

QCA Draft Decision

Aurizon Network Pty Ltd

[insert *Trustee*]

User Funding - Design and Construct Contract

[insert *Extension
name*]

(amended form of AS 4902-2000)

Formal Instrument of Agreement

Date

Parties

[Insert Trustee name / ABN] of [insert Trustee address] (Principal)

Aurizon Network Limited ACN 132 181 116 of Level 17, 175 Eagle Street, Brisbane (Contractor)

Background

- A The *Principal* wishes to engage the *Contractor* to carry out and complete the design and construction of *the Works* in accordance with the requirements of the *Contract*.
- B The *Principal* and the *Contractor* agree that the *Contractor* shall carry out and complete the *WUC* and complete the design and construction of the *Works* for the *Principal* on the terms of this *Contract*.
-

Agreed terms

1 Performance

- (a) The *Contractor* must carry out the *WUC* and complete the design and construction of *the Works* in accordance with the *Contract*.
- (b) The *Principal* shall pay the *Contractor* the *contract sum* at the times and in the manner provided for in the *Contract*.
- (c) Each of the parties shall perform the obligations imposed on it by the *Contract*.

2 Contract Sum

The *Principal* will pay the *Contractor* the lump sum of:

[Drafting note: insert contract sum]

referred to as the *contract sum* or such other sum as is payable under the terms of the *Contract*, at the times and in the manner specified in the *Contract*.

The *contract sum* is not subject to change, other than in accordance with the *Contract*.

3 Contract documents

The Contract comprises the following documents marked as follows:

Document Description	Where
This Formal Instrument of Agreement	This document
General Conditions of Contract	Attached to this document
Contract Particulars	Annexure Part A
Scope of work	Annexure Part B
Lump sum breakdown	Annexure Part C
Contractor's Proposal	Annexure Part D
Projected termination costs modelling	Annexure Part E
Insurance Schedule	Annexure Part F
Baseline site report	Annexure Part G
Baseline program	Annexure Part H
Allocation principles	Annexure Part I
Form of Unconditional Undertaking	Annexure Part J
Independent Certifier Deed	Annexure Part K
Expert Determination Agreement	Annexure Part L

4 Entire contract

Subject to clause [15.8] of the *Extension Project Agreement*, the documents listed in **clause 3** constitute the entire agreement between the parties in respect of the design and construction of *the Works* and the *Contract* supersedes all previous agreements, undertakings and communications, whether written or oral, relating to the subject matter of the *Contract*.

5 Order of Precedence

- (a) Subject to this **clause 5** and subclause 2.2(b) of the General Conditions, the documents forming this *Contract* are to be taken as mutually explanatory of one another.
- (b) Subject to clause 8.1 of the *General Conditions of Contract*, in the event of any ambiguity, discrepancy or inconsistency between the various documents forming the *Contract*, the order of priority will be as the documents are listed in **clause 3**.

6 Parties to give effect to the Contract

The parties agree that they shall do everything reasonably necessary to give effect to the *Contract*.

7 Conditions Precedent

7.1 Commencement of this Contract

Except for:

- (a) the terms of this *Formal Instrument of Agreement*, and
- (b) the following provisions contained in the General Conditions:
 - (i) clause 1 (*Interpretation and construction of Contract*);
 - (ii) clause 5 (*Security*);
 - (iii) clause 8 (*Contract documents*);
 - (iv) clause 9 (*Assignment and subcontracting*);
 - (v) clause 42 (*Dispute resolution*); and
 - (vi) clause 44 (*Liability*),

which will commence on the date of this *Contract*, and subject to **clause 7.2**, this *Contract* will not be in full force and effect until *Condition Precedent Satisfaction Date*.

7.2 Termination

This Contract will automatically terminate, without the need for any Party to give notice to any other Party, if:

- (a) no *Extension Project Agreement* has been executed by all of the parties to it on or before the *End Date*; or
- (b) the *Extension Project Agreement* is terminated in accordance with clause [2.5] of the *Extension Project Agreement*.

Execution

Executed as an agreement.

Executed by Aurizon Network Pty Ltd)
ACN 132 181 116 by its duly appointed)
officer in the presence of:)

.....
Witness

.....
Officer

.....
Name of Witness (print)

.....
Name of Officer (print)

On this day of 2014

Executed by [insert] Pty Ltd ACN)
[insert] 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)

General Conditions

[NOTE: refer to separate amended AS 4902-2000]

**Annexure Part A
ANNEXURE to the Australian
Standard General Conditions of
Contract for Design and Construct**

Part A

Contract Particulars

[NOTE: refer to separate amended AS 4902-2000]

Annexure Part B
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part B

Scope of Work

[NOTE: to be inserted]

Annexure Part C
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part C

Lump sum breakdown

[NOTE: to be inserted]

Annexure Part D
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part D

Contractor's Proposal

[NOTE: to be inserted]

Annexure Part E
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part E

Projected termination costs modelling

[NOTE: to be inserted]

Annexure Part F
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part F

Insurance Schedule

[NOTE: details of relevant insurances to be completed for each project following consultation between Aurizon and its insurance advisors]

Annexure Part G
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part G

Baseline site report

[NOTE: report or reports identifying baseline site conditions to be inserted at this Annexure Part G.]

Annexure Part H
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part H

Baseline program

[NOTE: to be inserted]

Annexure Part I
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part I

Allocation principles

[NOTE: to be inserted, based on allocation principles in Schedule 2 to the SUHD.]

Annexure Part J
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part J

Form of unconditional undertaking

[NOTE: form of bank guarantee to be inserted at this Annexure Part [B]]

Annexure Part K
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part K

Independent Certifier Deed

[NOTE: form of Independent Certifier Deed to be agreed and inserted]

Annexure Part L
Annexure to the Australian Standard
General Conditions of Contract for
Design and Construct

Part L

Expert Determination Agreement

Date

Parties

Aurizon Network Pty Ltd ACN 132 181 116 of **Level 17, 175 Eagle Street, Brisbane (Contractor)**

[Name of Trustee] ABN [#] of [address] (**Principal**)

[Name of Expert] [ACN/ABN] of [address] (**Expert**)

Background

- C The Principal and the Contractor are parties to the D&C Contract.
 - D The Expert has been appointed to determine any Dispute that may be referred to it in accordance with the Expert Determination Process.
-

Agreed terms

1 Definitions

1.1 Defined terms

In this document these terms have the following meanings:

Determination	The determination of a Dispute in accordance with the Expert Determination Process.
D&C Contract	The agreement entitled “Design and Construct Contract for Standard User Funding Agreement” between the Principal and the Contractor.
Dispute	Means a dispute or matter for determination referred to

	the Expert in accordance with the D&C Contract.
Expert Determination Process	The process for determining a Dispute as set out in the D&C Contract, this agreement and the Rules.
Expert's Fees and Disbursements	The Expert's fees and disbursements calculated in accordance with Schedule 1 .
Rules	The rules for the Expert Determination Process set out in Schedule 2 .
Term	Has the meaning given in clause 2.1 .

1.2 Terms defined in the D&C Contract

Except as otherwise defined in **clause 1**, terms used in this agreement that are defined in the D&C Contract will have the same meanings in this agreement.

2 Term, Appointment and Role of Expert

2.1 Term

The Term commences on the date of this agreement and expires on the termination of the Expert's appointment in accordance with this agreement.

2.2 Appointment

- (a) The Expert is appointed for the Term to determine any Disputes referred to it in the manner and within the times set out in this agreement and the Rules.
- (b) The Expert accepts the appointment on the basis set out in this agreement.

2.3 Role of the Expert

- (a) The parties agree that:
 - (i) the Expert will act as an expert and not as an arbitrator;
 - (ii) neither the Determination nor the Expert Determination Process is an arbitration and any conference conducted during the Expert Determination Process is not a hearing conducted under any legislation or rules relating to any form of arbitration;
 - (iii) the rules of evidence do not apply to the Expert Determination Process or to the Determination; and
 - (iv) in making the Determination or conducting the Expert Determination Process the Expert must proceed in accordance with:
 - (A) the law;
 - (B) the D&C Contract;
 - (C) this agreement;
 - (D) the Rules; and
 - (E) the requirements of procedural fairness.

- (b) The Expert must take all reasonable steps to avoid any conflict of interest, potential conflict of interest or other circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially.
- (c) If, at any time during the Term, the Expert becomes aware of any circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially in relation to a Dispute, the Expert must notify the Principal and the Contractor immediately.

2.4 Termination

This agreement will terminate five Business Days after joint written notice is given from the Principal and the Contractor to the Expert.

3 Confidentiality

- (a) The Expert must keep confidential all proceedings and submissions relating to the Expert Determination Process (including the fact that any step in the Expert Determination Process is occurring), and all documents prepared for the purposes of the Expert Determination Process (including the Determination). No such proceedings, submissions or documents, nor any other information relating to or arising out of the Expert Determination Process, may be divulged to any other person, except with the prior consent of both the Principal and the Contractor or as may be required by law or to the extent necessary to give effect to or enforce the Determination.
- (b) The parties must keep confidential (subject to any exclusions in the D&C Contract) all proceedings and submissions relating to the Expert Determination Process (including the fact that any step in the Expert Determination Process is occurring), and all documents prepared for the purposes of the Expert Determination Process (including the Determination) in accordance with their obligations under the D&C Contract.

4 Costs and Fees

- (a) As between the Principal and the Contractor and the Expert, the Principal and the Contractor are jointly and severally liable for the payment of the Expert's Fees and Disbursements. The Principal and the Contractor agree to comply with any reasonable direction from the Expert as to the provision of security deposits in respect of the Expert's Fees and Disbursements.
- (b) The Principal and the Contractor agree as between themselves that:
 - (i) they will each pay one half of:
 - (A) the Expert's Fees and Disbursements; and
 - (B) any third party costs incurred in holding the conference referred to in rule 3 of the Rules, including any booking fee, room hire and transcript costs; and
 - (ii) they will each bear their own costs of and incidental to the preparation of this agreement and their participation in the Expert Determination Process, including their legal costs and the costs of any consultants they engage.

5 Exclusion of Liability

Except in the case of fraud or wilful default, the Expert will not be liable to either the Principal or the Contractor for any act or omission by the Expert in the performance or purported performance of this agreement.

6 Co-operation of the Parties

- (a) Each party agrees to:
- (i) do all things reasonably necessary for the proper, expeditious and cost effective conduct of the Expert Determination Process;
 - (ii) comply with the reasonable requests and directions of the Expert in relation to the conduct of the Expert Determination Process; and
 - (iii) be represented at any conference convened by the Expert by a person or persons with authority to agree on procedural matters.
- (b) If either the Principal or the Contractor does not comply with the Expert's reasonable directions, the Expert may continue with the Expert Determination Process and determine a Dispute despite the non-compliance.

7 Subsequent Proceedings

The Expert will not accept an appointment as an arbitrator, advocate or adviser to the Principal or the Contractor in any arbitral, judicial or adjudication proceedings relating to a Dispute or any part of a Dispute. Neither the Principal nor the Contractor will take action to cause the Expert to breach this **clause 7**.

8 Governing Law

This agreement is governed by and must be construed according to the law applying in Queensland.

9 Urgent Relief

Nothing in this agreement or the Rules will prejudice the right of the Principal or the Contractor to seek urgent interlocutory relief in respect of a Dispute.

10 Jurisdiction

The parties irrevocably:

- (a) submit to the non-exclusive jurisdiction of the courts of the State of Queensland and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this agreement; and
- (b) waive any objection they may now or in the future have to the venue of any proceedings, and any claim they may now or in the future have that any proceeding has been brought in an inconvenient forum, if that venue falls within **clause 10(a)**.

11 GST

11.1 Interpretation

- (a) Except if the context suggests otherwise, terms used in this **clause 11** have the meanings given to those terms by the GST Law (as amended from time to time).
- (b) Unless otherwise expressly stated, all consideration to be provided under this agreement is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this **clause 11**.
- (c) 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.

11.2 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.

11.3 Additional amount of GST payable

If GST becomes payable on any supply made by a party (**Supplier**) under or in connection with this agreement:

- (a) any party (**Recipient**) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (**GST Amount**), at the same time as any other consideration is to be first provided for that supply; and
- (b) the Supplier must provide a Tax Invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid in accordance with **clause 11.3(a)**.

11.4 Adjustment events

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(a)** 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.

12 General

12.1 Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this agreement:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

Principal

Delivery address:

Postal address:

Fax:

Attention:

Contractor

Delivery address:

Postal address:

Fax:

Attention:

Expert

Delivery address:

Postal address:

Fax:

Attention:

- (c) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
- (d) must be delivered by hand or posted by prepaid post to the address, or sent by fax to the number, of the addressee, in accordance with **clause 12.1(b)**; and
- (e) is taken to be received by the addressee:
 - (i) (in the case of prepaid post sent to an address in the same country) on the third Business Day after the date of posting;
 - (ii) (in the case of prepaid post sent to an address in another country) on the seventh Business Day after the date of posting by airmail;
 - (iii) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent; and
 - (iv) (in the case of delivery by hand) on delivery,but if the communication is taken to be received on a day that is not a Business Day or after 5.00 pm, it is taken to be received at 9.00 am on the next Business Day.

12.2 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this agreement.

12.3 Counterparts

This agreement may be executed in any number of counterparts and by each of the parties on separate counterparts. Each counterpart constitutes an original of this agreement, and all together constitute one agreement.

12.4 Interpretation

In this agreement headings are for ease of reference only and do not affect interpretation, and the following rules apply in interpreting this agreement unless the context makes it clear that a rule is not intended to apply:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this agreement, and a reference to this agreement includes any schedules, annexures and exhibits;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (f) a reference to time is to Brisbane, Australia time;
- (g) a month means a calendar month;
- (h) a reference to a party is to a party to this agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (i) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (j) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (k) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act;
- (l) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (m) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (n) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (o) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day;
- (p) nothing contained in this agreement will be deemed or construed as creating the relationship of partnership or of principal and agent;
- (q) no waiver of any breach of this agreement or of any of its terms will be effective unless the waiver is in writing and signed by the party against whom the waiver is claimed, and no waiver of any breach will operate as a waiver of any other breach or subsequent breach; and

- (r) if a party is obliged to do something it must do so at its own cost unless expressly provided otherwise in this agreement.

Schedule 1

The Expert's Fees and Disbursements

[To be inserted at the time of entering into the Expert Determination Agreement. Disbursements should include fees paid to consultants and advisors engaged by the Expert pursuant to rule 5 of the Rules]

Schedule 2

Rules

1 Commencement

The Expert Determination Process commences when one party refers a matter for determination by the Expert in accordance with the D&C Contract ("Expert Determination Notice").

2 Submissions

- (a) On the date the Expert is appointed in accordance with the D&C Contract, the party that gave the Expert Determination Notice ("Claimant") must give the other party to the Dispute ("Respondent") and the Expert:
 - (i) a statement setting out the particulars of the Dispute referred for Determination;
 - (ii) any agreed statement of facts;
 - (iii) a submission on the legal and factual issues of its claim; and
 - (iv) all documents and other evidentiary material on which it relies, (together, the "Claimant's Submissions").
- (b) Within three Business Days of receiving the Claimant's Submissions, the Respondent must give the Claimant and the Expert a response to the Claimant's Submissions including any cross-claim ("Respondent's Submissions").
- (c) If the Expert decides further information or documentation (including submissions) is required for the Determination, the Expert may direct the Claimant or the Respondent (or both) to provide such further information or documentation (including submissions) as the Expert may require.
- (d) The Expert must disclose to both the Claimant and the Respondent all information or documentation (including submissions) received by the Expert on a private and confidential basis.
- (e) Any times fixed pursuant to these Rules may be varied by agreement of the parties.

3 Conference

- (a) The Expert may, if he or she thinks appropriate, call a conference of the Claimant and the Respondent. The Expert must give the Claimant and the Respondent reasonable notice in writing of the date, venue and agenda for the conference.
- (b) The Claimant and the Respondent must appear at the conference and may make submissions on the subject matter of the conference. If either the Claimant or the

Respondent fails to appear at a conference of which that party had been notified under **rule 3(a)**, the Expert and the other party to the Dispute may nevertheless proceed with the conference.

- (c) The Claimant and the Respondent:
 - (i) may be accompanied at a conference by legal or other advisers; and
 - (ii) will be bound by any procedural directions as may be given by the Expert in relation to the conference both before and during the course of the conference.
- (d) The conference must be held in private.
- (e) If required by either the Claimant or the Respondent, transcripts of the conference proceedings must be taken and made available to the Expert, the Claimant and the Respondent on a private and confidential basis.

4 General

- (a) Except where otherwise required by these Rules, the Expert may receive information in any way the Expert thinks fit (including as inquisitor).
- (b) Any dispute arising between the Claimant and the Respondent in respect of these Rules or any matter associated with the Expert Determination Process will be submitted to and determined by the Expert.
- (c) Subject to **rule 3(b)**, meetings and discussions with the Expert in respect of a Dispute or the submissions of either the Claimant or the Respondent must only take place in the presence of both the Claimant and the Respondent.
- (d) The Expert Determination Process will not terminate or discontinue because of the failure of either the Claimant or the Respondent to:
 - (i) serve a submission, statement or response within the prescribed time; or
 - (ii) appear at a conference of which that party had been notified under **rule 3(a)**.
- (e) The Expert Determination Process may be terminated at any time prior to the issue of the Determination by the Claimant and the Respondent giving joint notice to the Expert terminating the Expert Determination Process.

5 The Determination

- (a) The Expert must make his or her Determination in relation to a Dispute within 10 Business Days of the date on which the Expert is appointed in accordance with the D&C Contract (or such longer period as the Claimant and the Respondent agree (each acting reasonably) having regard to the nature and subject matter of the Dispute).
- (b) The Determination must:
 - (i) be in writing stating the Expert's determination and giving reasons;
 - (ii) be made in accordance with:
 - (A) the law;
 - (B) the D&C Contract;

- (C) this agreement (including these Rules); and
 - (D) the requirements of procedural fairness; and
- (iii) be made on the basis of:
- (A) the submissions and statements of the parties (subject to **rule 2(d)**);
 - (B) the further information and documentation (including submissions) received by the Expert under **rule 2(c)** (if any);
 - (C) the conference (if any); and
 - (D) the Expert's own expertise (as supplemented by any advice which the Expert obtains from his or her own advisers and consultants).
- (c) To the extent permitted by law, the Expert will have no power to apply or have regard to the provisions of Part 2 of the *Civil Liability Act 2003* (Qld) (and any equivalent statutory provision in any other state or territory).
- (d) Subject to **rule 5(e)**, the Determination will be final and binding on the Claimant and the Respondent.
- (e) If the Determination contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description of any person, matter or thing, or a defect of form, then the Expert must correct the Determination.

6 Modification

These Rules may be modified only by agreement of the Principal and the Contractor.

AS 4902-2000 Standards Australia

Standards Australia is an independent company, limited by guarantee, which prepares and publishes most of the voluntary technical and commercial standards used in Australia. These standards are developed through an open process of consultant and consensus, in which all interested parties are invited to participate. Through a Memorandum of Understanding with the Commonwealth government, Standards Australia is recognized as Australia's peak national standards body. For further information on Standards Australia visit us at www.standards.org.au.

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