

QCA Consolidated Draft Decision

Aurizon Network Pty Ltd

[Insert name of Access Holder]

Access Agreement – Coal

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Date

Parties

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

The person specified in **item 1** of **Schedule 1 (Access Holder)**

Background

- A Aurizon Network is responsible for the provision of access to the Nominated Network in accordance with the Access Undertaking.
 - B The Access Holder wishes to secure non-exclusive rights of access to the Nominated Network for the operation of Train Services by an Operator (or Operators).
 - C Aurizon Network has agreed to grant non-exclusive Access Rights to the Access Holder for the operation of Train Services over the Nominated Network by an Operator (or Operators) in accordance with one or more Train Operations Deed.
 - D The Parties may enter into separate agreements for the provision of services by Aurizon Network to the Access Holder other than the grant of the Access Rights.
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1 Definitions and interpretation

1.1 Definitions

In this Agreement:

Acceptable Credit Rating means a minimum long term credit rating of not less than BBB- from Standard & Poor's Ratings Services (or equivalent rating by another internationally recognised ratings agency).

Access has the meaning given in the Access Undertaking.

Access Agreement means an access agreement made under the Access Undertaking, other than this Agreement.

Access Charges means:

- (a) where the term is used in respect of a Billing Period, the Access Charges for that Billing Period as calculated in accordance with the Access Charge Provisions; and
- (b) otherwise, the charges calculated in accordance with the Access Charge Provisions and any interest payable in relation to such charges under this Agreement.

Access Charge Provisions means:

- (a) the provisions of the Access Undertaking which include the access charges and the details of the application of the access charges (which, as at the Commencement Date, are Part 6 and schedule F of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to the application or calculation of access charges (including any TOP Charge).

Access Charge Rates are the rates set out in **Schedule 4**.

Access Holder Agreement means each of the following types of agreements between Aurizon Network and the Access Holder:

- (a) a licence in respect of a train loadout facility;
- (b) an agreement allowing the connection of Private Facilities to the Infrastructure; or
- (c) an agreement in relation to the funding and/or construction of Connecting Infrastructure.

Access Holder's Staff means employees, contractors, volunteers and agents of the Access Holder and any other person under the control or supervision of the Access Holder who is involved in any activity associated with the Train Services but does not include an Operator or the employees, contractors, volunteers or agents of an Operator.

Access Interface Deed means a deed in the form contained in **Schedule 7**.

Access Rights means the rights of access to the Nominated Network granted under this Agreement (whether or not utilised by an Operator from time to time).

Access Seeker has the meaning given in the Access Undertaking.

Access Undertaking means the access undertaking submitted by Aurizon Network to the QCA and approved by the QCA under the *Queensland Competition Authority Act 1997* (Qld) from time to time, except that in **clauses 3.1(b)** and **3.2**, it is the access undertaking in force at the time of entering into this Agreement or any later version adopted by the Parties under **clause 3.2**.

Accreditation means the ability to lawfully carry out railway operations under the Rail Safety Act (whether by being accredited under the Rail Safety Act or by being exempt from the requirement to be accredited under the Rail Safety Act), and

Accredited means to have Accreditation.

Ad Hoc Train Service for a Train Service Type means:

- (a) a Network Train Service which is additional to the Nominated Monthly Train Services for that Train Services Type but which is otherwise in accordance with the Train Description for that Train Service Type; or
- (b) a Network Train Service which is not a Train Service for a Train Service Type but which Aurizon Network permits an Operator to operate for the Access Holder under this Agreement as if it was a Train Service for the Train Service Type (subject to any derogations to the Train Description for the Train Service Type permitted by Aurizon Network, which includes a change in the Origin and Destination for that Train Service Type

provided that the changed Origin and Destination forms part of the Nominated Network).

Adjoining Network means a rail network which is not part of the Infrastructure but which connects to the Infrastructure.

Agreement means this document, including the schedules and annexures to it.

Assign means to assign, novate, transfer, part possession with, license, charge, mortgage, become trustee of, grant an option or other right over or otherwise deal with or encumber, but does not include the nomination of an Operator by the Access Holder and the execution of a Train Operations Deed.

Aurizon Network Cause has the meaning given in the Access Undertaking.

Aurizon Network's Staff means the employees, contractors and agents of Aurizon Network and any other person under the control or supervision of Aurizon Network involved in the provision of Access Rights.

Authority has the meaning given in the Access Undertaking.

Available Capacity has the meaning given in the Access Undertaking.

Billing Period means the period of a Month, except that:

- (a) the first Billing Period starts on the Commitment Date and ends on the last day of the Month in which the Commitment Date occurs; and
- (b) the last Billing Period commences on the first day of the Month during which this Agreement terminates or expires and ends on the date of termination or expiry.

Business Day means a day which is not a Saturday, Sunday or public holiday in Brisbane or, if and to the extent that this Agreement expressly refers to another place, in that other place.

Capacity has the meaning given in the Access Undertaking.

Capacity Assessment has the meaning given in the Access Undertaking.

Capacity Shortfall has the meaning given in the Access Undertaking.

Change in Access Undertaking means:

- (a) any amendment to or replacement of the Access Undertaking or any successor undertaking to the Access Undertaking; or
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of the Access Undertaking resulting from a decision of a court or other Authority.

Change in Control in relation to any entity (the first mentioned entity) means:

- (a) a change in the entity that Controls the first mentioned entity (other than if the Ultimate Holding Company of the first mentioned entity remains the same following the change);
- (b) an entity that Controls the first mentioned entity ceases to Control that entity (other than if the Ultimate Holding Company of the first mentioned entity remains the same following the change); or
- (c) if the first mentioned entity is not Controlled, another entity acquires Control of the first mentioned entity.

Change in Law has the meaning given in the Access Undertaking, except that the reference to “Commencing Date” is replaced with “Commencement Date” (as defined under this Agreement).

Change in Relevant Taxes has the meaning given in the Access Undertaking.

Charge means:

- (a) any mortgage, charge, a general or special notarial bond, pledge, hypothec or lien; or
- (b) any other interest or arrangement of any kind that in substance secures the payment of money or the performance of an obligation, or that gives a creditor priority over unsecured creditors in relation to any property.

Chargee has the meaning given in **clause 29.3**.

Chargor has the meaning given in **clause 29.3**.

Claim means any action, proceeding, claim, demand, damage, loss, cost, liability or expense, including the costs and expenses of defending or settling any action, proceeding, claim or demand.

Coal System has the meaning given in the Access Undertaking.

Collateral has the meaning given in the PPS Act.

Commencement Date means the date of this Agreement.

Commitment Date means the earliest Train Service Commitment Date under this Agreement.

Compliant Nomination Requirements means:

- (a) subject to **paragraph (b)** of this definition, the Train Description for the Train Service Type which the Access Holder wishes to allocate to the nominee Operator in the nominee Operator’s new or existing Train Operations Deed (as applicable) must be the same as the Train Description for that Train Service Type in this Agreement;
- (b) in respect of each Train Service Type which is the subject of the nomination, the aggregate of:
 - (i) the “Nominated Monthly Operational Rights (for a 30 day Month)” in the Train Description for that Train Service Type in the nominee Operator’s Train Operations Deed; and
 - (ii) the “Nominated Monthly Operational Rights (for a 30 day Month)” in the Train Description for that Train Service Type in all other Train Operations Deeds related to this Agreement (if any),

must not exceed the “Nominated Monthly Train Services (for a 30 day Month)” set out in the Train Description for that Train Service Type in this Agreement. For the avoidance of doubt, where the nomination is accompanied by the statement in **clause 4.3(b)(ii)(B), paragraph (b)(i)** of this definition is to be determined on the basis of the nominee Operator’s Train Operations Deed taking into account the additional Access Rights for the relevant Train Service Type which the Access Holder wishes to allocate to the nominee Operator.

Conditional Access Rights has the meaning given in **clause 9.2**.

Conditional Access Provisions means:

- (a) the provisions of the Access Undertaking which include the details of the Conditional Access Rights (which, as at the Commencement Date, is clause 8.9 of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to the Conditional Access Rights.

Confidential Information means the terms of this Agreement and any information, data or other matter disclosed to a Recipient by or on behalf of the Discloser in relation to this Agreement where:

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the Discloser; or
- (b) the information, data or matter is marked confidential by the Discloser when disclosed,

but excluding any such information, data or other matter which:

- (c) is already in the public domain or becomes available to the public through means other than a breach of the confidentiality undertaking by the Parties under this Agreement;
- (d) was in the Recipient's lawful possession before the disclosure by the Discloser;
- (e) is received by the Recipient independently from a Third Party who is free to disclose such information, data or other matter to the Recipient; or
- (f) has ceased to retain its confidential nature, for example, where the disclosure of the information, data or other matter by the Recipient would no longer reasonably be expected to affect the commercial affairs of the Discloser.

Connecting Infrastructure has the meaning given in the Access Undertaking.

Consequential Loss means:

- (a) any loss of revenue, loss of profits or loss of production;
- (b) any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport;
- (c) loss of business opportunities;
- (d) loss of or damage to reputation or goodwill;
- (e) any wasted overheads or demurrage;
- (f) loss of or damage to credit rating; and
- (g) loss or damage that does not naturally, according to the usual course of things, flow from a breach of contract,

but does not include any of the following Claims to the extent that the Party would in the absence of this definition be entitled to recover them at law:

- (h) any costs or expenses incurred by the Party in connection with mitigating the effects of any breach of this Agreement by the other Party (including implementing a workaround solution in respect of or otherwise mitigating

any failure of a Party to comply with the requirements (including warranties) of this Agreement) provided that if a loss arising from the breach of the Agreement is itself not recoverable because it is a Consequential Loss, the costs or expenses incurred in mitigating that loss must also be treated as (non-recoverable) Consequential Loss;

- (i) 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;
 - (ii) personal injury to or death of any person; or
- (j) in respect of any personal injury Claim, special loss or economic loss as those terms are used in the context of personal injury claims; or
- (k) any fines or penalties imposed by a governmental or regulatory body for failure by the Party to comply with the Law as a result of the other Party's failure to comply with the requirements of this Agreement, and any costs or expenses incurred by the first Party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failures or breaches.

Control has the meaning given in the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Corresponding Suspension Event in respect of a Termination Event means the Suspension Event specified in the same row as that Termination Event in **Schedule 6**.

Daily Train Plan means a Daily Train Plan under the relevant Train Operations Deed.

Default 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 24**).

Defaulting Operator has the meaning given in **clause 14.1(a)**.

Depot for a Train Service Type means a depot, as specified in the Train Description for that Train Service Type.

Destination for a Train Service Type means the destination specified as such in the Train Description for that Train Service Type.

Discloser means a Party that discloses Confidential Information to the other Party.

Dispute has the meaning given in **clause 24.1**.

Dispute Notice has the meaning given in **clause 24.1**.

Dispute Provisions has the meaning given in the Access Undertaking.

Emergency Possession has the meaning given in the Access Undertaking.

Environment has the meaning given in the Environmental Protection Act.

Environmental Law has the meaning given in the Access Undertaking.

Environmental Management Plan means the environmental management plan developed, implemented and maintained by an Operator under a Train Operations Deed.

Environmental Regulator means, in respect of an Environmental Law, the Authority administering that Environmental Law.

Evaluation Period has the meaning given in the Access Undertaking.

Expansion has the meaning given in the Access Undertaking.

Expert has the meaning given in **clause 24.3**.

Expiry Date means the latest Train Service Expiry Date under this Agreement.

Financial Obligation means any obligation of the Access Holder to:

- (a) pay, or cause to be paid, an amount of money, including damages for a breach of this Agreement; and
- (a) provide Security or an additional or replacement Security.

FM Access Rights means the Access Rights for each Train Service Type which cannot be made available by Aurizon Network for an Operator to operate Train Services for the Access Holder due to damage to, or the destruction of, a part of the Nominated Network referred to in **clause 25.2** (assuming that part of the Nominated Network will not be repaired or replaced).

Force Majeure Event has the meaning given in the Access Undertaking.

Force Majeure Provisions means:

- (a) the provisions of the Access Undertaking which include Force Majeure Events and the details of the application of the Force Majeure Event (which, as at the Commencement Date, is **clause 7.7** of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to a Force Majeure Event.

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

Incident means any Network Incident involving the activities of an Operator.

Incident Commander means a member of Aurizon Network's Staff who has been delegated responsibility for the direction and coordination of Aurizon Network's, each relevant Operator's and the Access Holder's resources in the performance of their respective roles and tasks at the site of an Incident, recording events during the course of an Incident and liaison with external agencies.

Incremental Costs has the meaning given in the Access Undertaking.

Indicative Tonnage for a Train Service Type means the tonnage as specified as such in the Train Description for that Train Service Type.

Infrastructure has the meaning given to the term “Rail Infrastructure” in the Access Undertaking.

Infrastructure Enhancement has the meaning given in the Access Undertaking.

Infrastructure Lease means any lease or sublease to Aurizon Network of any Infrastructure which forms part of the Nominated Network.

Infrastructure Lessor means any lessor or sublessor under an Infrastructure Lease.

Insolvency Event means the happening of any of the following events in relation to a Party:

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in section 459F(1) of the Corporations Act;
- (b) a meeting is convened to pass a resolution to place it in voluntary liquidation or to appoint an administrator unless the resolution is withdrawn within 10 Business Days or the resolution fails to pass;
- (c) an application is made to a court for it to be wound up and the application is not dismissed within 10 Business Days after it is made;
- (d) the appointment of a liquidator, provisional liquidator or controller (as defined in the Corporations Act) of any of its assets if that appointment is not revoked within 10 Business Days after it is made;
- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement; or
- (f) any similar event occurs in respect of the Party under the laws of any jurisdiction other than Australia.

Interface Risk Assessment has the meaning given in the Access Undertaking.

Interface Risk Management Plan or **IRMP** has the meaning given in the Access Undertaking.

Interface Risk Provisions means:

- (a) the provisions of the Access Undertaking which include the details of:
 - (i) the Interface Risks, the Interface Risk Assessment and the IRMP (which, as at the Commencement Date, are clause 4.10.2 and Schedules A and C of the Access Undertaking); and
 - (ii) the Environmental Management Plan (which, as at the Commencement Date, is Schedule C of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to the Interface Risks, the Interface Risk Assessment, the IRMP and the Environmental Management Plan.

Interface Risk has the meaning given in the Access Undertaking.

Intermediate Train Plan or **ITP** has the meaning given in the Access Undertaking.

Investigation means the investigation conducted in accordance with the Investigation Procedures.

Investigation Procedures means the procedures in relation to investigations which are:

- (a) specified in Aurizon Network's document entitled *Incident Report and Investigations* which is published on the Website (as amended and replaced from time to time); and
- (b) as far as practicable, applied consistently for all Access Holders in the same Coal System.

Joint Venture means the unincorporated joint venture (if any) between the JV Participants specified in **item 6** of **Schedule 1**.

JV Participants means the entities (if any) specified in **item 7** of **Schedule 1**.

Landowner has the meaning given in **clause 34.17**.

Law has the meaning given in the Access Undertaking.

Loading Facility for a Train Service Type means the loading facility located at the ultimate Origin for that Train Service Type (whether located on the Nominated Network, an Adjoining Network or otherwise), as specified in the Train Description for that Train Service Type.

Maintenance Work has the meaning given in the Access Undertaking.

Major Periodic Maintenance has the meaning given in the Access Undertaking.

Material Change means a:

- (a) Change in Relevant Taxes;
- (b) Change in Law;
- (c) Change in Access Undertaking; or
- (d) matter deemed to be a Material Change under **clause 34.17(d)**.

Maximum Other Dwell Times for a Train Service Type means the maximum Other Dwell Times for Train Services for that Train Service Type as specified as such in the Train Description for that Train Service Type.

Maximum Sectional Running Time for a Section for a Train Service Type means the maximum Sectional Running Times for Train Services for that Train Service Type operating on that Section as specified as such in the Train Description for that Train Service Type.

Maximum Time at Depot for a Train Service Type means the maximum Time at Depot for Train Services for that Train Service Type as specified as such in the Train Description for that Train Service Type.

Maximum Time at Loading Facility for a Train Service Type means the maximum Time at Loading Facility for Train Services for that Train Service Type as specified as such in the Train Description for that Train Service Type.

Maximum Time at Unloading Facility for a Train Service Type means the maximum Time at Unloading Facility for Train Services for that Train Service Type as specified as such in the Train Description for that Train Service Type.

Month means calendar month.

Net Financial Effect on a Party of an event or circumstance means the net effect in financial terms of the occurrence of the event or circumstance on the Party in relation to performing its obligations and exercising its rights under this Agreement and/or a Train Operations Deed including any increases in costs (whether capital or operating, fixed or variable) and other detriments incurred, or to be incurred, by the Party but deducting the amount of any savings or other benefits or advantages received, or to be received, by the Party, and on the basis that the Party uses reasonable endeavours to mitigate the net effect of the event or circumstance.

Network Customer means any person (including the Access Holder) that has been granted access rights to operate Network Train Services on all or part of the Infrastructure.

Network Incident has the meaning given in the Access Undertaking.

Network Interface Point means a location at which the Infrastructure meets an Adjoining Network.

Network Management Principles has the meaning given in the Access Undertaking.

Network Train Service means the running of a Train between specified origins and destinations by a Railway Operator (including any Stowage) on the Infrastructure.

Nominal Payload for a Train Service Type means the nominal Payload for that Train Service Type as specified as such in the Train Description for that Train Service Type.

Nominated Monthly Train Services for a Train Service Type means the number of Train Services for that Train Service Type that the Access Holder is entitled to have operated during any Month:

- (a) in the case of a Month that is 30 days, as specified in the Train Description for that Train Service Type; and
- (b) in the case of a Month that is longer or shorter than 30 days, a pro rata portion of the number of Train Services referred to in **paragraph (a)** of this definition (rounded to the nearest even number of whole Train Services provided that where the pro rata portion of the number of Train Services is a whole odd number, the number of Train Services will be rounded up to the nearest even number) to reflect the longer or shorter period,

as varied in accordance with this Agreement.

Nominated Network means that part of the Infrastructure described in **item 1 of Schedule 3**.

Nominated Network FM Reduction Notice has the meaning given in clause 7.7 of the Access Undertaking.

Nominated Unloading Facility means an unloading facility specified in the Access Undertaking for a nominated Reference Train Service.

Non-Charging Party has the meaning given in **clause 29.3**.

Notice has the meaning given in **clause 33.1**.

Obstruction means any circumstance relating to the whole or any part of the Infrastructure, including Rollingstock, debris or other objects on the Infrastructure, which has the potential to cause a disruption to or cancellation of Train Services or Train Movements, and includes any Network Incident but does not include an Operational Constraint imposed by Aurizon Network.

Operational Constraint has the meaning given in the Access Undertaking.

Operator means each Accredited Railway Operator that is nominated by the Access Holder in accordance with **clause 4.3(b)** who is contracted by the Access Holder to operate Train Services for the Access Holder in accordance with the relevant nomination – but only to the extent of the relevant nomination.

Operator's Staff means, in respect of an Operator, the employees, contractors, volunteers and agents of that Operator and any other person under the control or supervision of that Operator who is involved in any activity associated with the Train Services but does not include the employees, contractors, volunteers or agents of another Operator.

Origin for a Train Service Type means the origin specified as such in the Train Description for that Train Service Type.

Other Conditional Access Holder for:

- (a) an Expansion means an Access Holder (other than the Access Holder) that has been granted access rights under an Access Agreement which are conditional upon the Expansion being completed and commissioned; and
- (a) a Segment of an Expansion means an “Other Conditional Access Holder” for the Expansion (as defined in **paragraph (a)** of this definition) that may operate Network Train Services on that Segment exercising their Other Conditional Access Rights for the Expansion.

Other Conditional Access Rights for an Other Conditional Access Holder for an Expansion means the access rights granted under an Access Agreement to the Other Conditional Access Holder which are conditional upon the Expansion being completed and commissioned.

Other Dwell Times means, for any other permitted activity, the time period commencing when a Train Service arrives at the specified point for that activity and ending when it is ready to depart from that point and the relevant Train Controller has been advised accordingly.

Over-Allocation has the meaning given in **clause 4.7(b)**.

Overload Detector means a weighing mechanism other than a Weighbridge and specified in **item 5.2** of **Schedule 3**.

Party means a party to this Agreement, and **Parties** means the parties to this Agreement. For the avoidance of doubt, an Operator is not a party to this Agreement.

Passenger Priority Obligations has the meaning given in the Access Undertaking.

Payload of a Train Service means the weight of product loaded onto any Train

used in operating that Train Service.

Performance Levels has the meaning given in the relevant Train Operations Deed.

Planned Dwell Times means each of Time at Loading Facility, Time at Unloading Facility, Time at Depot and Other Dwell Times specified in the Train Schedule.

Planned Possession has the meaning given in the Access Undertaking.

Possession has the meaning given in the Access Undertaking.

PPS Act means the *Personal Property Securities Act 2009* (Cth).

Private Facilities means sidings, loading and unloading facilities and any other facilities of any kind:

- (a) which either:
 - (i) are required to be accessed or used by an Operator to operate any Train Services for the Access Holder in the manner contemplated by this Agreement; or
 - (ii) if no Operator has been nominated in respect of the relevant Train Services, would have been required to be accessed or used by an Operator, had one been nominated; and
- (b) which do not form part of the Nominated Network.

Queensland Competition Authority or **QCA** means the authority established under the *Queensland Competition Authority Act 1997* (Qld).

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

Rail Safety Regulator means the chief executive of the department administering the Rail Safety Act.

Railway Manager has the meaning given in the Transport Infrastructure Act.

Railway Operator has the meaning given in the Access Undertaking.

Recipient means a Party that receives Confidential Information from the Discloser.

Reduction Factor has the meaning given in the Access Undertaking.

Reduction Factor Provisions means:

- (a) the provisions of the Access Undertaking which include the Reduction Factor and the details of the calculation and application of the Reduction Factor (which, as at the Commencement Date, is **clause 7.4.4** of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to the application or calculation of the Reduction Factor.

Reference Tariff has the meaning given in the Access Undertaking.

Reference Tariff Provisions means:

- (a) the schedule of the Access Undertaking which includes the Reference Tariffs and the details of the application of the Reference Tariffs for a

particular Reference Train Service (which, as at the Commencement Date, is schedule F of the Access Undertaking); and

- (b) any other provisions of the Access Undertaking which affect or relate to the application or calculation of Reference Tariffs or access charges (including any TOP Charge).

Reference Train Service has the meaning given in the Access Undertaking.

Related Body Corporate has the meaning given in the Corporations Act.

Relevant Collateral means Collateral which is the subject of a Security Interest granted under this Agreement.

Relevant Tax means any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on Aurizon Network by, or payable by Aurizon Network to, any Authority but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.

Relinquishment Provisions means:

- (a) the provisions of the Access Undertaking which relate to the relinquishment of Access Rights (which, as at the Commencement Date, are 7.4.3 and 7.4.4 of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to the relinquishment of Access Rights.

Resumption Notice has the meaning given in the Access Undertaking.

Resumption Provisions means:

- (a) the provisions of the Access Undertaking which relate to capacity resumption (which, as at the Commencement Date, is **clause 7.6** of the Access Undertaking); and
- (b) any other provisions of the Access Undertaking which affect or relate to capacity resumption.

Rollingstock means locomotives, carriages, Wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicles which operate on or use a Track, and where used in respect of an Operator's Rollingstock includes Rollingstock which is owned, hired or leased by an Operator, supplied by a contractor of an Operator or is otherwise in the possession or control of an Operator.

Rollingstock Configuration has the meaning given in the Access Undertaking.

Safeworking Procedures means the procedures and systems, including supporting communications systems, for the safe operation of Trains and protection of worksites on the Infrastructure specified in Aurizon Network's document entitled *Safeworking Procedures* as:

- (a) notified by Aurizon Network to the Access Holder; or
 - (b) published on the Website,
- (as amended and replaced from time to time).

Scheduled Time means the time of arrival or departure for a Train Movement at specified locations on the Nominated Network as set out in the Train Schedule

or as amended by Aurizon Network from time to time on the day of operation pursuant to the Network Management Principles.

Section means a section of Track between two locations on the Nominated Network as shown in the diagram(s) in **Schedule 3**.

Sectional Running Times means the time period measured from the time a Train Service passes the signal controlling entry into a Section until the time the Train Service arrives at the signal controlling entry into the next adjoining Section or the Adjoining Network (as applicable), and does not include an allowance for Planned Dwell Times.

Security means:

- (a) a parent company guarantee in a form reasonably acceptable to Aurizon Network and from a holding company (as defined in the Corporations Act) of the Access Holder that has an Acceptable Credit Rating;
- (b) an unconditional and irrevocable bank guarantee in favour of Aurizon Network which:
 - (i) is issued by a trading bank holding a current Australian banking licence and having a credit rating equivalent to or better than a Standard & Poor's BBB- rating;
 - (ii) requires the issuing bank to pay on demand by Aurizon Network, without recourse to the Access Holder or any other person, an amount or amounts up to the amount specified in the bank guarantee;
 - (iii) has no expiry date (or, if it is not possible for the Access Holder to obtain a bank guarantee with no expiry date, has an expiry date no earlier than 12 months after the date of issue of the bank guarantee);
 - (iv) states that it is assignable by Aurizon Network to an assignee from Aurizon Network under this Agreement (subject to the relevant bank and the Access Holder being given notice of the identity of the assignee); and
 - (v) is otherwise in a form and upon terms reasonably acceptable to Aurizon Network; or
- (c) any other form of security reasonably acceptable to Aurizon Network, in a form and upon terms reasonably acceptable to Aurizon Network,

as security for the due and proper performance by the Access Holder of its obligations under this Agreement.

Security Amount at a time means the amount determined in accordance with **item 4** of **Schedule 1** at that time.

Security Interest has the meaning given in **clause 34.20(a)**.

Segment of an Expansion means each segment of the Expansion specified as such in the Train Description for the Conditional Access Rights which are conditional upon the completion and commissioning of the Expansion.

State means the State of Queensland.

Stowage has the meaning given in the Access Undertaking.

Supplier has the meaning given in **clause 30.3**.

Supply Chain Rights has the meaning given in the Access Undertaking.

Suspension Event means any event or circumstance specified as such in **Schedule 6**.

Suspension Notice has the meaning given under **clause 26.1**.

Term means the term of this Agreement in accordance with **clause 2.1**.

Termination Event means any event or circumstance specified as such in **Schedule 6**.

Third Party means a person other than the Access Holder or Aurizon Network.

Third Party Land has the meaning given in **clause 34.17(a)**.

Through-Running Train Service Type means a Train Service Type that has a Destination and/or Origin that is a Network Interface Point and is specified as such in the Train Description for that Train Service Type.

Time at Depot means the time period commencing when a Train Service arrives at the entry signal for a Depot and ending when it is ready to depart the Depot and the relevant Train Controller has been advised accordingly.

Time at Loading Facility means the time period commencing when a Train Service arrives at the entry signal for a Loading Facility and ending when it presents at the exit signal for the Loading Facility, is ready to depart the Loading Facility and the relevant Train Controller has been advised accordingly.

Time at Unloading Facility means the time period commencing when a Train Service arrives at the entry signal for an Unloading Facility and ending when it presents at the exit signal for the Unloading Facility, is ready to depart the Unloading Facility and the relevant Train Controller has been advised accordingly.

TOP Charge in respect of this Agreement:

- (a) for a Year means the amount which is the sum of the "TOP Charge" (as defined in paragraph (b) of this definition) for each Train Service Type for the Year; and
- (b) for a Train Service Type for a Year means the amount calculated in accordance with clause 3.3 of Schedule F in the Access Undertaking for the Train Service Type and Year.

Track has the meaning given in the Access Undertaking.

Train has the meaning given in the Access Undertaking.

Train Control means the management and monitoring of all Train Movements and of all other operation of Rollingstock on the Infrastructure and of any activities affecting or potentially affecting such Train Movements or Rollingstock operation including:

- (c) recording Train running times on Train diagrams and in Aurizon Network's information systems;
- (d) reporting of Incidents occurring on the Infrastructure;

- (e) managing Incidents occurring on the Infrastructure from within a Train Control centre;
- (f) field Incident management;
- (g) yard control services; and
- (h) exchanging information with Railway Operators.

Train Control Direction means any instruction or direction (whether given orally or in writing or by means of signal or other similar device) issued by or on behalf of Aurizon Network acting reasonably relating to Train Movements.

Train Controller means the person nominated by Aurizon Network from time to time as the supervisor of Train Movements on the relevant part of the Nominated Network.

Train Description for a Train Service Type means the description of, specifications for, and constraints on, the Access Rights for that Train Service Type specified in **Schedule 2**.

Train Movement has the meaning given in the Access Undertaking.

Train Operations Deed means a deed between Aurizon Network and an Operator in substantially the form of the Standard Train Operations Deed (as that term is defined in the Access Undertaking) (or as agreed between the Operator and Aurizon Network) pursuant to which Aurizon Network agrees that the Operator may utilise Access Rights allocated to the Operator by the Access Holder, in accordance with this Agreement.

Train Schedule means the train diagrams, yard schedules, terminal schedules and any other form of train timetable prepared by Aurizon Network before the day of operation in accordance with the Network Management Principles showing the programmed times of arrival or departure for Train Movements at specified locations on the Infrastructure.

Train Service for a Train Service Type means the running, by an Operator for the Access Holder, of a Train in one direction from the Origin to the Destination, or from the Destination to the Origin, for that Train Service Type (including any Stowage) in accordance with the Train Description for that Train Service Type.

Train Service Commitment Date for a Train Service Type means the date specified as such in the Train Description for that Train Service Type.

Train Service Compliance Date for a Train Service Type means the date specified as such in the Train Description for that Train Service Type.

Train Service Expiry Date for a Train Service Type means the date specified as such in the Train Description for that Train Service Type.

Train Service Type means each type of train service specified as such in **Schedule 2**.

Transfer means the transfer of all or part of the Access Rights to a Third Party.

Transfer Provisions means:

- (a) the clauses of the Access Undertaking which relate to the transfer of Access Rights (which, as at the Commencement Date, is clauses 7.4.2 and 7.4.4 of the Access Undertaking); and

- (b) any other provisions of the Access Undertaking which affect or relate to the transfer of Access Rights.

Transport Infrastructure Act means the *Transport Infrastructure Act 1994* (Qld).

Ultimate Holding Company has the meaning given in the Corporations Act.

Unloading Facility for a Train Service Type means the unloading facility located at the ultimate destination for that Train Service Type (whether located on the Nominated Network, an Adjoining Network or otherwise), as specified in the Train Description for that Train Service Type.

Urgent Possession has the meaning given in the Access Undertaking.

Wagon means any rollingstock (including a wagon bogie) designed to carry any load other than passengers.

Website has the meaning given in the Access Undertaking.

Weighbridge means a weighbridge or weightometer verified under the *National Measurement Act 1960* (Cth), as specified in **item 5.1** of **Schedule 3**.

Year means each year commencing on 1 July and ending on 30 June during the Term and, if applicable, includes:

- (a) the shorter period commencing on the first day of the Month in which the Commitment Date occurs and ending on the next 30 June; and
- (b) the shorter period commencing on the 1 July occurring prior to the date of expiration or termination of this Agreement and ending on the date of expiration or termination of this Agreement.

1.2 Interpretation

In this Agreement, unless expressed to the contrary:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes all other genders;
- (c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it; and
- (e) a reference to:
 - (i) a person includes a partnership, unincorporated association, corporation or other entity, government or statutory body;
 - (ii) a person includes its legal personal representative, successors and assigns;
 - (iii) conduct includes any omission and any representation, statement or undertaking, whether or not in writing;
 - (iv) conduct includes a benefit, remedy, discretion, authority or power;
 - (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;

- (vi) the words “include”, “includes” or “including” must be read as if they are followed by the words “without limitation”;
- (vii) writing includes:
 - (A) any mode of representing or reproducing words in tangible and permanently visible form, including fax transmission; and
 - (B) words created or stored in any electronic medium and retrievable in perceivable form;
- (viii) time is to local time in Brisbane, Queensland;
- (ix) “A\$”, “\$” or “dollars” is a reference to the lawful currency of Australia;
- (x) this or any other document or agreement includes the document or agreement as novated, amended or replaced from time to time and despite any changes in the identity of the parties;
- (xi) anything (including any amount) is a reference to the whole or part or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (xii) under a clause includes in accordance with that clause;
- (xiii) a clause or schedule is a reference to a clause or schedule (as applicable) in this Agreement;
- (xiv) any legislation or any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;
- (xv) any code, guideline, recommendation or policy, or any provision of any code, guideline, recommendation or policy, includes any modification of it, or the substitution of it or any of its provisions for others, unless otherwise specified or directed by Aurizon Network;
- (xvi) any Authority, association or body whether statutory or otherwise (**first body**) is, if the first body ceases to exist or is re-constituted, re-named or replaced or the powers or functions of the first body is transferred to any other Authority, association or body (**replacement body**), deemed to refer to the replacement body established or constituted in lieu of the first body or as nearly as may be succeeding to the powers or functions of the first body;
- (xvii) access or access rights does not include rights granted by Aurizon Network to a Railway Operator under a Train Operations Deed; and
- (xviii) the Access Holder, if the Access Holder is comprised of more than one entity (for example, if the Access Holder is comprised of the participants in an unincorporated joint venture), is a reference to each entity comprising the Access Holder.

1.3 References to Access Rights

For the avoidance of doubt, Access Rights that are entitled to be utilised for the Access Holder includes Access Rights that could have been utilised had the Access Holder, in accordance with this Agreement, nominated an Operator to

use those Access Rights.

1.4 Material published on the Website

For the avoidance of doubt, material published on the Website includes material which is available to the Access Holder or its Operator via secured, password-protected online access to the Website.

1.5 Headings

Headings do not affect the interpretation of this Agreement.

1.6 Inconsistency

- (a) If there is any inconsistency between the substantive terms of this Agreement (comprising **clauses 1 to 36**) and the schedules of this Agreement, the substantive terms of this Agreement prevail to the extent of the inconsistency.
- (b) Subject to **clause 9.1(b)**, if there is any inconsistency between matters contained in the Access Undertaking (as amended by any Change in Access Undertaking) and this Agreement, the provisions of this Agreement prevail to the extent of the inconsistency unless expressly provided to the contrary.

2 Term

2.1 Term

This Agreement commences on the Commencement Date and, unless earlier terminated in accordance with its terms, continues until the Expiry Date.

2.2 Right to renewal

The Parties acknowledge and agree that any right which the Access Holder may have to renew this Agreement will be as provided in the Access Undertaking (as amended by any Change in Access Undertaking).

3 Access Undertaking

3.1 Incorporation

- (a) The parties agree that, for the purposes of the Access Undertaking, the Access Holder is considered an Access Seeker.
- (b) Aurizon Network and the Access Holder must comply with the following under the Access Undertaking:
 - (i) Interface Risk Provisions;
 - (ii) Transfer Provisions;
 - (iii) Relinquishment Provisions;
 - (iv) Reduction Factor Provisions;
 - (v) Force Majeure Provisions;
 - (vi) Resumption Provisions; and
 - (vii) Conditional Access Provisions.

- (c) Aurizon Network and the Access Holder must comply with the following under the Access Undertaking:
 - (i) Access Charge Provisions; and
 - (ii) Reference Tariff Provisions.
- (d) For the avoidance of doubt, the provisions set out in **clause 3.1(b)** and **3.1(c)** form part of this Agreement as if they were set out in full in this Agreement and, despite any other provision in the Access Undertaking:
 - (i) **clause 21** applies to any claim in respect of a breach of any such provision; and
 - (ii) **clause 24** applies in respect of any Dispute between the Parties in respect of any right or obligation (or in respect of the enforcement) of any such provision.

3.2 Changes in Access Undertaking

- (a) If there is a Change in Access Undertaking at any time relating to the provisions set out in **clause 3.1(b)**, then this **clause 3.2** applies.
- (b) A Party (**Notifying Party**) may, within 20 Business Days from the date of the Change in the Access Undertaking (or such longer period as the Parties may agree), notify (**Amendment Notice**) the other Party (**Receiving Party**) of:
 - (i) the changes to the terms of this Agreement which the Notifying Party requires as a consequence of, or to give full effect to, any Change in Access Undertaking relating to the provisions set out in **clause 3.1(b)**; and
 - (ii) the date from which the changes become effective (and if any changes become effective from different dates, the dates applicable to each change), which must be on or after the date on which the Change in Access Undertaking became effective (**Change Date(s)**).
- (c) An Amendment Notice must include an amended version of this Agreement, with the changes referred to in **clause 3.2(b)(i)** clearly identified.
- (d) Promptly following receipt of an Amendment Notice, the Receiving Party must notify the Notifying Party the extent to which the Receiving Party accepts or does not accept the drafting of the amendments to the terms of this Agreement proposed in the Amendment Notice (but the Receiving Party must not refuse to accept the incorporation into this Agreement of the Changes in the Undertaking outlined in the Amendment Notice).
- (e) If the Receiving Party does not accept the drafting of the amendments to the terms of this Agreement, the Parties must promptly meet to negotiate and attempt to agree the changes to the terms of this Agreement which are necessary as a consequence of, or to give full effect to, the Changes in the Undertaking specified in the Amendment Notice.
- (f) If the Parties do not agree the amendments in respect of the matters outstanding under **clause 3.2(e)** by the Change Date(s), the matter must be referred to the QCA for determination in accordance with the Dispute Provisions.

- (g) Amendments to the terms of this Agreement:
 - (i) accepted under **clause 3.2(d)**;
 - (ii) agreed under **clause 3.2(e)**; or
 - (iii) determined by the QCA under **clause 3.2(f)**,become effective from the Change Date(s) (or such other time as the QCA may determine).
- (h) Within 10 Business Days from the date:
 - (i) of the notice given under **clause 3.2(d)**;
 - (ii) the Parties agree under **clause 3.2(e)**; or
 - (iii) the QCA determines such amendments,(as applicable) Aurizon Network must prepare and send to the Access Holder a copy of this Agreement as modified.

4 Access Rights

4.1 Grant of Access Rights

In consideration of the Access Holder paying the Access Charges, on and from each Train Service Commitment Date for each Train Service Type until the Train Service Expiry Date for that Train Service Type, Aurizon Network grants, and will provide, to the Access Holder the Access Rights for that Train Service Type in accordance with the Train Description for that Train Service.

4.2 Nature and scope of Access Rights

- (a) The Access Rights granted under **clause 4.1** are non-exclusive contractual rights and do not give the Access Holder any right, title or interest of any proprietary nature in the Nominated Network.
- (b) Aurizon Network must provide the Access Holder with certain benefits, rights and services in accordance with the Access Undertaking and, to the extent relevant to the Access Holder's Access Rights, it is intended that the terms on which these requirements are provided are detailed in this Agreement.

4.3 Exercise of Access Rights and Operator nomination

- (a) The Parties acknowledge and agree that:
 - (i) the grant of the Access Rights to the Access Holder does not entitle the Access Holder to itself operate Train Services on the Nominated Network (unless it is also an Accredited Railway Operator and is nominated as an Operator in accordance with this Agreement);
 - (ii) the Access Holder can only utilise the Access Rights by nominating an Operator from time to time, in accordance with this Agreement; and
 - (iii) the Access Holder may nominate more than one Operator.
- (b) Subject to **clause 4.6(a)**, the Access Holder may, from time to time, provided that it is not in material breach of any of its obligations under this Agreement, nominate an Operator to utilise all or part of the Access

Rights upon giving at least 20 Business Days prior written notice to Aurizon Network. The notice must:

- (i) specify:
 - (A) the name, ABN, address and contact details of the Operator;
 - (B) the Access Rights which the Access Holder wishes to allocate to the Operator for the Operator to use in providing Train Services for the Access Holder;
 - (C) the first day and the last day of the period for which the Access Rights are to be allocated to the Operator; and
- (ii) be accompanied by either:
 - (A) a Train Operations Deed, executed by the Operator, which:
 - (1) reflects, in schedule 2 of that Train Operations Deed, the Access Rights which the Access Holder wishes to allocate to the Operator; and
 - (2) satisfies the Compliant Nomination Requirements; or
 - (B) a statement and evidence identifying the Operator's existing Train Operations Deed in respect of utilisation of the Access Rights under this Agreement and evidence that:
 - (1) the Operator agrees to the relevant nomination; and
 - (2) the Compliant Nomination Requirements are satisfied.
- (c) Access Rights allocated by the Access Holder to be used by any one or more Operators may not exceed, in aggregate, the Access Holder's Access Rights under this Agreement.
- (d) Despite any other provision in this Agreement and without limiting any of Aurizon Network's obligations under **clauses 4.3(e)** and **4.5(b)**, Aurizon Network must accept, or act on:
 - (i) any nomination of an Operator by the Access Holder under **clause 4.3(b)**; or
 - (ii) any variation which increases the allocation of Access Rights (including an increase to the period for which the Access Rights are to be allocated) to an Operator under **clause 4.5**,except where Aurizon Network (acting reasonably) determines either:
 - (iii) in respect of a nominated Train Service Type the Access Holder does not hold, or have the benefit of, Supply Chain Rights for those Train Services; or
 - (iv) the Operator:
 - (A) is in material breach of any of its obligations under an existing Train Operations Deed with Aurizon Network (or Access Agreement if the Operator is also a Network Customer); or
 - (B) is not Accredited.
- (e) Aurizon Network must:

- (i) within 10 Business Days of receiving the nomination under **clause 4.3(b)**, notify the Access Holder and the relevant Operator whether it accepts or rejects (providing its reasons) the nomination;
- (ii) if it rejects the nomination, facilitate the resolution of any matter the subject of its reasons for the rejection; and
- (iii) if it accepts the nomination, promptly do all things reasonably required (including compliance with **clause 4.6(a)** where applicable and amending the relevant Train Operations Deed to the extent required) to ensure that any delay to Train Services is minimised to the extent practicable including:
 - (A) execute both copies of the Train Operations Deed and return one copy to the Operator, if provided under **clause 4.3(b)(ii)(A)**; or
 - (B) vary the relevant Train Operations Deed to include the right to operate Train Services utilising the Access Rights in respect of which the Operator was nominated, and provide notice of that variation to the Operator, if a statement and evidence was provided under **clause 4.3(b)(ii)(B)**.
- (f) If Aurizon Network accepts the nomination of an Operator:
 - (i) the Access Holder must promptly provide a copy of this Agreement to the Operator; and
 - (ii) Aurizon Network must provide a copy of the IRMP to the Access Holder promptly after it has been agreed between the Parties and the Operator in accordance with the IRMP Provisions.

4.4 Access Interface Deed

- (a) If the Access Holder has entered into this Agreement for or on behalf of a Customer (as that term is defined in the Access Undertaking), prior to or on the date it exercises its rights under **clause 4.3(b)**, the Access Holder must execute and deliver the Access Interface Deed to Aurizon Network.
- (b) As soon as practicable after receiving the Access Interface Deed duly executed by the Access Holder, Aurizon Network must:
 - (i) provide a copy of the Access Interface Deed to the Access Holder; and
 - (ii) notify the Operator in writing that the Access Interface Deed has been executed by the Access Holder and Aurizon Network.

4.5 Changes to Operator nominations

- (a) The Access Holder may, from time to time, upon giving at least 2 Business Days prior written notice to Aurizon Network and each affected Operator:
 - (i) vary any nomination previously given by the Access Holder under this Agreement so as to vary either or both of the following:
 - (A) the Access Rights which the Access Holder has allocated to an Operator; or

- (B) the period for which the Access Rights are to be allocated to an Operator (provided that the period does not extend beyond the expiry date for the relevant Train Path (as that term is defined in the Access Undertaking)); or
 - (ii) withdraw any nomination previously given by the Access Holder under **clause 4.3(b)** or this **clause 4.5(a)**; and
 - (iii) if the variation or withdrawal of a nomination results from the operation of clause 10.2(d) under a Train Operations Deed, the Access Holder may nominate, in accordance with **clause 4.3**, an alternative Operator to utilise the “Category 1 Reduced Operational Rights” (as defined in the Train Operations Deed) and/or the “Category 2 Reduced Operational Rights” (as defined in the Train Operations Deed) (as applicable).
- (b) Aurizon Network must notify the Access Holder and the Operator if it accepts or rejects (providing its reasons) in accordance with **clauses 4.3(d)(ii) to 4.3(d)(iv)(B)** the variation within the lesser of 10 Business Days or the period remaining prior to the relevant Intermediate Train Plan being finalised.
 - (c) Where an Operator receives an increased allocation of Access Rights following a varied nomination in accordance with this **clause 4.5**, and the date on which that variation commences is during the period covered by the then current Intermediate Train Plan, then Aurizon Network will schedule any additional Train Services in accordance with the Network Management Principles.
 - (d) If Aurizon Network rejects the nomination, it must facilitate the resolution of any matter the subject of its reasons for the rejection.
 - (e) If Aurizon Network accepts the nomination, it must promptly do all things reasonably required to ensure that any delay to Train Services is minimised to the extent practicable including vary the relevant Train Operations Deed to include the right to operate Train Services utilising the Access Rights (or the “Category 1 Reduced Operational Rights” (as defined in the Train Operations Deed) and/or the “Category 2 Operational Rights” (as defined in the Train Operations Deed), as applicable) in respect of which the Operator was nominated.

4.6 Nominations with different Train Descriptions

- (a) If at any time:
 - (i) the Access Holder intends to:
 - (A) nominate an Operator to utilise all or part of the Access Rights; or
 - (B) vary a nomination previously given by the Access Holder; and the Train Services of the relevant Operator will have a Train Description different from that contemplated in **Schedule 2**; or
 - (ii) the Access Holder otherwise wishes to vary the Train Services from the Train Description nominated in **Schedule 2**,

then:

- (iii) prior to nominating the Operator or varying the nomination, Aurizon Network and the Access Holder must negotiate and endeavour to agree any amendments to this Agreement (including any amendments to the Access Rights and, subject to **clause 4.6(b)**, the Access Charge Rates) that may be necessary to reflect the Train Description of the Train Services to be operated by the relevant Operator for that part of the Access Rights to be allocated to that Operator; and
 - (iv) no amendment to the Access Rights that results in the Access Holder being granted increased rights to access the Nominated Network has any effect unless and until the Access Holder and Aurizon Network have complied with Aurizon Network's Access Undertaking (as amended by any Change in Access Undertaking) (including with respect to the allocation of those increased Access Rights).
- (b) Any variation to the Access Charge Rates under **clause 4.6(a)(iii)**:
- (i) must not exceed the amount required to compensate Aurizon Network for any reasonable and direct increase in cost to Aurizon Network arising from the nomination, or variation to the nomination of, the Operator; and
 - (ii) must be reasonably justified (including calculations) by Aurizon Network to the Access Holder.

4.7 Reduction of rights resulting in an Over-Allocation

If at any time:

- (a) the Access Rights of:
 - (i) the Access Holder are reduced, relinquished or transferred under this Agreement; or
 - (ii) the Nominated Monthly Train Services in respect of a Train Service Type are reduced or varied under this Agreement or the Operator's Train Operations Deed; and
 - (b) as a result of such reduction, relinquishment or transfer of Access Rights or reduction or variation of Nominated Monthly Train Services in respect of a Train Service Type, the Access Rights allocated by the Access Holder to any one or more Operators under **clause 4.3** or **4.4** for a Train Service Type exceed, in aggregate, the Access Holder's Access Rights under this Agreement for that Train Service Type following the reduction, relinquishment or transfer (such excess being the **Over-Allocation**),
- then, unless the Access Holder varies the nominations in accordance with **clause 4.5(a)** within 2 Business Days of such reduction, relinquishment or transfer to eliminate the Over-Allocation, the Access Holder will be deemed to have varied the nominations in accordance with **clause 4.5(a)** as follows:
- (c) if the Access Holder has nominated only one Operator for that Train Service Type, reducing the Access Rights for that Train Service Type which the Access Holder has allocated to the Operator under its Train Operations Deed by the Over-Allocation; or

- (d) if the Access Holder has nominated multiple Operators in respect of an affected Train Service Type, reducing the Access Rights for that Train Service Type which the Access Holder has allocated to each Operator under this Agreement and each Operator's respective Train Operations Deed by a share of the Over-Allocation that is as closely as possible proportionate to the Train Services allocated to the Operator for the affected Train Service Type as a share of the total Train Services allocated to all Operators for that Train Service Type,

and such reduction will take effect on the date the reduction, variation, relinquishment or transfer takes effect, with Aurizon Network providing written notice of the reduction to each affected Operator as soon as practicable.

4.8 Operation of Ad Hoc Train Service

If:

- (a) the Access Holder (or its Operator) notifies Aurizon Network that it wishes to have an Operator (which the Access Holder must identify when notifying Aurizon Network) operate an Ad Hoc Train Service (which the Access Holder (or its Operator) must identify having reference to the definition of Ad Hoc Train Service) for a Train Service Type; and
- (b) the relevant Operator has notified Aurizon Network that is able and willing to operate that Ad Hoc Train Service for a Train Service Type under its Train Operations Deed to the extent the Access Holder provided the notice under **clause 4.8(a)**,

then:

- (c) to the extent permitted by the Network Management Principles, Aurizon Network must (if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking but otherwise must use reasonable endeavours to) schedule the Ad Hoc Train Service for the Train Service Type in the Daily Train Plan; and
- (d) on and from the time that the Ad Hoc Train Service is scheduled in the Daily Train Plan, the terms and conditions of this Agreement apply to the Ad Hoc Train Service as if the Ad Hoc Train Service is a Train Service for the Train Service Type the relevant Operator is entitled to operate utilising the Access Rights for that Train Service Type.

4.9 Supply Chain Rights

- (a) The Access Holder must demonstrate to the satisfaction of Aurizon Network (acting reasonably) that the Access Holder holds, or has the benefit of, or is reasonably likely to hold, or have the benefit of, Supply Chain Rights for the commencement of the operation of the Train Services for each Train Service Type.
- (b) The Access Holder may not nominate an Operator under this Agreement in respect of a Train Service Type for which the Access Holder does not hold, or have the benefit of, Supply Chain Rights for those Train Services.
- (c) The Access Holder must, for each Train Service Type, use all reasonable endeavours to continue to hold, or have the benefit of, those Supply Chain Rights until at least the Train Service Expiry Date for the Train Service, provided that if the term of any Supply Chain Rights expires or

terminates prior to the Train Service Expiry Date for that Train Service, the Access Holder must use reasonable endeavours to secure equivalent Supply Chain Rights for the period until the Train Service Expiry Date for that Train Service.

- (d) If, prior to the commencement of the operation of the Train Services for each Train Service Type, Aurizon Network:
 - (i) acting reasonably, considers the Access Holder's circumstances have changed; and
 - (ii) notifies the Access Holder that it requires details of the changed circumstances,

the Access Holder must, within 10 Business Days after its notice, provide Aurizon Network reasonable details of:

- (iii) the Supply Chain Rights for the Train Services for a Train Service Type that the Access Holder holds, or has the benefit of at the time; and
- (iv) if applicable, the steps which the Access Holder has taken, or intends to take to secure any additional, renewed, extended or replacement Supply Chain Rights for the Train Services for the Train Service Type and the status of any such steps.

5 Billing and payments

5.1 Charges

- (a) The Access Holder must pay to Aurizon Network the Access Charges and any other charges (if any) as calculated in accordance with this Agreement.
- (b) Where a Train Service is taken to be cancelled under a Train Operations Deed, despite the Train Service being cancelled and not operated, the Train Service will be taken to be one of the Nominated Monthly Train Services for the Train Service Type for the Month in which the Train Service was originally scheduled in the Daily Train Plan provided that:
 - (i) the reason for the cancellation is not (or is deemed under the relevant Train Operations Deed to not be) an Aurizon Network Cause; and
 - (ii) the relevant Operator notified Aurizon Network that it decided not to, or was unable to, operate that Train Service less than 48 hours (or failed to give any notification) before the time for commencement of the operation of that Train Service as originally scheduled in the Daily Train Plan.

5.2 Invoicing

- (a) As soon as reasonably practicable after the end of each Billing Period, Aurizon Network must give to the Access Holder an invoice for:
 - (i) the Access Charges for that Billing Period; plus
 - (ii) any amounts payable but unpaid by the Access Holder to Aurizon Network under this Agreement, and which have not previously been

invoiced, as at the end of the Billing Period.

- (b) Aurizon Network must give the Access Holder an invoice under **clause 5.2(a)** after the end of a Billing Period even if no amount is required to be invoiced under **clause 5.2(a)** for that Billing Period.
- (c) If this Agreement terminates or expires on a date other than 30 June then, as soon as reasonably practicable after the first 30 June to occur after the termination or expiry of this Agreement, Aurizon Network must give to the Access Holder an invoice for the TOP Charge (if any) for the Year during which this Agreement terminated or expired.
- (d) Each invoice given under this **clause 5.2** must be accompanied by reasonable details of Aurizon Network's calculation of the amounts claimed in the invoice including a breakdown of the Access Charges and itemised description of any other amounts (for the amounts in **clause 5.6**, particulars must include amounts against which the set-off is applied).

5.3 Payment

- (a) Subject to **clause 5.4**, the Access Holder must:
 - (i) pay to Aurizon Network the amount claimed in an invoice given under **clause 5.2** within 10 Business Days after the invoice is given to the Access Holder; and
 - (ii) pay all amounts payable to Aurizon Network under this Agreement:
 - (A) in Australian currency; and
 - (B) by:
 - (1) direct deposit into one or more bank accounts notified by Aurizon Network to the Access Holder in the invoice for this purpose (whether or not those bank accounts are in the name of Aurizon Network); or
 - (2) such other payment method as Aurizon Network specifies in the invoice (acting reasonably).
- (b) Any payment by the Access Holder of an amount payable under this Agreement in accordance with this **clause 5.3** is taken to be a payment of such amount to Aurizon Network for the purpose of this Agreement (whether or not such amount is paid into a bank account in the name of Aurizon Network).

5.4 Disputes

- (a) Any Disputes in connection with an amount claimed in an invoice must be resolved in accordance with **clause 24**.
- (b) Despite **clause 5.4(a)**, if an amount claimed in an invoice given by Aurizon Network under **clause 5.2** is Disputed, then unless the amount is nil due to the operation of **clause 5.6**, the Access Holder must pay to Aurizon Network:
 - (i) the portion of the amount claimed in the invoice that is not in Dispute; and
 - (ii) 50% of the portion of the amount claimed in the invoice that is in Dispute,

within the time specified in **clause 5.3(a)(i)**.

- (c) Upon resolution of any Dispute about an amount claimed in an invoice given by Aurizon Network, if the total amount which Aurizon Network was entitled to claim in the invoice (as resolved) is:
- (i) more than the amount paid by the Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 5.5** (from the date when the amount in Dispute would have been due and payable under **clause 5.3(a)(i)** but for **clause 5.4(b)**, until the date on which the difference, together with any interest, has been paid in full), must be paid by the Access Holder to Aurizon Network within 20 Business Days after the resolution of the Dispute; or
 - (ii) less than the amount paid by the Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 5.5** (from the date when the amount in Dispute was paid by the Access Holder until the date on which the credit is applied or the amount is paid (as applicable) under this **clause 5.4(c)(ii)**), must be:
 - (A) applied by Aurizon Network as credit in favour of the Access Holder against the amount claimed in the next invoice to be issued by Aurizon Network to the Access Holder under **clause 5.2** after the resolution of the Dispute (and, if necessary, to subsequent invoices issued by Aurizon Network under **clause 5.2** until the amount of the difference (including any interest) has been fully credited in favour of the Access Holder against amounts payable under invoices issued by Aurizon Network to the Access Holder under **clause 5.2**); or
 - (B) if there will be no further invoices issued by Aurizon Network to the Access Holder under **clause 5.2** after the resolution of the Dispute or the last credit referred to in **clause 5.4(c)(ii)(A)**, paid by Aurizon Network to the Access Holder within 20 Business Days after resolution of the Dispute or the last credit referred to in **clause 5.4(c)(ii)(A)** (as applicable).

5.5 Interest on overdue payments and Disputed amounts

- (a) Without prejudice to the rights, powers and remedies of a Party under this Agreement or otherwise at Law, 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, then that Party must pay interest on the outstanding amount calculated in accordance with this **clause 5.5**.
- (b) Interest accrues on outstanding amounts from the due date for payment until that amount, together with the interest on that amount, has been paid in full.
- (c) Interest under **clauses 5.4(c)(i), 5.4(c)(ii) and 5.5(b)** is calculated at the Default Rate. Any interest accrued but unpaid at the end of each Month is capitalised and, once capitalised, will itself bear interest.

5.6 Right of set-off

A Party may deduct from any amounts which are due and payable by the Party to the other Party under this Agreement any amounts which are due and payable by the other Party to the Party under this Agreement.

5.7 Consequences of failure to comply with Performance Levels

- (a) If an Operator nominated by the Access Holder under this Agreement does not comply with the Performance Levels imposed on it under a Train Operations Deed, then, subject to **clause 5.4**, the Access Holder must pay to Aurizon Network the amount (if any) determined in accordance with the relevant Train Operations Deed as a result of that failure, as part of the invoice issued by Aurizon Network for Access Charges and other charges for the Billing Period immediately following Aurizon Network becoming entitled to that amount provided that, if there is no next Billing Period, the Access Holder must pay such amount to Aurizon Network within 10 Business Days after receipt of an invoice from Aurizon Network.
- (b) If Aurizon Network does not comply with the Performance Levels imposed on it under a Train Operations Deed, then Aurizon Network will credit to the Access Holder the amount (if any) determined in accordance with the relevant Train Operations Deed as a result of that failure by way of a deduction from the invoice issued by Aurizon Network for Access Charges and other charges for the Billing Period immediately following the Access Holder becoming entitled to that amount in accordance with **clause 5.7(c)**.
- (c) If the total amount which Aurizon Network must credit to the Access Holder under **clause 5.7(b)** is more than the amount under the invoice issued by Aurizon Network for Access Charges and other charges for the Billing Period immediately following the Access Holder becoming entitled to that amount, then:
 - (i) the amount of the difference must be applied by Aurizon Network as credit in favour of the Access Holder against the amount claimed in the next invoice to be issued by Aurizon Network under **clause 5.2** and to subsequent invoices issued by Aurizon Network under **clause 5.2** until the amount of the difference has been fully credited in favour of the Access Holder against amounts payable under invoices issued by Aurizon Network under **clause 5.2**); or
 - (ii) if there is no next Billing Period, then Aurizon Network must pay such amount to the Access Holder within 10 Business Days after receipt of an invoice from the Access Holder.

6 Security

6.1 Requirement to provide Security after Commencement Date

- (a) This **clause 6.1** only applies if **item 3** of **Schedule 1** states that it applies.
- (b) On or before the date 10 Business Days prior to the Commitment Date, the Access Holder must deliver Security to Aurizon Network which satisfies the requirements of this **clause 6** for an amount of not less than the Security Amount.

6.2 Requirement to provide Security on certain events occurring

- (a) If at any time during the Term when the Access Holder is not required to provide Security to Aurizon Network under this **clause 6**:
 - (i) the Access Holder does not pay any amount (together with any interest) payable under this Agreement and which is not the subject of a Dispute by the due date for payment or within five Business Days after Aurizon Network gives written notice to the Access Holder requiring payment; or
 - (ii) Aurizon Network considers (acting reasonably) that the Access Holder may:
 - (A) no longer be financially sound;
 - (B) no longer be able to meet its debts as and when they fall due; or
 - (C) not otherwise be capable of performing its obligations under this Agreement,

then the Access Holder must, within 10 Business Days after being required to do so by Aurizon Network, deliver Security to Aurizon Network which satisfies the requirements of this **clause 6** for an amount of not less than the Security Amount.

- (b) In considering whether to require the Access Holder to provide Security under **clause 6.2(a)(ii)**, Aurizon Network may take into consideration:
 - (i) expected future payment obligations under this Agreement and the financial performance of the Access Holder; and
 - (ii) the Access Holder ceasing to have an Acceptable Credit Rating.

6.3 Requirement to provide Security for the Security Amount

- (a) If the Access Holder is required to provide Security under this **clause 6**, the Security must be provided and maintained for an amount of not less than the Security Amount.
- (b) If at any time during the Term:
 - (i) the Access Holder is required to provide Security under this **clause 6**; and
 - (ii) the Security provided by the Access Holder to Aurizon Network under this **clause 6** is for an amount which is less than the Security Amount (including due to Aurizon Network having recourse to the Security under **clause 6.6**),

then the Access Holder must promptly (and in any event within 10 Business Days after being required to do so by Aurizon Network) deliver to Aurizon Network:

- (iii) additional Security; or
- (iv) replacement Security,

which satisfies the requirements of this **clause 6** so that Security is provided and maintained for an aggregate amount of not less than the Security Amount.

6.4 Requirement to provide Security for additional Train Service Type

Without limiting **clause 6.3**, if:

- (a) at any time during the Term:
 - (i) **Schedule 2** is varied to include an additional Train Service Type; or
 - (ii) the Train Description for an existing Train Service Type is varied;
- (b) at the time of the variation referred to in **clause 6.4(a)** the Access Holder is required to provide Security under this **clause 6**; and
- (c) at the time of the variation referred to in **clause 6.4(a)** the Security provided by the Access Holder to Aurizon Network under this **clause 6** is for an amount which is less than the amount which will be the Security Amount on and from, as applicable:
 - (i) the Train Service Commitment Date for that additional Train Service Type; or
 - (ii) the date the variation to the Train Description for that existing Train Service Type takes effect,

having regard to the additional Access Charges payable, in the future, for that Train Service Type, then the Access Holder must promptly (and in any event within 10 Business Days before the applicable date specified in **clause 6.4(c)(i)** or **6.4(c)(ii)**) deliver to Aurizon Network:

- (iii) additional Security; or
- (iv) replacement Security,

which satisfies the requirements of this **clause 6** so that Security is provided and maintained for an aggregate amount of not less than the amount which will be the Security Amount on and from the applicable date specified in **clause 6.4(c)(i)** or **6.4(c)(ii)** (having regard to the additional Access Charges payable, in the future, for that Train Service Type).

6.5 Replacement of Security

The Access Holder may, with Aurizon Network's consent, replace any Security provided by the Access Holder under this **clause 6** with replacement Security which satisfies the requirements of this **clause 6**.

6.6 Recourse to Security

Aurizon Network may have recourse to the Security:

- (a) if Aurizon Network notifies the Access Holder of a payment default under **item 1** of **Schedule 6** and the Access Holder fails to remedy the default within 20 Business Days after the date the notice is given, following the expiry of such period;
- (b) if the amount is not payable by a specified date and the Access Holder fails to make payment within 20 Business Days after Aurizon Network has requested payment of such amount, following the expiry of such period; or
- (c) if the amount is the subject of a Dispute, in accordance with **clause 5.4(c)(i)**.

6.7 Review of requirement to provide Security

If at any time during the Term, the Access Holder:

- (a) is required to provide Security under this **clause 6**; and
- (b) considers that its financial circumstances have changed such that it should no longer be required to provide Security,

then the Access Holder may request (provided that the Access Holder must not request more than once in any Year) that Aurizon Network review the creditworthiness of the Access Holder and Aurizon Network will undertake such a review when requested.

6.8 Return of Security

Aurizon Network must return to the Access Holder (and, where appropriate, give the Access Holder any necessary releases in relation to) any Security provided by the Access Holder under this **clause 6**:

- (a) subject to Aurizon Network's rights of recourse to the Security under **clause 6.6**, promptly and in any event within 10 Business Days after the date of termination or expiry of this Agreement;
- (b) on the Access Holder delivering to Aurizon Network any replacement Security under **clause 6.3(b)(iv)**, **6.4(c)(iv)** or **6.5** which satisfies the requirements of this **clause 6**; or
- (c) if, after a review pursuant to **clause 6.7**, Aurizon Network considers, acting reasonably, that it is no longer necessary for the Access Holder to provide Aurizon Network with Security under this **clause 6**.

7 Accreditation

- (a) Aurizon Network must have and maintain Accreditation to the extent required to perform its obligations and exercise its rights under this Agreement and, if requested to do so in writing by the Access Holder, provide to the Access Holder copies of documentation evidencing currency, renewal or amendment of its Accreditation within five Business Days of such request.
- (b) Aurizon Network must notify the Access Holder as soon as possible of any notice from an Authority affecting, or likely to affect, its Accreditation, and must provide a copy of that notice to the Access Holder on request.

8 Resumption of Access Rights

- (a) Unless otherwise specified in this Agreement, Aurizon Network may resume some or all of the Access Rights in accordance with the Resumption Provisions.
- (b) The Access Holder and Aurizon Network must comply with the Resumption Provisions.
- (c) Within the later of two Business Days after:
 - (i) a Resumption Notice is given to the Access Holder; and
 - (ii) the resolution of the Dispute if:

- (A) there is a Dispute in connection with a decision by Aurizon Network to resume the Access Holder's Access Rights; and
- (B) the outcome of the Dispute is that the Access Rights must be resumed,

the Access Holder may give notice to Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which the Access Holder has allocated to an Operator to take into account any resumption of Access Rights determined or agreed under the Resumption Provisions or as determined under the relevant dispute resolution process.

- (d) Except to the extent that the Access Holder has given a notice as contemplated in **clause 8(c)** , the resumption of Access Rights for each Train Service Type:
 - (i) firstly, are deemed to reduce the Access Rights for that Train Service Type for which the Access Holder has not nominated an Operator; and
 - (ii) if, after the operation of the Relinquishment Provisions, there is an Over-Allocation for the relevant Train Service Type, **clause 4.7** applies in respect of that Over-Allocation.

9 Reduction of Conditional Access Rights due to Capacity Shortfall

9.1 Application

- (a) This **clause 9** only applies in respect of a Train Service Type if the Train Description for that Train Service Type specifies that this **clause 9** applies in respect of that Train Service Type.
- (b) If this **clause 9** applies in respect of a Train Service Type, this **clause 9** only applies to the extent that it:
 - (i) is not inconsistent with the Access Undertaking (as amended by any Change in Access Undertaking); and
 - (ii) does not oblige Aurizon Network to do or not do anything that would cause Aurizon Network to breach the Access Undertaking (as amended by any Change in Access Undertaking).

9.2 Conditional Access Rights

If this **clause 9** applies in respect of a Train Service Type:

- (a) the Access Rights for that Train Service Type under this Agreement (**Conditional Access Rights**) are conditional upon the completion and commissioning of the Expansion specified in the Train Description for that Train Service Type;
- (b) despite the Train Service Commitment Date specified in the Train Description for the Conditional Access Rights, the Train Service Commitment Date for the Conditional Access Rights will be taken to be the later of:
 - (i) the Train Service Commitment Date for the Conditional Access

- Rights specified in the Train Description for the Conditional Access Rights; and
- (ii) the date upon which all Segments of the Expansion are completed and commissioned; and
- (c) the Access Holder and Aurizon Network must comply with the Conditional Access Provisions.

9.3 Effect on Operator nominations

- (a) Within the later of:
 - (i) two Business Days after the Capacity Assessment Notice is given to the Access Holder in accordance with the Conditional Access Provisions; and
 - (ii) if the Access Holder disputes the Capacity Assessment Notice or is otherwise invited to participate in the dispute resolution process under the relevant Other Conditional Access Holder's Access Agreement, two Business Days after the resolution of the Dispute, the Access Holder may notify Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which the Access Holder has allocated to an Operator to take into account the variation to the Conditional Access Rights under this **clause 9**.
- (b) Except to the extent that the Access Holder has given a notice as contemplated in **clause 9.3(a)** in respect of the variation to the Conditional Access Rights under this **clause 9** for each affected Train Service Type, the variation to the Conditional Access Rights for each affected Train Service Type:
 - (i) are deemed to reduce the Access Rights for that Train Service Type for which the Access Holder has not nominated an Operator; and
 - (ii) if, after the operation of **clause 9.3(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, **clause 4.7** applies in respect of that Over-Allocation.

9.4 Future capacity developments

If any Conditional Access Rights are varied under this **clause 9**, the Access Holder acknowledges and agrees that Aurizon Network will only be obliged to develop additional Capacity, and to grant the Access Holder Access Rights in respect of any such additional Capacity, if, and to the extent that, it is obliged to do so under the Access Undertaking (as amended by any Change in Access Undertaking).

10 Relinquishment of Access Rights

- (a) The Access Holder may relinquish some or all of the Access Rights in accordance with the Relinquishment Provisions.
- (b) The Access Holder and Aurizon Network must comply with the Relinquishment Provisions.

11 Transfer of Access Rights by Access Holder

- (a) The Access Holder may Transfer all or part of the Access Rights to itself or a Third Party in accordance with the Transfer Provisions.
- (b) The Access Holder and Aurizon Network must comply with the Transfer Provisions.

12 Reduction Factor

12.1 Determination of the Reduction Factor

- (a) If Nominated Access Rights are intended to be relinquished under **clause 10** or **11**, the Reduction Factor must be calculated in accordance with the Reduction Factor Provisions.
- (b) The Access Holder and Aurizon Network must comply with the Transfer Provisions.

12.2 Replacement Access Agreement

If Aurizon Network identifies an opportunity for it to enter into an Access Agreement with an existing or prospective Network Customer that would result in a lessening of the Relinquishment Fee or Transfer Fee (as applicable) that would otherwise be payable to Aurizon Network under **clause 10** or **11** (as applicable), Aurizon Network will not unreasonably delay the process for negotiating and executing an Access Agreement with that existing or prospective Network Customer.

13 Resumptions, reductions, relinquishments and transfers - General

13.1 Termination where no Access Rights remain

- (a) Where Access Rights have been resumed, reduced, relinquished or transferred in accordance with this Agreement (including under **clauses 7, 9, 10, 11** and **25.3**) to the extent that there is no longer any Access Rights remaining the subject of this Agreement, then Aurizon Network may terminate this Agreement by notice to the Access Holder (without prejudice to those provisions which are stated to survive this Agreement).
- (b) Any termination under this **clause 13.1** is without prejudice to any rights of any Party which accrued on or before termination.

13.2 Effect on entitlement to operate and Access Charge Rates

Where Access Rights have been resumed, reduced, relinquished or transferred in accordance with this Agreement (including under **clauses 7, 9, 10, 11** and **25.3**), then for the avoidance of doubt:

- (a) the Access Holder's entitlement to have an Operator operate Train Services is also reduced in accordance with that resumption, reduction, relinquishment or transfer of Access Rights;
- (b) the Access Holder's Nominated Monthly Train Services for each applicable Train Service Type will be taken to be varied to be reduced in

accordance with that resumption, reduction, relinquishment or transfer of Access Rights; and

- (c) the Access Holder will no longer be obliged to pay Access Charges in respect of the resumed, reduced, relinquished or transferred Access Rights (except for any such Access Charges that accrued prior to the resumption, reduction, relinquishment or transfer, including any TOP Charge payable in respect of the part of the Year prior to the resumption, reduction, relinquishment or transfer).

13.3 No compensation or liability

- (a) Except for any payment specifically provided in this Agreement or liability for any breach by Aurizon Network of this Agreement, Aurizon Network is not liable for any loss or damage, however caused (including in contract, tort (including negligence) or otherwise) suffered or incurred by the Access Holder in connection with any resumption, reduction, relinquishment or transfer of Access Rights in accordance with **clauses 7, 9, 10, 11 and 25.3**.
- (b) The Access Holder releases Aurizon Network from any Claim for loss or damage referred to in **clause 13.3(a)** that the Access Holder may otherwise have.

14 Consequences of a failure of an Operator to satisfy conditions

14.1 Reduction of allocation of Access Rights

If:

- (a) an Operator (**Defaulting Operator**) fails to satisfy the conditions for:
 - (i) the commencement of Train Services under clause 10.2 of its Train Operations Deed; or
 - (ii) the commencement of Train Services for a Train Service Type under clause 10.3 of its Train Operations Deed; and
- (b) Aurizon Network has given a notice to the Access Holder and the Defaulting Operator in accordance with clause 10.2(c) or clause 10.3(c)(iv)(A)(1) (as applicable) of the Defaulting Operator's Train Operations Deed,

then, on such notice being given by Aurizon Network:

- (c) the Access Holder is deemed to have withdrawn its allocation of Access Rights to the Defaulting Operator in respect of:
 - (i) in the case of a notice under clause 10.2(c) of the Defaulting Operator's Train Operations Deed, all of the Access Rights for which the Defaulting Operator has been nominated; and
 - (ii) in the case of a notice under clause 10.3(c)(iii) of the Defaulting Operator's Train Operations Deed, that part of the Access Rights for which the Defaulting Operator has been nominated but in respect of which the Defaulting Operator has failed to satisfy the relevant conditions in clause 10.3 of its Train Operations Deed; and

- (d) without limiting the Access Holder's rights under **clauses 4.3** and **4.4**, the Access Holder will have the right under **clauses 4.3(b)** and **4.4** to nominate a new Operator to use, or vary the previous nomination of another Operator to include, the Access Rights which were previously allocated to the Defaulting Operator.

14.2 Reversing changes to Train Descriptions

- (a) If:
 - (i) a Defaulting Operator fails to satisfy the conditions for the commencement of Train Services for a Train Service Type (**relevant Train Service Type**) under clause 10.3 of its Train Operations Deed; and
 - (ii) Aurizon Network has given a notice to the Access Holder and the Defaulting Operator in accordance with clause 10.3(c)(iv)(B)(1) of the Defaulting Operator's Train Operations Deed,the Access Holder may elect to allocate the varied Train Service Type to another Operator (either through a new nomination or variation of an existing nomination).
- (b) If the Access Holder fails to notify Aurizon Network of its election within 10 Business Days then the Train Description for the relevant Train Service Type will be taken not to have been varied (even if the relevant variation has taken effect) and the Train Description for the relevant Train Service Type will be taken to be the Train Description for the relevant Train Service Type in force immediately before the variation took effect.

15 Compliance

15.1 General requirements – Parties

To the extent relevant to the performance of its obligations under this Agreement, each Party must observe and comply with:

- (a) all applicable Laws;
- (b) the lawful requirements of relevant Authorities; and
- (c) to the extent applicable to that Party:
 - (i) the terms of the Access Undertaking (as amended by any Change in Access Undertaking); and
 - (ii) the IRMP (subject to, in the Access Holder's case, receipt of the IRMP from Aurizon Network in accordance with **clause 4.3(f)(ii)**).

15.2 General Requirements – Aurizon Network

To the extent relevant to the performance of its obligations under this Agreement, Aurizon Network must observe and comply with:

- (a) the conditions of its Accreditation;
- (b) all licences and permits affecting its operations;
- (c) the Network Management Principles; and
- (d) any Environmental Authority it holds from time to time.

15.3 Non-compliance by Operator with Train Description

- (a) If:
- (i) Train Services for a Train Service Type operated by an Operator (**Defaulting Operator**) do not comply, in any material respect, with the Train Description for the Train Service Type, except where such non-compliance is attributable to another Railway Operator or Aurizon Network; and
 - (ii) the Defaulting Operator fails to demonstrate to the reasonable satisfaction of Aurizon Network, within 20 Business Days of being requested to do so, that those Train Services operated by the Defaulting Operator will consistently comply with the applicable Train Description for the remainder of the Term,

then, without limiting any right Aurizon Network has to suspend or terminate the Train Services for a Train Service Type under a Train Operations Deed, Aurizon Network must promptly:

- (iii) notify the Access Holder of any such non-compliance and the failure to demonstrate future consistent compliance with the relevant Train Description (**Notice of Defaulting Operator**); and
 - (iv) commence consultation with the Access Holder and the Defaulting Operator in respect the non-compliance.
- (b) Without limiting any right Aurizon Network has to suspend or terminate the Train Services for a Train Service Type under the Train Operations Deed, before taking any steps under **clause 15.3(c)**, Aurizon Network must provide the Access Holder with at least 20 Business Days from the date of the Notice of Defaulting Operator to:
- (i) unless the Train Services for a Train Service Type have been terminated under a Train Operations Deed, procure the Defaulting Operator to rectify the non-compliance notified under **clause 15.3(a)**; or
 - (ii) nominate an alternative Operator to provide the relevant Train Services in accordance with its rights to do so under this Agreement, and

unless the Train Services for a Train Service Type have been terminated under a Train Operations Deed, provide the Access Holder prior notice of any action Aurizon Network intends to take under **clause 15.3(c)**.

- (c) If, following the provision of the Notice of Defaulting Operator under **clause 15.3(a)** and taking of the steps in **clause 15.3(b)**, the Access Holder has not nominated an alternative Operator to provide the relevant Train Services within 20 Business Days from the provision of the Notice of Defaulting Operator or Aurizon Network continues to not be reasonably satisfied that the Defaulting Operator will consistently comply with the Train Description under the Train Operations Deed for the remainder of the term of that Train Operations Deed, Aurizon Network may:
- (i) vary the applicable Train Description for the Affected Train Service Type to a level it reasonably expects to be achievable by the Defaulting Operator for the remainder of the Term, having regard to

- the extent of previous compliance with the applicable Train Description (but not taking into account, for the purpose of assessing previous compliance, any non-compliance to the extent that the non-compliance was attributable to another Railway Operator or to Aurizon Network); and
- (ii) reasonably vary this Agreement in accordance with **clauses 32.3(f), 32.3(g) and 32.3(h)** to reflect the impact of the change in the applicable Train Description.
 - (d) If Aurizon Network varies the applicable Train Description for the Affected Train Service Type under **clause 15.3(c)(i)**, it must issue a notice to the Access Holder setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in **Schedule 2** of this Agreement.
 - (e) The Access Holder is entitled to dispute any variation proposed by Aurizon Network pursuant to this **clause 15.3** in accordance with the process set out in **clause 32.3(h)**.

16 Weighbridges and Overload Detectors

16.1 Verification

If clause 17 of the Train Operations Deed applies then:

- (a) subject to **clause 16.1(b)**, unless otherwise determined by calibration testing under clause 17.4 of the Train Operations Deed, the relevant Weighbridge or Overload Detector (as applicable) is deemed to have malfunctioned from the date the notice is given under clause 17.4(a) of the Train Operations Deed until the testing referred to in clause 17.4(b) of the Train Operations Deed has been carried out and, if required, the Weighbridge or Overload Detector has been recalibrated. Until such testing has been carried out and the Weighbridge or Overload Detector has been recalibrated, the mass of the relevant Train or Wagon which would otherwise have been measured by that Weighbridge or Overload Detector will be the Maximum Desirable Gross Tonnage (as the term is defined in the Train Operations Deed) for the Train or Wagon, as applicable; and
- (b) where the person conducting the test in accordance with clause 17.4(b) of the Train Operations Deed determines that the Weighbridge or Overload Detector (as applicable) is measuring within the tolerances specified in item 5 of Schedule 3 of the Train Operations Deed, the Weighbridge or Overload Detector will be treated as having been measuring accurately from the date on which the relevant notice was given under clause 17.4(a) of the Train Operations Deed and the Access Charges will be determined from that date in accordance with **Schedule 4**. The invoice for Access Charges for the Billing Period immediately following the Billing Period in which such determination is made will be adjusted to appropriately account for the difference in payment of Access Charges arising from the Weighbridge or Overload Detector having been treated as malfunctioning under **clause 16.1(a)**.

17 Infrastructure management

17.1 Notifications

- (a) As soon as is reasonably practicable after it becomes aware, the Access Holder must notify Aurizon Network of any damage to or disrepair or failure in operation or function of any part of the Nominated Network.
- (b) The Access Holder:
 - (i) unless permitted under this Agreement or authorised by Aurizon Network, must not cause any Obstruction or permit to continue any Obstruction caused by the Access Holder; and
 - (ii) must notify Aurizon Network as soon as reasonably practicable after the Access Holder's Staff or Access Holder's directors discover or become aware of:
 - (A) any Obstruction (including all Incidents) or any breach or suspected breach of Safeworking Procedures; or
 - (B) anything which the Access Holder, the Access Holder's Staff or Access Holder's directors, observe which may reasonably be considered to cause or contribute to the occurrence of an Incident or Obstruction; or
 - (C) any harm to the Environment within the area of the Nominated Network, which the Access Holder knows would result in a breach by Aurizon Network of the terms of any environmental authority it holds in connection with the Nominated Network.

17.2 Investigations

- (a) If an Incident occurs, an Investigation into the Incident must be:
 - (i) commenced as soon as practicable unless otherwise agreed between the Parties; and
 - (ii) conducted in accordance with the Investigation Procedures.
- (b) Each Party must cooperate, and ensure that Aurizon Network's Staff or the Access Holder's Staff (as applicable) cooperate, fully with any Investigation.
- (c) The Parties must consult in good faith in relation to the implementation of any recommendations arising from an Investigation in accordance with the Investigation Procedures.

18 Interface management

18.1 Compliance with Interface Risk Management Plan

Each Party must advise the other Party of any failure to comply with the IRMP as soon as reasonably practicable after the Party becomes aware of such non-compliance, including details of the nature of the non-compliance and how the Party has rectified or intends to rectify the non-compliance.

18.2 Interface representative

- (a) Prior to the commencement of any Train Services, each Party must nominate one or more appropriately qualified representatives (by

identifying the name, title, experience (including length of experience) and qualifications of each representative) (**Interface Representative**) who is or are (as applicable) to be responsible for:

- (i) making decisions in relation to interface issues that arise in connection with this Agreement;
 - (ii) liaising and cooperating with representatives of the other Party on those interface issues; and
 - (iii) meeting with representatives of the other Party at locations, times and by means (including in person) specified by Aurizon Network from time to time.
- (b) Each Party must ensure that any representative it nominates under this **clause 18.2** is available to efficiently and effectively perform the responsibilities of the Interface Representative specified in **clause 18.2(a)**.

19 Insurance by Access Holder

19.1 Maintain insurance policies

Before the commencement of Train Services, the Access Holder must, at its expense, take out and subsequently maintain current at all times during the Term insurance with a corporation (as defined in the Corporations Act) licensed to conduct insurance business in Australia (or otherwise reasonably acceptable to Aurizon Network) those policies of insurance required by this Agreement.

19.2 Required insurance policies

The Access Holder must effect and maintain insurance for the risks and on the terms specified in **Schedule 5**.

19.3 Disclosure of insurance policies

The Access Holder must provide to Aurizon Network evidence of the insurance policies effected and maintained pursuant to this **clause 19** (including evidence that the cover provided under those insurance policies complies with this **clause 19** and of the currency of those insurance policies) to Aurizon Network's reasonable satisfaction:

- (a) at least 10 Business Days before the commencement of Train Services;
- (b) within 10 Business Days after renewal of each insurance policy during the Term; and
- (c) within 10 Business Days after being requested to do so in writing by Aurizon Network.

19.4 Failure to disclose insurance policies

Without prejudice to Aurizon Network's other rights and remedies in respect of such default, if the Access Holder, whenever required to do so under this Agreement, fails to produce to Aurizon Network evidence to the reasonable satisfaction of Aurizon Network of insurances that have been effected or maintained by it and does not remedy that default within 10 Business Days after Aurizon Network gives notice to the Access Holder requiring that default to be remedied, Aurizon Network may effect and maintain the insurance and pay the

premiums and any amount so paid will be a debt due from the Access Holder to Aurizon Network.

19.5 Minimum terms of policies

Each of the policies of insurance effected in accordance with this Agreement must, to the extent permitted by Law:

- (a) note the interests of the Access Holder, any contractor of the Access Holder engaged by the Access Holder in relation to the performance of the Access Holder's obligations under this Agreement and Aurizon Network;
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amends the cover provided without the written consent of Aurizon Network (not to be unreasonably withheld or delayed); and
- (c) include the terms and be for the amounts referred to in **Schedule 5**.

19.6 Access Holder not to render policy void

The Access Holder must not render any of the insurances effected in accordance with this **clause 19** void or voidable or liable to refusal of any claim.

19.7 Compliance

The Access Holder must at all times comply with the terms and conditions of all insurance policies effected pursuant to this **clause 19**.

19.8 Notice of potential claims

In addition to any other obligation on the Access Holder under this Agreement, the Access Holder must:

- (a) notify Aurizon Network as soon as practicable after the making of any Claim under any insurance policy required by this Agreement;
- (b) notify Aurizon Network of the Claim in reasonable detail; and
- (c) keep Aurizon Network informed of subsequent developments concerning any Claim,

to the extent that such Claim is in connection with this Agreement.

19.9 Access Holder to pay all excess/deductibles

- (a) The Access Holder must, in respect of any Claims by it or any other insured for which it is responsible, pay and bear all excesses/deductibles provided for in any insurances effected in accordance with this **clause 19**.
- (b) If the Access Holder fails to pay any excess/deductible provided for in any insurances effected in accordance with this **clause 19**, Aurizon Network may pay the relevant excess/deductible and any amount so paid will be a debt due from the Access Holder to Aurizon Network.

19.10 Settlement of claims

If:

- (a) Aurizon Network makes a Claim against the Access Holder for damage to the Infrastructure;
- (b) the Claim is in respect of the same matter as the Access Holder claims under a policy required by this Agreement for damage to Infrastructure; and

(c) the Access Holder has not disputed Aurizon Network's Claim, then upon settlement of the Access Holder's Claim, under such policy, the portion of monies owed by the Access Holder to Aurizon Network must be paid to Aurizon Network from the monies received by the Access Holder under the policy against which the Access Holder made a Claim.

20 Indemnities

20.1 Indemnity for personal injury and property damage

Subject to **clause 20.2** and **clause 21**, each Party is solely liable for, and releases, indemnifies and will keep indemnified the other Party, its directors and Staff against, all Claims of any nature suffered or incurred by, or made or brought against, the other Party, its directors or Staff in respect of:

- (a) any loss of, damage to or destruction of property (including property of the other Party); or
- (b) personal injury to or death of any person,
in each case caused by or contributed to (to the extent of the contribution) by:
- (c) any breach of this Agreement by the Party; or
- (d) any negligent act or omission of, the Party or the Party's Staff in connection with this Agreement.

20.2 Indemnity by Access Holder for certain liabilities to Third Parties

Despite **clause 20.1** but subject to **clause 21**, the Access Holder is solely liable for, and releases, indemnifies and will keep indemnified Aurizon Network, Aurizon Network's directors and Aurizon Network's Staff against, all Claims of any nature made or brought against, Aurizon Network, Aurizon Network's directors or Aurizon Network's Staff by a Third Party in respect of:

- (a) any loss of, damage to or destruction of property; or
- (b) personal injury to or death of any person,
in each case caused by or contributed to (to the extent of the contribution) by:
- (c) any breach of this Agreement by the Access Holder; or
- (d) any negligent act or omission of the Access Holder or the Access Holder's Staff.

20.3 Duty to mitigate

Each Party must use all reasonable endeavours to mitigate the damage, loss, cost, liability or expense in respect of which an indemnity in this Agreement applies, except to the extent that such loss, damage, injury or death, cost or expense results from the breach of this Agreement or any negligent act or omission of the other Party or the other Party's Staff.

20.4 General provisions regarding indemnities

- (a) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties and survives the expiry or termination of this Agreement.

- (b) It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity in this Agreement.

21 Limitations and exclusions of liability

21.1 Exclusion of Consequential Loss

Except as expressly provided otherwise in **clause 27**, neither Party is liable to the other under or in connection with this Agreement (including under an indemnity) for any Consequential Loss however caused (including any breach of this Agreement or negligent act or omission of a Party).

21.2 Time limit and minimum threshold on Claims

Neither Party (**first Party**) is liable for, and the other Party must not make any Claim against the first Party under or in connection with this Agreement unless:

- (a) notice of the Claim has been given to the first Party within 12 Months after the other Party becomes aware of the occurrence of the event or circumstance giving rise to the Claim; and
- (b) the amount of the Claim exceeds \$100,000 in respect of any one event or cause of action or series of related events or causes of action, provided that if this condition is satisfied then the other Party may proceed for the full amount of the Claim and not only the amount in excess of \$100,000.

21.3 Claims and exclusions in respect of Infrastructure standard

Despite any other provision of this Agreement, Aurizon Network, its directors and Aurizon Network's Staff are not liable to the Access Holder for any Claim, and the Access Holder must not make any Claim against Aurizon Network, Aurizon Network's directors and/or Aurizon Network's Staff, in respect of any:

- (a) loss of or damage to real or personal property, including property of the Access Holder;
- (b) personal injury to or death of any person; or
- (c) any other damage, expense, injury, cost or loss whatsoever,

arising out of or in connection with the standard of the Infrastructure or any failure of or defect in the Infrastructure, except to the extent that such loss, damage, injury or death, cost or expense results directly from the failure of Aurizon Network to perform its obligations under clause 19.2(a) of a Train Operations Deed or Aurizon Network's negligence in performing those obligations.

21.4 Claims and exclusions in respect of non-provision of access

- (a) Subject to **clause 21.4(b)**, only and despite any other provision of this Agreement, Aurizon Network, Aurizon Network's directors and Aurizon Network's Staff are not liable to the Access Holder for any Claim, and the Access Holder must not make any Claim against Aurizon Network, Aurizon Network's directors and/or Aurizon Network's Staff, in respect of any failure by Aurizon Network to make the Infrastructure available for an Operator to operate a Train Service for the Access Holder at the Scheduled Time in the Train Schedule.
- (b) Aurizon Network is liable to the Access Holder in respect of any failure by Aurizon Network to make the Infrastructure available to enable an

Operator to operate a Train Service for the Access Holder at the Scheduled Time in the Train Schedule if (and then only to the extent that):

- (i) Aurizon Network did not reschedule the relevant Train Service if required to do so under a Train Operations Deed; and
- (ii) the failure by Aurizon Network to make the Infrastructure available was not permitted under this Agreement or was attributable to a breach of this Agreement by, or negligent act or omission of, Aurizon Network; and
- (iii) the failure by Aurizon Network to make the Infrastructure available was not attributable to:
 - (A) the Access Holder or the Access Holder's Staff;
 - (B) an Operator or an Operator's Staff;
 - (C) another Railway Operator (other than Aurizon Network) or any employees, contractors, volunteers or agents of another Railway Operator (other than Aurizon Network);
 - (D) a Force Majeure Event;
 - (E) Major Periodic Maintenance of, or Infrastructure Enhancements to, the Infrastructure scheduled in a manner consistent with the Network Management Principles;
 - (F) if:
 - (1) the Access Rights for the relevant Train Service are Conditional Access Rights;
 - (2) there is a Capacity Shortfall in respect of any Segment of the applicable Expansion; and
 - (3) the Conditional Access Rights have not been varied under **clause 9**,
the unavailability in the Infrastructure is attributable to the Capacity Shortfall in relevant Infrastructure;
 - (G) a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor; or
 - (H) any action taken by Aurizon Network, acting reasonably, in response to an emergency or a genuine safety risk; and
- (iv) either:
 - (A) the Parties and the relevant Operator have not agreed upon and implemented a performance and adjustment regime for the purposes of the relevant Train Operations Deed and the total number of Train Services (expressed as a percentage) cancelled in a Billing Period as a result of a failure by Aurizon Network to make the Infrastructure available (other than any failure by Aurizon Network to make the Infrastructure available which is attributable to an event or circumstance specified in **clauses 21.4(b)(iii)(A) to 21.4(b)(iii)(G)**) exceeds five percent of the total number of Train Services scheduled

- in the Daily Train Plan for that Billing Period; or
- (B) the Parties and the relevant Operator have agreed upon and implemented a performance and adjustment regime for the purposes of the relevant Train Operations Deed, but the failure to make the Infrastructure available is of a magnitude which is beyond the scope of that performance and adjustment regime.

21.5 Claims and exclusions in respect of delays to Train Movements

Despite any other provision of this Agreement, a Party (**Defaulting Party**) is not liable to the other Party (**Affected Party**) for any Claim, and the Affected Party must not make any Claim against the Defaulting Party, in respect of delays to Train Movements unless (and then only to the extent that):

- (a) the delay was a result of a breach of this Agreement by the Defaulting Party, or a negligent act or omission on the part of the Defaulting Party; and
- (b) if the delay was caused by or the result of an Operational Constraint:
- (i) where Aurizon Network is the Affected Party, the Operational Constraint resulted from a breach of this Agreement by the Access Holder; or
 - (ii) where the Access Holder is the Affected Party, the Operational Constraint was not permitted under this Agreement or resulted from a breach of this Agreement by, or negligent act or omission of Aurizon Network; and
- (c) the delay is not attributable to:
- (i) the Affected Party or where the Affected Party is:
 - (A) Aurizon Network - Aurizon Network's Staff; or
 - (B) the Access Holder - the Access Holder's Staff, an Operator or an Operator's Staff;
 - (ii) another Railway Operator (other than the Defaulting Party) or any employees, contractors, volunteers or agents of another Railway Operator (other than the Defaulting Party);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of, or Infrastructure Enhancements to, the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) any action taken by Aurizon Network, acting reasonably, in response to an emergency or a genuine safety risk; and
- (d) either:
- (i) the Parties and the relevant Operator have not agreed upon and implemented a performance and adjustment regime for the purposes of the relevant Train Operations Deed; or
 - (ii) the Parties and the relevant Operator have agreed upon and implemented a performance and adjustment regime for the

purposes of the relevant Train Operations Deed, but the delays are of a magnitude which is beyond the scope of that performance and adjustment regime.

21.6 Defence of Claims by Third Parties

- (a) Each Party must provide such reasonable assistance as requested by the other Party in the defence of any Claim made against the other Party by a Third Party arising out of any Incident or other event giving rise to the Claim.
- (b) The Party that requested assistance under **clause 21.6(a)** must, within five Business Days after a demand is made, pay to the other Party any costs and expenses reasonably incurred by the other Party in providing the assistance requested under **clause 21.6(a)**.

21.7 Exclusion of Claims in certain other circumstances

- (a) Except to the extent that an Operational Constraint results from a breach by, or negligent act or omission of, Aurizon Network of this Agreement or a Train Operations Deed, any delays or cancellations of Train Services caused by or resulting from Operational Constraints will not constitute a default by Aurizon Network of its obligations under this Agreement and Aurizon Network will not be liable for any Claims suffered or incurred by or made or brought by or against the Access Holder as a result of or arising from the imposition of such an Operational Constraint.
- (b) Except as otherwise provided in this Agreement, Aurizon Network will not be liable for any delays or cancellations of Train Services or Claims suffered or incurred by or made or brought by or against the Access Holder and the Access Holder must not make any Claim against Aurizon Network, its director and/or Aurizon Network's Staff as a result of an Operator complying with a request by Aurizon Network in accordance with clause 20.4(i) of a Train Operations Deed.
- (c) If Aurizon Network takes action in accordance with clause 20.4(e) of a Train Operations Deed, then Aurizon Network has no liability for any damage to or loss of freight caused by such actions.
- (d) Aurizon Network will not be liable for any delays or cancellations of Train Services or Claims suffered or incurred by or made or brought by or against the Access Holder as a result of the exercise by Aurizon Network of its rights under clause 23 of a Train Operations Deed, provided that Aurizon Network complies with the relevant provisions under the IRMP regarding conduct of an audit or inspection.

22 Determination of liability and loss adjustment

22.1 Determination of liability

In the event of an Incident involving the Access Holder or any other event which results or could result in a Claim by or against the Access Holder or Aurizon Network, liability as between the Access Holder and Aurizon Network is determined, for the purposes of **clauses 20** and **21.3**:

- (a) as agreed between the Parties;

- (b) subject to **clause 22.1(c)**, failing such agreement within one Month of either Party giving notice to the other requiring agreement on liability, by a loss adjuster appointed under **clause 22.2**; or
- (c) where the amount of the Claim exceeds \$200,000 and either Party is dissatisfied with the report of the loss adjuster, by a court of competent jurisdiction.

22.2 Loss Adjuster

Subject to **clause 32**, where a matter is to be referred to a loss adjuster in accordance with **clause 22.1**:

- (a) the loss adjuster:
 - (i) must be appointed by the Parties; or
 - (ii) in default of such appointment within 10 Business Days after the need to appoint a loss adjuster, is to be nominated at either Party's request by the President of The Australasian Institute of Chartered Loss Adjusters;
- (b) if the loss adjuster is to be nominated under **clause 22.2(a)(ii)** and the President of The Australasian Institute of Chartered Loss Adjusters declines to nominate a person as the loss adjuster but provides a list of people that could be appointed as the loss adjuster, then:
 - (i) the first person specified in that list will be taken to be nominated as the loss adjuster;
 - (ii) if the first person specified in that list does not accept the appointment as the loss adjuster, 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 loss adjuster; and
 - (iii) the process specified in **clause 22.2(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 loss adjuster accepts the appointment as the loss adjuster;
- (c) the Parties must comply with, and do all things necessary to satisfy and give effect to, the reasonable requirements of an agreed or nominated loss adjuster (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 the President of The Australasian Institute of Chartered Loss Adjusters agreeing to nominate a loss adjuster;
- (d) the loss adjuster must:
 - (i) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (ii) have no interest or duty which conflicts or may conflict with the loss adjuster's function as a loss adjuster (the loss adjuster being required to fully disclose any such interest or duty before their appointment); and

- (iii) not be, or have been in the last five years, an employee of an Operator, the Access Holder or Aurizon Network or of a Related Body Corporate of any of them;
- (e) the loss adjuster appointed under this **clause 22.2**:
 - (i) is not permitted to act until the loss adjuster has given written notice of the acceptance of the appointment to both Parties;
 - (ii) is required to undertake to keep confidential all matters coming to the loss adjuster's knowledge by reason of their appointment and the performance of their duties; and
 - (iii) is deemed to be and act as an expert and not an arbitrator, and the Law relating to arbitration, including the *Commercial Arbitration Act 2013* (Qld), does not apply to the loss adjuster or their determination or the procedures by which they may reach a determination.

22.3 Parties to assist loss adjuster

- (a) Each Party must ensure to the best of its ability that the loss adjuster appointed under **clause 22.2** is given the opportunity to interview any employee, agent or contractor involved in, or with knowledge of, the Incident or event giving rise to the Claim or with any other relevant information that may be of use to the loss adjuster.
- (b) Each Party must make available to the loss adjuster appointed under **clause 22.2** any files, documents, data, recordings or other information in the possession or control of the Party that may be of use to, or is requested by, the loss adjuster for the purposes of their investigation.

22.4 Decision of the loss adjuster

- (a) The loss adjuster appointed under **clause 22.2** will determine the quantum of the relevant Claim and the liability of the Access Holder and/or Aurizon Network in respect of such Claim and must provide a copy of their report on such matters to each of the Parties within a reasonable time after their appointment.
- (b) In the absence of manifest error, the decision of the loss adjuster is final and binding upon the Parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than \$200,000.

22.5 Costs of the loss adjuster

The costs of the loss adjuster must be borne by the Parties in such proportions as liability is determined by the loss adjuster, or where the liability is ultimately determined by a court of competent jurisdiction, in such proportions as liability is determined by the court.

23 Material Change

23.1 Adjustment for a Material Change

- (a) If there is no Reference Tariff applicable to the Train Services for a Train Service Type under this Agreement, then:

- (i) if at any time after the Commencement Date a Material Change occurs which directly affects the cost to Aurizon Network of performing its obligations or exercising its rights under this Agreement and/or a Train Operations Deed, then Aurizon Network must notify the Access Holder giving details of the Net Financial Effect on Aurizon Network of the Material Change;
 - (ii) within 10 Business Days after receipt of a notice under **clause 23.1(a)(i)**, the Parties must meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement to remove as far as practicable the Net Financial Effect on Aurizon Network of the Material Change and return Aurizon Network to the position it would have been in had it not been for the Material Change; and
 - (iii) if the Parties have not agreed on the relevant adjustments within 15 Business Days after Aurizon Network's notice, then either Party may refer the matter to an Expert for determination in accordance with **clause 24.3**.
- (b) If there is a Reference Tariff applicable to the Train Services for a Train Service Type under this Agreement, then the relevant Reference Tariff Provisions will provide for the consequences of Material Change.

23.2 Parties' obligations continue

The Parties' obligations under this Agreement continue despite the existence of a Material Change.

24 Disputes

24.1 Method

If any claim, dispute or question (**Dispute**) arises under this Agreement, then unless otherwise expressly provided to the contrary in this Agreement, such Dispute must be resolved in accordance with this **clause 24** and either Party may give to the other Party a notice (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in accordance with this **clause 24**.

24.2 Authorised representative resolution

- (a) Except as otherwise provided in this Agreement, within five Business Days after a Dispute Notice is given, the Dispute must be referred for resolution to an authorised representative of each of the Parties with authority to settle the Dispute on behalf of the relevant Party.
- (b) Within 10 Business Days after a Dispute Notice is given, the officers referred to in **clause 24.2(a)** must meet to resolve the Dispute.
- (c) Meetings referred to in **clause 24.2(b)** may be held in person or by telephone, video conference or other means of instantaneous communication.
- (d) If the Dispute is not resolved within 10 Business Days after:
 - (i) the date that the authorised representatives first meet to resolve the Dispute in accordance with **clause 24.2(b)**; or
 - (ii) if the authorised representatives do not meet within the time

required under **clause 24.2(b)**, the date the Dispute Notice is given, then the relevant Dispute may, by agreement between the Parties within five Business Days of expiration of the 10 Business Day period referred to in **clause 24.2(d)**, be referred for resolution by an Expert in accordance with **clause 24.3** or by arbitration in accordance with **clause 24.4**, failing which either Party may refer the Dispute to the courts of the State in accordance with **clause 24.6**.

24.3 Expert

Subject to **clause 32.1**, where any matter may be referred to an expert (**Expert**) pursuant to **clause 24.2(d)**, or is expressly required by this Agreement to be referred to an Expert, then except as otherwise provided for in this Agreement:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within 10 Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
 - (i) if the Parties agree the Dispute is purely of:
 - (A) a financial or accounting nature; or
 - (B) a technical nature,the President (for the time being) of the Resolution Institute in Australia; or
 - (ii) 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 24.3(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, then:
 - (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, then the next person specified in that list will be taken to be nominated as the Expert; and
 - (iii) the process specified in **clause 24.3(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 24.3(b)**, if the Expert is to be nominated by a person referred to in **clause 24.3(a)** and the person nominated as the Expert does not accept 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 24.3(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 24.3(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 their function as Expert, the Expert being required to fully disclose any such interest or duty by notice to the Parties before their appointment;
 - (iii) not be, or have been in the last five years, an employee of an Operator, the Access Holder, or Aurizon Network or of a Related Body Corporate of any of them;
 - (iv) not be permitted to act until the Expert has given notice to the Parties that the Expert 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 either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter provided to the Expert by the Parties;
 - (vi) provide both Parties with a copy of the Expert's determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after their appointment; and
 - (vii) be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties);
- (g) the Expert is deemed to be and must act as an expert and not an arbitrator and the Law relating to arbitration (including the *Commercial Arbitration Act 2013* (Qld)) will not apply to the Expert or the determination or the procedures by which the Expert may reach a determination;
- (h) in the absence of manifest error, the decision of the Expert is final and binding upon the Parties;
- (i) the costs of the Expert (and the costs of any advisers to the Expert) must be borne severally (and not jointly and severally) by the Parties in equal shares, with each Party bearing its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties);
- (j) the expert determination will be conducted in accordance with the expert determination rules adopted by the Resolution Institute from time to time,

except that to the extent of any inconsistency between those rules and this Agreement, the terms of this Agreement prevail;

- (k) any determination made by an Expert must be consistent with the provisions of this Agreement; and
- (l) the Parties must:
 - (i) procure the Expert to use reasonable endeavours to make its determination or finding in respect of the Dispute within 2 months from the date the initial statement regarding the Dispute is submitted by the claimant to the Expert; and
 - (ii) do everything reasonably requested by the Expert to assist the Expert in determining the Dispute, including providing or making available to the Expert, as soon as reasonably practicable, all information and materials in their possession or control requested by the Expert and attending any hearing convened by the Expert.

24.4 Arbitration

- (a) Subject to **clause 32.1**, the Parties may agree to refer any Dispute to arbitration by a single arbitrator sitting in Brisbane agreed upon between the Parties and, failing agreement upon such arbitrator within 10 Business Days after the date of notice from one Party to the other requiring the appointment of an arbitrator, by an arbitrator appointed by the President of the Resolution Institute. Every such reference will be an arbitration within the meaning of the *Commercial Arbitration Act 2013* (Qld), and subject to the provisions relating to arbitration contained in that Act.
- (b) If the Resolution Institute declines to nominate a person as the arbitrator but provides a list of people that could be appointed as the arbitrator, then:
 - (i) the first person specified in that list will be taken to be nominated as the arbitrator;
 - (ii) if the first person specified in that list does not accept the appointment as the arbitrator, then the next person specified in that list will be taken to be nominated as the arbitrator; and
 - (iii) the process specified in **clause 24.4(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 arbitrator accepts the appointment as the arbitrator;
- (c) subject to **clause 24.4(b)**, if the person nominated as the arbitrator under **clause 24.4(a)** does not accept appointment, then either Party may request that the Resolution Institute appoints an alternative person as the arbitrator.

24.5 Queensland Competition Authority (QCA)

Subject to **clause 32.1**, the Parties may agree to refer, and where required by this Agreement must refer, any Dispute to the QCA.

24.6 Determination by Court

If any Dispute is not:

- (a) resolved in accordance with **clause 24.2**;

- (b) referred to an Expert in accordance with **clause 24.3**; nor
 - (c) referred to the QCA in accordance with **clause 24.5**,
- then either Party may refer the Dispute to the courts of the State.

25 Force Majeure

25.1 Suspension of obligations

- (a) If, by reason of a Force Majeure Event affecting Aurizon Network, Aurizon Network is prevented or hindered (or likely to be prevented or hindered) from carrying out, whether wholly or in part, its obligations under this Agreement (other than an obligation to pay money), then the obligations of Aurizon Network to provide Access Rights under this Agreement will be suspended for the time that the performance of such obligations is prevented or hindered by the Force Majeure Event provided Aurizon Network notifies the Access Holder in accordance with the requirements of the Force Majeure Provisions.
- (b) Without prejudice to its rights under this **clause 25.1** and the Force Majeure Provisions, Aurizon Network may issue further notices in respect of the Force Majeure Event as it considers reasonably necessary to update the Access Holder as to each of the matters set out in the Force Majeure Provisions.
- (c) If Aurizon Network notifies the Access Holder in accordance with this **clause 25.1**:
 - (i) the Force Majeure Provisions apply; and
 - (ii) the Parties must comply with the Force Majeure Provisions.
- (d) Despite **clause 1.6(b)**, if the terms of this **clause 25** are inconsistent, ambiguous or conflict with the terms of the Force Majeure Provisions, the terms of the Force Majeure Provisions will prevail to the extent of the inconsistency, ambiguity or conflict.

25.2 Reduction of Access Rights due to loss or damage to Nominated Network

If a Nominated Network FM Reduction Notice is given in accordance with the Force Majeure Provisions, then the FM Access Rights will cease to form part of the Access Rights on and from the date specified in the notice (which must be at least 20 Business Days from the date of the notice).

25.3 Effect of Nominated Network FM Reduction Notice on Operator nominations

- (a) Within 10 Business Days after the Nominated Network FM Reduction Notice is given to the Access Holder, the Access Holder may give written notice to Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which the Access Holder has allocated to an Operator to take into account the reduction to the Access Rights by the FM Access Rights.
- (b) Except to the extent that the Access Holder has given a notice as contemplated in **clause 25.3(a)** in respect of the reduction to the Access

Rights by the FM Access Rights, the FM Access Rights for each Train Service Type:

- (i) firstly, are deemed to reduce the Access Rights for that Train Service Type for which the Access Holder has not nominated an Operator; and
 - (ii) if, after the operation of **clause 25.3(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, **clause 4.7** applies in respect of that Over-Allocation.
- (c) As soon as practicable after the expiry of the period referred to in **clause 25.3(a)**, Aurizon Network must issue a notice to the Access Holder and each affected Operator summarising, in respect of each Train Service Type affected by the FM Access Rights, the changes to:
- (i) the “Nominated Monthly Train Services (for a 30 day Month)” set out in **Schedule 2** of this Agreement; and
 - (ii) the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of each affected Operator’s Train Operations Deed.

25.4 Termination after extended Force Majeure Event

If, by reason of a Force Majeure Event, Aurizon Network is wholly prevented or hindered from carrying out its obligations under this Agreement (other than an obligation to pay money) for a period of more than three consecutive Months, then:

- (a) the Parties must meet to endeavour to identify any alternative viable means to perform the suspended obligations; and
- (b) failing any alternative means being agreed within one Month after the end of the three Month period, the Access Holder may terminate this Agreement by 20 Business Days’ notice to Aurizon Network and **clause 25.2** applies without prejudice to any of the rights of the Parties which accrued before the date of such termination.

26 Suspension

26.1 Suspension of Access Rights

- (a) If a Suspension Event specified in **Schedule 6** occurs, Aurizon Network may, by notice in writing to the Access Holder and the relevant Operator (**Suspension Notice**), suspend the Access Rights of the Access Holder.

26.2 Details of suspension

A Suspension Notice given by Aurizon Network to the Access Holder and the relevant Operator under **clause 26.1** must set out:

- (a) the rights of the Access Holder which are affected by the suspension;
- (b) the reason for the suspension; and
- (c) the actions the Access Holder must take to have the suspension lifted.

26.3 Effect of suspension

The suspension of any rights under this **clause 26** does not affect or suspend any other obligation of the Access Holder, including the obligation to pay Access

Charges under this Agreement, and is without prejudice to Aurizon Network's other rights and remedies in respect of that or any other default.

26.4 Duration of suspension

The suspension of any rights under **clause 26.1** continues until such time as the Access Holder has remedied the relevant default or non-compliance notified in the Suspension Notice.

26.5 Suspension of an Operator's rights under a Train Operations Deed

- (a) The Access Holder acknowledges that, under a Train Operations Deed, Aurizon Network has a right to suspend the right of a particular Operator to operate some or all of the Operator's Train Services for a Train Service Type or Train Services generally upon the occurrence of any one or more of a number of specified events or circumstances in respect of that Operator.
- (b) Aurizon Network will notify the Access Holder if it suspends the right of a particular Operator to operate some or all of the Operator's Train Services for a Train Service Type or Train Services generally under a Train Operations Deed and the Access Holder will have the right to nominate an alternate Operator to operate the affected services in accordance with **clause 4.3** or **4.4**.
- (c) The suspension of any of an Operator's rights under a Train Operations Deed does not affect or suspend any obligation of the Access Holder, including the obligation to pay Access Charges under this Agreement.

27 Liability for wrongful suspension

Where Aurizon Network suspends some or all of the Access Holder's Access Rights, Aurizon Network will be liable to the Access Holder in respect of loss or damage (including damages for Consequential Loss arising from the suspension) if, and only if:

- (a) no reasonable person in Aurizon Network's position could have formed the view that the stated grounds for the suspension existed (Aurizon Network must bear the burden of establishing that a reasonable person in Aurizon Network's position could have formed that view); and
- (b) the Access Holder has used all reasonable endeavours to mitigate the loss or damage arising from the suspension.

28 Termination

28.1 Termination of Agreement

- (a) Subject to **clause 28.1(b)** and without limiting any rights of termination contained elsewhere in this Agreement, Aurizon Network may, by notice in writing to the Access Holder, terminate this Agreement if a Termination Event specified in **Schedule 6** occurs.
- (b) If there is a Corresponding Suspension Event in respect of the Termination Event referred to in **clause 28.1(a)**, then Aurizon Network may only exercise its rights under **clause 28.1(a)**:

- (i) if it has first exercised its right of suspension in respect of the Corresponding Suspension Event under **clause 26**; and
- (ii) from the 21st Business Day after the date of the Suspension Notice in respect of the Corresponding Suspension Event.

28.2 Termination by the Access Holder

Without limiting any rights of termination contained elsewhere in this Agreement, the Access Holder may, by notice in writing to Aurizon Network, terminate this Agreement if any of the following occurs:

- (a) an Insolvency Event in relation to Aurizon Network occurs and continues for a period of 40 Business Days;
- (b) Aurizon Network's Accreditation is cancelled or amended such that it cannot perform its obligations generally under this Agreement, and such default continues for at least 20 Business Days after the Access Holder gives Aurizon Network notice of the default;
- (c) Aurizon Network fails to pay when due any amount payable under this Agreement, and such default continues for at least 20 Business Days after the Access Holder gives Aurizon Network notice of the default; or
- (d) Aurizon Network is in default of the due performance of any other obligation under this Agreement, and such default continues for at least 40 Business Days after the Access Holder gives Aurizon Network notice of the default.

28.3 Grounds for termination to be specified

A notice given under **clause 28.1** or **28.2** must set out the grounds for the termination.

28.4 Obligations and other rights upon termination or expiry

- (a) Neither termination of this Agreement by a Party under this **clause 28** nor expiry of this Agreement prejudices:
 - (i) a Party's right to make a Claim, recover damages or avail itself of other remedies under this Agreement or at law; or
 - (ii) either Party's rights to recover money due to it under this Agreement.
- (b) On termination of this Agreement, Aurizon Network and the Access Holder are released from all further obligations or liabilities under this Agreement, except for:
 - (i) rights which accrued on or before termination, including for any breach of this Agreement which occurred before termination. Any liability in respect of such prior breach will be limited in the manner provided in this Agreement; or
 - (ii) any provisions which are expressed as surviving the expiry or termination of this Agreement.

29 Assignment

29.1 Assignment by Aurizon Network

- (a) Aurizon Network may Assign the whole or any part of its rights or obligations under this Agreement without the prior consent of the Access Holder, provided that:
 - (i) the Assignee is Accredited; and
 - (ii) Aurizon Network procures that the Assignee covenants with the Access Holder by deed to be bound by and to perform the obligations of Aurizon Network under this Agreement to the extent of the rights and obligations Assigned to the Assignee.
- (b) On the Assignee entering into the deed referred to in **clause 29.1(a)**, Aurizon Network is released and discharged from further liability under this Agreement in respect of the obligations which the Assignee has undertaken under that deed to be bound by and to perform.

29.2 Assignment by the Access Holder

- (a) The Access Holder may not Assign its rights or obligations under this Agreement other than in accordance with this **clause 29.2**.
- (b) The Access Holder may, provided it is not in default in the performance or observance of any of its obligations under this Agreement, Assign the whole or any part of its rights and obligations under this Agreement to:
 - (i) a Related Body Corporate of the Access Holder which is capable of performing the obligations of the Access Holder under this Agreement, provided that:
 - (A) the Access Holder remains liable for the performance of the duties, responsibilities and obligations assumed by the Assignee; and
 - (B) the performance by the Assignee will (to the extent of such performance) discharge the Access Holder's liability for the performance of the duties, responsibilities and obligations Assigned; or
 - (ii) a person other than a Related Body Corporate of the Access Holder with the prior written consent of Aurizon Network, provided that such consent will not be unreasonably withheld if Aurizon Network is satisfied that such person is:
 - (A) financially sound; and
 - (B) otherwise capable of performing the obligations of the Access Holder under this Agreement.
- (c) Any Assignment by the Access Holder of its rights and obligations under this Agreement is conditional on and will not take effect until:
 - (i) the Assignee covenants with Aurizon Network by deed, in such terms as Aurizon Network may reasonably require, to be bound by and to perform the obligations of the Access Holder under this Agreement; and
 - (ii) if required by Aurizon Network, the Assignee delivers Security to

Aurizon Network which satisfies the requirements of **clause 6** for an amount of not less than the Security Amount.

- (d) Subject to **clause 29.2(e)**, if a Change in Control of the Access Holder occurs without Aurizon Network's prior written consent, the occurrence of the Change in Control will be taken to be an Assignment of the Access Holder's rights and obligations under this Agreement which is not permitted under this **clause 29.2**.
- (e) **Clause 29.2(d)** does not apply to a Change in Control where:
 - (i) the Access Holder or its Ultimate Holding Company is listed on a recognised stock exchange;
 - (ii) the Change in Control is a result of a Change in Control of that listed entity; and
 - (iii) that listed entity remains listed on that recognised stock exchange both before and after that Change in Control.
- (f) This **clause 29.2** does not limit the Access Holder's right to Transfer Access Rights in accordance with **clause 11**.

29.3 Charging

A Party (**Chargor**) may create a Charge over all of its rights under this Agreement in favour of a recognised financial institution (**Chargee**) to secure financial accommodation provided to the Chargor in relation to its obligations under this Agreement, provided that the Chargee must first covenant in writing in favour of the other Party (**Non-Charging Party**), pursuant to a deed in such terms as the Non-Charging Party may reasonably require, that in relation to the exercise of any power of sale or other right or remedy under the Charge granted to the Chargee, the Chargee and any person (including any receiver or receiver and manager or agent) claiming through the Chargee will comply with the provisions of this **clause 29** as if it were originally a party to this Agreement, and will not exercise any power of sale of the rights and/or obligations of the Chargor under this Agreement except in accordance with this **clause 29**.

30 GST

30.1 Construction

In this **clause 30**:

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

30.2 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.

30.3 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.

30.4 Timing of GST payment

The recipient will pay the amount referred to in **clause 30.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

30.5 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 30.3**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

30.6 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 30.3** 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.

30.7 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.

31 Confidentiality

31.1 Confidentiality

Subject to **clause 31.2**, the Recipient must:

- (a) keep confidential, and must not disclose to any Third Party, any Confidential Information disclosed to the Recipient by the Discloser; and
- (b) not use the Confidential Information for any purpose other than for the purposes of this Agreement or, if Aurizon Network is the Recipient, for the purposes of:
 - (i) Capacity Assessment;
 - (ii) investigation and planning of Maintenance Work;
 - (iii) planning Infrastructure Enhancements; and
 - (iv) complying with its obligations under the Access Undertaking.

31.2 Permitted disclosures

The Recipient may disclose Confidential Information disclosed to it by the Discloser to a Third Party where:

- (a) the Recipient has obtained the prior written approval of the Discloser to such disclosure. The Discloser must not unreasonably withhold such approval if the Recipient has procured a confidentiality undertaking in respect of the information from such Third Party in favour of both Parties on terms and conditions satisfactory to both Parties, acting reasonably; or
- (b) disclosure is:
 - (i) required or compelled by any order of a court of competent jurisdiction;
 - (ii) required or compelled by any Law;
 - (iii) required or compelled by notice validly issued by any Authority;
 - (iv) necessary for the conduct of any legal proceedings, including any dispute resolution process under this Agreement;
 - (v) reasonably required for the performance of Train Control functions;
 - (vi) required under any stock exchange listing requirement or rule;
 - (vii) required by the Rail Safety Regulator or an Environmental Regulator;
 - (viii) to an Operator provided that:
 - (A) the Disclosure is:
 - (1) required by the terms of this Agreement;
 - (2) reasonably necessary for the performance of obligations or the exercise of rights under this Agreement or the Operator's Train Operations Deed; or
 - (3) reasonably necessary in connection with the safe operation of the Nominated Network; and
 - (B) the Discloser must ensure that the Operator keeps the Confidential Information confidential on terms no less onerous than this **clause 31**;
 - (ix) to the Recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the Discloser;
 - (x) to an expert for the purposes of a dispute resolution process, or an auditor for the purposes of an audit, under a "User Funding Agreement" (as defined in the Access Undertaking), if such expert or auditor has executed a legally enforceable confidentiality deed in favour of the Discloser;
 - (xi) to legal practitioners and accountants of the Recipient or a Related Body Corporate of it:

- (A) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (B) who are under a duty of confidentiality to the Recipient; and
 - (C) who have been advised of the confidential nature of the Confidential Information; or
- (xii) otherwise permitted or required in accordance with this Agreement or the Access Undertaking (as amended by any Change in Access Undertaking).

31.3 Discloser may give certain directions

On expiry or termination of this Agreement, the Discloser may direct the Recipient to do any combination of the following in respect of some or all of the Confidential Information disclosed by the Discloser to the Recipient:

- (a) subject to the lawful requirements of the Recipient to retain copies of Confidential Information for business records and document control registers, to immediately deliver to the Discloser the Confidential Information specified by the Discloser;
- (b) to immediately destroy the Confidential Information specified by the Discloser; and
- (c) where the Recipient has disclosed the Confidential Information to any Third Party, to procure the compliance by that Third Party with the requirements of this **clause 31.3** as if that Third Party were the Recipient.

31.4 PPS Act

In addition to the obligations imposed under this **clause 31**, each Party agrees to not disclose any information of the kind described in section 275(1) of the PPS Act, including:

- (a) information about this Agreement including a copy of it;
- (b) information about the amount or the obligation secured by any Security Interest created by or under this Agreement and the terms of such payment or performance at any time; or
- (c) information about Relevant Collateral at any time.

31.5 Survival

Without limiting **clause 34.1**, this **clause 31** survives the destruction or return of Confidential Information in accordance with this Agreement.

31.6 Injunctive relief

The Recipient acknowledges and agrees that a breach of this **clause 31** would be harmful to the business interests of the Discloser and that, as a result, the Discloser may seek urgent injunctive relief, specific performance or a similar remedy to prevent the occurrence or continuance of any breach or suspected breach of this **clause 31** in addition to any other remedies available at law or in equity under or independently of this Agreement.

32 Relationship with Train Operations Deed

32.1 Disputes

- (a) Prior to any referral of a matter to a loss adjuster, expert, arbitrator or the QCA (**Adjudicator**) in accordance with **clause 22.1** or **24**, either Party may notify the other Party that an Operator should be a party to that referral and, if such a notice is given, then the Party which has given the notice must:
 - (i) notify the relevant Operator of the matter to be referred to the Adjudicator; and
 - (ii) provide the relevant Operator with a copy of the provisions of this Agreement governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, the Adjudicator (**Dispute Provisions**).
- (b) If an Operator is given a notice under **clause 32.1(a)**, then:
 - (i) where the Adjudicator is to be a loss adjuster, expert or arbitrator, the Parties are deemed not to have agreed the appointment of the loss adjuster, expert or arbitrator unless the Operator has also agreed to the appointment of that loss adjuster, expert or arbitrator;
 - (ii) the Parties must comply with the Dispute Provisions in respect of the Operator as though the Operator was a Party to this Agreement for the purposes of the matter referred to the Adjudicator; and
 - (iii) the Adjudicator, in addition to determining the matter between the Parties, must also determine any claim, dispute, question or liability involving the Operator and the relevant Train Operations Deed arising in connection with any of the events or facts the subject of the matter referred to the Adjudicator (unless that claim, dispute, question or liability has already been agreed by Aurizon Network and the Operator or otherwise determined).
- (c) If the Access Holder is notified of a matter to be referred to an Adjudicator in accordance with a Train Operations Deed, then the Access Holder:
 - (i) must comply with the provisions of that agreement governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, an Adjudicator;
 - (ii) must provide the Adjudicator with a copy of this Agreement;
 - (iii) agrees that the Dispute Provisions do not apply to any claim, dispute, question or liability involving the Access Holder and this Agreement in connection with the matter referred to the Adjudicator; and
 - (iv) agrees that, for the avoidance of doubt, the decision of that Adjudicator, in the absence of manifest error, will be final and binding upon the Access Holder.

32.2 Performance Levels

- (a) If a notice is given under the Train Operations Deed that a party considers that the Performance Levels are no longer appropriate, the Parties and

the Operator must use reasonable endeavours to agree on varied Performance Levels.

- (b) If the Parties and the Operator are unable to agree to such variations then the existing Performance Levels will continue to apply unless varied by Aurizon Network in accordance with clause 12.2(a)(iv) of the Train Operations Deed.

32.3 Amendments due to changes to Train Operations Deed

If:

- (a) modified or additional Rollingstock or Rollingstock Configurations are authorised under a Train Operations Deed;
- (b) the Performance Levels specified in a Train Operations Deed are varied;
- (c) an Interface Risk Management Plan or Environmental Management Plan is prepared, reviewed, amended or audited, in accordance with a Train Operations Deed;
- (d) the Train Description under a Train Operations Deed is varied; or
- (e) a Train Operations Deed is otherwise amended as a result of or in connection with any of the matters in paragraphs (a) to (e),

then:

- (f) the Parties must amend this Agreement (including, but not limited to, by Aurizon Network varying the Access Charge Rates or Train Description) as reasonably necessary to reflect the change or variation to the Train Operations Deed and otherwise comply with this Agreement (including, for example, the Access Holder varying its nomination of the Operator (if necessary)), provided that any such amendment ceases to apply to the extent the relevant Operator ceases to be nominated as the Operator of the relevant Train Services;
- (g) Aurizon Network must advise the Access Holder of any variations to the Access Charge Rates payable by the Access Holder as a result of that change or variation; and
- (h) where the Parties cannot agree on the amendments to this Agreement, to the extent that those amendments:
 - (i) are not variations to the Access Charge Rates, the matter will be referred to an expert in accordance with **clause 24.3**; and
 - (ii) are variations to the Access Charge Rates (and any other amendments have been agreed by the Parties or otherwise determined), either Party may refer the matter to the QCA for determination in accordance with **clause 24.5**,

provided that any such amendment or variation will not result in any increase to the total capacity allocated to the Access Holder under this Agreement.

32.4 Notice to Access Holder

- (a) If any of the matters referred to in **clauses 32.3(a) to 32.3(e)** is proposed by Aurizon Network or the Operator and the proposal, if agreed, would require amendments to this Agreement or otherwise adversely affect the

Access Rights or utilisation of the Access Rights, then Aurizon Network must provide:

- (i) written notice to the Access Holder of the proposal as soon as practicable; and
 - (ii) the Access Holder with a reasonable opportunity to participate in any negotiations or discussions between Aurizon Network and the Operator of such a proposal.
- (b) If the Access Holder disputes the proposed amendments to this Agreement or the effect on the Access Rights or utilisation of the Access Rights (as applicable) arising from a matter referred to in **clauses 32.3(a) to 32.3(e)**, then the Access Holder may refer the dispute to the QCA for determination in accordance with **clause 24.5**.

33 Notices

33.1 Form of Notice

Any notice, demand, invoice, certification, process or other communication authorised or required to be given by a Party to another under this Agreement (other than a Train Control Direction or a direction from the Incident Commander) (**Notice**) must be in writing and signed by an authorised officer of that Party and may, if agreed by the Parties, be in electronic form.

33.2 Method of service

A Notice may be given by being:

- (a) personally delivered to a Party;
- (b) left at the Party's current address for service;
- (c) sent to the Party's current address for service by pre-paid ordinary mail;
- (d) sent by facsimile transmission to the Party's current facsimile number for service; or
- (e) if agreed by the Parties, sent by email to the Party's current email address for service.

33.3 Deemed Notice

Subject to **clause 33.5**, a Notice given in accordance with this **clause 33** is deemed to be given if:

- (a) personally delivered, upon delivery;
- (b) posted to an address in Australia, three Business Days after posting;
- (c) posted to an address outside Australia, 10 Business Days after posting;
- (d) sent by facsimile, on the next Business Day after being sent if following transmission the sender receives a transmission report indicating that the facsimile was sent to the addressee's facsimile number; or
- (e) sent by email, on the next Business Day after being sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered.

33.4 Addresses for notices

- (a) Each Party's address for notices is as set out in **item 2** of **Schedule 1**.
- (b) A Party may from time to time change its particulars for service by giving notice of that change to the other Party.

33.5 Train Control Direction or Incident Commander's Direction

- (a) A Train Control Direction is deemed to have been given at the time the direction is given, issued or made.
- (b) A direction from an Incident Commander is deemed to have been given at the time the direction is communicated by the Incident Commander.

34 General

34.1 Survival

This **clause 34** and **clauses 5, 6, 13, 17, 21, 22, 24, 28, 30, 31** and **33** survive the expiration or termination of this Agreement.

34.2 Amendment

- (a) Except as otherwise provided in this Agreement, any variation or amendment to this Agreement must be in writing signed by both Parties.
- (b) The Access Holder must provide each Operator with a copy of any written agreement to variations or amendments to this Agreement.

34.3 Entire agreement

- (a) This Agreement, the Schedules and other documents referred to in the Schedules constitute the entire understanding and agreement between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Agreement are merged in and superseded by this Agreement and are of no force or effect. No Party is liable to any other Party in respect of those matters.
- (c) Neither Party has relied on any representations made by the other Party relating to the subject matter of this Agreement or otherwise.
- (d) 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.

34.4 Counterparts

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

34.5 Non-merger

Each representation, covenant and obligation under this Agreement continues in full force and effect until such representation, obligation or covenant is satisfied or completed.

34.6 Authority to enter into agreement

- (a) Each Party warrants to the other Party that, in respect of itself, it has full power to enter into and perform its obligations under this Agreement, and that this Agreement constitutes valid and binding obligations on it, enforceable in accordance with its terms.
- (b) If this Agreement is executed by an attorney, the attorney states, by such execution, that as at the time of such execution the attorney has received no notice of the revocation of the power of attorney pursuant to which the attorney has executed this Agreement.

34.7 Consents and approvals

Unless otherwise stated in this Agreement, if a Party has a right to accept, reject, decide, determine, consent or make any decision or exercise any discretion or decide to give any notice under this Agreement, the Party may do so conditionally or unconditionally at its discretion.

34.8 Relationship

The relationship between the Parties is entirely contractual. Nothing in this Agreement creates, or is to be taken to create, any partnership, joint venture or relationship of employer and employee between the Parties or any of them.

34.9 Certificate

A certificate signed by any duly authorised officer of Aurizon Network as to a matter or as to a sum payable to Aurizon Network in connection with this Agreement is prima facie evidence of the matter stated in it or the sum payable.

34.10 Costs

Subject to any express provision in this Agreement to the contrary, each Party bears its own legal and other expenses relating directly or indirectly to the preparation of, and performance of its obligations under, this Agreement.

34.11 Duty

- (a) The Access Holder is, as between the Parties, liable for and must duly pay all stamp duty (including any fine or penalty) on or relating to this Agreement and any document executed under or in connection with it.
- (b) If Aurizon Network pays any stamp duty (including any fine or penalty) on or relating to this Agreement, or any document executed under or in connection with it, the Access Holder must, within 10 Business Days after receiving such demand, reimburse Aurizon Network the amount paid.

34.12 Waiver and exercise of rights

- (a) A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) No failure or delay by either Party to exercise any right or remedy under this Agreement may be construed or operate as a waiver or be evidence of delay, laches or acquiescence in equity or at law in respect of such right or remedy.
- (c) A waiver or consent by any Party of any default or breach of any term of this Agreement does not constitute a waiver of later defaults or breaches of the same or any other term.

- (d) A Party's election not to exercise any rights under this Agreement does not prejudice any other rights which that Party may have against the other Party arising out of any failure by the other Party to comply with this Agreement.

34.13 Computation of time

Where time is to be calculated by reference to a day or event, that day or the day of the event will be excluded.

34.14 Severance of invalid or illegal terms

- (a) If any term of this Agreement, or its application to any Party, person or circumstance, is or becomes invalid, void, voidable or otherwise unenforceable for any reason whatever, then:
 - (i) that term, or its application to such Party, person or circumstance, is severed from this Agreement;
 - (ii) the remainder of this Agreement, excluding the severed part, remains in force, and any term which includes the severed part applies to such Party, person or circumstance without reliance on the part severed; and
 - (iii) to the extent permissible by Law, the Parties must agree to replace the severed term, effective from the date of severance, with a valid and enforceable term which so far as possible achieves the same purpose, object or effect as the invalid, void, voidable or otherwise unenforceable term was intended to achieve and does not cause any substantial reduction in the benefits of either Party or material re-allocation of risks between the Parties.
- (b) The Parties must act reasonably and in good faith in seeking an agreement under this **clause 34.14** as to a replacement term.
- (c) If the Parties cannot agree upon a replacement term, this Agreement is continued in accordance with **clauses 34.14(a)(i)** and **34.14(a)(ii)**.

34.15 Rights cumulative

Subject to any express provision in this Agreement to the contrary, the rights of any Party under this Agreement are cumulative and are in addition to any other rights of that Party.

34.16 Approvals and consents

Subject to any express provision in this Agreement to the contrary, a Party may conditionally or unconditionally give or withhold any consent to be given under this Agreement.

34.17 Third Party Land

The Access Holder acknowledges that:

- (a) the land specified in **item 4 of Schedule 3 (Third Party Land)** is not owned or controlled by Aurizon Network; and
- (b) entry onto that Third Party Land is not included within the definition of Access,

and agrees that in respect of that Third Party Land:

- (c) the Access Holder will comply with the requirements of the person that owns or controls that Third Party Land (**Landowner**) in relation to that Third Party Land as notified to the Access Holder by Aurizon Network from time to time;
- (d) if, after the Commencement Date, there is a change in the costs incurred by Aurizon Network due to the requirements of the Landowner in respect of that Third Party Land, then that change is deemed to be a Material Change; and
- (e) if Aurizon Network's rights in respect of that Third Party Land are terminated for any reason other than the default of Aurizon Network of any agreement that affects Aurizon Network's use of that Third Party Land or other than by agreement with the Landowner, then Aurizon Network may, by notice to the Access Holder, suspend and/or terminate the Access Rights insofar as they relate to that part of the Nominated Network which is situated on that Third Party Land.

34.18 Implementation of agreement

Each Party must promptly execute all documents and do all such acts and things as are necessary or desirable to implement and give full effect to the provisions of this Agreement.

34.19 Governing law and jurisdiction

- (a) This Agreement is governed by, and is to be construed in accordance with, the law in force in the State.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in the State, and any courts which have jurisdiction to hear appeals from any of those courts, and waives any right to object to any proceedings being brought in those courts.

34.20 PPS Act

- (a) If a Party (**first party**) reasonably determines that this Agreement contains a "Security Interest" for the purposes of the PPS Act (**Security Interest**), the other Party (**second party**) agrees to do anything (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the first party (after consultation with the second party) reasonably asks and considers necessary for the purposes of:
 - (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
 - (ii) enabling the first party to apply for any registration, or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the first party; or
 - (iii) enabling the first party to exercise rights in connection with the Security Interest.
- (b) A Party is not required to give any notice under the PPS Act to the other Party or any other person and each Party waives the right to receive any such notice (including a notice of 'Verification Statement' as this term is

defined under the PPS Act) unless the notice is required by the PPS Act and that obligation cannot be excluded.

- (c) To the extent that this Agreement gives rise to a Security Interest, the Parties agree that for the purposes of section 115 of the PPS Act, the following sections of the PPS Act will not apply to any Relevant Collateral:
- (i) section 95 (notice by Secured Party of removal of Accession);
 - (ii) section 121(4) (notice by Secured Party of enforcement of Security Interest in liquid assets);
 - (iii) section 125 (obligation of Secured Party to dispose of or retain Collateral after seizure);
 - (iv) section 130, to the extent that it requires a party to give any notice to the other party (notice by Secured Party of disposal of Collateral);
 - (v) section 132(3)(d) (obligation of Secured Party to show amounts paid to other Secured Parties in statement of account);
 - (vi) section 132(4) (statement of account by Secured Party if it does not dispose of Collateral within prescribed period);
 - (vii) section 135 (notice by Secured Party of retention of Collateral);
 - (viii) section 142 (redemption of Collateral); and
 - (ix) section 143 (reinstatement of Security Agreement).

35 Most favoured nation status

35.1 Notice of contravention of price differentiation limitations

If the Access Holder (**Claimant Access Holder**) believes on reasonable grounds that:

- (a) Aurizon Network has entered into an Access Agreement with another Network Customer for a Network Train Service that transports the same specified commodity in the same specified geographic area as a Train Service operated using the Access Rights granted under this Agreement (**Like Train Service**); and
- (b) the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation set out in the Access Undertaking (including the value of the access charge, take or pay terms and terms of payment),

then the Claimant Access Holder may provide written notification to Aurizon Network which must include the reasons why the Claimant Access Holder considers this to be the case.

35.2 Aurizon Network's response

Within 20 Business Days after receipt of such notification, Aurizon Network must advise the Claimant Access Holder:

- (a) whether or not Aurizon Network agrees that the Access Agreement with the other Network Customer is for a Like Train Service and, if not, the reasons why Aurizon Network considers this to be the case;

- (b) if Aurizon Network agrees that the Access Agreement with the other Network Customer is for a Like Train Service, whether or not Aurizon Network agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation set out in the Access Undertaking and, if not, the reasons why Aurizon Network considers that the access charge applicable to the Like Train Service has not been developed in contravention of the limits on price differentiation; and
- (c) if Aurizon Network agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation, then within 40 Business Days after the advice provided under this **clause 35.2**, Aurizon Network must advise the Claimant Access Holder:
 - (i) whether or not Aurizon Network has been able to vary the access charge applicable to the Like Train Service such that it no longer contravenes the limits on price differentiation set out in the Access Undertaking; or
 - (ii) if Aurizon Network has not been able to vary the access charge applicable to the Like Train Service, that Aurizon Network agrees to the reduction of the Access Charges payable by the Claimant Access Holder, including the amount of the proposed reduced Access Charges.

35.3 Disputes

If the Access Holder does not agree with Aurizon Network's response, the dispute must be referred to an Expert for resolution in accordance with **clause 24.3**.

35.4 Interaction with other Network Customers

If:

- (a) another Network Customer notifies Aurizon Network that it believes that some or all of the Claimant Access Holder's Train Services are a "Like Train Service" as defined in the other Network Customer's Access Agreement to a Network Train Service operated by the other Network Customer, and that the Access Charge has been developed in contravention of the limits on price differentiation set out in the Access Undertaking; and
- (b) Aurizon Network agrees that this Agreement is for a Like Train Service and that any Access Charge under this Agreement has been developed in contravention of the limits on price differentiation set out in the Access Undertaking,

then Aurizon Network has the right by notice to the Claimant Access Holder to vary the Access Charge such that it no longer contravenes the limits on price differentiation set out in the Access Undertaking.

36 JV Participants and liability

36.1 Applicability

This **clause 36** only applies if **item 5 of Schedule 1** states that it applies.

36.2 Warranty

The Access Holder warrants that it enters into this Agreement as agent for the JV Participants in their respective percentage interests in the Joint Venture from time to time.

36.3 JV Participants and percentage interests

- (a) The percentage interest of the JV Participants in the Joint Venture will be as notified by the Access Holder to Aurizon Network from time to time, in accordance with this Agreement.
- (b) As at the Commencement Date, the respective percentage interests of the JV Participants in the Joint Venture are as specified in **item 7 of Schedule 1**.

36.4 Liability of JV Participants

- (a) The liability of each JV Participant under this Agreement will, subject to **clause 36.4(c)**, be several in respect of Financial Obligations in proportion to their respective percentage interests.
- (b) Each JV Participant will be jointly and severally liable in respect of the performance of any obligations under this Agreement that are not Financial Obligations.
- (c) Subject to **clause 36.4(e)**, if a JV Participant is in default of a Financial Obligation, and the Access Holder has not given notice to Aurizon Network identifying the defaulting JV Participant within five Business Days after the date of Aurizon Network giving a notice to the Access Holder identifying the default, all JV Participants will be jointly and severally liable for the performance of the Financial Obligation.
- (d) Any notice given by the Access Holder under **clause 36.4(c)** is conclusive evidence that the JV Participant specified in the notice is the JV Participant that is in default and the notice binds all JV Participants.
- (e) If a Financial Obligation is a payment obligation which does not have a specified due date, then **clause 36.4(c)** comes into effect only if:
 - (i) Aurizon Network notifies the JV Participants of the failure to comply with the Financial Obligation; and
 - (ii) the default is not remedied after a reasonable time (of at least 20 Business Days) from the date the JV Participants receive the notice under **clause 36.4(e)(i)**.

36.5 Termination and Suspension

For the avoidance of doubt, where a Suspension Event or Termination Event is attributable to or relates to an act or omission of one or more (but not all) of the JV Participants, Aurizon Network will be entitled to suspend or terminate (as applicable) this Agreement under **clauses 26 and 28** (as applicable) despite the Suspension Event or Termination Event (as applicable) not being attributable to or relating to an act or omission of all of the JV Participants.

Execution

Executed as an agreement

Executed by Aurizon Network Pty Ltd)
ABN 78 132 181 116:)
)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Executed by [the Access Holder])
ABN [insert]:)
)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Schedule 1 – Reference schedule

Item	Description	Details	
Access Holder details			
1	Access Holder	Name:	[insert]
		ABN:	[insert]
Particulars for Notices			
2	Address for Notices	Aurizon Network	
		Address:	[insert]
		Facsimile:	[insert]
		Email:	[insert]
		Attention:	[insert]
		Access Holder	
		Address:	[insert]
		Facsimile:	[insert]
		Email:	[insert]
		Attention:	[insert]
Security details			
3	Does clause 6.1 apply?	[yes/no]	
4	Security Amount	<p>The Security Amount (if applicable), at a time, will be an amount equivalent to the maximum amount of aggregate TOP Charges for all Train Service Types under this Agreement that could potentially be payable in up to 6 months assuming:</p> <p>(a) all of the Train Services were not operated for the Access Holder during the applicable period; and</p> <p>(b) the reason that the Train Services are not operated is not as a result of Aurizon Network Cause.</p>	
[Joint Venture]			
5	Does clause 36 apply?	[yes/no]	
6	Name of Joint Venture	[insert name of Joint Venture or "Not Applicable" if no Joint Venture]	
7	JV Participants and percentage interests	Name of JV Participant	Percentage Interest
		[insert name]:	[insert interest]%
		[insert name]:	[insert interest]%
		[insert name]:	[insert interest]%

Schedule 2 – Train Descriptions

Part A – Matters applicable to specific Train Service Types

1 Train Service Type #1

1.1 Applicable Reference Tariff

[insert name of applicable type of Reference Tariff]

1.2 Matters relevant to Train Service Type – irrelevant to Reference Tariff

Details of dates	
Train Service Compliance Date	[insert]
Train Service Commitment Date	[insert]
Train Service Expiry Date	[insert]
General details	
Commodity	Coal
Coal System	[insert]
Reference Train Service	[yes /no]
Conditional Access Rights	
Does clause 9 apply?	[yes/no]
	[if yes, insert description of Expansion]
Operator(s)	
Name:	[insert]
Address:	[insert]
Facsimile:	[insert]
Email:	[insert]
Attention:	[insert]

1.3 Key characteristics of Train Service Type #1 – Reference Tariff sensitive

Details of route and facilities	
Origin	[insert]
Destination	[insert]
Loaded distance from Origin to Destination (km)	[insert]
Empty distance from Destination to	[insert]

Details of route and facilities	
Origin (km)	
Loading Facility	[insert]
Unloading Facility	[insert]
Depot	[insert]
Through-Running Train Service Type	[yes /no]
Details of maximum dwell times	
Maximum Time at Loading Facility (hours)	[insert]
Maximum Time at Unloading Facility (hours)	[insert]
Maximum Time at Depot (hours)	[insert]
Maximum Other Dwell Times (hours)	[insert]
Maximum Sectional Running Times	
Maximum Sectional Running Times	The Maximum Sectional Running Time for a Section for the Train Service Type are set out in appendix A to this Schedule 2 .
Nominated Monthly Train Services	
Nominated Monthly Train Services	The Nominated Monthly Train Services for the Train Service Type is set out in appendix B to this Schedule 2 .
Maximum Payload	
Maximum Payload	The Maximum Payload for the Train Service Type is set out in appendix B to this Schedule 2 .

1.4 Special operating restrictions

Without limiting the special operating restrictions which are specified in **item 1.2** of **Part B** of **Schedule 2** as being applicable to all Train Service Types, in scheduling Train Services for the Train Service Type in accordance with the Network Management Principles, Aurizon Network will comply with the following special operating restrictions (if any):

Item	Special operating restriction
1	[insert]
2	[insert]

1.5 Cycle description

Subject to:

- (a) any Train Control Direction given to the Operator in respect of a Train Service;
- (b) any exceptions which are specified in **part B** of this **Schedule 2** as being applicable to all Train Service Types; and
- (c) any exceptions specified in the table below,

the Operator must operate Train Services for the Train Services Type over the most direct route on the Nominated Network between the Origin and Destination and Origin (as applicable).

Item	Exceptions
1	[insert]
2	[insert]

Where there is duplicated Track or multiple roads (eg yards), Aurizon Network will have the ability to schedule the Train Service over any of the Tracks or roads.

1.6 Permitted Train Movements on the Nominated Network

Item	Permitted Movements
1	[Insert any permitted Train Movements by the Operator on the Nominated Network other than direct corridor travel of the Train Service in accordance with the specified Sectional Running Times and Dwell Times.]
2	[insert]

Part B – Matters applicable to all Train Service Types

1 Matters applicable to all Train Service Types

1.1 Overview

The matters set out in this **part B** of **Schedule 2** are applicable to all Train Service Types and form part of the Train Service Description for all Train Service Types.

1.2 Special operating restrictions

Without limiting the special operating restrictions for a Train Service Type which are specified in **item 1.4** of **Part A** of **Schedule 2** (if any), in scheduling Train Services in accordance with the Network Management Principles, Aurizon Network will comply with the following special operating restrictions:

Item	Special operating restriction
1	[insert]
2	[insert]

1.3 Cycle description

Subject to the exceptions set out in the table below, Train Services cycle description is the most direct route over the Nominated Network between the Origin and Destination and Destination and Origin (as applicable).

Item	Exceptions
1	[insert]
2	[insert]

1.4 Stowage

Item	Stowage requirements
1	[Insert short term Stowage requirements additional to that provided in the relevant Reference Tariff Provisions.]
2	[insert]

Appendix A to Schedule 2 - Sectional Running Times

1 Train Services that are Reference Train Services

[Drafting note: This item will set out the Maximum Sectional Running Times for Train Services that are Reference Train Services.]

Maximum Sectional Running Times: Reference Train Services

Location From	Location To	Empty (mins)	Loaded (mins)

Standard Sectional Running Times: Reference Train Services

		Empty (mins)			Loaded (mins)		
Location From	Location To	Pass to Stop	Start to Pass	Start to Stop	Pass to Stop	Start to Pass	Start to Stop

2 Train Services that are not Reference Train Services

[Drafting note: If a Train Service for a Train Service Type is a not a Reference Train Service, the Maximum Sectional Running Times for Train Services for that Train Service Type for each Section will be specifically set out in this item.]

Maximum Sectional Running Times: Non- Reference Train Services

Location From	Location To	Empty (mins)	Loaded (mins)

Standard Sectional Running Times: Non-Reference Train Services

		Empty (mins)			Loaded (mins)		
Location From	Location To	Pass to Stop	Start to Pass	Start to Stop	Pass to Stop	Start to Pass	Start to Stop

Appendix B to Schedule 2 – Nominated Monthly Train Services

1 Train Service Type #1

Nominated Monthly Train Services (for a 30 day Month)	[insert]
Maximum Payload	[insert] tonnes
Nominal Payload	[insert] tonnes
Indicative Tonnage (for a 30 day Month)	[insert] tonnes

Note for information purposes only: The Nominated Monthly Train Services (for a 30 day Month) for a Train Service Type is the number of Train Services calculated in accordance with the following formula:

$$\text{NMTS} = 2 \times \text{Loaded Train Services}$$

where:

NMTS = the Nominated Monthly Train Services (for a 30 day Month) for the Train Service Type

Loaded Train Services = IT/AAP (rounded to the nearest whole Train Service on the basis that where the first decimal place is greater than three, the number of Train Services is to be rounded up to the nearest number of whole Train Services and, where the first decimal place is three or less, the number of Train Services is to be rounded down to the nearest number of whole Train Services)

IT = the Indicative Tonnage (for a 30 day Month) for the Train Service Type

AAP = the Nominal Payload for the Train Service Type

Appendix C to Schedule 2 – Conditional Access Rights

1 Train Service Type #1

Details of Expansion	
Details of Expansion	[insert]
Details of Segments	
Details of Segment #1	Description: [insert] Initial Available Capacity: [insert]
Details of Segment #2	Description: [insert] Initial Available Capacity: [insert]
Details of Segment # [#]	Description: [insert] Initial Available Capacity: [insert]

Schedule 3 – Nominated Network

1 Nominated Network

The Nominated Network is that part of the Infrastructure described by reference to the diagrams and/or tables set out below, but does not include any freight terminals, railway stations, passenger facilities, workshops or maintenance depots (including provisioning facilities).

[Insert line diagram(s) depicting the Nominated Network]

2 Parts of Nominated Network subject to clause 25.2

For the purpose of **clause 25.2**, the specified parts of the Nominated Network are those parts of the Nominated Network described by reference the diagrams and/or tables set out below:

[Insert line diagram(s) depicting the Nominated Network]

[Drafting note: Aurizon Network may specify parts of the Nominated Network for the purpose of **clause 25.2** which are life expired, obsolete and/or only used by a single user.]

3 Train Control centres and signal cabins

The movement of an Operator's Trains while on the Nominated Network will be controlled by the Train Control centres and signal cabins at locations to be notified by Aurizon Network from time to time.

4 Third Party Land

[Insert diagram(s)/table(s) (if applicable)]

5 Weighbridges and Overload Detectors

5.1 Weighbridges

Location	Party responsible for Weighbridge	Tolerance
[insert]	[insert]	[The tolerances required to achieve verification under the <i>National Measurement Act 1960</i> (Cth)]

5.2 Overload Detectors

Location	Party responsible for Overload Detector	Tolerance
[insert]	[insert]	+/- [insert] %

Schedule 4 – Access Charges

1 Access Charge Rates

Unless otherwise approved or required by the QCA, Aurizon Network must calculate the Access Charges for the Train Services to which a Reference Tariff applies on a basis that comprises all of the following elements (and including any other amount that may be included in an Access Charge in accordance with the Access Undertaking):

Description of Access Charge Rate	Definition	Access Charge Rate (ex GST)	
		\$	Unit
Train Service Type # [insert]			
Incremental Maintenance Tariff	AT ₁	[insert]	\$ / '000 Gtk
Incremental Capacity Tariff	AT ₂	[insert]	\$ / RTP
Allocated Tariff 1	AT ₃	[insert]	\$ / '000 Ntk
Allocated Tariff 2	AT ₄	[insert]	\$ / Net Tonne
Electric Tariff	AT ₅	[insert]	\$ / '000 Egtk
Electric Energy Charge	EC	[insert]	\$ / '000 Egtk
QCA Levy	QL	[insert]	\$ / Net Tonne
Train Service Type # [insert]			
Incremental Maintenance Tariff	AT ₁	[insert]	\$ / '000 Gtk
Incremental Capacity Tariff	AT ₂	[insert]	\$ / RTP
Allocated Tariff 1	AT ₃	[insert]	\$ / '000 Ntk
Allocated Tariff 2	AT ₄	[insert]	\$ / Net Tonne
Electric Tariff	AT ₅	[insert]	\$ / '000 Gtk
Electric Energy Charge	EC	[insert]	\$ / '000 Gtk
QCA Levy	QL	[insert]	\$ / Net Tonne

[Drafting note: If a Train Service Type has a cross system component to it, this table will be populated in accordance with the cross system pricing rules in Schedule F of the Access Undertaking, and in particular for clarity note that the access charge is based on a cross system reference tariff. Where there is an 'Expansion Tariff' (as defined in the Access Undertaking), this table will be populated in accordance with Schedule F of the Access Undertaking for the correct expansion tariff.]

Schedule 5 – Insurance

1 Workers compensation insurance

The Access Holder must effect and maintain insurance covering such liability as may arise at common law or by virtue of any applicable workers' compensation legislation in respect of any Access Holder's Staff.

Schedule 6 – Suspension Events and Termination Events

Item	Suspension Event	Termination Event
1	The Access Holder fails to pay by the due date any amount payable under this Agreement, and such default continues for at least 10 Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to pay by the due date any amount payable under this Agreement, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
2	An Insolvency Event occurs in respect of the Access Holder.	An Insolvency Event occurs in respect of the Access Holder and continues for a period of at least 40 Business Days.
3	The Access Holder fails to: (a) effect or maintain the insurances required under clause 19.2 ; or (b) provide evidence of the insurances required under clause 19.2 having been effected and maintained, and such default continues for at least five Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to: (a) effect or maintain the insurances required under clause 19.2 ; or (b) provide evidence of the insurances required under clause 19.2 having been effected and maintained, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
4	The Access Holder fails to establish, maintain or replace the Security as required under this Agreement, and such default continues for at least five Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to establish, maintain or replace the Security as required under this Agreement, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
5	The Access Holder purports to Assign any of its rights or interests in this Agreement other than as permitted in this Agreement.	The Access Holder purports to Assign any of its rights or interests in this Agreement other than as permitted by this Agreement.
6	The Access Holder fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the Access Holder, may (either of itself or if other requirements are satisfied) result in any other Suspension Event occurring), and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the Access Holder, may (either of itself or if other requirements are satisfied) result in any other Termination Event occurring), and such default continues for at least 40 Business Days after Aurizon Network notifies the Access Holder of the default.

Schedule 7 – Pro forma Access Interface Deed

Aurizon Network Pty Ltd

[Insert Customer]

Access Interface Deed

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Date

Parties

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

[insert] of [insert address] (**Customer**)

Background

- A The Customer and the Operator are parties to the Rail Haulage Agreement.
 - B The Railway Manager and the Operator are parties to the Access Agreement.
 - C The Parties wish to enter into this Deed to create a contractual relationship between the Railway Manager and the Customer and record their agreement in respect of circumstances in which they will be liable to each other for loss suffered in connection with the provision or utilisation of Access.
-

Agreed terms

1 Interpretation

1.1 Definitions

In this Deed:

Access has the meaning given in the Access Agreement.

Access Agreement means the Access Agreement [insert] between the Railway Manager and the Operator dated on or about the date of this Deed.

Access Rights means rights of access granted by the Railway Manager to the Operator under the Access Agreement which are required to enable the Operator to provide the Haulage Services.

Access Undertaking means the access undertaking submitted by the Railway Manager to the QCA and approved by the QCA under the *Queensland Competition Authority Act 1997* (Qld) as in force at the time of entering into the Access Agreement or any later version adopted by the Railway Manager and the Operator under clause 3.2 of the Access Agreement.

Claim means any action, proceeding, claim, demand, damage, loss, cost, liability or expense including the costs and expenses of defending or settling any action, proceeding, claim or demand.

Consequential Loss means:

- (a) any loss of revenue, loss of profits or loss of production;

- (b) any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport;
- (c) loss of business opportunities;
- (d) loss of or damage to reputation or goodwill;
- (e) any wasted overheads or demurrage;
- (f) loss of or damage to credit rating; and
- (g) loss or damage that does not naturally, according to the usual course of things, flow from a breach of contract,

but Consequential Loss does not include any of the following Claims to the extent that the party would in the absence of this definition be entitled to recover them at law:

- (h) any costs or expenses incurred by the party in connection with mitigating the effects of any breach of the Access Agreement by the other party (including implementing a workaround solution in respect of or otherwise mitigating any failure of a party to comply with the requirements (including warranties) of the Access Agreement) provided that if a loss arising from the breach of the Access Agreement is itself not recoverable because it is a Consequential Loss, the costs or expenses incurred in mitigating that loss must also be treated as (non-recoverable) Consequential Loss;
- (i) 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
- (j) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims; or
- (k) any fines or penalties imposed by a governmental or regulatory body for failure by the party to comply with the Law as a result of the other party's failure to comply with the requirements of the Access Agreement, and any costs or expenses incurred by the first party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failure or breaches.

Deed means this Access Interface Deed.

Haulage Services means the haulage services provided by the Operator to the Customer under the Rail Haulage Agreement.

Infrastructure has the meaning given to the term "Rail Infrastructure" in the Access Undertaking.

Infrastructure Lease means any lease or sublease to Aurizon Network of any Infrastructure which forms part of the Nominated Network.

Infrastructure Lessor means any lessor or sublessor under an Infrastructure Lease.

Operator means [insert].

Party means a party to this Deed.

Queensland Competition Authority or **QCA** means the authority established under the *Queensland Competition Authority Act 1997* (Qld).

Rail Haulage Agreement means the agreement between the Operator and the Customer for the provision of rail haulage services to the Customer and for which purpose the Operator requires the Access Rights.

Staff of a party, means the employees, contractors, volunteers and agents of the party and any other person under the control or supervision of the party which is involved in:

- (a) in the case of the Railway Manager, any activity associated with the Access Agreement, the Infrastructure or the provision of Access Rights; and
- (b) in the case of the Customer, any activity associated with:
 - (i) the haulage services provided by the Operator to the Customer under the Rail Haulage Agreement; or
 - (ii) the Customer's mine or other production facility (if any) to which the haulage services provided by the Operator under the Rail Haulage Agreement relate.

1.2 Construction

In this Deed, unless expressed to the contrary:

- (a) the singular include the plural and vice versa;
- (b) a gender includes all other genders;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it;
- (e) a reference to:
 - (i) a person includes a partnership, unincorporated association, corporation or other entity, government or statutory body;
 - (ii) a person includes its legal personal representatives, successors and assigns;
 - (iii) conduct includes any omission or any representation, statement or undertaking, whether or not in writing;
 - (iv) conduct includes a benefit, remedy, discretion or power;
 - (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
 - (vi) the words "include", "includes" or "including" must be read as if they are followed by the words "without limitation";
 - (vii) writing includes:
 - (A) any mode of representing or reproducing words in tangible

- and permanently visible form, and includes fax transmissions;
and
- (B) words created or stored in any electronic medium and retrievable in perceivable form;
 - (viii) time is to local time in Brisbane, Queensland;
 - (ix) "A\$", "\$" or "dollars" is a reference to the lawful currency of Australia;
 - (x) this or any other document or agreement includes the document or agreement as novated, varied or replaced from time to time and despite any change in the identity of the parties;
 - (xi) anything (including any amount) is a reference to the whole or part or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
 - (xii) under a clause includes in accordance with that clause;
 - (xiii) a clause or schedule is a reference to a clause or schedule (as applicable) in this Deed;
 - (xiv) any legislation or any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;
 - (xv) any Authority, association or body whether statutory or otherwise (**first body**) is, if the first body ceases to exist or is re-constituted, re-named or replaced or the powers or functions of the first body is transferred to any other Authority, association or body (**replacement body**), deemed to refer to the replacement body established or constituted in lieu of the first body or as nearly as may be succeeding to the powers or functions of the first body;
 - (xvi) access or access rights does not include rights granted by the Railway Manager to a Railway Operator under a train operations deed; and
 - (xvii) the Customer, if the Customer is comprised of more than one entity (for example, if the Customer is comprised of the participants in an unincorporated joint venture), is a reference to each entity comprising the Customer.

1.3 Headings

Headings do not affect the interpretation of this Deed.

2 Relations between the Parties

2.1 No liability for Consequential Loss

The Railway Manager and the Customer are not liable to the other Party and must not make any Claim against the other Party under or in connection with the Access Agreement, the Access Rights or the Infrastructure in respect of any Consequential Loss whether as a result of:

- (a) the performance, non-performance or breach of the Access Agreement or any other obligation;
- (b) the standard of or any failure of or defect in the Infrastructure;
- (c) negligence;
- (d) breach of warranty or representation; or
- (e) any other act, omission or circumstance whatsoever.

2.2 Indemnities between Customer and the Railway Manager

- (a) Subject to **clauses 2.1** and **2.4**, the Customer is solely liable for and releases, indemnifies and will keep indemnified the Railway Manager, the Railway Manager's directors and the Railway Manager's Staff against all Claims of any nature suffered or incurred by or made or brought against the Railway Manager, the Railway Manager's directors or the Railway Manager's Staff due to or arising out of the Access Agreement or this Deed in respect of any loss of or damage to or destruction of real or personal property (including property of the Railway Manager) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the Customer.
- (b) Subject to **clauses 2.1** and **2.4**, the Railway Manager is solely liable for and releases, indemnifies and will keep indemnified the Customer, the Customer's directors and the Customer's Staff against all Claims of any nature suffered or incurred by or made or brought against the Customer, the Customer's directors or the Customer's Staff due to or arising out of the Access Agreement or this Deed in respect of any loss of or damage to or destruction of real or personal property (including property of the Customer) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the Railway Manager.

2.3 Extent of Aurizon Network's liability to Customer for non-Consequent Loss

Subject to **clauses 2.1**, **2.4** and **2.5**, the Railway Manager will be liable to the Customer for any Claim to the same extent that the Railway Manager would have been liable for that Claim under the Access Agreement if the Claim was made by the Operator.

2.4 Exclusions of Liability in Access Agreement apply

For the purposes of **clauses 2.2** and **2.3**, each provision of the Access Agreement that directly or indirectly has the purpose or effect of regulating, excluding or limiting the liability of, or the making of a Claim against, the Railway Manager or the Operator (including limiting what conduct will constitute a breach and setting out when and how a Claim may be brought including any preconditions to doing so) will also operate to regulate, exclude or limit the liability of, or the making of a Claim against, the Railway Manager or the Customer by the other Party.

2.5 Application of References to Operator in Access Agreement

For the purposes of applying **clauses 2.3** and **2.4**, all references to the Operator in relevant provisions of the Access Agreement will be deemed to include reference to the Customer, except to the extent that any such provision refers to or requires the Operator or the Railway Manager and the Operator to agree anything which will only be deemed to be a reference to the Customer where:

- (a) the matter to be agreed relates to the Claim or subject of the Claim by the Customer; and
- (b) the matter has not, prior to the Claim, been agreed by the Railway Manager and the Operator for the purposes of the Access Agreement.

3 Assignment

A Party must not assign its interests under the Access Agreement or the Rail Haulage Agreement (as applicable) to another person (**intended assignee**) unless the intended assignee has first executed and delivered to the other Party a deed of assumption, in a form acceptable to the other Party, acting reasonably, under which the intended assignee undertakes to be bound by the terms of this Deed.

4 General

4.1 Amendment

This Deed may only be varied or replaced by a written document executed by the Parties.

4.2 Entire understanding

- (a) This Deed and the Access Agreement contain the entire understanding and agreement between the Parties as to the subject matter of this Deed.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Deed are merged in and superseded by this Deed and are of no effect whatsoever. 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 Deed; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

4.3 Counterparts

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

4.4 Duty

- (a) The Customer as between the Parties is liable for and must pay all duty (including any fine or penalty except where it arises from default by another Party) on or relating to this Deed, any document executed under it or any dutiable transaction evidenced or effected by it.

- (b) If a Party other than the Customer pays any duty (including any fine or penalty) on or relating to this Deed, any document executed under it or any dutiable transaction evidenced or effected by it, the Customer must pay that amount to the paying Party on demand.

4.5 Legal costs

Except as expressly stated otherwise in this Deed, each Party must bear its own legal and expenses relating directly or indirectly to the preparation of, and performance of its obligations under, this Deed.

4.6 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a Party of a right relating to this Deed does not prevent any other exercise of that right or the exercise of any other right.
- (b) No failure or delay by either Party to exercise any right or remedy under this Deed may be construed or operate as a waiver or be evidence of delay, laches or acquiescence in equity or at law in respect of such right or remedy.
- (c) A waiver or consent by any Party of any default or breach of any term of this Deed does not constitute a waiver of later defaults or breaches of the same or any other term.
- (d) A Party's election not to exercise any rights under this Deed does not prejudice any other rights which that Party may have against the other Party arising out of any failure by the other Party to comply with this Deed.
- (e) A Party is not liable for any loss, cost or expense of any other Party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

4.7 Computation of time

Where time is to be calculated by reference to a day or event, that day or the day of the event is excluded.

4.8 Governing law and jurisdiction

- (a) This Deed is governed by, and is to be construed in accordance with, the law in force in Queensland.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Queensland and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

4.9 Liability

An obligation of two or more persons binds them separately and together.

Execution

Executed as a deed

Executed by Aurizon Network Pty Ltd)
ABN 78 132 181 116:)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Executed by [insert]:)
)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date