway Operator is not acceptable to Aurizon Network if Aurizon Network could refuse to enter into an Operator Access Agreement with the Railway Operator, on the basis of the suitability of, or some other criteria related to, the Railway Operator, under the then current Access Undertaking.~~

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Industry Note

~~The additional criteria are unnecessary as the term Railway Operator is defined by reference to the appropriate accreditation. In any event, if Aurizon is entitled under the applicable legislation to refuse to enter into an Operator Access Agreement with a particular entity, this clause would not prejudice that ability (as the obligation to enter into sufficient agreements under this clause 3.1 sits with the Unit Holder, or Umbrella Counterparty as appropriate).~~

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~~(b)~~

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3.2 Completion and modification of Access Agreement

- (a) If:

- (i) the Unit Holder wishes to enter into an Access Holder Access Agreement under **clause 3.1**, then the Unit Holder irrevocably authorises and directs Aurizon Network;
- (ii) the Unit Holder nominates a nominee to enter into an Access Holder Access Agreement under **clause 3.1**, then the Unit Holder must procure the nominee to irrevocably authorise and direct Aurizon Network; and/or
- (iii) the Unit Holder nominates a Railway Operator acceptable to Aurizon Network to enter into an Operator Access Agreement under **clause 3.1**, then the Unit Holder must procure the nominated Railway Operator to irrevocably authorise and direct Aurizon Network,

to:

- (iv) complete the applicable Access Agreement by inserting the date of the applicable Access Agreement;
- (v) complete the applicable Access Agreement by including a term equal to the Access Agreement Term;
- (vi) complete the applicable Access Agreement to include the applicable Nominated Access Rights for each Access Period during the Access Agreement Term;
- (vii) complete and include in the applicable Access Agreement all schedules and attachments referred to in, or contemplated by, the applicable Access Agreement; and

~~(viii) complete any other blank spaces that have not otherwise been completed in the applicable Access Agreement; and~~

- (viii) modify and otherwise complete the terms of the applicable Access Agreement in accordance with **part 2 of schedule 2**.

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Industry Note

Paragraph (vii) is too broad. The access agreement needs to be completed in accordance with information prescribed in Schedule 2. Industry is concerned to ensure that the scope for delay is minimised.

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- (b) Aurizon Network must act reasonably and in good faith in completing and modifying any Access Agreements under this **clause 3.2**.
- (c) The Unit Holder must (and must procure its nominee or nominated Railway Operator, as applicable, to) act reasonably and in good faith in its dealings with Aurizon Network in relation to the completion and modification of any Access Agreements entered into under this **clause 3.2**.

[Drafting note: As an alternative to the approach contemplated under clauses 3.1 and 3.2, a near complete version of the applicable Access Agreement (modified in accordance with schedule 2) could be annexed to this Agreement. This clause 3 could be amended to provide for the Unit Holder to enter into that version of the Access Agreement after any incomplete matters have been completed by Aurizon Network. This clause 3 (and associated definitions) would need to be amended to give effect to that alternative approach.]

3.3 Default Access Agreement

- (a) This **clause 3.3** applies if (and only if) an Access Agreement or Access Agreements which meet the requirements of **clause 3.1** have not been entered by the date required under **clause 3.1**.
- (b) A document in the form of the Pro Forma Access Agreement (**Default Access Agreement**):
 - (i) is taken to be in full force and effect on and from the Due Date as an access agreement between Aurizon Network and the Unit Holder for the Access Agreement Term; and
 - (ii) binds Aurizon Network and the Unit Holder (or, if the Unit Holder has nominated one or more nominees, such nominees) on and from the Due Date,
whether or not:
 - (iii) the details referred to in **clause 3.2**, or any of them, have been completed, or are capable of completion, as at the Due Date; or
 - (iv) Aurizon Network and the Unit Holder (or any nominee) have properly executed that document.
- (c) After the Due Date:
 - (i) Aurizon Network must deliver a copy of the Default Access Agreement to the Unit Holder; and
 - (ii) promptly after the copy of the Default Access Agreement is delivered to the Unit Holder, the Unit Holder (or its nominee or nominees) must duly execute a copy of the Default Access Agreement and deliver it to Aurizon Network.

3.4 Dispute

If the Unit Holder Disputes the form of:

- (a) an applicable Access Agreement completed and modified by Aurizon Network under **clause 3.2**; or
 - (b) the Default Access Agreement,
- then:
- (c) the Unit Holder may give Aurizon Network a Dispute Notice in respect of that matter; and

- (d) if the Dispute is not resolved in accordance with **clause 8.2**, the matter may be referred to an Expert for the Expert to determine the form of the applicable Access Agreement (applying, for the purposes of such determination, the requirements imposed on Aurizon Network under this **clause 3**).

4 Utilisation of Nominated Access Rights

4.1 Application

This **clause 4** does not apply, and will be of no force or effect, if:

- (a) the Unit Holder is a “Preference Subscriber” (as defined in the Unit Holders Deed) which was issued Preference Units under clause **5.10** of the Unit Holders Deed; and
- (b) this Agreement was entered into between the Unit Holder, Aurizon Network and the initial trustee of the Trust following the execution of this Agreement by Aurizon Network in accordance with clause **5.16** of the Unit Holders Deed.

4.2 Access Utilisation Notice

- (a) If the Transfer Date occurs during the Construction Period, then within 60 Business Days after the Transfer Date, the Unit Holder must give a notice (**Access Utilisation Notice**) to Aurizon Network which:
 - (i) specifies:
 - (A) whether or not the Unit Holder, in its reasonable opinion, has a reasonable likelihood of utilising the whole of the Nominated Access Rights for each Access Period; and
 - (B) if not, the extent of the Nominated Access Rights (expressed as an even number of one-way train services) for each Access Period which the Unit Holder has a reasonable likelihood of utilising; and
 - (C) reasonable details of the reasons for the Unit Holder’s opinions in relation to the matters under **clauses 4.2(a)(i)(A)** and **4.2(a)(i)(B)**; and
 - (ii) is accompanied by reasonable documentary evidence which supports the Unit Holder’s opinions in relation to the matters under **clauses 4.2(a)(i)(A)** and **4.2(a)(i)(B)**.
- (b) If the Unit Holder does not give Aurizon Network an Access Utilisation Notice within the time required under **clause 4.2(a)**, the Unit Holder will be deemed to have given Aurizon Network, on the Transfer Date, an Access Utilisation Notice which specifies that the Unit Holder does not have a reasonable likelihood of utilising any of the Nominated Access Rights for any Access Period.

4.3 No utilisation of Nominated Access Rights

If the Unit Holder gives, or is deemed to give, Aurizon Network an Access Utilisation Notice which specifies that the Unit Holder does not have a reasonable likelihood of utilising any of the Nominated Access Rights for any Access Period then:

- (a) Aurizon Network may give a notice to the Unit Holder notifying it that **clause 3** ceases to apply, and will be of no further force or effect, with effect on and from the Access Utilisation Notice Date, in which case, **clause 3** will cease to apply, and will be of no further force or effect, with effect on and from the Access Utilisation Notice Date; and/or
- (b) Aurizon Network may terminate, with effect on the Access Utilisation Notice Date, any Access Agreement entered into, or deemed to be entered into, under **clause 3** before the Access Utilisation Notice Date by giving notice to the Unit Holder and the other parties to any such Access Agreement.

4.4 Access utilisation determination

- (a) Unless **clause 4.3** applies, within 30 Business Days after the Access Utilisation Notice Date, Aurizon Network must:
 - (i) determine, in its reasonable opinion:
 - (A) whether or not the Unit Holder has a reasonable likelihood of utilising the whole of the Nominated Access Rights for each Access Period; and
 - (B) if not, the extent of the Nominated Access Rights (expressed as an even number of one-way train services) for each Access Period which the Unit Holder has a reasonable likelihood of utilising;
 - (ii) give the Unit Holder a notice (**Access Utilisation Determination Notice**) specifying:
 - (A) Aurizon Network's determination(s) under **clause 4.4(a)(i)**; and
 - (B) reasonable details of the reasons for such determination(s).
- (b) The Unit Holder must promptly (and in any event, within five Business Days after being required to do so) provide Aurizon Network with any information or documentation reasonably required by Aurizon Network for the purpose of making the determination(s) under **clause 4.4(a)(i)**.

4.5 Dispute

- (a) If Aurizon Network gives the Unit Holder an Access Utilisation Determination Notice which specifies that Aurizon Network has determined under **clause 4.4(a)(i)** that the Unit Holder does not have a reasonable likelihood of utilising some or all of the Nominated Access Rights for any one or more Access Periods (and Aurizon Network's

determination(s) specified in an Access Utilisation Determination Notice differs to the Unit Holder's opinion(s) specified in an Access Utilisation Notice), then the Unit Holder may, within ten Business Days after Aurizon Network gives the Access Utilisation Determination Notice to the Unit Holder, give Aurizon Network a Dispute Notice under **clause 8.1(a)** which Disputes Aurizon Network's determination(s) under **clause 4.4(a)(i)** as specified in the Access Utilisation Determination Notice.

- (b) If a Dispute referred to in **clause 4.5(a)** is not resolved in accordance with **clause 8.2**, then the Unit Holder may refer that Dispute to an Expert to determine, in its reasonable opinion, the matters that Aurizon Network was required to determine under **clause 4.4(a)(i)**.
- (c) If Aurizon Network gives the Unit Holder an Access Utilisation Determination Notice under **clause 4.4(a)(ii)** and the Unit Holder does not give Aurizon Network a Dispute Notice referred to in **clause 4.5(a)** within the time referred to in **clause 4.5(a)**, then:
 - (i) the Unit Holder must not give Aurizon Network a Dispute Notice under **clause 4.5(a)** which Disputes Aurizon Network's determination(s) under **clause 4.4(a)(i)** as specified in the Access Utilisation Determination Notice;
 - (ii) any such Dispute Notice which is given by the Unit Holder will be of no effect; and
 - (iii) the Unit Holder will not have, and must not make, any Claim against Aurizon Network in respect of that Dispute.

4.6 No utilisation of Access Rights

If:

- (a) Aurizon Network determines under **clause 4.4(a)(i)** (and the Unit Holder does not give Aurizon Network a Dispute Notice referred to in **clause 4.5(a)** in respect of such determination); or
- (b) if the Unit Holder gives Aurizon Network a Dispute Notice referred to in **clause 4.5(a)**, it is agreed or determined under the Dispute Resolution Process,

that the Unit Holder does not have a reasonable likelihood of utilising any of the Nominated Access Rights for any of the Access Periods, then:

- (c) Aurizon Network may give a notice to the Unit Holder notifying it that **clause 3** ceases to apply, and will be of no further force or effect, with effect on and from the Effective Date, in which case, **clause 3** will cease to apply, and will be of no further force or effect, with effect on and from the Effective Date; and/or
- (d) Aurizon Network may terminate, with effect on the Effective Date, any Access Agreement entered into, or deemed to be entered into, under **clause 3** before the Effective Date by giving notice to the Unit Holder and the other parties to any such Access Agreement.

4.7 Variation of Nominated Access Rights and/or Access Rights

- (a) If:
- (i) Aurizon Network determines under **clause 4.4(a)(i)** (and the Unit Holder does not give Aurizon Network a Dispute Notice referred to in **clause 4.5(a)** in respect of such determination); or
 - (ii) if the Unit Holder gives Aurizon Network a Dispute Notice referred to in **clause 4.5(a)**, it is agreed or determined under the Dispute Resolution Process,

that the Unit Holder does not have a reasonable likelihood of utilising some or all of the Nominated Access Rights for any one or more Access Periods, then:

- (iii) Aurizon Network may give a notice to the Unit Holder notifying it that the Nominated Access Rights for each Under-utilised Access Period will be deemed to be varied, with effect upon the Effective Date, to be the Maximum Utilised Nominated Access Rights, in which case, the Nominated Access Rights for each Under-utilised Access Period will be deemed to be varied, with effect upon the Effective Date, to be the Maximum Utilised Nominated Access Rights; and/or
- (iv) if any Access Agreements have been entered into, or deemed to have been entered into, under **clause 3** before the Effective Date: then:
 - (A) if only one Access Agreement has been entered into, or deemed to have been entered into, under **clause 3** before the Effective Date, then:
 - (1) Aurizon Network may give a notice to the Unit Holder and the other parties to that Access Agreement, notifying them that the Access Rights granted under that Access Agreement for each Under-utilised Access Period will be varied, with effect upon the Effective Date, to be the Maximum Utilised Nominated Access Rights; and
 - (2) that Access Agreement will be deemed to be varied, as specified in the notice given by Aurizon Network to each of the parties to the Access Agreement under **clause 4.7(a)(iv)(A)(1)**, with effect on the Effective Date; and
 - (B) if more than one Access Agreement has been entered into, or deemed to have been entered into, under **clause 3** before the Effective Date, then within 20 Business Days after the Effective Date, the Unit Holder must notify Aurizon Network of the variations which it requests to the Access Rights granted under those Access Agreements for each Under-

utilised Access Period, so that, the Access Rights granted, in aggregate, under those Access Agreements for each Under-utilised Access Period equal the Maximum Utilised Nominated Access Rights.

- (b) If the Unit Holder gives Aurizon Network a notice under **clause 4.7(a)(iv)(B)**, within the time required under **clause 4.7(a)(iv)(B)** and in accordance with **clause 4.7(a)(iv)(B)**, then:
- (i) Aurizon Network may give a notice to the Unit Holder and the other parties to each of the Access Agreements which the Unit Holder has requested to be varied under **clause 4.7(a)(iv)(B)**, notifying them of the variations to the Access Rights for the Under-utilised Access Periods granted under their respective Access Agreements as requested in the notice given by the Unit Holder under **clause 4.7(a)(iv)(B)**; and
 - (ii) each such Access Agreement will be deemed to be varied, as specified in the notice given by Aurizon Network to each of the parties to the Access Agreements under **clause 4.7(b)(i)**, with effect on the Effective Date.
- (c) If:
- (i) the Unit Holder does not give Aurizon Network a notice referred to in **clause 4.7(a)(iv)(B)** within the time required under **clause 4.7(a)(iv)(B)**; or
 - (ii) the Unit Holder gives Aurizon Network a notice referred to in **clause 4.7(a)(iv)(B)** within the time required under **clause 4.7(a)(iv)(B)** but the notice is not in accordance with **clause 4.7(a)(iv)(B)**,
- then:
- (iii) Aurizon Network may, in its absolute discretion, determine to vary the Access Rights granted under any one or more of the Access Agreements referred to in **clause 4.7(a)(iv)(B)** for each Under-utilised Access Period, so that the Access Rights granted, in aggregate, under those Access Agreements for each Under-utilised Access Period equal the Maximum Utilised Nominated Access Rights;
 - (iv) Aurizon Network may, promptly after making the determination referred to in **clause 4.7(c)(iii)**, give a notice to the Unit Holder and each of the parties to each of the Access Agreements which Aurizon Network has determined to vary under **clause 4.7(c)(iii)**, notifying them of the variations to the Access Rights for the Under-utilised Access Periods granted under their respective Access Agreements as determined by Aurizon Network in accordance with **clause 4.7(c)(iii)**; and

- (v) each such Access Agreement will be deemed to be varied, as specified in the notice given by Aurizon Network to each of the parties to the Access Agreements under **clause 4.7(c)(iv)**, with effect on the Effective Date.

5 Tax indemnity

5.1 Tax Indemnity

- (a) The Parties acknowledge and agree that the Extension Structure is not intended to result in any Extension Structure Tax Cost to an Indemnified Entity.
- (b) Subject to **clause 5.1(f)**, the Unit Holder must indemnify and keep indemnified Aurizon Network and the Trustee (both in its capacity as trustee of the Trust and in its personal capacity) (each an **Indemnified Entity**) against any:
 - (i) Extension Structure Tax Cost; and
 - (ii) all costs and expenses incurred or payable by an Indemnified Entity or a Related Body Corporate of it in connection with any Extension Structure Tax Cost referred to in this **clause 5.1(b)** or any action taken under or consistent with this **clause 5**, (for the avoidance of doubt, costs incurred by an Indemnified Entity in the ordinary course of its business in relation to matters that are unlikely to give rise to an Extension Structure Tax Cost are excluded), including:
 - (A) reasonable costs of engaging any person (other than an Indemnified Entity) to assist the Indemnified Entity;
 - (B) reasonable costs of employees of the Indemnified Entity or a Related Body Corporate of it; and
 - (C) all costs relating to legal proceedings concerning any Extension Structure Tax Cost, any audit or investigation made by a Governmental Agency in relation to the Tax treatment of the Extension Structure, and the settlement of, and steps taken to mitigate or resolve any process which could lead to, an Extension Structure Tax Cost, whether or not it transpires that it does,but only to the extent set out in **clause 5.6**.
- (c) An Extension Structure Tax Cost is:
 - (i) any Liability for Tax that an Indemnified Entity or the Head Company incurs, suffers or is liable for, less any Extension Structure Tax Benefit;

(ii) any Liability incurred by an Indemnified Entity under a Transaction Document to compensate another party to that document in respect of that party's Liability for Tax; or

(iii) the tax effect (if any) of any Tax Relief of an Indemnified Entity or the Head Company that is utilised or denied,

in respect of the implementation of, participation in or exit from the Extension Structure where:

(iv) the Liability, utilisation or denial would not have arisen or occurred; or

(v) the Liability or the amount of the Tax Relief utilised or denied is greater than the amount that would have arisen, been utilised or denied,

had the Extension not been designed, procured, constructed and commissioned and the Extension Structure not been implemented.

(d) An Extension Structure Tax Benefit means the tax effect of any Tax Relief available to an Indemnified Entity or the Head Company in relation to the Extension Structure for the year of income to which the Liability for Tax referred to in **clause 5.1(c)(i)** relates, but only if the Tax Relief has not already been taken into account in determining the Liability for Tax and only to the extent that the tax effect of any Tax Relief does not exceed the Liability for Tax.

(e) In determining the tax effect of any Tax Relief for the purpose of **clause 5.1(c)** or **5.1(d)**, the income tax rate is that which applies to the Indemnified Entity or the Head Company, as the case may be (for the purposes of section 4-10 of the Tax Act and determined in accordance with section 23 of the *Income Tax Rates Act 1986* (Cth)), at the time that the Liability for Tax is incurred, suffered or arises or the Tax Relief is utilised or denied, expressed as a decimal.

(f) The Unit Holder is not liable for a Claim under the Tax Indemnity to the extent that the Claim arises from any:

(i) amount derived by Aurizon Network (or the Head Company) as Project Manager under clause **[13]** of the Project Management Agreement;

(ii) amount of any "Fee" (as defined in the Rail Corridor Agreement) derived by Aurizon Network (or the Head Company) as Landholder under clause **[5]** of the Rail Corridor Agreement;

(iii) amount derived by Aurizon Network (or the Head Company) in its capacity as a Preference Unit Holder in the Trust;

(iv) Liability for Tax of the Trustee that arises as a result of the Ordinary Unit Holder directing the Trustee under clause **[15.5]** of the Unit Holders Deed to accumulate income of the Trust;

- (v) amount derived by the Trustee pursuant to clause [19] of the Trust Deed;
 - (vi) amount derived or expense incurred by Aurizon Network (or the Head Company) in satisfying its obligations to repair or replace the Extension Infrastructure (or part thereof) under clause [4] of the Extension Infrastructure Sub-Lease;
 - (vii) Stamp Duty payable on, in relation to, or as a consequence of any acquisition by Aurizon Network of Preference Units in the Trust;
 - (viii) Liability for Tax that arises in respect of any amount by which the proportion of an Access Charge for a fiscal year that is attributable to the operation and maintenance of the Extension exceeds the expenditure incurred by Aurizon Network or the Head Company in relation to the operation and maintenance of the Extension during that fiscal year;
 - (ix) failing to comply with a Tax Law (except where that failure arises as a result of the Indemnified Entity adopting a position after forming the view, acting reasonably, that the position would more likely than not prevail if adjudicated by a court);
 - (x) demand made by an Indemnified Entity after the expiry of 3 months after the expiration of the statutory period within which the relevant Governmental Agency may seek to recover the Tax to which the Claim relates;
 - (xi) "Optimisation Fee" (as defined in the Project Management Agreement) derived by the Trustee pursuant to the Project Management Agreement;
 - (xii) amount equal to "OPRA" (as defined in [schedule 2] of the Extension Infrastructure Sub-Lease) derived by Aurizon Network or the Head Company;
 - (xiii) amount of interest derived by an Indemnified Entity or the Head Company pursuant to clause [14.2] of the Rail Corridor Agreement or clause [8.3] of the Extension Infrastructure Sub-Lease; or
 - (xiv) charges, Taxes and rates payable by Aurizon Network, as lessee, in accordance with clause [#] of the Extension Infrastructure Sub-Lease.
- (g) For the avoidance of doubt, any Tax Relief or other Tax benefit that arises to an Indemnified Entity or the Head Company in respect of the matters set out in **clause 5.1(f)** will not reduce any amount payable by the Unit Holder under the Tax Indemnity.
- (h) If the Unit Holder has made a payment to an Indemnified Entity under the Tax Indemnity and the Indemnified Entity or the Head Company receives any payment (whether by way of refund, credit, offset, recoupment, compensation, penalty, damages, restitution, relief or otherwise) in respect of the Extension Structure Tax Cost giving rise to

the payment under the Tax Indemnity, then the Indemnified Entity must pay to the Unit Holder within 30 Business Days of receipt of the payment an amount equal to the lesser of:

- (i) the Unit Holder's share of the value of the payment so received and allocated in accordance with **clause 5.6**; and
- (ii) the payment made by the Unit Holder to the Indemnified Entity under the Tax Indemnity to which the payment relates.

5.2 Amendments and dispute

- (a) If an Indemnified Entity becomes aware that the Extension Structure results in, or is likely to result in, an Extension Structure Tax Cost, then the Indemnified Entity must, within a reasonable time (having regard to the nature and complexity of the circumstances resulting in or likely to result in an Extension Structure Tax Cost and the applicable regulatory timeframes governing any dispute of the Extension Structure Tax Cost with the relevant Governmental Agency) of becoming aware, give the Unit Holder notice setting out the amount of the Extension Structure Tax Cost that it has calculated and reasonable particulars in relation to that calculation (including details of any Extension Structure Tax Benefit taken into account in the calculation of the Extension Structure Tax Cost) and the amount allocated to the Unit Holder pursuant to **clause 5.6 (Tax Claim Notice)**. Notwithstanding any other provision in this Agreement, the Unit Holder's sole remedy for any delay by an Indemnified Entity in providing a Tax Claim Notice will be that the Unit Holder will not be liable under the Tax Indemnity to the extent that the delay gives rise to or increases an amount contemplated by **clause 5.1(b)(i)**, net of any corresponding benefit arising from the delay.
- (b) The Unit Holder must notify the Indemnified Entity within 20 Business Days of receipt of a Tax Claim Notice if it:
 - (i) disagrees with the existence or calculation of the Extension Structure Tax Cost or the allocation to the Unit Holder contained in such notice and, if so, what modifications it proposes (**Tax Adjustment Notice**); or
 - (ii) proposes that an Indemnified Entity dispute or procure the dispute of the Extension Structure Tax Cost with the relevant Governmental Agency (**Tax Dispute Notice**). The Unit Holder may only issue a Tax Dispute Notice if it provides reasonable particulars (having regard to the nature and complexity of the circumstances resulting in or likely to result in an Extension Structure Tax Cost) of the action that the Unit Holder proposes be taken in respect of the Extension Structure Tax Cost (**Disputing Action**) and is accompanied by evidence reasonably satisfactory to the Indemnified Entity that Preference Unit Holders holding not less than 75% of the total number of Preference Units on issue have agreed to the proposed Disputing Action.

- (c) On receipt of a Tax Adjustment Notice or Tax Dispute Notice within the requisite notice period, the Unit Holder and the Indemnified Entity must engage in good faith discussions to reach agreement in respect of:
- (i) in the case of a Tax Adjustment Notice, corrections to the calculation of the Extension Structure Tax Cost and the allocation to the Unit Holder and, if such agreement is reached, the amount of the Extension Structure Tax Cost or the allocation to the Unit Holder will be adjusted accordingly; or
 - (ii) in the case of a Tax Dispute Notice, whether an Indemnified Entity will commence or procure the commencement of a Disputing Action and, if so, the type of Disputing Action.
- (d) If the Indemnified Entity and the Unit Holder cannot, within 20 Business Days after the day on which the Unit Holder gives a Tax Adjustment Notice to the Indemnified Entity, agree on the Extension Structure Tax Cost or the allocation to the Unit Holder, or if either **clause 5.7(b)(i)** or **clause 5.7(b)(ii)** applies in relation to the calculation of the Extension Structure Tax Cost or its allocation among Preference Unit Holders:
- (i) the Extension Structure Tax Cost and the allocation to the Unit Holder is to be determined by a Tax Expert. In so acting, the Tax Expert:
 - (A) must be instructed to review the basis for and the calculation of the Extension Structure Tax Cost and the allocation to the Unit Holder by reference to the Tax Law applicable to the period relevant to the Extension Structure Tax Cost to achieve the aim set out in **clause 5.1(a)** using the principles in **clauses 5.1(c), 5.1(d), 5.1(e)** and **5.6**; and
 - (B) will act as an expert and not as an arbitrator and, in the absence of manifest error, his or her decision will be final and binding on the Parties with the amount of the Extension Structure Tax Cost and the allocation to the Unit Holder being adjusted accordingly; and
 - (ii) to the extent that the Tax Adjustment Notice given under **clause 5.2(b)(i)** gives rise to the reference to the Tax Expert under this **clause 5.2(d)**, as between the Parties, the Unit Holder and each Other Unit Holder that gave a Tax Adjustment Notice in respect of substantially the same matters under a provision of an agreement corresponding to **clause 5.2(b)(i)** of this Agreement will pay the Tax Expert's costs and expenses in respect of any such reference in the proportion which the number of Preference Units held by each of the Unit Holder and each Other Unit Holder that gave such a Tax Adjustment Notice bears to the total number of Preference Units on issue to the Unit Holder and Each Other Unit Holder that gave Tax Adjustment Notices, at that time.

- (e) If the Indemnified Entity and the Unit Holder cannot, within 20 Business Days after the day on which the Unit Holder gives a Tax Dispute Notice to the Indemnified Entity, agree on the matters contemplated by **clause 5.2(c)(ii)**, or if either **clause 5.7(b)(i)** or **clause 5.7(b)(ii)** applies in relation to the taking of any Disputing Action:
- (i) the matter is to be referred to a Tax Expert to determine:
 - (A) whether any such Disputing Action is more likely than not to succeed and, if so, what type of Disputing Action should be taken; and
 - (B) the Tax Expert will act as an expert and not as an arbitrator and, in the absence of manifest error, his or her decision will be final and binding on the Parties; and
 - (ii) to the extent that the Tax Dispute Notice given under **clause 5.2(b)(ii)** gives rise to the reference to the Tax Expert under this **clause 5.2(e)** then, as between the Parties, the Unit Holder and each Other Unit Holder to which a corresponding provision to **clause 5.2(b)(ii)** applies will pay the Tax Expert's costs and expenses in respect of any such reference in the proportion which the number of Preference Units held by each of the Unit Holder and each Other Unit Holder bears to the total number of Preference Units on issue to the Unit Holder and all Other Unit Holders, at that time.
- (f) If the Indemnified Entity and the Unit Holder agree, within 20 Business Days after the day on which the Unit Holder gives the Tax Dispute Notice to the Indemnified Entity, to commence or procure the commencement of a Disputing Action or the Tax Expert determines that any Disputing Action is more likely than not to succeed:
- (i) Aurizon Network must, within two Business Days of the date of the agreement to commence a Disputing Action or the date that the Tax Expert notifies the Parties of the determination in **clause 5.2(e)**, notify the Unit Holder regarding the entity that will take the Disputing Action;
 - (ii) if:
 - (A) more than one Unit Holder that is a party to the Unit Holders Deed has given notice to an Indemnified Entity under a provision of an agreement corresponding to **clause 5.2(b)(ii)** of this Agreement; or
 - (B) an Indemnified Entity is of the opinion, acting reasonably, that the Disputing Action may be relevant to one or more Preference Unit Holders that are parties to the Unit Holders Deed,
- the Indemnified Entity must call a meeting of the Preference Unit Holders for the purpose of nominating one Preference Unit Holder

to represent them (**Unit Holder Representative**) for the purposes of this **clause 5.2(f)**. The Unit Holder agrees that the Unit Holder Representative will be determined by Preference Unit Holders holding not less than 50% of the total number of Preference Units on issue at that time ;

- (iii) the Indemnified Entity will be responsible for conducting the Disputing Action including, subject to the Indemnified Entity complying with **clause 5.2(f)(iv)**, controlling all discussions, correspondence and communications with any Governmental Agency in relation to the Disputing Action;
- (iv) the Indemnified Entity must, in relation to the conduct of the Disputing Action:
 - (A) act in good faith at all times;
 - (B) liaise with the Unit Holder Representative as to any action proposed or not proposed to be taken;
 - (C) follow all reasonable instructions of the Unit Holder Representative. An instruction will not be regarded as reasonable if complying with it would cause material reputational damage to the Indemnified Entity or any Related Body Corporate;
 - (D) make available to the Unit Holder Representative, as soon as possible, but in any event within five Business Days, of receipt by the Indemnified Entity, a copy of the portion of any notice, correspondence or other document relating to the Disputing Action;
 - (E) notify the Unit Holder Representative regarding, and make provision for the Unit Holder Representative to attend all meetings, discussions or conferences with any Governmental Agency; and
 - (F) except if **clause 5.2(f)(iv)(C)** applies, not take any action which it is objectively unreasonable to take in all the circumstances;
- (v) the Unit Holder must, in relation to the conduct of the Disputing Action:
 - (A) bear all costs in relation to the conduct of the Disputing Action; and
 - (B) pay to the relevant Indemnified Entity so much of any Tax as is required by the relevant Governmental Agency to be paid in order to conduct the Disputing Action no later than the day that is five Business Days preceding the due date (or any extended date for payment permitted by the relevant Governmental Agency) specified in any notice issued by the Governmental Agency,

but only to the extent set out in **clause 5.6**; and

- (vi) the Indemnified Entity must not:
 - (A) accept, compromise, pay, agree to arbitrate, settle or admit liability in relation to the Disputing Action; or
 - (B) make any payment in respect of the Disputing Action to a Governmental Agency (except any payment made to a Governmental Agency as contemplated by **clause 5.2(f)(v)(B)**),
without the prior approval of the Unit Holder Representative (such approval not to be unreasonably withheld or delayed).
- (vii) For the avoidance of doubt, the Indemnified Entity has no obligations under **clauses 5.2(f)(iv)(B), (C), (D) or (E)** or **clause 5.2(f)(vi)** if the Preference Unit Holders fail to appoint a Unit Holder Representative under **clause 5.2(f)(ii)**.

5.3 Payment

- (a) The Unit Holder must pay to an Indemnified Entity an amount equal to:
 - (i) **(no adjustment or dispute)** if the Unit Holder does not give a Tax Adjustment Notice or a Tax Dispute Notice to the Indemnified Entity under **clause 5.2(b)** within the requisite period and neither **clause 5.7(b)(i)** or **clause 5.7(b)(ii)** applies, the amount of the Extension Structure Tax Cost allocated to the Unit Holder as specified in the Tax Claim Notice within 25 Business Days after the day the notice was given;
 - (ii) **(adjustment agreed)** if the Parties agree to the amount of the adjusted Extension Structure Tax Cost allocated to the Unit Holder in accordance with **clause 5.2(c)(i)** and **clause 5.2(d)** does not apply, that amount within five Business Days of reaching the agreement referred to in **clause 5.2(c)(i)**;
 - (iii) **(Tax Expert determined Extension Structure Tax Cost)** if **clause 5.2(d)** applies and no Disputing Action is or is to be taken, an amount equal to the adjusted Extension Structure Tax Cost allocated to the Unit Holder referred to in **clause 5.2(d)(i)(B)** within five Business Days of the Tax Expert notifying the Parties of the amount of the adjusted Extension Structure Tax Cost and the amount allocated to the Unit Holder; or
 - (iv) **(Tax Expert determined no Disputing Action)** if no Disputing Action is or is to be taken following a referral to the Tax Expert under **clause 5.2(e)**, an amount equal to the amount of the Extension Structure Tax Cost allocated to the Unit Holder as notified by the Indemnified Entity under **clause 5.2(a)** within five Business Days of the Tax Expert notifying the Parties of his or her decision.

- (b) If a Disputing Action is or is to be taken:
- (i) then subject to **clause 5.2(f)(v)(B)**, any payment that would otherwise be required to be made by the Unit Holder pursuant to **clause 5.3(a)** will be deferred until such time that the Disputing Action is concluded;
 - (ii) within a reasonable time following the conclusion of the Disputing Action, the Indemnified Entity must recalculate the Extension Structure Tax Cost and its allocation to the Unit Holder having regard to the outcome of the Disputing Action and provide a copy of the recalculation to the Unit Holder;
 - (iii) if the amount of the Extension Structure Tax Cost allocated to the Unit Holder as determined in accordance with **clause 5.3(b)(ii)**:
 - (A) exceeds the amount paid by the Unit Holder pursuant to **clause 5.2(f)(v)(B)** (if any), the Unit Holder must pay to the Indemnified Entity an amount equal to the Extension Structure Tax Cost as determined, but only to the extent set out in **clause 5.6**, less any amount paid by the Unit Holder pursuant to **clause 5.2(f)(v)(B)** and not refunded pursuant to **clause 5.1(h)**, within five Business Days of the determination; or
 - (B) is less than the amount paid by the Unit Holder pursuant to **clause 5.2(f)(v)(B)** (if any) and the Indemnified Entity or the Head Company receives any refund in respect of that amount, the Indemnified Entity must pay an amount equal to the lesser of:
 - (1) the refund so received; and
 - (2) the payment made by the Unit Holder pursuant to **clause 5.2(f)(v)(B)**,within five Business Days of receipt of the refund.
- (c) The Unit Holder must pay to the Indemnified Entity any amount under **clause 5.1(b)(ii)** allocated to the Unit Holder under **clause 5.6** or determined by the Tax Expert and any amount under **clause 5.2(f)(v)(A)**, but only to the extent set out in **clause 5.6**, within ten Business Days after notice of the Claim is provided to the Unit Holder.
- (d) The Unit Holder is not required to make a payment to the Indemnified Entity under this **clause 5.3** to the extent that the Indemnified Entity has recovered compensation in relation to the same matter under a Transaction Document (excluding this Agreement).

5.4 No further adjustment to particular Extension Structure Tax Cost

The Parties acknowledge and agree that, subject to **clause 5.1(h)** and **clause 5.3(b)(iii)(A)**, an Extension Structure Tax Cost which has been determined and settled in accordance with **clause 5.3** will be final and:

- (a) the Indemnified Entities are precluded from bringing any further claim under **clause 5.1**, and agree that the Unit Holder will not be liable to make any additional payment, in respect of that particular Extension Structure Tax Cost; and
- (b) the Unit Holder is precluded from bringing any claim against the Indemnified Entities, and agrees that the Indemnified Entities will not be liable to make any payment or refund to the Unit Holder, in respect of that particular Extension Structure Tax Cost.

However, for the avoidance of doubt, nothing in this **clause 5.4** prohibits a Tax Claim Notice in respect of any other Extension Structure Tax Cost.

5.5 Tax effect

If any payment by the Unit Holder to an Indemnified Entity under this Agreement, including **clause 5.3**, would require the Indemnified Entity or the Head Company to pay Tax (for the avoidance of doubt, including any amount calculated under Parts 3-1 to 3-3 of the *Income Tax Assessment Act 1997* (Cth)) as a result of the amount received by the Indemnified Entity, the Unit Holder must pay to the Indemnified Entity, within five Business Days of a demand from the Indemnified Entity, an additional amount calculated as follows:

$$AA = \left[\frac{P}{(1 - T)} \right] - P$$

where:

AA = the additional amount to be paid;

P = the amount payable by the Unit Holder to the Indemnified Entity disregarding this clause; and

T = the income tax rate that would apply to the Indemnified Entity or the Head Company, as the case may be (for the purposes of section 4-10 of the Tax Act and determined in accordance with section 23 of the *Income Tax Rates Act 1986* (Cth)), at the time that the calculation is performed, expressed as a decimal.

5.6 Apportionment

- (a) The amount of any:
 - (i) liability of the Unit Holder under the Tax Indemnity (including any amount referred to in **clauses 5.1(b)(i)**, **5.1(b)(ii)**, **5.2(f)(v)** and **5.3**); or

- (ii) refund to be provided by the Indemnified Entities to the Unit Holder in accordance with **clause 5.1(h)** or **5.3(b)(iii)(A)**,

will be calculated as follows:

$$A = L \times P/TP$$

where:

A = the amount to be paid by the Unit Holder to an Indemnified Entity or to be refunded by an Indemnified Entity to the Unit Holder as the case may be;

L = the amount payable by or refundable to the Unit Holder disregarding this clause;

P = means the sum of:

- (a) the number of Preference Units (if any) held by the Unit Holder; and

- (b) the number of Linked Preference Units for the Unit Holder (if any) (excluding any Linked Preference Units for the Unit Holder that are held by an entity that is a "Unit Holder" under an "Umbrella Agreement" (as defined in the Unit Holders Deed)); and

TP = the total number of Preference Units on issue, including, for the avoidance of doubt, the Preference Units held by Aurizon Network (if any).

- (b) For the purposes of the formula in **clause 5.6(a)**, the number of units held by a person is to be determined:
 - (i) for an Extension Structure Tax Cost referred to in **clause 5.1(b)(i)** (including where the subject of a payment under **clause 5.2(f)(v)**), at the time that the Tax Claim Notice is given by the Indemnified Entity under **clause 5.2(a)**;
 - (ii) for costs and expenses referred to in **clause 5.1(b)(ii)**, at the time that the relevant cost or expense is incurred or payable by an Indemnified Entity or a Related Body Corporate; and
 - (iii) for a refund in accordance with **clauses 5.1(h)** or **5.3(b)(iii)(A)**, at the time that the refund is to be provided.

5.7 Appointment of Tax Expert

- (a) Where **clause 5.7(b)** does not apply, the Tax Expert will be an independent Tax expert that Aurizon Network and the Unit Holder agree or, failing such agreement within 10 Business Days, appointed by the President (or his or her delegate) of the Tax Institute (or its successor).
- (b) If:
 - (i) one or more Preference Unit Holders that are parties to the Unit Holders Deed have given a notice to an Indemnified Entity under a

provision of an agreement corresponding to **clause 5.2(b)** of this Agreement and the matter that is the subject of that notice is to be referred to a Tax Expert under a provision of that agreement corresponding to **clause 5.2(d)** or **clause 5.2(e)** of this Agreement; or

(ii) an Indemnified Entity is of the opinion, acting reasonably, that a matter that is to be referred to a Tax Expert under:

(A) **clause 5.2(d)** or **clause 5.2(e)** of this Agreement may be relevant to one or more Preference Unit Holders that are parties to the Unit Holders Deed; or

(B) a provision of an agreement corresponding to **clause 5.2(d)** or **clause 5.2(e)** of this Agreement may be relevant to the Unit Holder under this Agreement,

then Aurizon Network may by notice to the Preference Unit Holders nominate two independent Tax experts to determine the matters in dispute under this Agreement and any agreement including a clause corresponding to **clause 5.2(d)** or **clause 5.2(e)** of this Agreement. Each Preference Unit Holder must promptly advise Aurizon Network which of the nominees it approves to be the Tax Expert. The Tax Expert will be the person that is approved by the most Preference Unit Holders based on the number of Preference Units on issue at that time.

(c) The amount of any costs of the Tax Expert will be allocated pro rata among all Preference Unit Holders to whom the proviso in **clauses 5.2(d)(ii)** or **clause 5.2(e)(ii)** (or a provision of an agreement corresponding to those provisions) does not apply.

5.8 Deduction under Unit Holders Deed

If any Tax Indemnity Amount is not paid by the due date for payment under this **clause 5 (Unpaid Amount)**, then:

(a) Aurizon Network may notify the Trustee of the non-payment of the Unpaid Amount;

(b) the Trustee must exercise its rights under the Unit Holders Deed to deduct the Unpaid Amount from any amounts which are due and payable to the Unit Holder and any Linked Unit Holder under the Unit Holders Deed; and

(c) the Trustee must pay any amount deducted to the relevant Indemnified Entity promptly after the date the amount is deducted.

6 Regulatory Asset Base

Industry Note – Regulatory Asset Base

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The obligations imposed on Aurizon Network in this clause 6 were not sufficiently detailed having regard to the importance of ensuring the inclusion of Capital Costs in the RAB. The additional

obligations below are all subject to a reasonableness qualification and should be performed by Aurizon Network as a matter of course.

6

6.1 Inclusion into Regulatory Asset Base

(a) Aurizon Network must seek to include:

- ~~(a)~~(i) the Trust Capital Costs (**Capital Costs**);
- ~~(b)~~(ii) the Aurizon Network Land Acquisition Costs (also **Capital Costs**); and
- ~~(c)~~(iii) the Construction Interest on the Capital Costs,

into the Regulatory Asset Base as soon as reasonably practicable under the Access Undertaking.

(b) Without limiting clause 6.1(a), Aurizon Network must:

- (i) Act in the best interests of the Trust;
- (ii) do all things which it reasonably can do (including the making of submissions to the Access Regulator) to promote and encourage the making of a decision by the Access Regulator to include the Capital Costs and Construction Interest into the Regulatory Asset Base;
- (iii) act reasonably and in good faith and consult with the Trustee before making any submission referred to in clause 6.1(b)(ii) (including consulting with the Trustee about the context of any submission);
- (iv) not do anything which would, or would be likely to, prejudice the making of a decision by the Access Regulator to include the Capital Costs and Construction Interest in the Regulatory Asset Base;
- (v) not delay seeking the inclusion of the Capital Costs and Construction Interest in the Regulation Asset Base;
- (vi) if the Access Regulator makes a decision to include the Capital Costs and Construction Interest in the Regulatory Asset Base, do all things reasonable to ensure that such costs remain in the Regulatory Asset Base; and
- (vii) not do anything which would, or would be likely to, have the effect of removing all or a material part of the Capital Costs and Construction Interest from the Regulatory Asset Base.

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6.2 Calculation of Construction Interest

The Construction Interest on the Capital Costs is the amount calculated in accordance with the following formula:

$$CI = \left[\sum_{x=1}^t CC_x \times (1 + R_{mth})^{t-x+1} \right] - CC$$

where:

| | | |
|------------------|---|--|
| CI | = | The Construction Interest on the Capital Costs |
| CC | = | The total Capital Costs incurred by the Trustee and Aurizon Network |
| CC _x | = | The part of the Capital Costs incurred by the Trustee and Aurizon Network in Month x |
| R | = | The annual interest rate (expressed as a decimal) that the Access Regulator uses to capitalise interest on costs included in the Regulatory Asset Base for the Extension |
| R _{mth} | = | $(1+R)^{1/12} - 1$ |
| t | = | The number of months from the date of the first CC _x amount is incurred by the Trustee or Aurizon Network to the date the Capital Costs are included in the Regulatory Asset Base |
| x | = | Each month after the first CC _x is incurred (x = 1 in the first month after the first CC _x amount is incurred by the Trustee or Aurizon Network) |

7 Termination

7.1 ~~No rights of termination~~ Termination

(a) The Unit Holder may immediately terminate this Agreement by notice to Aurizon Network if an Insolvency Event occurs in respect of Aurizon Network.

~~(a)(b) Despite Except as provided in clause 7.1(a) and despite~~ any rule of law or equity to the contrary, no Party may terminate, rescind or treat as repudiated, or obtain any order with the effect of terminating or rescinding, this Agreement.

7.2 No prejudice as to right to damages

Subject to **clause 9**, nothing in this **clause 7** prejudices in any way a Party's right to Claim and recover damages for any breach of this Agreement by the another Party.

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8 Disputes

8.1 Notification of Disputes

- (a) If any Claim, dispute or question (except any Claim, dispute or question in relation to any Extension Structure Tax Cost, which must be dealt with solely under **clause 5.2 (Dispute)**) arises between the Parties under this Agreement, any Party may give to each other Party a notice in writing (**Dispute Notice**) specifying the Dispute and referring it for resolution in accordance with this **clause 8**.
- (b) Unless otherwise expressly provided to the contrary in this Agreement, a Dispute must be resolved in accordance with this **clause 8**.

8.2 Chief executive officer resolution

- (a) Within ten Business Days after the giving of a Dispute Notice any Dispute must be referred in the first instance to the chief executive officer of Aurizon Network (or his or her nominee), the chief executive officer of the Unit Holder (or his or her nominee) and the chief executive officer of the Trustee (or his or her nominee) for the purposes of this **clause 8.2** for resolution.
- (b) If the Dispute is not resolved within ten Business Days after the referral under **clause 8.2(a)** or in the event that any chief executive officer appoints a nominee that is unacceptable to another Party, then the relevant Dispute:
 - (i) must, where this Agreement expressly requires referral to an expert; and
 - (ii) may, by agreement of the Parties in any other case, be referred for resolution by an expert (**Expert**) in accordance with **clause 8.3**.

8.3 Expert determination

Where any matter is referred to an Expert pursuant to **clause 8.2** or otherwise in accordance with the terms of this Agreement then the following provisions of this **clause 8.3** will apply:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within ten Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at any Party's request by:
 - (i) where the Parties agree the Dispute is purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;
 - (ii) where the Parties agree the Dispute is purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and

- (iii) in any other case, the President (for the time being) of the Queensland Law Society, Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 8.3(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the Expert; and
 - (iii) the process specified in **clause 8.3(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the Expert accepts the appointment as the Expert;
- (c) subject to **clause 8.3(b)**, if the Expert is to be nominated by a person referred to in **clause 8.3(a)** and the person nominated as the Expert does not accept the appointment as the Expert, then an alternative person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 8.3(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 8.3(a)** the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert;
- (e) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert;
- (f) the Expert must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose any such interest or duty by notice to the Parties before his or her appointment;
 - (iii) not be, or have been in the last five years, an employee of the Trustee, Aurizon Network or a Preference Unit Holder or a Related

Body Corporate of the Trustee, Aurizon Network or a Preference Unit Holder;

- (iv) not be permitted to act until he or she has given notice to the Parties that he or she is willing and able to accept the appointment;
 - (v) have regard to the provisions of this Agreement and consider all submissions (including oral submissions by a Party provided that such oral submissions are made in the presence of the other Parties), supporting documentation, information and data with respect to the matter submitted by the Parties;
 - (vi) provide all Parties with a copy of his or her determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after his or her appointment;
 - (vii) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties); and
 - (viii) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration (including, without limitation, the *Commercial Arbitration Act 1990* (Qld)), will not apply to him or her or the determination or the procedures by which he or she may reach a determination; and
- (g) if the determination of a matter referred to the Expert would require the Expert to be provided with any Price Sensitive Information by Aurizon Network, the Expert must enter into a confidentiality agreement in favour of Aurizon Network requiring the Expert to keep the Price Sensitive Information confidential.

8.4 Parties to assist Expert

The Parties must do everything reasonably requested by the Expert to assist the Expert in determining the Dispute including producing information and materials requested by the Expert and attending any hearing convened by the Expert.

8.5 Decision of Expert

In the absence of manifest error, the decision of the Expert is final and binding upon the Parties.

8.6 Costs

- (a) The costs of the Expert and any advisers engaged by the Expert will be borne equally by the Parties to the Dispute.

- (b) Each Party to the Dispute will bear its own legal costs and the costs of any advisers to it in respect of the Dispute Resolution Process under this **clause 8**.

8.7 Determination by court

- (a) If any Dispute is not otherwise resolved in accordance with this **clause 8**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane.
- (b) Each Party irrevocably and unconditionally:
 - (i) agrees that the courts of the State, and any courts which have jurisdiction to hear appeals from any of those courts, are to have exclusive jurisdiction to settle disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this Agreement may be brought in, and only in, such courts;
 - (ii) waives any objection which it may have now or hereafter to the laying of the venue of any Proceedings in such courts and any Claim that any such Proceedings have been brought in an inconvenient forum; and
 - (iii) agrees that a final judgment in any Proceedings brought in such courts will be final and binding upon such Party and may be enforced in the courts of any other jurisdiction.

8.8 Injunctive relief

Nothing in this Agreement will prevent a Party from seeking urgent injunctive relief from a court.

8.9 Disputes involving Unit Holders under Umbrella Agreements

If:

- (a) a Dispute which arises under this Agreement, or the outcome or consequences of that Dispute, may be relevant to the Trustee, Aurizon Network and/or an Other Unit Holder under an Other Umbrella Agreement; or
- (b) a "Dispute" (as defined under an Other Umbrella Agreement) which arises under the Other Umbrella Agreement, or the outcome or consequences of that Dispute, may be relevant to the Trustee, Aurizon Network and/or the Unit Holder under this Agreement,

then:

- (c) as applicable:
 - (i) Aurizon Network, the Trustee and/or the Unit Holder may join all (for the avoidance of doubt, not only some) of the Other Unit Holders to the dispute resolution process under this Agreement; or

- (ii) Aurizon Network and/or the Trustee may join the Unit Holder and all (for the avoidance of doubt, not only some) of the Other Unit Holders to the dispute resolution process under the Other Umbrella Agreement; and
- (d) Aurizon Network, the Trustee, the Unit Holder and each Other Unit Holder joined to participate in the dispute resolution process under this Agreement or an Other Umbrella Agreement (as applicable) will be bound by the outcome of the resolution of the Dispute irrespective of whether or not Aurizon Network, the Trustee, the Unit Holder or the Other Unit Holders (as applicable) choose to actively participate in the dispute resolution process.

8.10 Time bar

If a Party does not give a Dispute Notice under **clause 8.1(a)** in respect of a Dispute within 12 Months after the date it becomes aware or ought reasonably to have become aware of the occurrence of the event or circumstance giving rise to the Dispute:

- (a) the Party must not give the other Parties such a Dispute Notice;
- (b) any such Dispute Notice which is given by the Party will be taken to be of no effect; and
- (c) the Party will not have, and must not make, any Claim against the other Parties in respect of the Dispute.

9 Limitation of liability

Industry Note – Liability

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The current drafting proposes to limit Aurizon Network's liability under the UA and each other Transaction document to \$1.00 (except where expressly stated otherwise in a Transaction Document).

It is not appropriate to limit Aurizon's liability under the UA given the nature of its obligations – which are both basic (in the sense that they are readily performed) and fundamental to the Unit Holders (in terms of the consequences that would flow from a breach). Aurizon's obligations under the UA are essentially to seek inclusion of the costs in the RAB (acting reasonably), to enter into the Access Agreement and to maintain confidentiality.

It is unnecessary to include a clause in relation to liability under other Transaction Documents. Such liability is dealt with in the individual documents.

As noted above, it is also inappropriate to include an exclusion of consequential loss given the limited number of obligations and the nature of the loss that would flow to a Unit Holder from breach of such obligations (i.e. loss of rent from failure to include the Capital Costs in the RAB and loss of income from failure to enter into a relevant Access Agreement).

In relation to the deletion of clause 9.8, as noted in other Transaction Documents, it is unacceptable

to have a separate provision (specific to Aurizon) outside the scope of the Dispute Resolution clause.

9

9.1 Limitation of Aurizon Network's liability under this Agreement

Except:

- (a) as otherwise expressly provided in this Agreement; or
- (b) to the extent:
 - (i) that Aurizon Network has committed fraud in connection with this Agreement or Gross Negligence or Wilful Default; or
 - (ii) otherwise prohibited by law;

Aurizon Network's liability to each of the Unit Holder and Trustee in respect of a Claim arising out of, or in any way related to, this Agreement is limited to, and will in no event exceed, the total amount of \$1.00.

9.2 Limitation of Aurizon Network's liability to Unit Holder under another Transaction Document

Except as otherwise expressly provided in another Transaction Document, Aurizon Network's liability to the Unit Holder in respect of a Claim arising out of, or in any way related to, that other Transaction Document is limited to, and will in no event exceed, the total amount of \$1.00.

9.3 No liability in relation to capacity

Aurizon Network will not have any liability to the Trustee or the Unit Holder in respect of any Claim arising out of, or in any way related to, the level of capacity created by the Extension except for any liability Aurizon Network may have under the Access Undertaking or an Access Agreement.

9.4 Exclusion of Consequential Loss under this Agreement

- (a) Subject to clause 9.4(b), a Party will not be liable to another Party for, and any indemnity given by a Party does not extend to, any Consequential Loss suffered by or Claimed against another Party arising out of, or in any way related to, this Agreement.
- (b) Clause 9.4(a) does not apply to the indemnity given by the Unit Holder under clauses 5 and 15.4 of this Agreement.

9.5 Exclusion of Consequential Loss under another Transaction Document

- (a) Subject to clause 9.5(b), Aurizon Network will not be liable to the Unit Holder for, and any indemnity given by Aurizon Network to the Unit Holder does not extend to, any Consequential Loss suffered by or claimed against the Unit Holder arising out of, or in any way related to, another Transaction Document.
- (b) Clause 9.5(a) does not apply to the extent:

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- ~~(i) expressly provided otherwise in another Transaction Document; or~~
- ~~(ii) that a Transaction Document expressly provides that Aurizon Network is liable to pay an amount to the Unit Holder.~~
- ~~(c) For the avoidance of doubt, Aurizon Network will not be liable to any Party (including for any Consequential Loss) for any matter of whatever nature concerning or in relation to the Unit Holder's obligation to supply product from a mine to any third party or to make product available to transport.~~

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9.69.1 Trustee's limitation of liability

- (a) Aurizon Network and the Unit Holder acknowledges that the Trustee enters into this Agreement only as trustee of the Trust, and in no other capacity (other than in respect of the warranties in relation to trustee capacity in **clause 14.2** which are given by the Trustee in its personal capacity).
- (b) A liability of the Trustee arising under, or in connection with, this Agreement is limited to and can be enforced against the Trustee only to the extent to which the Trustee is entitled to be indemnified out of the Trust for the liability and the liability can be satisfied out of property of the Trust.
- (c) The limitation of liability in this **clause 9.1** will not apply to any liability of the Trustee to the extent that the liability is not satisfied out of the property of the Trust because there is a reduction in the Trustee's right of indemnity as a result of the Trustee committing fraud, "Gross Negligence" or "Wilful Default" (each a defined in the Trust Deed).

9.7 Scope of Claim, liability or loss

For the avoidance of doubt:

- ~~(a) references in this **clause 9** to a Claim, liability or loss include:~~
 - ~~(i) a Claim for, or liability or loss arising from, breach of contract, tort (including negligence), breach of equitable duty, breach of statutory duty, breach of the *Competition and Consumer Act 2010* (Cth) or otherwise; and~~
 - ~~(ii) a Claim, liability or loss arising out of the performance or non-performance of any obligation under a Transaction Document, or arising out of a termination of a Transaction Document for any reason (including breach, repudiation or otherwise).~~

9.8 Claims against Aurizon Network

~~The Trustee and the Unit Holder will not have, and must not make, any Claim against Aurizon Network in relation to, or arising out of, the entry into or the performance or non-performance of this Agreement, or give a Dispute Notice to Aurizon Network in respect of such a Claim under **clause 8.1**, unless:~~

- ~~(a) the Trustee or the Unit Holder (as applicable) first provides Aurizon Network with a notice of the purported Claim and allows Aurizon Network a reasonable period to rectify the relevant default; and~~
- ~~(b) Aurizon Network fails to rectify that default within that reasonable period.~~

10 Confidentiality

10.1 Confidentiality obligations

A Party (**Recipient**):

- (a) may use Confidential Information of a Party (**Disclosing Party**) only for the purposes of this Agreement or another Transaction Document; and
- (b) must keep confidential all Confidential Information of a Disclosing Party except for disclosures permitted under **clause 10.2**.

10.2 Disclosure of Confidential Information

A Recipient may disclose Confidential Information of a Disclosing Party:

- (a) to any person, where the Disclosing Party has consented in writing to such disclosure (such consent not to be unreasonably withheld or delayed, and may be given subject to reasonable conditions, such as the signing of an appropriate confidentiality undertaking);
- (b) to the extent necessary to progress negotiations with any other person relevant to matters contemplated in this Agreement who executes a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (c) to the extent necessary to effect the administration or enforcement of this Agreement, or further negotiations pursuant to this Agreement, by employees, professional advisers (including legal advisers) and consultants of the Recipient;
- (d) to any Related Body Corporate of the Recipient to the extent necessary for reporting purposes within a relevant group of companies, governance and oversight of the relevant group of companies and obtaining any approval or consent (whether or not directly from that Related Body Corporate) in relation to the Recipient entering into this Agreement;
- (e) to potential purchasers, assignees or transferees of the shares in the Recipient or a Related Body Corporate of it or of the rights or obligations of the Recipient under this Agreement and the other Transaction Documents who execute a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (f) to a bank or other financial institution (and its professional advisers and any security trustee or agent for it) (who execute a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it) in connection with and for the purpose of any loan or

other financial accommodation sought to be arranged by, or provided to, the Recipient or a Related Body Corporate of it;

- (g) to legal, accounting and financial or other advisers or consultants to the Recipient or a Related Body Corporate of it:
 - (i) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (ii) who are under a duty of confidentiality to the Recipient; and
 - (iii) who have been advised of the confidential nature of the Confidential Information;
- (h) to any officers or employees of the Recipient or a Related Body Corporate of the Recipient (excluding, in the case of Aurizon Network, any Related Body Corporate that provides rail haulage services) who:
 - (i) have a need to know for the purposes of this Agreement or another Transaction Document (and only to the extent that each has a need to know); and
 - (ii) before disclosure, have been directed by the Recipient to keep confidential all Confidential Information of the Disclosing Party;
- (i) if, and to the extent, the Recipient is required to do so by law (other than by section 275 of the *Personal Property Securities Act 2009* (Cth)) or by any rules or regulations of a recognised stock exchange (including where the disclosure is to a Related Body Corporate of the Recipient that is responsible for making such disclosures for the relevant group of companies and for the purpose of such a Related Body Corporate determining whether, and the extent to which, such a disclosure is required to be made);
- (j) to any Governmental Agency to the extent required by law or where such disclosure is determined by the Trustee to be reasonably required for the administration of the Trust;
- (k) if disclosure is lawfully required by the Access Regulator, or in accordance with the Access Undertaking;
- (l) to an Expert under this Agreement, an "Expert" (as defined under an Other Umbrella Agreement) under an Other Umbrella Agreement; and
- (m) to another Party to the extent:
 - (i) expressly provided in this Agreement; or
 - (ii) reasonably required for the purposes of this Agreement or another Transaction Document.

10.3 Conditions of disclosure

If a Recipient discloses Confidential Information of a Disclosing Party to a person under **clause 10.2 (Disclosee)**, the Recipient must:

- (a) ensure that the Disclosee is aware that the Confidential Information is confidential information of the Disclosing Party; and
- (b) use reasonable endeavours to ensure that the Disclosee does not improperly disclose or improperly use the Confidential Information.

11 GST

11.1 Construction

In this **clause 11**:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law; and
- (b) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member and the GST joint venture operator of any GST joint venture of which the entity is a participant.

11.2 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

11.3 Payment of GST

If GST is payable on any supply made by a party (or any entity through which that Party acts) (**Supplier**) under or in connection with this Agreement, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.

11.4 Timing of GST payment

The recipient will pay the amount referred to in **clause 11.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

11.5 Tax invoice

The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under **clause 11.3**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

11.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause 11.3** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

11.7 Reimbursements

Where a Party is required under this Agreement to pay or reimburse an expense or outgoing of another Party, the amount to be paid or reimbursed by the first Party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other Party is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

12 Assignment

12

12.1 Assignment

Subject to **clauses 12.2 to 12.7**, a Party must not assign, transfer, mortgage, charge, make the subject of a trust or otherwise deal with or encumber all or any of its rights or liabilities under this Agreement (or procure or permit any of those things) without the prior consent of the other Parties.

12.2 Assignment by Unit Holder during Construction Period

- (a) During the Construction Period, if the Unit Holder proposes to transfer all of the Unit Holder's Preference Units to a proposed transferee, the Unit Holder must also transfer all of the Unit Holder's rights and obligations under this Agreement to the proposed transferee with effect upon the proposed transferee becoming the registered holder of the Preference Units.
- (b) The Parties and the proposed transferee must execute a deed of assignment and assumption or a deed of novation in a form acceptable to Aurizon Network (acting reasonably) to give effect to the transfer of the rights and liabilities of the Unit Holder under **clause 12.2(a)**.
- (c) During the Construction Period, if the Unit Holder proposes to transfer a portion of the Unit Holder's Preference Units to a proposed transferee, the Unit Holder must procure the proposed transferee to enter into an agreement with Aurizon Network and the Trustee (**Transferee Umbrella Agreement**) which:
 - (i) is on the same terms and conditions as this Agreement except that the Nominated Access Rights for each Access Period to be specified in part 1 of schedule 2 of the Transferee Umbrella Agreement will be the proportion (rounded to the nearest even number of one-way train services, as determined by Aurizon Network, acting reasonably) of the Nominated Access Rights for each Access Period specified in **part 1 of schedule 2** of this Agreement (immediately prior to such transfer of Preference Units)

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which the number of Preference Units which are to be transferred to the proposed transferee bear to the total number of the Unit Holder's Preference Units immediately prior to such transfer of Preference Units; and

- (ii) unconditionally takes effect upon the proposed transferee becoming the registered holder of the transferred Preference Units.
- (d) If, during the Construction Period, the Unit Holder transfers a proportion of the Unit Holder's Preference Units to a proposed transferee in accordance with **clause 12.2(c)**, the Nominated Access Rights for each Access Period specified in **part 1 of schedule 2** of this Agreement will be taken to be varied (reduced), with effect upon the proposed transferee becoming the registered holder of the Preference Units, to be the proportion (rounded to the nearest even number of one-way train services, as determined by Aurizon Network, acting reasonably) of the Nominated Access Rights for each Access Period specified in **part 1 of schedule 2** of this Agreement (immediately prior to such transfer of Preference Units) which the number of Preference Units which are not to be transferred to the proposed transferee bears to the total number of the Unit Holder's Preference Units immediately prior to such transfer of Preference Units.
- (e) For the avoidance of doubt, this **clause 12.2** applies to a transfer of the Unit Holder's Preference Units under the option granted by it under clause **[8.6]** of the Unit Holders Deed.

12.3 Sale of Preference Units during Construction Period

If, during the Construction Period, the Trustee exercises its rights to sell or transfer all or a portion of the Unit Holder's Preference Units under the Trust Deed or the Unit Holders Deed, then **clause 12.2** will apply to the sale of such Preference Units as if the sale or transfer of the Preference Units by the Trustee was a transfer of such Preference Units by the Unit Holder.

12.4 Assignment by Unit Holder after Construction Period

- (a) The Unit Holder may, after the Construction Period, transfer all of its rights and obligations under this Agreement to a third party provided that:
 - (i) the Unit Holder is not in breach of any of its obligations under this Agreement; and
 - (ii) Aurizon Network, acting reasonably, is satisfied that the third party:
 - (A) is financially sound; and
 - (B) is otherwise capable of performing the obligations of the Unit Holder under this Agreement.

(b) The Parties and the third party transferee must execute a deed of assignment and assumption or a deed of novation in a form acceptable

to Aurizon Network (acting reasonably) to give effect to the transfer of the rights and liabilities of the Unit Holder under this **clause 12.4**.

~~(b)~~(c) Aurizon Network agrees that after the Construction Period, there is no requirement for the Unit Holder under this Agreement to also hold Preference Units.

12.5 Assignment by Aurizon Network

- (a) If an entity will acquire all of Aurizon Network's interest in the parts of the Railway Network which include the Segments, Aurizon Network must transfer all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires Aurizon Network's interest in the relevant parts of the Railway Network.
- (b) If an entity will acquire an undivided interest in the parts of the Railway Network which include the Segments, Aurizon Network must transfer to that entity a proportion of its rights and liabilities under this Agreement equivalent to that entity's undivided interest in the relevant parts of the Railway Network at the time that the entity acquires the interest in the relevant parts of the Railway Network.
- (c) The Parties must, promptly upon demand by Aurizon Network, execute a deed of assignment and assumption or a deed of novation in a form acceptable to Aurizon Network (acting reasonably) to give effect to the transfer of any rights or liabilities of Aurizon Network required under this **clause 12.5**.

12.6 Assignment by Trustee

- (a) If the Trustee is replaced by a new trustee of the Trust, the Trustee must, with effect upon the appointment of the new trustee of the Trust, assign its rights and liabilities under this Agreement to the new trustee of the Trust.

~~(b)~~ The Trustee must not otherwise assign its rights and liabilities under this Agreement.

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12.7 Charging

(a) Aurizon Network and the Unit Holder may mortgage, charge or encumber (**Charge**) all or any of its rights and obligations under this Agreement in whole or in part, in favour of any financier, mortgagee or chargee (**Chargee**), provided that the requirements of clause **[12.4(a)]** of the Unit Holders Deed are complied with.

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(b) If a Unit Holder exercises its rights under clause 12.7(a), and where required by the Unit Holder from time to time, Aurizon Network and the Trustee will enter into a direct agreement with the Unit Holder and the Unit Holder's financier, agent or security trustee under which Aurizon Network agrees:

- (i) to give the financier, agent or security trustee (as applicable) a copy of all notices which are required to be given to the Unit Holder under this Agreement);
- (ii) not to vary this Agreement without the written approval of the financier, agent or security trustee (as applicable); and
- (iii) that the financier, agent or security trustee (as applicable) may at any time by written notice to Aurizon Network exercise its rights to step-in and act as the agent of the Unit Holder and be treated in all respects as if it was the relevant Unit Holder.

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13 Notices

13.1 General

A notice, demand, certification, process or other communication (**Notice**) relating to this Agreement must be in writing in English and may be given by an agent of the sender.

13.2 How to give a Notice

In addition to any other lawful means, a Notice may be given by being:

- (a) personally delivered;
- (b) left at the Party's current business address for Notices;
- (c) sent to the Party's current postal address for Notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by fax to the Party's current fax number for Notices.

13.3 Particulars for giving of Notices

- (a) Each Party's particulars for the giving of Notices are initially the particulars set out in **item 2 of schedule 1**.
- (b) Each Party may change its particulars for the giving of Notices by Notice to each other Party.
- (c) A notice given to a Party which is signed is evidence that the notice has been signed by a person duly authorised by the sender and that Party is entitled to rely on that notice without further inquiry or investigation.

13.4 Notices by post

Subject to **clause 13.6**, a Notice is given if posted:

- (a) within Australia to an Australian postal address, three Business Days after posting; or
- (b) outside of Australia to an Australian postal address or within Australia to an address outside of Australia, ten Business Days after posting.

13.5 Notices by fax

Subject to **clause 13.6**, a Notice is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

13.6 After hours Notices

If a Notice is given:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or public holiday in that place.

13.7 Process service

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this Agreement may be served by any method contemplated by this **clause 13** or in accordance with any applicable law.

14 Warranties

14.1 Warranties

Each Party warrants that:

- (a) it is a corporation validly existing under the laws applicable to it;
- (b) it is able to pay its debts as and when they fall due;
- (c) it has the power to enter into and perform this Agreement and has obtained all necessary consents to enable it to do so;
- (d) its obligations under this Agreement are enforceable in accordance with their terms;
- (e) no litigation, arbitration or administrative proceeding has been commenced before, and no judgment or award has been given or made by, any court, arbitrator, other tribunal or governmental agency against it which would have a material adverse effect on its ability to observe its obligations under this Agreement; and
- (f) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this Agreement.

14.2 Trustee warranties

The Trustee warrants that:

- (a) it has full power and authority to enter into this Agreement and to perform the Trustee's obligations under this Agreement and the Trust Deed;
- (b) it is the sole trustee of the Trust and no action has been taken to remove or replace the Trustee; and
- (c) it has the right to be fully indemnified out of the assets of the Trust in respect of all its obligations under this Agreement, and the Trustee has not done or omitted to do anything that would result in its right of indemnity being restricted or limited in any way.

14.3 Reliance

- (a) Each Party acknowledges that each other Party has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 14.1**.
- (b) The Trustee acknowledges that Aurizon Network has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 14.2**.

15 General

15.1 Survival

This **clause 15** and **clauses 5** and **[#]** survive the termination of this Agreement.

15.2 Applicable law

- (a) This Agreement will be governed by and construed in accordance with the laws applicable in the State of Queensland.
- (b) Each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Queensland and courts of appeal from them in respect of any proceedings arising out of or in connection with this agreement. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

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15.3 Waiver

- (a) Waiver of any right arising from a breach of this Agreement or any right arising from a default under this Agreement must be in writing and signed by the Party granting the waiver.
- (b) A single or partial exercise or waiver by a Party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (c) A failure or delay in exercise, or partial exercise, of a right arising from a breach of this Agreement does not result in a waiver of that right.

15.4 Stamp Duty

- (a) Except to the extent covered by **clause 5.1**, as between the Parties, the Unit Holder is liable for and must pay all Stamp Duty on or relating to:
- (i) this Agreement, any document executed under it or any dutiable transaction contemplated, evidenced or effected by it; or
 - (ii) any Stamp Duty payable on, in relation to, or as a consequence of:
 - (A) any acquisition by the Unit Holder of Preference Units of any kind in the Trust, including partly paid Preference Units;
 - (B) the payment by the Unit Holder in response to any call, and any other paying up of outstanding amounts on its Preference Units;
 - (C) any redemption, surrender or cancellation of the Unit Holder's Preference Units;
 - (D) any change to the rights attaching to the Unit Holder's Preference Units;
 - (E) any change in capacity of the Unit Holder in holding its Preference Units;
 - (F) any change in the rights attaching to an Ordinary Unit; and
 - (G) any other act or event that results in Stamp Duty being payable in connection with the Unit Holder's Preference Units or in connection with Preference Units held by a holder of Ordinary Units except any Stamp Duty payable by the transferee in respect of a transfer of Preference Units,

whether or not the Unit Holder is liable under a statute to pay the Stamp Duty.

- (b) Aurizon Network is liable for and must pay all Stamp Duty on or relating to any act or omission by Aurizon Network in connection with Aurizon Network holding the Preference Unit.
- (c) If Aurizon Network or the Trustee pays any Stamp Duty to which **clause 15.4(a)** applies, the Unit Holder must pay that amount to Aurizon Network or the Trustee (as applicable) on demand and hereby indemnifies Aurizon Network and the Trustee for that amount.
- (d) If the Unit Holder pays any Stamp Duty to which **clause 15.4(b)** applies, Aurizon Network must pay that amount to the Unit Holder on demand and hereby indemnifies the Unit Holder for that amount.

Industry Note: Clause 21

Further efforts should be made to seek stamp duty relief.

(d)

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15.5 Legal costs

Except as expressly stated otherwise in this Agreement, each Party must pay its own legal costs and expenses of the drafting, negotiating and execution of this Agreement.

15.6 Amendments to be in writing

Except where this Agreement expressly provides a process for amendment or variation, an amendment or variation of this Agreement will only be effective if it is in writing and executed by all Parties to this Agreement.

15.7 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

15.8 Consents

Except as expressly stated otherwise in this Agreement, a Party may conditionally or unconditionally give or withhold any consent to be given under this Agreement and is not obliged to give its reasons for doing so.

15.9 Further assistance

Each Party must promptly sign, execute and complete all additional documents which may be necessary and do whatever else is reasonably required to effect, perfect, or complete the provisions of this Agreement and to perform its obligations under it.

15.10 Counterparts

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

15.11 Entire understanding

- (a) This Agreement, the other Transaction Documents and the Security Documentation together contain the entire understanding between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement, the other Transaction Documents and the Security Documentation and are of no effect. No Party is liable to any other Party in respect of those matters.
- (c) No oral explanation or information provided by any Party to another:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

15.12 Relationship of Parties

This Agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

15.13 Severability

- (a) Subject to **clause 15.13(b)**, if a provision of this Agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Agreement.
- (b) **Clause 15.13(a)** does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this Agreement; or
 - (B) relative commercial or financial positions of the Parties; or
 - (ii) would be contrary to public policy.

15.14 Survival of representations and warranties

All representations and warranties in this Agreement will survive the execution and delivery of this Agreement and the completion of the transactions contemplated by it.

15.15 Enurement

The provisions of this Agreement will, subject as otherwise provided in this Agreement, enure for the benefit of and be binding on the Parties and their respective successors and permitted novatees and assigns.

15.16 Merger

The obligations contained in this Agreement will continue until satisfied in full.

15.17 Powers of attorney

An attorney by executing this Agreement declares that he or she has received no notice of revocation of the power of attorney pursuant to which he or she executes this Agreement.

15.18 Interest on overdue payments

- (a) If, for any reason, a Party does not pay an amount payable under or in connection with this Agreement on or before the due date for payment, it must pay interest to the Party who is entitled to receive the payment.
- (b) Interest will accrue on the outstanding amount from the due date for payment until that amount, together with the interest thereon, has been paid.
- (c) Interest will be calculated at the Interest Rate, and any interest accrued but unpaid at the end of each Month will be capitalised and will thereafter itself bear interest.

15.19 Indemnity

It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity conferred by this Agreement.

Executed as an agreement.

Executed by [Independent Trustee])
as trustee for the **[Name of Trust]** in)
accordance with section 127 of the
Corporations Act 2001 (Cth):

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

Date: / /

Executed by Aurizon Network Pty)
Ltd in accordance with section 127 of)
the *Corporations Act 2001* (Cth):

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

Date: / /

Executed by [Unit Holder] in)
accordance with section 127 of the)
Corporations Act 2001 (Cth):

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

Date: / /

Schedule 1

Agreement details

1 Unit Holder

Name: [insert]
ABN: [insert]
Address: [insert]

2 Particulars for Notices

2.1 Trustee

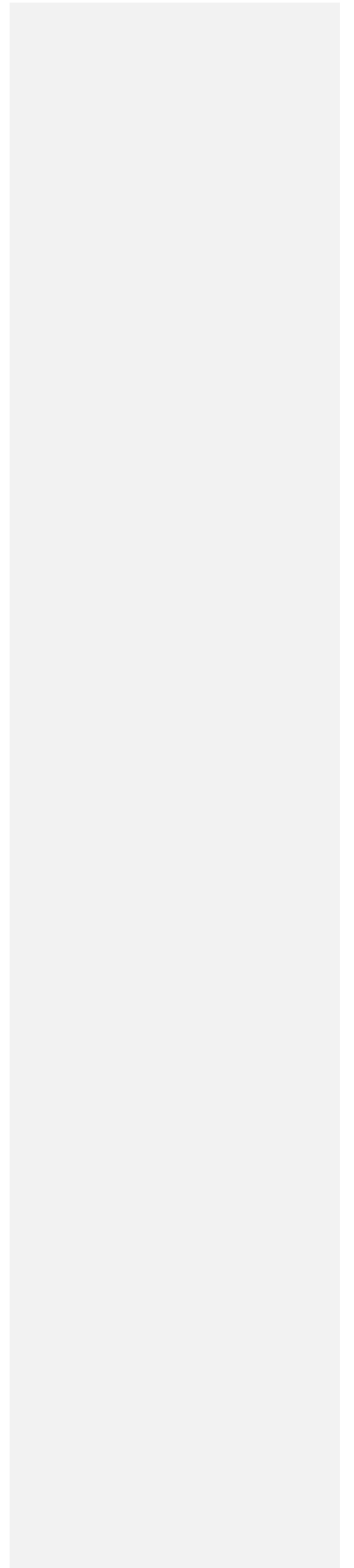
Business address [insert]
Postal address [insert]
Facsimile No. [insert]
Attention: [insert]

2.2 Aurizon Network

Business address Level 5
192 Ann Street
BRISBANE QLD 4000
Postal address GPO Box 456
BRISBANE QLD 4001
Facsimile No. 07 3235 3930
Attention: Vice President, Commercial Development

2.3 Unit Holder

Business address [insert]
Postal address [insert]
Facsimile No. [insert]
Attention: [insert]



Schedule 2

Access Agreement (Clause 3.2)

Part 1 - Nominated Access Rights

| Access Period | Nominated Access Rights |
|---------------|-------------------------|
| [insert] | [insert] |
| [insert] | [insert] |

[Drafting note: This part 1 of schedule 2 will specify the Nominated Access Rights (expressed as train service entitlements) for each Access Period (being a year or part year) during the Access Agreement Term for any Access Agreement(s) entered into, or deemed to be entered into, under clause 3. All of the details of the train service entitlements (including origins and destinations, section run times and train configurations) that would be completed in schedule 1 of an Access Agreement will be included in part 3 of this schedule 2.]

Part 2 - Modification to terms of Access Agreement

[Drafting note: The items in this part 2 of schedule 2 may need to be amended to reflect the provisions of any standard Access Agreement in effect at the time this Agreement is to be executed.]

Each:

- (a) Access Holder Access Agreement between Aurizon Network and the Unit Holder (or its nominee) (**Access Holder**); and/or
- (b) Operator Access Agreement between Aurizon Network and the Unit Holder's nominated Railway Operator (also an **Access Holder**),

to be entered into under **clause 3** is required to be modified as follows:

| Item | Matter | Principle or requirement |
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| 1 | Train service description | The train services to be operated by the Access Holder under the Access Agreement will be as described in part 3 of this schedule 2 . |
| 2 | Term | The term of the Access Agreement will commence on the date of execution of the Access Agreement (or such later date as agreed by the parties to the Access |

| Item | Matter | Principle or requirement |
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| | | Agreement) and end on the "Termination Date" (as defined in item 3 of this part 2 of schedule 2). |
| 3 | Termination Date | <p>The date of termination for the Access Agreement (Termination Date) must be the earlier of:</p> <ul style="list-style-type: none"> (a) ten years after the "Commitment Date" (as defined in item 4 of this part 2 of schedule 2); and (b) the date on which the Access Agreement is terminated pursuant to the provisions of the Access Agreement. |
| 4 | Commitment Date | <ul style="list-style-type: none"> (a) The date by which the access rights under the Access Agreement are to be available to the Access Holder (Commitment Date) must be the later of: <ul style="list-style-type: none"> (i) the Available Date for the last of the Unit Holder's Segments to become Available; (ii) [insert date]; and <p>[Drafting note: The above date to be specified on a transaction-by-transaction basis.]</p> (iii) the date on which Aurizon Network, acting reasonably, is satisfied that any "Connecting Infrastructure" (as defined in Aurizon Network's 2010 Access Undertaking (as approved on 1 October 2010) as at the date of this Agreement) in respect of the connection of the Required Mine Specific Infrastructure to Aurizon Network's Railway Network and any other enhancements (other than the Extension) required to Aurizon Network's Railway Network have been completed, <p>provided that the Commitment Date for any subsequent Derivative Access</p> |

| Item | Matter | Principle or requirement |
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| | | <p>Agreement entered into after the above dates have occurred will be the day following the date of the expiration or termination of the Access Agreement which the subsequent Derivative Access Agreement is replacing.</p> <p>(b) In this item 4 of part 2 of schedule 2:</p> <p>Available has the meaning given in the Project Management Agreement;</p> <p>Available Date has the meaning given in the Project Management Agreement;</p> <p>Derivative Access Agreement has the meaning given in item 7 of this part 2 of schedule 2; and</p> <p>Required Mine Specific Infrastructure means rail transport infrastructure (including any enhancements to existing rail transport infrastructure) or other infrastructure which does not form part of the Extension but is required to connect the Unit Holder's mine to Aurizon Network's Railway Network so as to enable the Nominated Access Rights to be used by or for the Access Holder (if any).</p> |

| Item | Matter | Principle or requirement |
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| 5 | Completion of matters prior to commencement of train services | <p>(a) If the Access Agreement gives Aurizon Network a right to terminate it if the Access Holder, by a specified date, has not done (or procured the doing of) anything that is required to be done before the Access Holder can commence (or permit the commencement of) any train services, then that date is:</p> <ul style="list-style-type: none"> (i) the date three-two Months prior to the Commitment Date provided, at that date, Aurizon Network has no reasonable expectation that the Access Holder will be able to comply with those requirements prior to the Commitment Date; or (ii) otherwise, the Commitment Date. <p>(b) In this item 5 of part 2 of schedule 2, Commitment Date has the meaning given in item 4 of this part 2 of schedule 2.</p> |
| 6 | Direction to pay | <p>(a) The Access Holder must pay the Access Charges payable under any invoice issued by Aurizon Network under the Access Agreement in the manner directed by Aurizon Network.</p> <p>(b) Without limiting paragraph (a) of this item 6 of part 2 of schedule 2, Aurizon Network may direct the Access Holder to pay the Access Charges payable under any invoice issued by Aurizon Network under the Access Agreement into one or more bank accounts nominated by Aurizon Network (whether or not those bank accounts are in the name of Aurizon Network).</p> <p>(c) Any payment by the Access Holder of Access Charges in the manner directed by Aurizon Network is taken to be payment of the Access Charges to Aurizon Network for the purpose of</p> |

| Item | Matter | Principle or requirement |
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| | | <p>the Access Agreement (whether or not they are paid to Aurizon Network).</p> <p>(d) If, at the time that Aurizon Network gives the Access Holder an invoice for Access Charges for a Month, Aurizon Network does not give the Access Holder a direction to pay some or all of the amount payable under such invoice to the "Direction to Pay Account" (as defined in the Extension Infrastructure Sub-Lease), then the Access Holder must notify Aurizon Network that it has not been given a direction to pay some or all of the amount payable under such invoice to the "Direction to Pay Account" (as defined in the Extension Infrastructure Sub-Lease).</p> <p>(e) If:</p> <ul style="list-style-type: none"> (i) within five Business Days after receiving an invoice referred to in paragraph (d) of this item 6 of part 2 of schedule 2, the Access Holder notifies Aurizon Network that it has not been given a direction to pay some or all of the amount payable under such invoice to the "Direction to Pay Account" (as defined in the Extension Infrastructure Sub-Lease); and (ii) within five Business Days after the Access Holder gives Aurizon Network a notice referred to in paragraph (e)(i) of this item 6 of part 2 of schedule 2, Aurizon Network does not give the Access Holder a direction to pay some or all of the amount payable under such invoice to the "Direction to Pay Account" (as defined in the Extension Infrastructure Sub-Lease); <p>then, despite the Access Holder not being given a direction to pay, the</p> |

| Item | Matter | Principle or requirement |
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| | | <p>Access Holder will be taken to have been given a direction by Aurizon Network to pay the whole of the amount payable under such invoice into the "Direction to Pay Account" (as defined in the Extension Infrastructure Sub-Lease).</p> |
| 7 | Modifications to be included in Derivative Access Agreements | <p>(a) Aurizon Network and the Access Holder agree that the terms of any Derivative Access Agreement will, prior to execution of the Derivative Access Agreement, be modified in accordance with this part 2 of schedule 2 as if each reference to:</p> <ul style="list-style-type: none"> (i) "Access Holder" in this part 2 of schedule 2 is a reference to the access holder under the Derivative Access Agreement; and (ii) "Access Agreement" in this part 2 of schedule 2 is a reference to the Derivative Access Agreement. <p>(b) Entry into a Derivative Access Agreement by Aurizon Network is conditional upon the Derivative Access Agreement being consistent with the modifications provided in paragraph (a) of this item 7 of part 2 of schedule 2.</p> <p>(c) In this item 7 of part 2 of schedule 2, Derivative Access Agreement means:</p> <ul style="list-style-type: none"> (i) an access agreement entered into (or deemed to be entered into) under clause 3 of this Agreement; and (ii) any access agreement entered into as a consequence of: <ul style="list-style-type: none"> (A) the renewal, replacement, transfer, assignment or novation, in whole or in part, of an access agreement |

| Item | Matter | Principle or requirement |
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| | | <p>referred to in paragraph (c)(i) or this paragraph (c)(ii) of this item 7 of part 2 of schedule 2; and</p> <p>(B) the transfer, in whole or in part, of the access rights under an access agreement referred to in paragraph (c)(i) or this paragraph (c)(ii) of this item 7 of part 2 of schedule 2,</p> <p>despite the identity of the parties to such access agreement being different to the parties to an access agreement referred to in paragraph (c)(i) or this paragraph (c)(ii) of this item 7 of part 2 of schedule 2.</p> |
| 8 | Right of renewal | <p>(a) Aurizon Network will notify the Access Holder for coal carrying train services operating solely in the Central Queensland Coal Region (and the Customer of that Access Holder (if any)) no more than three (3) years and no less than two (2) years prior to the expiration of an Access Right of that Access Holder under the Access Agreement that, if:</p> <p>(i) the Access Holder or the Customer (if any) wishes to seek to retain the applicable Access Right beyond the expiry date for that Access Right; or</p> <p>(ii) the Customer wishes another Railway Operator to acquire the applicable Access Right on and from the expiry date for the Access Right,</p> <p>(Renewal),</p> <p>then the Access Holder, the Customer or the relevant Railway Operator must</p> |

| Item | Matter | Principle or requirement |
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| | | <p>submit an Access Application to Aurizon Network within 60 days after Aurizon Network gave such notice to the Access Holder and Customer (if any).</p> <p>(b) If an Access Application submitted under paragraph (a) of this item 8 of part 2 of schedule 2 is not a Renewal Application, then this item 8 of part 2 of schedule 2 will not apply to the Access Application (and, for the avoidance of doubt, it will be considered in accordance with the Access Undertaking in force at the time of such Access Application if, and to the extent that, it is required to be considered under that Access Undertaking).</p> <p>(c) Subject to paragraph (d) of this item 8 of part 2 of schedule 2, if an Access Application submitted under paragraph (a) of this item 8 of part 2 of schedule 2 is a Renewal Application, then, Aurizon Network will enter into an access agreement (on the terms of the applicable then standard access agreement modified as a "Derivative Access Agreement" in accordance with item 7 of this part 2 of schedule 2) to give effect to the Renewal under the Renewal Application.</p> <p>(d) Paragraph (c) of this item 8 of part 2 of schedule 2 will not apply to a Renewal Application submitted after the date that the Extension Infrastructure Sub-Lease expires or terminates (for any reason).</p> <p>(e) For the avoidance of doubt, if an Access Holder makes an access application for access rights in addition to the Access Rights sought under a Renewal Application, then:</p> <p>(i) this item 8 of part 2 of schedule 2 will not apply to that access</p> |

| Item | Matter | Principle or requirement |
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| | | <p>application;</p> <ul style="list-style-type: none"> (ii) that access application will not prejudice the Access Holder's rights under this item 8 of part 2 of schedule 2 in respect of a Renewal Application; and (iii) that access application will be considered in accordance with the Access Undertaking in force at the time of that access application if, and to the extent that, it is required to be considered under that Access Undertaking. <p>(f) In this item 8 of part 2 of schedule 2, Renewal Application means an Access Application submitted under, and within the time required in, paragraph (a) of this item 8 of part 2 of schedule 2 in respect of Access Rights:</p> <ul style="list-style-type: none"> (i) not in excess of those under the relevant Access Holder's existing Access Agreement; (ii) for the existing mine which receives the benefit of those Access Rights or a Replacement Mine; and (iii) for a term of at least ten (10) years or, if the Access Application relates to an existing mine, the remaining life of that mine, <p>but does not include such an Access Application in respect of Access Rights:</p> <ul style="list-style-type: none"> (iv) that were granted to the relevant Access Holder under its existing Access Agreement as a transferee (whether by the transfer of the Access Holder's rights under its existing Access Agreement to the Access Holder |

| Item | Matter | Principle or requirement |
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| | | <p>or by Aurizon Network entering into the Access Holder's existing Access Agreement as a new Access Agreement with the Access Holder to give effect to a transfer of Access Rights to the Access Holder); or</p> <p>(v) which do not have a demonstrated ability to exit the Railway Network for unloading.</p> <p>(g) Capitalised terms (other than "Access Holder", "Renewal" and "Renewal Application") used in this item 8 of part 2 of schedule 2 which are defined in Aurizon Network's 2010 Access Undertaking (as approved on 1 October 2010) have the meaning given in that Access Undertaking as at the date of this Agreement.</p> |
| 9 | Obligation to pay 'Take or Pay' charges | <p>(a) If:</p> <p>(i) the Access Agreement is entered into under clause 3; and</p> <p>(ii) both of the following dates have occurred:</p> <p>(A) the Available Date for the last of the Unit Holder's Segments to become Available; or</p> <p>(B) [insert date]; and</p> <p>[Drafting note: The above date to be specified on a transaction-by-transaction basis.]</p> <p>(iii) Aurizon Network, acting reasonably, is not satisfied that any "Connecting Infrastructure" (as defined in Aurizon Network's 2010 Access Undertaking (as approved on 1 October 2010) as at the date of this Agreement) in respect of the connection of the Required Mine Specific Infrastructure to Aurizon</p> |

| Item | Matter | Principle or requirement |
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| | | <p>Network's Railway Network and any other enhancements (other than the Extension) required to Aurizon Network's Railway Network have been completed,</p> <p>then, despite the Commitment Date having not occurred, the provisions of the Access Agreement relating to, to the extent they relate to, the Access Holder's liability for, and the calculation, invoicing and payment of, Take or Pay will be deemed to commence and apply on and from the Pre-Commitment Date until the Commitment Date as if, for the purpose of those provisions:</p> <ul style="list-style-type: none"> (iv) the Commitment Date under the Access Agreement occurred on the Pre-Commitment Date; (v) all of the Train Services that the Access Holder would have been entitled to operate during that period, had the Commitment Date occurred on the Pre-Commitment Date, were unable to be operated; and (vi) the reason those Train Services were unable to be operated was not as a result of a Aurizon Network Cause. <p>(b) In this item 9 of part 2 of schedule 2, the terms Available, Available Date, Commitment Date and Required Mine Specific Infrastructure each have the meaning given in item 4 of this part 2 of schedule 2.</p> <p>(c) In this item 9 of part 2 of schedule 2, the terms Aurizon Network Cause, Take or Pay and Train Service each have the meaning given in the Access Agreement.</p> <p>(d) In this item 9 of part 2 of schedule 2, Pre-Commitment Date means later</p> |

| Item | Matter | Principle or requirement |
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| | | to occur of the dates referred to in item 9(a)(ii) of this part 2 of schedule 2 . |
| 10 | Suspension — non payment of amounts under Agreement | <p>If:</p> <p>(a) — the Unit Holder does not pay any amount which is due and payable by it under this Agreement; and</p> <p>(b) — does not pay such amount within a further ten Business Days after Aurizon Network gives the Unit Holder a notice to remedy requesting it to pay such amount;</p> <p>then Aurizon Network may suspend the right of the Access Holder to operate some or all of the train services under the Access Agreement until such amount is paid.</p> |
| 11 | Suspension — non payment of Transfer Consideration | <p>If the Unit Holder does not pay the “Transfer Consideration” (as defined in the Unit Holders Deed) to another Preference Unit Holder by the “Transfer Effective Date” (as defined in the Unit Holders Deed) under the Unit Holders Deed, then Aurizon Network may suspend the right of the Access Holder to operate some or all of the train services under the Access Agreement until such amount is paid.</p> |
| 12 | Excusal — User funder trusts | <p>If the default or negligence of a lessor or sublessor (other than Queensland Treasury Holdings Pty Ltd or Queensland Rail Limited but including the Trustee) of rail infrastructure to Aurizon Network under an infrastructure lease or sublease (including the Extension Infrastructure Sub Lease) with Aurizon Network (as lessee or sublessee), causes or contributes (except to the extent that the default or negligence of the lessor or sublessor was caused or contributed to by any default of Aurizon Network under a Transaction Document) to Aurizon Network being unable to provide some or all of the access rights under the Access Agreement, then, Aurizon Network is excused from providing such access rights and will have no liability to the Access Holder under the</p> |

| Item | Matter | Principle or requirement |
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| | | Access Agreement or otherwise in respect of the non-provision of such access rights. |
| 43 10 | Nominated Network | The "Nominated Network" under the Access Agreement will be the relevant parts of Aurizon Network's coal system excluding privately owned or Queensland Rail Ltd owned infrastructure (other than for such infrastructure that is leased to Aurizon Network). |
| 44 11 | Termination – clause 4.3(b) | If Aurizon Network gives the Access Holder a notice contemplated under clause 4.3(b) , the Access Agreement will terminate with effect on the Access Utilisation Notice Date, and no party will have any liability to any other party under the Access Agreement on and from the Access Utilisation Notice Date. |
| 45 12 | Termination – clause 4.6(d) | If Aurizon Network gives the Access Holder a notice contemplated under clause 4.6(d) , the Access Agreement will terminate with effect on the Effective Date, and no party will have any liability to any other party under the Access Agreement on and from the Effective Date. |
| 46 13 | Variation of Access Rights – clause 4.7(a)(iv)(A)(1), 4.7(b)(i) or 4.7(c)(iv) | If Aurizon Network gives the Access Holder a notice contemplated under clause 4.7(a)(iv)(A)(1), 4.7(b)(i) or 4.7(c)(iv) , the Access Rights under the Access Agreement will be varied, with effect on the Effective Date, as specified in such notice. |
| 47 | Transfer of Preference Units | <p>(a) If:</p> <ul style="list-style-type: none"> (i) the Access Agreement is entered into under clause 3; and (ii) after the Access Agreement is entered into but before the end of the Construction Period, <p>any of the Linked Preference Unit Holder's Preference Units are transferred by:</p> <ul style="list-style-type: none"> (iii) the Linked Preference Unit Holder; or (iv) the Trustee exercising a power of sale of the Linked Preference |

| Item | Matter | Principle or requirement |
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| | | <p style="text-align: center;">Unit Holder's Preference Units,</p> <p>(Transferred Preference Units),</p> <p>then the Access Holder's Access Rights for each Access Period under the Access Agreement will, with effect from the date the Transferred Preference Units are transferred, be varied to be reduced by the proportion (rounded to the nearest even number of one-way train services, as determined by Aurizon Network acting reasonably) of the Access Rights for each Access Period under the Access Agreement (immediately prior to such transfer) which the number of Transferred Preference Units bears to the total number of the Linked Preference Unit Holder's Preference Units immediately prior to such transfer of Preference Units.</p> <p>(b) — In this item 17 of this part 2 of schedule 2 "Linked Preference Unit Holder" means the party that was the "Unit Holder" under this Agreement at the time the Access Agreement was entered into under clause 3.</p> |

Part 3 – Train Service Description

[Drafting note: The Train Service Description to be specified in the Access Agreement to be determined on a transaction-by-transaction basis.]