

Aurizon Network, October 2017 submission

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

Aurizon Network Pty Ltd

User Funding – Rail Corridor Agreement

[*insert Extension
name*]

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Date

Parties

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

Aurizon Network Pty Ltd ABN 78 132 181 116 of Level 17, 175, Eagle
Street, Brisbane, Queensland (**Landholder**)

Background

- A The Landholder is the owner, lessee or licensee of the Extension Land.
 - B The Parties agree that the Extension Infrastructure may be situated on the Extension Land in accordance with the terms of this Agreement.
-

Agreed terms

1 Interpretation

1.1 Extension Project Agreement

In this Agreement, except to the extent a term is defined in **clause 1.2** or otherwise expressed to the contrary, capitalised terms have the meaning given in the Extension Project Agreement.

1.2 Definitions

In this Agreement:

Agreement means this document, including the schedules.

Additional Land means land which is not owned, leased or licensed by the Landholder, or which is leased or licensed by the Landholder on terms which do not allow the Landholder to grant a licence to the Trustee on terms which are in all material respects the same as the terms of this Agreement, at the date of a Proposed Variation.

Additional Land Interest means such freehold, leasehold or other right or interest in the Additional Land as necessary for the Additional Land (or such part of it as is required for the Proposed Variation) to form part of the Extension Land.

Adjustment Event has the meaning given to "adjustment event" in the Construction Agreement.

Associates of a Party means the Party's officers, employees, contractors, agents and invitees or any of them (and, for the avoidance of doubt, in the case of the Trustee, does not include the Landholder and in the case of the Landholder does not include the Trustee).

CEO Process means the process for resolution of disputes by senior management set out in the Dispute Resolution Process.

Commencement Date means the Condition Precedent Satisfaction Date.

Cost has the meaning given in **clause 13.5(h)(i)**.

Dispute Resolution Process means the process for resolution of disputes set out in the Extension Project Agreement.

DTMR means the State represented by the Department of Transport and Main Roads.

Expert Process means the process for resolution of disputes by an Expert set out in the Dispute Resolution Process

Extension Land means the area indicated on the plan(s) in **schedule 1** as the "Extension Area", as varied from time to time in accordance with **clauses 2.2, 3.3 and 3.4**.

Extension Project Agreement means the agreement entitled "*User Funding – Extension Project Agreement: [insert Extension name]*" between the Trustee, the Landholder and others.

Fee means the amount of \$1.00.

General Provisions means those provisions set out in clause **[15]** of the Extension Project Agreement.

Head Lease means a lease from the Governor in Council to DTMR of land that includes all or part of the Extension Land.

Infrastructure means "Railway Transport Infrastructure" as defined in the Extension Infrastructure Head-Lease as at the Commencement Date.

Landholder Infrastructure means any rail infrastructure that is:

- (a) owned, leased or licensed by the Landholder; and
- (b) located on the Extension Land,

but does not include the Extension Infrastructure.

Landholder Requirements means all directions, policies, rules and procedures (including, in relation to safety, health and environmental matters) notified by the Landholder to the Trustee from time to time in connection with the Trustee's and its Associates' access to and use of the Extension Land.

Non-Proposing Party has the meaning given in **clause 3.3(a)**.

Notice has the meaning given in **clause 13.3**.

Parties means collectively the Landholder and the Trustee, and **Party** means one of them.

Proposed Variation has the meaning given in **clause 3.3(a)**.

Proposing Party has the meaning given in **clause 3.3(a)**.

RCTI has the meaning given in **clause 13.5(d)(i)**.

Removed Infrastructure means:

- (a) a Removed Obsolete Part or Replaced Part; or
- (b) "Removed Infrastructure" (as defined in the Extension Infrastructure Sub-Lease).

Revenue has the meaning given in **clause 13.5(h)(ii)**.

Sublease means any sublease of the Head Lease between DTMR and the Landholder in respect of land including all or part of the Extension Land.

Supplier has the meaning given in **clause 13.5(c)**.

Trustee Supplies has the meaning given in **clause 13.5(d)(i)**.

Variation has the meaning given to "discretionary variation" in the Construction Agreement.

1.3 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) the provisions of clause **[1.2]** of the Extension Project Agreement apply to this Agreement; and
- (b) on land includes over or under the surface of the land.

2 Term

2.1 Term

- (a) Subject to **clause 2.1(b)**, this Agreement commences on the Commencement Date and will continue until the earlier of:
 - (i) the termination of the Trust; and
 - (ii) subject to **clause 2.2**, the expiration or earlier termination of any Head Lease or Sublease.
- (b) This Deed will automatically terminate, without the need for any Party to give notice to any other Party, if:
 - (i) the Extension Project Agreement has not been executed by all of the parties to it on or before the End Date; or
 - (ii) the Extension Project Agreement is terminated in accordance with clause **[2.5]** of the Extension Project Agreement.

2.2 Parties to meet

If any termination or expiration referred to in **clause 2.1(a)(ii)** relates to part only of the Extension Land:

- (a) then:
 - (i) where the Trustee or the Landholder has at least 10 Business Days prior notice of the proposed termination or expiration, the Trustee and the Landholder must at least 10 Business Days prior to that termination or expiry, meet and negotiate in good faith to agree alternative arrangements for the continuation of this Agreement; and
 - (ii) where the Trustee or the Landholder do not have sufficient prior notice of the termination or expiration to comply with **clause 2.2(a)(i)**, the Trustee and the Landholder must, as soon as reasonably practicable (and in any event within 10 Business Days of the date of the expiration or termination, or the date the parties become aware of the same) meet and negotiate in good faith to agree alternative arrangements for the continuation of this Agreement; and
- (b) this Agreement remains on foot:
 - (i) in relation to such of the Extension Land as is not subject to the termination or expiration referred to in **clause 2.1(a)(ii)**; and
 - (ii) in relation to such of the Extension Land as is subject to the termination or expiration referred to in **clause 2.1(a)(ii)** so far as is practicable as a matter of law until such negotiation has concluded.

3 Licence

3.1 Grant of licence in respect of Extension Land

The Landholder grants a non-exclusive licence to:

- (a) the Contractor under the Construction Agreement to access, Modify and use the Landholder Infrastructure as expressly required by, or permitted under, the Construction Agreement; and
- (b) the Trustee to:
 - (i) keep the Extension Infrastructure on the Extension Land; and
 - (ii) access and use, and to permit the Trustee's Associates to access and use, the Extension Land as expressly required by, or permitted under, another Transaction Document.

3.2 No unreasonable interference

The Landholder must not, and must use all reasonable endeavours to procure that its Associates and any third parties entitled to access and use

the Extension Land or the Landholder Infrastructure do not, unreasonably interfere with the licence granted under **clause 3.1**.

3.3 Extension Land

- (a) In the event of an Adjustment Event or a Variation, a Party (**Proposing Party**) may notify the other Party (**Non-Proposing Party**) of a proposal to vary the area of the Extension Land (**Proposed Variation**) (which proposal must include details of the variation, the reasons for the variation and any alternatives to that variation) to the extent required as a result of the Adjustment Event or a Variation.
- (b) The Parties must meet to discuss a Proposed Variation within ten Business Days after a notice is given under **clause 3.3(a)** (or such longer period as agreed by the Parties, acting reasonably).
- (c) Within ten Business Days after a meeting under **clause 3.3(b)** (or such longer period as agreed by the Parties, acting reasonably), the Non-Proposing Party must notify the Proposing Party that the Non-Proposing Party either:
 - (i) consents to the relevant Proposed Variation together with any reasonable requirements or conditions; or
 - (ii) does not consent to the relevant Proposed Variation together with the reasons why it does not give that consent,except that any such consent must not be unreasonably withheld (it being unreasonable to withhold consent if the Proposed Variation is required for a Variation that has prior approval under the Construction Agreement).
- (d) If the Non-Proposing Party does not give a notice under **clause 3.3(c)** within the time period specified in **clause 3.3(c)**, then the Non-Proposing Party is taken to consent to the Proposed Variation.
- (e) A Party may give a Dispute Notice in respect of any Dispute relating to any matter under this **clause 3.3**, including for the avoidance of doubt any failure to provide consent under **clause 3.3(c)**, and if the Dispute is not resolved in accordance with the CEO Process of the Dispute Resolution Process, the Dispute must be referred to an Expert to determine in accordance with the Expert Process of the Dispute Resolution Process;
- (f) If a Non-Proposing Party consents (or is deemed to consent) to a Proposed Variation, the Extension Land will be taken to be varied in accordance with that Proposed Variation from:
 - (i) where the commencement of the Proposed Variation is conditional on the satisfaction of conditions or requirements, the date of satisfaction or waiver of such conditions or requirements; or
 - (ii) otherwise, the date of such consent (or deemed consent),

except to the extent the Proposed Variation proposes to vary the area of the Extension Land to include any Additional Land (in which case **clause 3.4** will apply).

- (g) Promptly following a variation to the Extension Land under this **clause 3.3**, the Landholder must give the Trustee a revised version of **schedule 1** which incorporates that variation and that revised version of **schedule 1** is taken to replace the existing **schedule 1**.

3.4 Additional Land

- (a) If the Non-Proposing Party consents (or is deemed to consent) to a Proposed Variation which proposes to vary the area of the Extension Land to include any Additional Land, then, subject to **clause 3.4(b)**, the Landholder must, at its cost, use its reasonable endeavours to secure the Additional Land Interest in respect of that Additional Land which is most appropriate having regard to the nature and extent of the Proposed Variation.
- (b) The Landholder is not obliged to secure the Additional Land Interest in respect of the Additional Land where:
 - (i) having used such reasonable endeavours it is not able to obtain all Authority Approvals necessary for the acquisition of the Additional Land Interest or for the use of the Additional Land Interest as part of the Extension Land; or
 - (ii) the Additional Land Interest must be acquired from or granted by a third party if:
 - (A) it has been determined by the Access Regulator that the cost of the Landholder securing the Additional Land Interest will be included in the Regulated Asset Base, or the Trustee has indemnified the Landholder in respect of the cost of securing the Additional Land Interest, and the Landholder is not able to secure the Additional Land Interest on any terms, except that any terms as to cost must be consistent with the determination or indemnification (as the case may be), having undertaken bona fide arm's length negotiations with the third party to do so; or
 - (B) in circumstances where there has been no determination or indemnification as contemplated under **clause 3.4(b)(ii)(A)**, the Landholder is not able to secure the Additional Land Interest on reasonable commercial terms having undertaken bona fide arm's length negotiations with the third party to do so.
- (c) The Landholder must afford the Trustee the opportunity to attend and contribute to the negotiations referred to in **clause 3.4(b)(ii)(B)**.
- (d) If Aurizon Network secures an Additional Land Interest in respect of Additional Land under this **clause 3.4**, then the Extension Land will be

varied to include the Additional Land on the date the Landholder secures the Additional Land Interest.

- (a) Promptly following a variation to the Extension Land under this **clause 3.4**, the Landholder must give the Trustee a revised version of **schedule 1** which incorporates that variation and that revised version of **schedule 1** is taken to replace the existing **schedule 1**.

3.5 Trustee's general obligations

- (a) When accessing and using the Extension Land, the Trustee must, and must procure that its Associates, comply with all Landholder Requirements.
- (b) The Landholder covenants, represents and warrants that any Landholder Requirements are not, and will not be, more onerous than the directions, policies, rules and procedures which the Landholder imposes at that time on other parts of the Railway Network, in the same or similar circumstances.
- (c) The Trustee is responsible for the acts and omission of its Associates as if those acts and omissions were the acts and omissions of the Trustee itself.

4 Limited rights

- (a) The rights of the Trustee under this Agreement rest in contract only and do not create or confer upon the Trustee any tenancy or any estate or interest whatsoever in or over the Extension Land or the Landholder Infrastructure.
- (b) The rights of the Trustee under this Agreement are those of a licensee only and do not comprise or include any further or other rights.

5 Fee

- (a) No fee is payable by the Trustee to the Landholder on the execution of this Agreement.
- (b) The Fee is payable by the Trustee to the Landholder on each anniversary of the Commencement Date, if demanded by the Landholder until the termination of this Agreement.

6 Sublease

- (a) The Trustee acknowledges that the Landholder's interest in the Extension Land is or may be held pursuant to a Sublease.
- (b) To the extent that the Landholder's interest in the Extension Land is or becomes held pursuant to a Sublease:
 - (i) the Trustee acknowledges that:
 - (A) this Agreement will be subject to all reservations contained in the Head Lease and the Sublease, but only to the extent and from such time that such reservations are disclosed to the Trustee;
 - (B) it is a condition of the Head Lease that the land comprised within it is used for transport, purposes ancillary to transport and other commercial and community purposes as approved by the chief executive of DTMR; and
 - (C) it is a condition of the Sublease that the land comprised within it is used for the purpose of managing and operating a railway and is not used for any other purpose without the consent of the chief executive of DTMR;
 - (ii) despite any other clause in this Agreement but only to the extent and from such time that the terms of the Sublease are disclosed to the Trustee and without limitation to the provisions of clause **4(b)** of the Integrated Network Deed, the Trustee:
 - (A) must not act or omit to act or permit, cause or contribute to any act or omission which:
 - (1) is a breach of the Sublease or causes a breach of the Sublease; or
 - (2) causes (directly or indirectly) the Landholder to incur any costs or expenses in complying with the Sublease that the Landholder would not otherwise have incurred (except for any costs or expenses which the Landholder could have reasonably avoided or mitigated);
 - (B) acknowledges:
 - (1) DTMR's right to exercise any right or power held by the Landholder; and
 - (2) the rights of DTMR under the Sublease and that the Trustee's rights under this Agreement are subject to and subordinate to the rights of DTMR,in respect of any part of the Extension Land that is subject to the Sublease; and

- (C) acknowledges and agrees that it must not create or allow to subsist a Security Interest over all or part of the Trustee's rights or interests under this Agreement or in the Extension Land (if any) other than in accordance with the provisions of the Integrated Network Deed.
- (c) If the Head Lease or the Sublease is terminated for any reason, then the Landholder must provide to the Trustee a copy of any such notice received in connection with the termination as soon as reasonably practicable (and in any event, not later than three Business Days) after it is received by the Landholder.
- (d) The Landholder must provide to the Trustee a copy of any notice which is given to the Landholder under the Sublease which materially affects the Trustee's rights and/or obligations under this Agreement as soon as reasonably practicable (and in any event, not later than three Business Days) after it is received by the Landholder.
- (e) The Landholder covenants with the Trustee that the Landholder will comply with its obligations under the Sublease except that it will not be in default of this provision where a failure to comply is the result of the Trustee failing to comply with any of its obligations under the Transaction Documents.

7 Ownership

- (a) Nothing in this Agreement will be construed as vesting in the Landholder any proprietary or other interest in the Extension Infrastructure or any Removed Infrastructure.
- (b) The Parties acknowledge that, as between them:
 - (i) the ownership of Removed Infrastructure is provided for under the Extension Infrastructure Head-Lease or the Extension Infrastructure Sub-Lease (as applicable); and
 - (ii) the ownership of Extension Infrastructure is provided for under the Construction Agreement, Extension Infrastructure Head-Lease or the Extension Infrastructure Sub-Lease (as applicable).

8 Removal of infrastructure

The Trustee may, at any time, remove any part of the Extension Infrastructure without the prior consent of the Landholder.

9 Limitation of liability

9.1 Trustee's limitation of liability

- (a) The Landholder 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 [13.2] of the Extension Project Agreement 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, and to the extent of, the Trustee committing fraud, Gross Negligence, Wilful Default, breach of trust or breach of the Trust Deed or the Unit Holders Deed.

9.2 Application of Extension Project Agreement

The limitations and provisions contained in clause [7] of the Extension Project Agreement apply to this Agreement *mutatis mutandis*.

10 Contamination

- (a) Without limiting clause [25A] of the Construction Agreement, the Landholder:
 - (i) indemnifies the Trustee:
 - (A) against any Claim by any person who is not "a Party" (as defined under the Extension Project Agreement); or
 - (B) from any Losses incurred by the Trustee to any person who is not "a Party" (as defined under the Extension Project Agreement); and
 - (ii) releases the Trustee from any Claim by the Landholder, arising out of, in relation to or in connection with, whether directly or indirectly:
 - (iii) the discharge or escape of any pollutant or waste material from, or Contamination originating from the Extension Land; or
 - (iv) any Contamination on or in the Extension Land,to the extent that the matters set out above are not caused, or contributed to, by:
 - (v) the Trustee's failure to comply with **clause 3.5(a)**; or

- (vi) any act or omission of the Trustee or any officer, employee, agent or contractor of the Trustee (other than Aurizon Network).
- (b) For the purpose of **clause 10(a)(vi)**, the matters set out in **clauses 10(a)(iii)** and **10(a)(iv)** will not be taken to be caused, or contributed to, by the Trustee or any officer, employee, agent or contractor of the Trustee merely because the Trustee has:
 - (i) procured the design, construction and commissioning of the Extension Infrastructure under the Construction Agreement; and
 - (ii) permitted the use of the Extension Infrastructure for permitted purposes under the Extension Infrastructure Sub-Lease.

11 Termination

11.1 No right to termination

Despite any rule of law or equity to the contrary, neither Party may terminate, rescind or treat as repudiated, or obtain any order with the effect of terminating or rescinding, this Agreement other than as expressly provided for in this Agreement.

11.2 No prejudice as to right to damages

Subject to **clause 9**, nothing in this **clause 11** prejudices in any way a Party's right to Claim and recover damages for any breach of this Agreement by the other Party.

12 No warranty by the Landholder regarding Extension Land

No warranty is given by the Landholder in relation to any matter, act or thing concerning the Extension Land.

13 General

13.1 Disputes

If any Dispute arises between the Parties under this Agreement, the Parties must follow the Dispute Resolution Process to resolve that Dispute.

13.2 Confidentiality

The Parties must comply with the Confidentiality Obligations in respect of Confidential Information.

13.3 Notices

Any notice, demand, certification, process or other communication (**Notice**) under this Agreement must comply with and be given in accordance with the Extension Project Agreement as if the Notice were a notice under that document.

13.4 Assignment

A Party may only 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) in accordance with the Extension Project Agreement.

13.5 GST

- (a) In this **clause 13.5**:
- (i) unless there is a contrary indication, 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;
 - (ii) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
 - (iii) 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.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (c) 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 of the supply will pay to the Supplier an additional amount equal to the GST payable on the supply. Subject to **clauses 13.5(d)** and **13.5(e)**, the amount referred to in this **clause 13.5(c)** in addition to and at the same time and in the same manner (without any set-off or deduction) that the consideration for the supply is to be provided under this Agreement.
- (d) The Parties agree that:
- (i) the Landholder will issue a recipient created tax invoice (**RCTI**) in respect of any taxable supply which the Trustee makes to the Landholder under or in connection with this Agreement (**Trustee Supplies**);
 - (ii) the Trustee will not issue tax invoices in respect of the Trustee Supplies;
 - (iii) the Trustee is registered for GST as at the date of this Agreement and must notify the Landholder if it ceases to be registered;
 - (iv) the Landholder is registered for GST as at the date of this Agreement and must notify the Trustee if it ceases to be registered;

- (v) the Landholder will issue an adjustment note to the Trustee for any adjustment events that arise in relation to a supply for which a RCTI has been issued;
 - (vi) each RCTI to be issued in accordance with this Agreement is a tax invoice belonging to the class of invoices that the Commissioner of Taxation has determined in writing may be issued by the recipient of a taxable supply; and
 - (vii) the agreement in this **clause 13.5(d)** will terminate immediately if the Landholder or the Trustee cease to satisfy any of the requirements under the GST Law for issuing a RCTI.
- (e) In respect of taxable supplies to which **clause 13.5(d)** does not apply, the Supplier must deliver a tax invoice or an adjustment note to the recipient of the taxable supply before the Supplier is entitled to payment of an amount on account of GST under **clause 13.5(c)** in respect of the supplies it makes to the recipient. The recipient can withhold payment of the amount on account of GST until the Supplier provides a tax invoice or an adjustment note, as appropriate.
- (f) 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 13.5(c)** 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.
- (g) Where a Party is required under this Agreement to pay for, reimburse or contribute to any expense, loss, liability or outgoing of the other Party or indemnify another party in relation to such an expense, loss, liability or outgoing, the amount required to be paid, reimbursed or contributed by the first Party will be the sum of:
- (i) the amount of the expense, loss, liability or outgoing less any input tax credits in respect of the expense, loss, liability or outgoing to which the other Party is entitled; and
 - (ii) if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.
- (h) If an amount of consideration payable or to be provided under or in connection with this Agreement is to be calculated by reference to:
- (i) any expense, loss, liability or outgoing suffered or incurred by another person (**Cost**), that reference will be to the amount of that Cost excluding the amount of any input tax credit entitlement of that person relating to the Cost suffered or incurred; and
 - (ii) any price, value, sales, proceeds, revenue or similar amount (**Revenue**), that reference will be to that Revenue determined by deducting from it an amount equal to the GST payable on the supply for which it is consideration.

13.6 Survival

This **clause 13** and **clauses 1, 9, 10** and **11.2** survive the termination of this Agreement.

13.7 Incorporated General Provisions

Except to the extent of any inconsistency with this Agreement, the General Provisions are taken to be incorporated into this Agreement *mutatis mutandis*.

13.8 Applicable law

- (a) This Agreement will be governed by and construed in accordance with the laws applicable in the State.
- (b) Each Party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in the State 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.

13.9 Counterparts

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

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: / /

Schedule 1 – Extension Land

[Drafting note: Plan(s) showing "Extension Area" to be inserted on a transaction-by-transaction basis.]