

2014 DAU submission version

[QCA Final Decision](#)

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Aurizon Network Pty Ltd

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[Insert name of ~~End User~~[Access Holder](#)]

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# ~~End User~~ 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 (End User)~~ **Schedule 1 (Access Holder)**

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## Background

- A Aurizon Network is responsible for the provision of ~~access~~ **Access** to the Nominated Network in accordance with the Access Undertaking.
  - B The ~~End User~~ **Access Holder** wishes to secure non-exclusive rights of ~~access~~ **Access** to the Nominated Network for the operation of Train Services by an Operator (or Operators) ~~appointed by the End User.~~
  - C Aurizon Network has agreed to grant non-exclusive Access Rights to the ~~End User~~ **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 ~~Agreements and to provide Train Control for those Train Services on the terms and conditions of this Agreement~~ **Deed**.
  - D The Parties may enter into separate agreements for the provision of services by Aurizon Network to the ~~End User~~ **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 Application** has the meaning given in the Access Undertaking.~~

**Access Charges** means:

~~*[Where this Agreement provides for the End User to pay all Access Charges:]*~~

- (a) where the term is used in respect of a Billing Period, the Access Charges for that Billing Period as calculated in accordance with ~~item 3.1 of schedule 4~~ **Schedule 4**; and

- (b) otherwise, the charges calculated in accordance with ~~schedule 4~~ **Schedule 4** and any interest payable in relation to such charges under this Agreement.

~~[Where this Agreement provides for the End User to only pay TOP Charges:]~~

~~where the term is used~~ 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 ~~Billing Period, the Access Charges for that Billing Period;~~ train loadout facility;
- (i) ~~payable by the End User in accordance with item 3.1 of schedule 4;~~ and
- (i) ~~payable by an Operator in accordance with schedule 4 of the applicable Train Operations Agreement;~~ and
- (b) ~~otherwise,~~ an agreement allowing the connection of Private Facilities to the Infrastructure; or
- (c) an agreement in relation to ~~the charges payable to Aurizon Network by~~ funding and/or construction of Connecting Infrastructure.

Access Holder's Staff means ~~the End User~~ employees, contractors, volunteers and agents of the Access Holder and ~~each~~ any other person under the control or supervision of the Access Holder 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 ~~for the~~.

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

- (e) ~~Access Rights (and the right to utilise the Access Rights to operate Train Services) calculated in accordance with schedule 4 and schedule 4 of the applicable Train Operations Agreement respectively, and any interest payable in relation to such charges under such agreements.~~

~~Access Charge Rates~~ has the meaning given in **item 1.1 of schedule 4.**

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

~~Access Rights~~ means:

means the rights of access to the Nominated Network granted ~~pursuant to~~ under this Agreement (whether or not ~~allocated to~~ utilised by an Operator from time to time); ~~and~~.

- (a) ~~for a Train Service Type, the "Access Rights" (as defined in paragraph (a) of this definition) for the operation of Train Services for that Train Service Type.~~

**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.

**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.

~~**Activities** means any activity, including “railway operations” as defined under the Rail Safety Act.~~

**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 Service Type but which is otherwise in accordance with the Train ~~Service~~ 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 ~~End User~~ Access Holder under this Agreement as if it was a Train Service for the Train Service Type (subject to any derogations to the Train ~~Service~~ 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.

~~**Adjustment Charge** means an Adjustment Charge (as defined in the Access Undertaking) approved by the QCA from time to time.~~

~~**Advanced Access Seeker** means an Access Seeker that has:~~

- ~~(a) — commenced negotiation of an access agreement with Aurizon Network in respect of the access rights sought by the Access Seeker; and~~
- ~~(b) — demonstrated to Aurizon Network’s reasonable satisfaction that the Access Seeker will be able to fully utilise those access rights, including demonstrating to Aurizon Network’s satisfaction that the Access Seeker will hold, or will have the benefit of, or is reasonably likely to hold, or have the benefit of, Supply Chain Rights (as if the Access Seeker was the End User and an Operator was an operator for the Access Seeker for the purposes of that definition) for the operation of Network Train Services utilising those access rights for the whole of the term of those access rights~~

~~In determining whether the Access Seeker will continue to hold, or have the benefit of, the relevant Supply Chain Rights for the purposes of **paragraph (b)** of this definition, the Parties are to assume, if the Access Seeker or the holder of those Supply Chain Rights has an option granted in its favour to renew such Supply Chain Rights or extend the term of such Supply Chain Rights, that such option to renew or extend is exercised.~~

~~**Affected Train Service Type:**~~

- ~~(c) — in **clause 8**, has the meaning given in **clause 8.2(b)**; and~~
- ~~(a) — in **clause 16**, has the meaning given in **clause 16.6(b)**.~~

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



~~**Allowable Threshold** for a Billing Period means 10 percent of the total number of Train Services scheduled in the Daily Train Plan for that Billing Period.~~

~~**Ancillary Access Rights** has the meaning given in the Access Undertaking.~~

~~**Approval** means any consent, licence, permit, authorisation, lodgement, filing, agreement, certificate, permission, direction, declaration, authority, accreditation, approval or exemption issued by an Authority.~~

~~**Assessment Date** has the meaning given in **clause 8.1**.~~

**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 ~~End User~~[Access Holder](#) and the execution of a Train Operations ~~Agreement~~[Deed](#).

~~**Aurizon Network Cause** means where Aurizon Network is unable to make the Infrastructure available for the operation of Network Train Services in accordance with the End User's Access Rights under this Agreement or any other Access Holder's access rights under any other Access Agreement for the operation of Network Train Services on the Infrastructure, as a result of:~~

~~(b) — Planned Possessions, Emergency Possessions or Urgent Possessions;~~

~~(c) — a "Force Majeure Event", as defined in and affecting Aurizon Network under a Train Operations Agreement; or~~

~~(d) — any other action or inaction by Aurizon Network which directly resulted in the Infrastructure not being so available;~~

~~where such inability by Aurizon Network is not attributable in any way:~~

~~(e) — to an Access Holder, a Railway Operator or a Railway Operator's customer;~~

~~(f) — to Aurizon Network complying with its Passenger Priority Obligations;~~

~~(g) — to the unavailability of a Loading Facility or an Unloading Facility;~~

~~(h) — to the failure to load a Train at the Loading Facility for a Train Service Type within the Maximum Time at Loading Facility, or unload a Train at the Unloading Facility for a Train Service Type within the Maximum Time at Unloading Facility, as specified in the Train Service Description for that Train Service Type; or~~

~~(i) — in respect of each Train Service for a Through-Running Train Service Type, to the unavailability of, or cancellation of train services on, an Adjoining Network.~~

[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.

~~**Authorised Rollingstock Configurations** for a Train Service Type means Rollingstock Configurations for a Train Service Type which are taken to be authorised Rollingstock Configurations for that Train Service Type under a Train Operations Agreement from time to time.~~

~~**Authority** means the Crown (in right of the State or the Commonwealth), a minister of the Crown, a federal, state or local government department, a corporation or authority constituted for a public purpose, a holder of an office for a public purpose, a local authority, a court, a tribunal and any officer or agent of the foregoing acting as such.~~

**Authority** has the meaning given in the Access Undertaking.

**Available Capacity** has the meaning given in the Access Undertaking.

~~**Average Annual Payload** for a Train Service Type and for an Operator means, at a point in time, the average of the Payloads (expressed in tonnes) for each Train Service for that Train Service Type operated by that Operator from the Origin to the Destination (as recorded by a Weighbridge or Overload Detector) during the 12 month period ending at that point in time.~~

**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 ~~clause 7.3(a)~~ the Access Undertaking.

~~**Capacity Assessment Notice** has the meaning given in clause 7.5.~~

~~**Capacity Change** has the meaning given in clause 7.3(a).~~

**Capacity Shortfall** has the meaning given in the Access Undertaking.

~~**Central Queensland Coal Region** has the meaning given in the Access Undertaking.~~

**Change in Access Undertaking** means:

- (a) any amendment to or replacement of ~~an~~ 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 ~~an~~ 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** means:

- ~~(d) any amendment, repeal or enactment of any Law;~~
- ~~(e) any legally binding change in the interpretation or application, including by has the meaning given in the exercise of delegated authority, of any Law resulting from a decision of a court or other Authority;~~
- ~~(f) the making of any new directive, or any change in an existing directive, of any Authority Access Undertaking, except that is legally binding;~~
- ~~the imposition of a legally binding requirement for authorisations not required as at the the reference to "Commencing Date" is replaced with "Commencement Date;" (as defined under this Agreement).~~
- ~~(g) after the date of grant of any authorisation, a change in the terms and conditions attaching to that authorisation or the attachment of any new terms or conditions that are legally binding; or~~
- ~~(h) any such authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application being duly made, or being renewed on conditions that are legally binding and which are materially less favourable than those attached to the original authorisation.~~

**Change in Relevant Taxes** means:

- ~~(i) the imposition of a new Relevant Tax;~~
- ~~(j) an increase in the rate of a Relevant Tax; or~~
- ~~(k) a change in the basis of calculation of a Relevant Tax.~~

~~**Chargee** has the meaning given in clause 29.3 the Access Undertaking.~~

~~**Charger** has the meaning given in clause 29.3. **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.~~

**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.

~~Committed Capacity~~ has the meaning given in the ~~Access Undertaking~~.

~~Common Corridor~~ means that part of the Infrastructure that:

~~(l) — either:~~

- ~~(i) — would be utilised by an Operator to operate Train Services for the End User utilising the Nominated Access Rights; or~~
- ~~(ii) — if the End User has not nominated an Operator to operate Train Services utilising the Nominated Access Rights, would have been utilised by an Operator had the End User nominated an Operator to operate the relevant Train Services; and~~

~~(m) — will also be utilised by the Transferee's Network Train Services.~~

~~Common Costs~~ means those costs associated with the provision of Infrastructure that are not Incremental Costs for any particular Network Train Service using that Infrastructure.

~~Compliance Date~~ means the earliest Train Service Compliance Date under this Agreement.

**Compliant Nomination Requirements** means:

- (a) subject to **paragraph (b)** of this definition, the Train ~~Service~~ Description for the Train Service Type which the ~~End User~~[Access Holder](#) wishes to allocate to the nominee Operator in the nominee Operator's new or existing Train Operations ~~Agreement~~[Deed](#) (as applicable) must be the same as the Train ~~Service~~ Description for that Train Service Type in this Agreement;
- (a) 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 ~~Service~~ Description for that Train Service Type in the nominee Operator's Train Operations ~~Agreement~~[Deed](#); and
  - (ii) the "Nominated Monthly Operational Rights (for a 30 day Month)" in the Train ~~Service~~ Description for that Train Service Type in all other Train Operations ~~Agreements~~[Deeds](#) (if any),

must not exceed the "Nominated Monthly Train Services (for a 30 day Month)" set out in the Train ~~Service~~ Description for that Train Service Type in this Agreement. For the avoidance of doubt, where the nomination is accompanied by the statement in **clause 3.3(b)(iv)(B)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 ~~Agreement~~[Deed](#) taking into account the additional Access Rights for the relevant Train Service Type which the ~~End User~~[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:

- ~~(g) any special, indirect or consequential loss;~~
- ~~(h) any economic loss in respect of any claim in tort;~~
- (a) any loss of profits, loss of production, loss of revenue, loss of use, profits or loss of contract, 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 opportunity, loss of or damage to reputation or loss of goodwill;
- (e) any wasted overheads, any or demurrage;
- (a)(f) loss of or any damage to credit rating whatsoever; and
- ~~(b) any loss or damage arising out of any Claim by a Third Party,~~
- (g) in respect of a breach of this Agreement, loss or damage that does not naturally, according to the usual course of things, arise from the breach,

but does not include ~~loss or damage any of the following Claims to the extent that the applicable 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 ~~loss or damage~~ 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 this 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;

~~(e)~~ (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~~ 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 an Authority 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~~ **Schedule 6**.

**Customer ~~Specific Branch Lines~~** has the meaning given in the Access Undertaking.

~~**Cyclic Traffic** means traffic such as coal traffic in respect of which the entitlement to operate train services is defined in terms of a number of train services within a particular period of time (for example, a year, month or week).~~

~~**Daily Train Plan** means that document detailing the scheduled times for all Network Train Services operating on the Infrastructure and any Planned Possessions, Urgent Possessions and Emergency Possessions on a particular day on a specified part of the Infrastructure.~~

**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:

~~(d)~~ (l) 2%; and

~~(e)~~ (m) 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 24.3**).

**Defaulting Operator:**

~~(f) — in **clause 8**, has the meaning given in **clause 8.1(a)**;~~

~~in **clause 15**, has the meaning given in **clause 15.1(a)**; and **14.1(a)**.~~

~~(g) — in **clause 16**, has the meaning given in **clause 16.5(a)(i)**.~~

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

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

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

~~**Discount Rate** has the meaning given in the **Access Undertaking**.~~

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

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

~~**Effective Date**~~ **Emergency Possession** has the meaning given in **clause 10.1(d)(ii)**.

~~**Efficient Cost** means the cost, for each Year during the Evaluation Period, that reflects the cost that would be reasonably expected to be incurred by a Railway Manager adopting efficient work practices in the provision of the Infrastructure to the required service standard, having regard to any matters particular to the environment in which Aurizon Network operates, and including any transitional arrangements agreed between Aurizon Network and the QCA to reflect the transition from Aurizon Network's actual cost to that efficient cost~~ **Access Undertaking**.

~~**Emergency Possession** means a Possession required to rectify a serious fault with the Infrastructure that Aurizon Network, acting reasonably, considers dangerous to any person, or where severe speed restrictions have been imposed affecting the scheduled Network Train Services of Railway Operators.~~

~~**End User Agreement** means each of the following types of agreements between Aurizon Network and the End User:~~

~~(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.~~

~~**End User's Staff** means employees, contractors, volunteers and agents of the End User and any other person under the control or supervision of the End User 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.~~

**Environment** has the meaning given in the *Environmental Protection Act*: 1994

(Qld).

**Environmental Harm** means ~~Serious Environmental Harm, Material Environmental Harm or Environmental Nuisance.~~

**Environmental Law** means ~~a Law relating to~~ has the Environment, including:

~~(h) — a Law relating to planning, health, toxic or contaminating materials, dangerous goods, waste disposal or pollution; and~~

~~environmental protection policies, guidelines, regulations and relevant approved codes of practice, and~~ meaning given in the conditions of all licences, notices, directions, approvals, consents, permissions or permits, issued under any such Law Access Undertaking.

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

**Environmental Nuisance** means “environmental nuisance” as defined in the Environmental Protection Act.

**Environmental Protection Act** means the *Environmental Protection Act 1994* (Qld).

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

**Evaluation Period** ~~means, in respect of:~~

- ~~(i) — an individual Network Train Service, the period which is equal to the length of the expected duration of the existing or proposed access right under the Access Agreement in respect of the relevant Network Train Service;~~
- ~~(j) — a combination of Network Train Services for the purpose of determining a Reference Tariff to apply to some or all of those Network Train Services, the period for which that Reference Tariff will apply; or~~
- ~~(k) — a combination of Network Train Services other than those referred to in **paragraph (b)** of this definition, the period which is equal to the length of the expected duration of the longest existing or proposed access right under the Access Agreement in respect of any of the Network Train Services comprising the combination of Network Train Services.~~

**Existing Capacity** has the meaning given in the Access Undertaking.

**Expansion** has the meaning given in the Access Undertaking.

**Expansion Infrastructure** for an Expansion means the section or sections (as applicable) of the Infrastructure (excluding Customer Specific Branch Lines and Connecting Infrastructure) on which:

- ~~(l) — either:
  - ~~(i) — the Operator may operate Train Services for the End User utilising the Conditional Access Rights; or~~
  - ~~(ii) — if the End User has not nominated an Operator to operate Train Services utilising the Conditional Access Rights, an Operator may operate Train Services for the End User had the End User~~~~



~~nominated an Operator to operate the relevant Train Services; and~~  
~~(m) any Other Conditional Access Holders may operate, or cause the operation of, Network Train Services exercising their Other Conditional Access Rights for the Expansion.~~

**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 ~~End User~~Access Holder to:

- (a) pay, or cause to be paid, an amount of money, including damages for a breach of this Agreement; and
- (b) 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 ~~End User~~Access Holder due to damage to, or the destruction of, a part of the Nominated Network referred to in **clause 25.425.5** (assuming that part of the Nominated Network will not be repaired or replaced).

**Force Majeure Event** means any cause, event or circumstance, or combination of causes, events or circumstances, which ~~is a "Force Majeure Event" as defined in a Train Operations Agreement.~~

(a) is beyond the reasonable control of the affected Party; and

(b) by the exercise of due diligence the affected Party was not reasonably able to prevent or is not reasonably able to overcome,

and, provided that the requirements in paragraphs (a) and (b) of this definition are satisfied, includes:

(c) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the affected Party;

(d) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the affected Party is a party to such industrial action or would be able to influence or procure the settlement of such industrial action;

(e) act of God;

(f) war, invasion, terrorist act, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;

(g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Good Engineering Practices;

(h) malicious damage or sabotage;

(i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;

(j) failure of electricity supply from the electricity grid;

- (k) delay, restraint, restriction, embargo or other material adverse effect arising from any act or omission of any Authority;
- (l) fire, flood, storm surge, cyclone, tornado, earthquake, washaway, landslide, explosion, severe weather conditions or other catastrophe or natural calamity;
- (m) epidemic or quarantine restriction; and
- (n) delay of a supplier due to any of the foregoing whether any such cause of delay exists before or after the Commencement Date.

**Good Engineering Practices** means, in respect of any undertaking in any circumstances, the exercise of that degree of care, foresight, prudence and skill that would reasonably and ordinarily be expected from a competent, skilled and experienced person in the same type of undertaking in the same or similar circumstances.

**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~~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 ~~End User's~~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~~Authorities.

~~**Incremental Costs** means those costs of providing access rights, including capital (renewal and expansion) costs, that would not be incurred (including the cost of bringing expenditure forward in time) if the particular Network Train Service or combination of Network Train Services (as appropriate) did not operate, where those costs are assessed as the Efficient Costs and based on the assets reasonably required for the provision of the access rights.~~

**Incorporated Provisions** means each of the following provisions:

- (a) Interface Risk Provisions;
- (b) Transfer Provisions;
- (c) Relinquishment Provisions;
- (d) Reduction Factor Provisions;
- (e) Resumption Provisions;
- (f) Conditional Access Provisions; and
- (g) Reference Tariff Provisions.

**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 ~~Service~~-Description for that Train Service Type.

~~**Information Request Notice** has the meaning given in clause 6.1(a).~~

**Infrastructure** ~~means rail transport infrastructure as defined in the Transport~~[has the meaning given to the term "Rail Infrastructure" for which Aurizon Network is the owner or lessee, the use of which for providing transportation by rail is or is taken to be a service declared for the purposes of Part 5 of the Queensland Competition Authority Act 1997 \(Qld\). in the Access Undertaking.](#)

**Infrastructure Enhancement** ~~means the improvement, upgrading or other variation of the whole or any part of the Infrastructure which affects the capabilities of the Infrastructure and any major replacement programme for elements of the Infrastructure (and for the avoidance of doubt, includes an Expansion).~~ 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.

**Infrastructure Service Providers** ~~means persons who provide maintenance, construction and other related services in respect of the Infrastructure.~~

**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 ~~applicable Train Operations Agreement~~[Access Undertaking](#).

**Interface Risk Management Plan** or **IRMP** has the meaning given in the ~~applicable Train Operations Agreement~~[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, is Schedule 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 Railway Access Holders and Train Operators ~~operating Network Train Services~~ 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~~ **Schedule 1**.

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

**Landowner** has the meaning given in ~~clause 35.17~~ **34.17**.

**Law** includes:

- ~~(g) any statute, rule, regulation, code, proclamation, ordinance or by-law, present or future, whether State, Commonwealth or otherwise; and~~
- ~~(h) any requirement, condition, notice, consent, accreditation, order or direction or similar thing of any Authority (including the State in any of its regulatory capacities), present or future, given or imposed pursuant to anything specified in **paragraph (a)** of this definition.~~

~~Like Train Service~~ has the meaning given in ~~clause 36.1(a)~~ 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 ~~Service~~ Description for that Train Service Type.

~~Maintenance Work~~ means ~~any work involving maintenance or repairs to, or renewal, replacement and associated alterations or removal of, the whole or any part of the Infrastructure (other than Infrastructure Enhancements) and includes any inspections or investigations of the Infrastructure.~~

~~Major Periodic Maintenance~~ means ~~activities that renovate the Infrastructure to retain it in a functional condition completed on Track sections at intervals of more than one year and includes activities such as re-railing, rail grinding, resurfacing, re-signalling, communications upgrades, renovating structures,~~

~~ballast cleaning and re-sleepering.~~

~~**Master Train Plan** means that document detailing the scheduled times as advised by Aurizon Network from time to time for all Network Train Services and any Planned Possessions on a specified part of the Infrastructure.~~

**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 35.17(d)~~ **34.17(d)**.

~~**Material Environmental Harm** means “material environmental harm” as defined in the Environmental Protection Act.~~

~~**Maximum Desirable Gross Tonnage** has the meaning given in the applicable Train Operations Agreement.~~

~~**Maximum Gross Mass** for a Wagon or other Rollingstock has the meaning given in the applicable Train Operations Agreement.~~

**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 ~~Service~~ Description for that Train Service Type.

~~**Maximum Payload** for a Train Service Type means the maximum Payload for Train Services for that Train Service Type as specified as such in the Train Service 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 ~~Service~~ 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 ~~Service~~ 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 ~~Service~~ 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 ~~Service~~ 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 ~~Agreement~~ 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 Incident** means any Rollingstock derailment, Rollingstock disablement or breakdown, accident, collision or any other unplanned occurrence on the Infrastructure which causes or contributes to, or could cause or contribute to, injury to, or death of, any person, damage to any property or Environmental Harm or a disruption to, or cancellation of, any Train Movement.~~

**Network Customer** means any person (including the Access Holder) that has been granted rights of access 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.

~~**New Train Service Type:**~~

~~in **clause 8, Incorporated Provisions** has the meaning given in **clause 8.2(a)(i); and 3.2(b)(i).**~~

~~(e) — in **clause 16**, has the meaning given in **clause 16.6(a)(i).**~~

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

~~**Nominated Access Rights:**~~

~~(f) — in **clause 11**, has the meaning given in **clause 11.1(c)(i); and**~~

~~(g) — in **clause 12**, has the meaning given in **clause 12.1(c)(i)(A).**~~

**Nominated Monthly Train Services** for a Train Service Type means the number of Train Services for that Train Service Type that the ~~End User~~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 ~~Service~~ 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)~~ **(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 11** of ~~schedule~~ Schedule 3.

**Nominated Network FM Reduction Notice** ~~has the meaning~~ means a notice given ~~in~~ under ~~clause 25.4(d)~~ 25.5(d).

**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.~~

~~**Non-Defaulting Operator:**~~

~~(e) — in clause 8, has the meaning given in clause 8.2(a); and~~

~~(d) — in clause 16, has the meaning given in clause 16.6(a).~~

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

~~**Notice of Enquiry** has the meaning given in clause 9.1(a).~~

~~**Notice of Intention to Increase Nominal Payload** has the meaning given in clause 10.1(a).~~

~~**Notice of Intention to Relinquish** has the meaning given in clause 11.1(b).~~

~~**Notice of Intention to Transfer** has the meaning given in clause 12.1(b).~~

**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.

~~**Operating Parameters**~~ Operational Constraint has the meaning given in the Access Undertaking.

~~**Operational Constraint** means any restriction on the use of any part of the Infrastructure which impacts adversely on Train Services, including speed restrictions, load restrictions, Possessions or signalling or overhead restrictions.~~

**Operator** means each Accredited Railway Operator that is nominated by the ~~End User~~ Access Holder in accordance with ~~clause 3.3(b)~~ 4.3(b) who is contracted by the ~~End User~~ Access Holder to operate Train Services for the ~~End User~~ 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~~ 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 ~~Service~~ Description for that Train Service Type.

~~**Original Train Service Type:**~~

~~(e) — in clause 8, has the meaning given in clause 8.2(a)(ii); and~~

~~(f) — in clause 16, has the meaning given in clause 16.6(a)(ii).~~

**Other Conditional Access Holder** for:

- (g) ~~an Expansion means an Access Holder (other than the End User) that has been granted access rights under an Access Agreement which are conditional upon the Expansion being completed and commissioned; and~~
- (h) ~~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 3.6(b)4.7(b)**.

**Overload Detector** means a weighing mechanism other than a Weighbridge and specified in **item 5.2** of **schedule 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** ~~means~~has the ~~obligations of a Railway Manager pursuant to sections 265 and 266 of~~meaning given in the ~~Transport Infrastructure Act~~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 ~~Agreement~~Deed.

~~**Planned Capacity** has the meaning given in the Access Undertaking.~~

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

~~**Planned Possession** means a~~has the meaning given in the Access Undertaking.

~~**Possession** that is entered into the Master Train Plan and may adversely impact upon the operation of Network Train Services~~has the meaning given in the Access Undertaking.

~~**Possession** means the temporary closure and/or occupation by Aurizon Network of part of the Infrastructure (including closure of Track or isolation of any electrical overhead traction system) for the purpose of carrying out Maintenance Work, Infrastructure Enhancements or other work on, or in the proximity of, the Infrastructure which may affect the safety of any person or property.~~



**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 ~~End-User~~[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.

~~**Proposed Resumption Notice** has the meaning given in **clause 6.2**.~~

~~**Proposed Resumption Response Period** has the meaning given in **clause 6.3**.~~

~~**PV Amount:**~~

~~(c) — in **clause 11**, has the meaning given in **clause 11.3(a)**; and~~

~~(d) — in **clause 12**, has the meaning given in **clause 12.4(a)**.~~

~~**Quarter** means each period of three consecutive Months commencing each 1 January, 1 April, 1 July or 1 October in each year.~~

**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** means any person (including an Operator) that is an Accredited rail transport operator for~~[has](#) ~~the **Central Queensland Coal Region** meaning given in the **Access Undertaking**.~~

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

~~**Reduced Conditional Access Rights** for a Segment of an Expansion means the Reduced Conditional Access Rights for that Segment of the Expansion calculated in accordance with the formula in **clause 7.4**.~~

~~**Reduction Factor** means the reduction factor determined in accordance with **clause 13**~~[has the meaning given in the \*\*Access Undertaking\*\*.](#)

~~**Reduction Notice**~~[has](#)~~**Factor Provisions** means:~~

- (a) [the provisions of the Access Undertaking which include the meaning given in \*\*clause 8.1\*\* 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~~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 ~~Charges~~Charge).

~~**Reference Tariff Type** for a Train Service Type means the Reference Tariff Type specified in **schedule 2** for that Train Service Type.~~

**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 Rollingstock Configuration** for a Train Service Type means an Authorised Rollingstock Configuration for that Train Service Type which has a maximum Payload which exceeds the Maximum Payload for that Train Service Type.~~

**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 Date** has the meaning given in **clause 11.1(c)(iii)**.~~

~~**Relinquishment Fee**Provisions means the relinquishment fee determined in accordance with **clause 11.3**.~~

~~**Requested Ancillary Access Rights** has the meaning given in **clause 12.1(e)(ii)**.~~

(a) **Response** the provisions of the Access Undertaking which relate to the relinquishment of Access Rights (which, as at the Commencement Date, are clauses 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 **clause 9.2(a)**.

~~**Resumable Access Rights** for a Train Service Type means:~~

~~if the End User does not give Aurizon Network a notice under **clause 6.3** within the Proposed Resumption Response Period, the whole of the Underutilised Access Rights for the Train Service Type specified in the Proposed Resumption Notice; or Access Undertaking.~~

~~(a) — if the End User gives Aurizon Network a notice under **clause 6.3** within the Proposed Resumption Response Period, any part of the Underutilised Access Rights for the Train Service Type which:~~

~~(i) — the End User does not demonstrate, to Aurizon Network's~~

reasonable satisfaction, within the Proposed Resumption Response Period that:

(A) — there is a reasonable likelihood that the End User is able to utilise via the Operator(s); and

(B) — the End User has a need to utilise,

for the operation of Train Services for the Train Service Type; or

(ii) — in addition to any part of the Underutilised Access Rights for the Train Service Type referred to in **paragraph (b)(i)** of this definition, the End User notifies Aurizon Network during the Proposed Resumption Response Period may be taken by Aurizon Network to be Resumable Access Rights for the purposes of **clause 6.4**.

**Resumed Access Rights** for a Train Service Type has the meaning given in **clause 6.4(a)**.

**Resumption Date** has the meaning given in **clause 6.4(b)(ii)(B)**.

**Resumption Notice** has the meaning given in **clause 6.4(a)**.

**Resumption Trigger Event** for a Train Service Type means:

(c) — the Operator does not (or where there is more than one Operator, the Operators collectively do not), for any reason other than the failure of Aurizon Network to make the Access Rights for the Train Service Type available, operate at least 85% of the Train Services for the Train Service Type which are entitled to be operated for the End User during a Quarter, for any four consecutive Quarters; or

(d) — the occurrence of an Underutilisation Event for that Train Service Type.

**Revised Maximum Payload** for a Train Service Type means:

(e) — in **clause 8**, the amount calculated for that Train Service Type in accordance with **clause 8.3**; and

(f) — in **clause 10**, the amount calculated for that Train Service Type in accordance with **clause 10.2**.

**Revised Nominal Payload** for a Train Service Type:

(g) — in **clause 8**, means the amount calculated for that Train Service Type in accordance with **clause 8.3**;

(h) — in **clause 9**, means the amount calculated for that Train Service Type in accordance with **clause 9.2(a)**; and

(i) — in **clause 10**, has the meaning given in **clause 10.1(d)(i)(A)**.

**Revised Nominated Monthly Train Services** for a Train Service Type means:

(j) — in **clause 8**, the amount calculated for that Train Service Type in accordance with **clause 8.5**;

(k) — in **clause 9**, the amount calculated for that Train Service Type in accordance with **clause 9.2(a)**; and

(l) — in **clause 10**, the amount calculated for that Train Service Type in accordance with **clause 10.3**.

**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** means the description of the combinations of Rollingstock comprising a Train including identification number and gross mass of individual items of Rollingstock and the order in which those Rollingstock items are placed in the Train.~~

~~**Safety Law** means a Law relating to the safety of persons or property, including the Rail Safety Act and the Work Health and Safety Act 2011 (Qld).~~

~~**Safety Regulator** means, in respect of a Safety Law, the Authority administering that Safety Law.~~

**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 ~~End User~~Access Holder; or
  - ~~(a)~~(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~~in accordance with 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~~**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 an Australian incorporated holding company (as defined in the Corporations Act) of the Access Holder that has an Acceptable Credit Rating;

~~(a)~~(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~~that has an Acceptable Credit Rating;
- (ii) requires the issuing bank to pay on demand by Aurizon Network, without recourse to the ~~End-User~~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 ~~End-User~~Access Holder to obtain a bank guarantee with no expiry date, has an expiry date no earlier than 12 ~~months~~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 ~~End-User~~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

~~(b)~~(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 ~~End-User~~Access Holder of its obligations under this Agreement.

**Security Amount** at a time means the amount determined in accordance with ~~item 44 of schedule~~ **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 ~~Service~~ Description for the Conditional Access Rights which are conditional upon the completion and commissioning of the Expansion.

~~**Serious Environmental Harm** means "serious environmental harm" as defined in the Environmental Protection Act.~~

~~**Split Train Service Type:**~~

~~(e) — in **clause 8**, has the meaning given in **clause 8.2(a)**; and~~

~~(d) — in **clause 16**, has the meaning given in **clause 16.6(a)**.~~

**Staff** means Aurizon Network's Staff or the Access Holder's Staff (as applicable).

**State** means the State of Queensland.

~~**Stowage** means storage of Trains (excluding individual items of Rollingstock) on the Nominated Network at locations specified by Aurizon Network under the following circumstances:~~

~~(e) — during a Possession; or~~

~~(f) — during the operation of a Train Service.~~

**Supplier** has the meaning given in ~~clause 30.3~~ [the Access Undertaking](#).

**Supply Chain Rights** for a Train Service Type means:

- ~~(g) — if any Private Facilities are required to be accessed or used by an Operator (and, to the extent no Operator has been nominated, would have been required to be accessed or used by an Operator, had one been nominated) to operate Train Services for that Train Service Type for the End User, rights which are sufficient to allow the Operator to access or use those Private Facilities to operate those Train Services within the timeframes and in the manner contemplated in this Agreement;~~
- ~~(h) — if that Train Service Type is a Through-Running Train Service Type, rights which are sufficient to allow Train Services for that Train Service Type to enter or exit (as applicable) the Nominated Network from or to (as applicable) each applicable Adjoining Network within the timeframes and in the manner contemplated in this Agreement;~~
- ~~(i) — if the Train Services for that Train Service Type are to be operated to an Unloading Facility, rights which are sufficient to allow:
  - ~~(i) — an Operator to access (or, if no Operator has been nominated, rights which would have been sufficient to allow an Operator to access, had one been nominated) the relevant Unloading Facility with a fully loaded Train which complies with the Train Service Description for that Train Service Type; and~~
  - ~~(ii) — the unloading of all coal from the Train at the relevant Unloading Facility,~~within the timeframes and in the manner contemplated in this Agreement;  
and~~
- ~~(j) — if the Train Services for that Train Service Type are to be operated to a Loading Facility, rights which are sufficient to allow:
  - ~~(i) — an Operator to access (or, if no Operator has been nominated, rights which would have been sufficient to allow an Operator to access, had one been nominated) the relevant Loading Facility with a Train which complies with the Train Service Description for that Train Service Type; and~~
  - ~~(ii) — the loading of coal onto the Train at the relevant Loading Facility,~~within the timeframes and in the manner contemplated in this Agreement,~~  
assuming 100% utilisation of the Access Rights for that Train Service Type in accordance with the Train Service Description for that Train Service Type.

**Surplus Access Rights** has the meaning given in ~~clause 9.2(a)(ii)(C)~~ [the Access Undertaking](#).

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

**Suspension Notice** has the meaning given under ~~clause 26.1~~ or ~~26.2~~ **26.1**.

**System Discount** means ~~the amount specified as such for the relevant Reference Train Service in the Access Undertaking.~~

**System Premium** means ~~the amount specified as such for the relevant~~

~~Reference Train Service in the Access Undertaking.~~

~~**System Rules** means the rules made (including as amended and replaced) from time to time in accordance with the Access Undertaking.~~

~~**Tare Weight** for a Wagon or other Rollingstock has the meaning given in the applicable Train Operations Agreement.~~

**Term** means the term of this Agreement in accordance with **clause 2.1.2.1**.

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

**Third Party** means a person other than the ~~End User~~ [Access Holder](#) or Aurizon Network.

**Third Party Land** has the meaning given in **clause** ~~35.17(a)~~ **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 ~~that~~ **and** is specified as such in the Train ~~Service~~ 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 Charges:**

~~in respect of this Agreement,~~ [Charge](#) has the meaning given **item 1.1** of **schedule 4**; ~~and in~~ [Schedule 4](#).

~~(a) — in respect of another Access Agreement, means the charge for contracted Network Train Services where the contracted Network Train Services are not operated by, or by a Railway Operator for, the relevant Access Holder under the relevant Access Agreement.~~

~~**TOP Charges (ATPY)** for a year means:~~

~~(a) — in respect of this Agreement, the TOP Charges for a Train Service Type for that year that would be payable for the relevant Train Service Type for that year if the formula in **item 4.4** of **schedule 4** was “ $ATP = ATPY$ ”; and~~

~~(b) — in respect of another Access Agreement, the TOP Charges for that year that would be payable for contracted Network Train Services if the contracted Network Train Services are not operated by, or by a Railway Operator for, the relevant Access Holder under the relevant Access Agreement and the TOP Charges under that Access Agreement were calculated in a manner equivalent to the calculation of “ATPY” in **item 4.4** of **schedule 4**.~~

~~**Track** means the part of the Infrastructure comprising the rail, ballast, sleepers and associated fittings.~~

~~**Train** means any configuration of Rollingstock operating as a unit on Track.~~

**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:

- (a) recording Train running times on Train diagrams and in Aurizon Network's information systems;
- (a) reporting of Incidents occurring on the Infrastructure;
- (b) managing Incidents occurring on the Infrastructure from within a Train Control centre;
- (c) field Incident management;
- (d) yard control services; and
- (e) 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 Movement** means the operation of a Train on the Infrastructure by Aurizon Network, an Operator or any other Railway Operator.~~

**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 Agreement Deed** means ~~an agreement~~ a deed between Aurizon Network and an Operator in substantially the form of the ~~agreement contained in schedule 7 pursuant to~~ Standard Train Operations Deed (as that term is defined in the Access Undertaking) (or such other form as agreed between the Operator and Aurizon Network) under which Aurizon Network agrees that the Operator may utilise Access Rights ~~as~~ allocated to the Operator by the ~~End User~~ Access Holder, in accordance with this Agreement, ~~for the purpose of operating Train Services on the Nominated Network.~~

**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 ~~End User~~[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 ~~Service~~-Description for that Train Service Type.

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

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

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

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

**Transfer** means the ~~relinquishment~~[transfer](#) of all or part of the Access Rights ~~in order to create Available Capacity that can be used to grant access rights to the End User or~~ a Third Party.

**Transfer Cancellation Notice Fee** has the meaning given in ~~clause 12.3(e)~~[the Access Undertaking](#).

~~**Transfer Date** has the meaning given in **clause 12.1(c)(i)(C)**.~~

~~**Transfer Fee Provisions** means the transfer fee determined in accordance with **clause 12.4**.~~

~~**Transfer Period** has the meaning given in **clause 12.1(c)(i)(C)**.~~

~~**Transferee** has [clauses of](#) the meaning given in **clause 12.1(b)**.~~

~~**Transferee Access Agreement** has [Undertaking which relate to](#) the meaning given in **clause 12.2(e)**.~~

(a) ~~**Transferred**~~[transfer of](#) Access Rights ~~has~~[\(which, as at](#) the meaning given in ~~**clause 12.1(c)(i)(E)**~~[Commencement Date, are clauses 7.4.2 and 7.4.4 of the Access Undertaking\); 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).

~~**Underutilisation Event** for a Train Service Type means any cause, event or circumstance, or combination of causes, events or circumstances, other than the failure by Aurizon Network to make the Access Rights for the Train Service Type available, which will, or will likely, have a sustained or permanent and material adverse impact on the End User's ability to utilise, or need to utilise, the Access Rights for that Train Service Type (including, the End User ceasing to hold, or have the benefit of, any Supply Chain Rights).~~

~~**Underutilised Access Rights** for a Train Service Type means:~~

- ~~(b) — in respect of a Resumption Trigger Event for that Train Service Type specified in **paragraph (a)** of the definition of Resumption Trigger Event, the portion of future Access Rights for the Train Service Type (rounded to the nearest even number of whole Train Services for the Train Service Type) which is equal to the average of the portions of the Access Rights for the Train Service Type which were entitled to be utilised for the End User but were not utilised for the End User (including because no Operator has been nominated by the End User to utilise those Access Rights) in the applicable four consecutive Quarters referred to in **paragraph (a)** of the definition of Resumption Trigger Event; and~~
- ~~(c) — in respect of a Resumption Trigger Event for that Train Service Type specified in **paragraph (b)** of the definition of Resumption Trigger Event, the Access Rights for the Train Service Type which Aurizon Network considers, acting reasonably, were entitled to be utilised for the End User but the Operator (or if there is more than one Operator, the Operators collectively) will be unable to utilise, or will not need to utilise, (including because no Operator has been nominated by the End User to utilise those Access Rights) for the operation of Train Services for the Train Service Type for the End User as a consequence (whether direct or indirect) of the Underutilisation Event for the Train Service Type.~~

~~[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 Service Description for that Train Service Type.~~

~~**Urgent Possession** means a Possession required to correct problems that Aurizon Network, acting reasonably, considers potentially dangerous to person or property, other than an Emergency Possession.~~

~~**Variation Request Notice** has the meaning given in **clause 9.2(b)** [the Access Undertaking](#).~~

~~**Wagon** means any ~~Rollingstock~~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 5.15.1** of **schedule 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 ~~firm~~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 (~~including an Access Undertaking~~) 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~~an Operator under a ~~train operations agreement~~Train Operations Deed; and
- (xviii) the ~~End User~~Access Holder, if the ~~End User~~Access Holder is comprised of more than one entity (for example, if the ~~End User~~Access Holder is comprised of the participants in an unincorporated joint venture), is a reference to each entity comprising the ~~End User~~Access Holder.

### 1.3 References to ~~Train Service and~~ Access Rights

For the avoidance of doubt:

- ~~(a) a Train Service that is entitled to be operated for the End User includes a Train service that could have been operated had the End User, in accordance with this Agreement, nominated an Operator to use the Access Rights relevant to that Train Service;~~
- ~~(b) a Train Service that the Operator was entitled to operate includes a Train service that could have been operated had the End User, in accordance with this Agreement, nominated an Operator to use the Access Rights relevant to that Train Service; and~~

~~Access Rights~~ that are entitled to be utilised for the ~~End User~~Access Holder includes Access Rights that could have been utilised had the ~~End User~~Access Holder, in accordance with this Agreement, nominated an Operator to use those Access Rights.

### ~~1.4 Words and expressions defined in Access Undertaking~~

~~If a word or expression is defined under this Agreement to have the meaning given in the Access Undertaking and:~~

- ~~(a) the word or expression ceases to be defined in the Access Undertaking, the word or expression will have the meaning given in the Access Undertaking immediately prior to it ceasing to be defined in the Access Undertaking; or~~
- ~~(b) there ceases to be an Access Undertaking in force, the word or expression will have the meaning given in the Access Undertaking immediately prior to it ceasing to be in force.~~

## ~~1.5~~ ~~References to descriptors of Train Service Types~~

~~In this Agreement, references to any descriptor of a Train Service or a Train Service Type (for example, 'Destination', 'Loading Facility', 'Nominated Monthly Train Services', 'Origin' and 'Unloading Facility') is to that descriptor as applicable to that particular Train Service or Train Service Type.~~

## ~~1.6~~ ~~References to an Operator~~

~~All references in this Agreement to an act, omission, right or obligation of an Operator are to be interpreted as an act, omission, right or obligation (as applicable) of that Operator in the course of providing Train Services for the End User in respect of the Access Rights, and not in connection with:~~

- ~~(a) the provision of Train services by the Operator for any other person; or~~
- ~~(b) the provision of Train services for the End User in respect of access rights granted under any other Access Agreement.~~

### 1.71.4 **Material published on the Website**

For the avoidance of doubt, material published on the Website includes material which is available [to the Access Holder](#) via secured, password-protected online access ~~via~~[to](#) the Website.

### 1.81.5 **Headings**

Headings do not affect the interpretation of this Agreement.

## 1.6 **Words and expressions defined in Access Undertaking**

- (a) Subject to **clause 1.6(b)**, if a word or expression is defined in this Agreement to have the meaning given in the Access Undertaking, then it has the meaning given in the Access Undertaking in force as at the date of this Agreement.
- (b) If a word or expression used in any Incorporated Provisions which form part of this Agreement under **clause 3** is defined in the Access Undertaking, then it has the meaning given in the Access Undertaking in force on the date the relevant Incorporated Provisions is incorporated into this Agreement under **clause 3.1 or 3.2** (as applicable).

### 1.91.7 **Inconsistency**

- (a) If there is any inconsistency between the substantive terms of this Agreement (comprising **clauses 1 to [36/37]**) **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 End User Access Holder may have to renew this Agreement will be as provided in the Access Undertaking in force from time to time. (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 or an 'Access Holder' (as the term is defined under the Access Undertaking) (as applicable).
- (b) Subject to **clause 3.2**, the following provisions of the Access Undertaking (as in force as at the Commencement Date) form part of this Agreement as if they were set out in full under this Agreement:
  - (i) Interface Risk Provisions;
  - (ii) Transfer Provisions;
  - (iii) Relinquishment Provisions;
  - (iv) Reduction Factor Provisions;
  - (v) Resumption Provisions; and
  - (vi) Conditional Access Provisions.
- (c) The Reference Tariff Provisions of the Access Undertaking (as changed by a Change in Access Undertaking from time to time) form part of this Agreement as if they were set out in full in this Agreement.
- (d) For the avoidance of doubt, despite any other provision in the Access Undertaking:
  - (i) **clause 21** applies to any Claim in respect of a breach of any Incorporated Provisions which form part of this Agreement under **this clause 3**; 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 Incorporated Provisions which form part of this Agreement under **this clause 3**.

### 3.2 Changes in Access Undertaking

- (a) If there is a Change in Access Undertaking at any time which changes any of the Incorporated 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**):
  - (i) that it elects to amend this Agreement to replace the Incorporated Provisions which form part of this Agreement under **clause 3.1(b)** or this **clause 3.2 (Former Incorporated Provisions)** with the

- corresponding Incorporated Provisions as changed by the Change in Access Undertaking (**New Incorporated Provisions**); and
- (ii) of any other changes to the other terms of this Agreement (if any) which the Notifying Party requires as a consequence of, or to give full effect to the replacement of the Former Incorporated Provisions with the New Incorporated Provisions under this **clause 3.2**; and
  - (iii) of 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 in accordance with **clause 3.2(b)(ii)**.
- (e) If the Receiving Party does not accept the drafting of the amendments to the terms of this Agreement, then the Parties must promptly meet to negotiate and attempt to agree the changes to the terms of this Agreement (if any) which are necessary as a consequence of, or to give full effect to, the replacement of the Former Incorporated Provisions with the New Incorporated Provisions under this **clause 3.2**.
- (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 provisions of the Access Undertaking which provide for determination of disputes by the QCA.
- (g) On and from the Change Date(s) (or such other time as the QCA may determine):
- (i) the New Incorporated Provisions will form part of this Agreement as if set out in full in this Agreement;
  - (ii) the Former Incorporated Provisions will cease to form part of this Agreement; and
  - (iii) amendments to the terms of this Agreement:
    - (A) accepted under **clause 3.2(d)**;
    - (B) agreed under **clause 3.2(e)**; or
    - (C) determined by the QCA under **clause 3.2(f)**,  
become effective.
- (h) Within 10 Business Days from the date that amendments to the terms of this Agreement are accepted, agreed and/or determined (as applicable) under this **clause 3.2**, Aurizon Network must prepare and send to the Access Holder a copy of this Agreement as modified.

## 3.4 Access Rights

### 3.14.1 Grant of Access Rights

~~On and from the~~ 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 ~~End User~~ Access Holder the Access Rights for that Train Service Type in accordance with the Train ~~Service~~ Description for that Train Service ~~Type for the operation of Train Services for that Train Service Type by an Operator pursuant to that Operator's Train Operations Agreement on the terms and conditions of this Agreement.~~

### 3.24.2 Nature and scope of Access Rights

- (a) The Access Rights granted under **clause 3.14.1** are non-exclusive contractual rights and do not give the ~~End User~~ Access Holder any right, title or interest of any proprietary nature in the Nominated Network.
- (b) ~~The Parties acknowledge and agree that~~ Aurizon Network ~~is required to~~ must provide the ~~End User~~ Access Holder with certain benefits, rights and services in accordance with ~~clause [3.4(b)] of, and the definition of "Access" in,~~ the Access Undertaking and, to the extent ~~that these requirements are~~ relevant to the ~~End User's~~ Access Holder's Access Rights, it is intended that the terms on which ~~they~~ these requirements are provided are detailed in this Agreement.

### 3.34.3 Exercise of Access Rights and Operator nomination

- (a) The Parties acknowledge and agree that:
- (i) ~~the grant of the Access Rights to the End User in accordance with this Agreement~~ Access Holder does not entitle the ~~End User~~ Access Holder to itself operate Train Services on the Nominated Network (unless it is also an Accredited Railway Operator ~~which it is entitled to nominate, and has been~~ is nominated, ~~to use as an Operator in accordance with this Agreement~~);
- (i) ~~the Access Rights in accordance with this clause 3.3~~; and
- (ii) ~~the End User~~ Holder can only utilise the Access Rights by nominating an Operator from time to time, in accordance with ~~clause 3.3(b) or 3.4, to use Access Rights, allocated to that Operator by the End User, under the terms of a Train Operations Agreement; and~~ this Agreement; and
- (iii) the ~~End User~~ Access Holder may nominate more than one Operator.
- (b) Subject to ~~clause 3.5(a)~~ **4.6(a)**, the ~~End User~~ 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 ~~and the relevant Operator, nominate an Operator to utilise all or part of the Access Rights by written. The notice to Aurizon Network which~~ must:
- (i) ~~specifies~~ specify:
- (A) the name, ABN, address and contact details of the Operator;



- (B) ~~specifies~~ the Access Rights which the End-User Access Holder wishes to allocate to the Operator for the Operator to use in providing Train Services for the End-User Access Holder;
  - (C) ~~specifies~~ the first day and the last day of the period for which the Access Rights are to be allocated to the Operator; and
- (ii) ~~is~~ be accompanied by either:
- (A) ~~two copies of~~ a Train Operations ~~Agreement (in duplicate) in the form set out in schedule 7 (or such other form as Aurizon Network and the Operator have agreed), duly~~ Deed, executed by the Operator, which:
    - (1) reflects, in schedule 2 of that Train Operations ~~Agreement~~ Deed, the Access Rights which the End User 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 ~~applicable~~ Train Operations ~~Agreement~~ 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) ~~provided that at no time can the~~ Access Rights allocated by the End User Access Holder to be used by any one or more Operators may not exceed, in aggregate, the ~~End-User's 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 ~~is not obliged to~~ must accept, or act on:
- (i) any nomination of an Operator by the End-User Access Holder under ~~clause 3.3(b)~~ 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 3.4.5,~~
- ~~if:~~
- ~~that~~ 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 ~~Access Agreement or train operations agreement~~ Train Operations Deed with Aurizon Network; ~~(or Access Agreement if the Operator is also a Network Customer);~~ or

~~(iii) — Aurizon Network is not satisfied that the Operator is:~~

~~(A) — financially sound; and~~

~~(B) — otherwise capable of performing the obligations of the operator under a Train Operations Agreement.~~

~~(e) — Aurizon Network must, in respect of a nomination by the End User under **clause 3.3(b)**:~~

~~(B) is not Accredited.~~

(e) Aurizon Network must:

(i) within 10 Business Days of receiving the nomination, under clause 4.3(b), notify the End User Access Holder and the relevant Operator whether it accepts or rejects (providing its reasons) the nomination;

~~(ii) — subject to **clause 3.3(c)**, act reasonably in assessing the nomination;~~

~~(iii)(ii) whereif it decides to reject the nomination, provide reasons for the rejection in writing to the End User and the Operator and thereafter use its best endeavours to rejects the nomination, facilitate the resolution of any matter the subject of its reasons for the rejection; and~~

~~(iv)(iii) whereif it accepts the nomination, promptly do all things reasonably required (including compliance with **clause 3.5(a)4.6(a)** where applicable and amending the relevant Train Operations AgreementDeed to the extent required) to ensure that any delay to Train Services is minimised to the extent practicable. including:~~

~~(f) — If Aurizon Network accepts a nomination given if the notice under **clause 3.3(b)**, within 10 Business Days of notifying the End User and Operator of its acceptance under **clause 3.3(d)(i)**, Aurizon Network must:~~

~~(A) where **4.3(b)** is accompanied by two copies of a Train Operations Agreement was provided in accordance with clause 3.3(b)(iv)(A)Deed under clause 4.3(b)(ii)(A), execute both copies of the Train Operations AgreementDeed and return one copy to the Operator; or~~

~~(B) whereif the notice under **clause 4.3(b)** is accompanied by a statement and evidence was provided in accordance with under clause 3.3(b)(iv)(B)4.3(b)(ii)(B), vary the relevant Train Operations AgreementDeed 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.~~

(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 Interface Risk Provisions or determined under the Train Operations Deed.

#### 4.4 Access Interface Deed

- (a) If the Access Holder is also a Railway Operator and the Access Rights are to be used for the purposes of a rail haulage agreement between the Access Holder (in its capacity as 'Operator') and 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 procure the Customer executes and delivers the Access Interface Deed to Aurizon Network on or before the Commitment Date.
- (b) As soon as practicable after receiving the Access Interface Deed duly executed by the Customer, Aurizon Network must:
- (i) execute the Access Interface Deed;
  - (ii) provide a copy of the fully executed Access Interface Deed to the Customer; and
  - (iii) notify the Access Holder that the Access Interface Deed has been executed by the Customer and Aurizon Network.

#### 3.44.5 Changes to Operator nominations

- (a) The ~~End User~~Access Holder may, from time to time, upon giving at least ~~7 days~~2 Business Days prior written notice to Aurizon Network and each affected Operator:
- (i) vary any nomination previously given by the ~~End User~~under **clause 3.3(b)** or this **clause 3.4(a)**Access Holder under this Agreement so as to vary either or both of the following:
    - (A) the Access Rights which the ~~End User~~Access Holder has allocated to an Operator ~~(provided that at no time can the Access Rights for a relevant Train Service Type allocated by the End User to any one or more Operators exceed, in aggregate, the End User's Access Rights under this Agreement for that Train Service Type); or~~ or
    - (B) the period for which the Access Rights are to be allocated to an Operator ~~(provided that the period for which Access Rights are allocated to an Operator cannot~~does not extend beyond the ~~expiry date~~Train Service Expiry Date for the relevant Train Service Type); ~~); or~~ ;
  - (ii) with~~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) or 10.3(c)(iv)(A)(2) 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 ~~to comply with **clause 3.3(d)** in respect of any such varied nomination, subject to being required to~~must ~~notify of its acceptance or rejection~~the Access Holder and the Operator if it accepts or rejects (providing its reasons) in accordance with **clauses 4.3(d)(ii)** to

1.1(a)(i) the variation within the lesser of 10 Business Days ~~and/or~~ the period remaining prior to the relevant Intermediate Train Plan being finalised; ~~or~~.

~~(i) — withdraw any nomination previously given by the End User under clause 3.3(b) or this clause 3.4(a).~~

(c) Where an Operator receives an increased allocation of Access Rights following a varied nomination in accordance with this **clause 3.44.5**, 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 ordered by the Operator to the extent permitted 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.

### **3.54.6 Nominations with different Train ~~Service~~ Descriptions**

(a) If at any time:

(i) the ~~End User~~Access Holder intends to:

(A) nominate an Operator to utilise all or part of the Access Rights ~~under clause 3.3(b);~~ or

(B) vary a nomination previously given by the ~~End User under clause 3.3(b) or clause 3.4(a);~~Access Holder;

and the Train Services of the relevant Operator will have a Train ~~Service~~ Description different from that contemplated in ~~schedule 2~~**Schedule 2**; or

(ii) the ~~End User~~Access Holder otherwise wishes to vary the Train Services from the Train ~~Service~~ Description nominated in ~~schedule 2~~**Schedule 2**,

then:

(iii) prior to nominating the Operator or varying the nomination, Aurizon Network and the ~~End User~~Access Holder must negotiate and endeavour to agree any amendments to this Agreement (including any amendments to the Access Rights and subject to clause 1.1(a), the Access Charge Rates) that may be necessary to reflect the Train ~~Service~~ 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) — [the End User must pay, or cause to be paid, to Aurizon Network any unpaid Adjustment Charges that, but for the nomination or~~

~~variation, are or would have been payable by the Operator who provided Train Services corresponding to the Access Rights immediately prior to the relevant nomination or variation;~~

~~(v) — the obligation of the End User under **clause 3.5(a)(iv)** is a condition precedent to any amendments agreed between the Parties under **clause 3.5(a)(iii)**; and~~

~~[Square bracketed text only to be included where the End User is only paying TOP Charges]~~

~~(vi)(iv) \_\_\_\_\_ no amendment to the Access Rights that results in the End User Access Holder being granted increased rights to access the Nominated Network has any effect unless and until the End User 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) — [If the End User wishes to or is deemed to vary or withdraw its allocation of Access Rights to an Operator in accordance with **clause 3.4(a)**, or is deemed to vary or withdraw its allocation of Access Rights to an Operator in accordance with **clause 3.6**, then the End User must pay to Aurizon Network any Adjustment Charges that, but for the said variation or withdrawal of the allocation of Access Rights, are or would have been payable by the existing Operator under a Train Operations Agreement. The variation or withdrawal of the allocation of Access Rights in accordance with **clause 3.4** is subject to and conditional on the End User's payment of the Adjustment Charges to Aurizon Network.].~~  
~~[Paragraph (b) is deleted where the End User is paying all Access Charges]~~

(b) Any variation to the Access Charge Rates under **clause 4.6(a)(iii)**:

(i) must be in accordance with the pricing principles set out in Part 6 of the Access Undertaking, in particular clause 6.2; and

(ii) must be reasonably justified (including calculations) by Aurizon Network to the Access Holder.

### **3.64.7 Reduction of rights resulting in an Over-Allocation**

If at any time:

(a) either:

(i) the Access Rights of the End User Access Holder are reduced (including by agreement or under **clause 6.4** or **clause 7.5**) or, relinquished or transferred under **clause 9**, **clause 11** or **clause 12** ~~or this Agreement; or~~

(ii) the Nominated Monthly Train Services in respect of a Train Service Type are reduced or varied (including by agreement or under **clause 8**, **clause 10** or **clause 16.5**); under this Agreement; 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 ~~that have been~~ allocated by the End User Access Holder to any one or more Operators under **clause**

~~3.34.3 or 3.44.4~~ for a Train Service Type exceed, in aggregate, the ~~End User's~~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 ~~End User gives notice to Aurizon Network and each affected Operator~~Access Holder varies the nominations in accordance with **clause 3.4(a)4.5(a)** ~~varying any nominations previously given under clause 3.3 within 2 Business Days of such reduction, relinquishment, transfer or 3.4 variation~~ to eliminate the Over-Allocation, the ~~End User~~Access Holder will be deemed to have ~~given a notice to Aurizon Network~~varied the nominations in accordance with **clause 3.4(a):4.5(a)** as follows:

- (c) if the ~~End User~~Access Holder has nominated only one Operator for that Train Service Type, reducing the Access Rights for that Train Service Type which the ~~End User~~Access Holder has allocated to the Operator under its Train Operations ~~Agreement~~Deed by the Over-Allocation; or
- (d) if the ~~End User~~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 ~~End User~~Access Holder has allocated to each Operator under this Agreement and each Operator's respective Train Operations ~~Agreement~~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 ~~be deemed to be accepted by Aurizon Network and 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.

### **3.74.8 Operation of Ad Hoc Train Service**

- (a) If:
  - (i) the ~~End User~~Access Holder (or its Operator) notifies Aurizon Network that it wishes to have an Operator (which the ~~End User~~Access Holder must identify when notifying Aurizon Network) operate an Ad Hoc Train Service (~~referred to in paragraph (b) of 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
  - (ii) 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 ~~Agreement; and~~Deed to the extent the Access Holder provided the notice under clause 4.8(a)(i).  
then, to the extent permitted by the Network Management Principles,  
Aurizon Network ~~schedules;~~
  - (iii) must if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking; or
  - (iv) otherwise must use reasonable endeavours to,  
schedule the Ad Hoc Train Service for the Train Service Type in the Daily

Train Plan.

- (b) ~~then, on~~ On and from the time that the Ad Hoc Train Service is scheduled in the Daily Train Plan, ~~subject to clause 3.7(e)~~, the terms and conditions of this Agreement ~~will~~ apply to the Ad Hoc Train Service as if the Ad Hoc Train Service is a Train Service for the Train Service Type ~~which~~ the relevant Operator is entitled to operate ~~for the End User~~ utilising the Access Rights for ~~the~~ that Train Service Type.

~~(c)~~ If:

~~(i)~~ an Operator notifies Aurizon Network that it wishes to operate **Despite clause 4.8(b)**, if an Ad Hoc Train Service (referred to is of a type described in paragraph (a**b**) of the definition of Ad Hoc Train Service) for a and has a different Origin and Destination for that Train Service Type ~~for the End User; and~~

~~(ii)~~ Aurizon Network schedules the , then such Ad Hoc Train Service for the Train Service Type in the Daily Train Plan;

~~then, on and from the time that the Ad Hoc Train Service is scheduled in the Daily Train Plan, subject to **clause 3.8(c)**, the terms and conditions of this Agreement will apply to the Ad Hoc Train Service as if the Ad Hoc Train Service is a Train Service for the Train Service Type which the relevant Operator is entitled to operate for the End User utilising the Access Rights for the Train Service Type.~~

~~(d)~~ (c) If Aurizon Network schedules an Ad Hoc Train Service for a Train Service Type in the Daily Train Plan then, despite any other provision not be taken into account for the purposes of this Agreement, Aurizon Network, its directors and Aurizon Network's Staff are not liable to the End User for any Claim, and the End User must not make any Claim against Aurizon Network, its directors and/or Aurizon Network's Staff, in respect of any failure by Aurizon Network, for any reason (including breach or negligence by Aurizon Network), to make the Infrastructure available for the relevant Operator to operate the Ad Hoc Train Service for the End User (whether at the Scheduled Time in the Train Schedule, an alternative time or at all): the TOP Charge.

~~(e)~~ [The End User must pay Aurizon Network the Access Charges incurred in respect of the Ad Hoc Train Services.] [~~Include where End User paying all Access Charges.~~]

~~(f)~~ For the avoidance of doubt, nothing in **clause 3.7(a)** or **3.7(b)** requires Aurizon Network to schedule, or to endeavour to schedule, an Ad Hoc Train Service for a Train Service Type in the Daily Train Plan if the End User or Operator (as applicable) gives Aurizon Network a notice under **clause 3.7(a)** or **3.7(b)** (as applicable):

### 3.84.9 Supply Chain Rights

~~(a)~~ The End User Access Holder must, for each Train Service Type:

~~(i)~~ use reasonable endeavours demonstrate to hold, or have the benefit of, Supply Chain Rights for all Train Services for that Train Service Type at all times on and from the Train Service Commitment Date for that Train Service Type until the Train Service

~~Expiry Date for that Train Service Type;~~

~~(ii) ensure that an Operator does not operate Train Services for that Train Service Type at any time during which the End User does not hold, or have the benefit of, Supply Chain Rights for those Train Services; and~~

~~(iii) ensure that an Operator does not commence the operation of Train Services for a Train Service Type until the End User has demonstrated, to the reasonable satisfaction of Aurizon Network, the matters which the End User is required to demonstrate under clause 3.8(b).~~

~~(b)(a) On or before the Train Service Commitment Date for a Train Service Type, the End User must demonstrate to the reasonable satisfaction of Aurizon Network that the End User (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 that first Train Service Type on and from the Train Service Commitment Date for that Train Service Type until at least the Train Service Expiry Date for that for each Train Service Type.~~

~~(c) Within 10 Business Days after being requested to do so at any time by Aurizon Network, the End User must demonstrate to the reasonable satisfaction of Aurizon Network that the End User:~~

~~(i) holds, or has the benefit of, Supply Chain Rights for the operation of the Train Services for that Train Service Type; and~~

~~(b) is reasonably likely to 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.~~

~~(ii) 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 that the Train Service Type.~~

~~(c) In determining whether the End User will continue to hold, or have, provided that if the benefit term of, the relevant any Supply Chain Rights for the purposes of clause 3.8(b) or 3.8(c)(ii), the parties are to assume, if the End User or the holder of those expires or terminates prior to the Train Service Expiry Date for that Train Service Type, the Access Holder must use reasonable endeavours to secure equivalent Supply Chain Rights has an option granted in its favour to renew such for the period until the Train Service Expiry Date for that Train Service Type.~~

~~(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 or extend the term of such for the Train Services for a Train Service Type that the Access Holder holds, or has the benefit of at the time; and

~~(iii)(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, that such option to renew or extend is exercised, for the Train Services for the Train Service Type and the status of any such steps.

~~(d) The End User must promptly provide Aurizon Network with any information that Aurizon Network reasonably requires in relation to the matters which the End is required to demonstrate under **clause 3.8(b)** or **3.8(c)**.~~

## 45 Billing and payments

### 4.15.1 Charges

~~{The End User has a right to elect whether this Agreement should provide for it to pay all Access Charges, or just TOP Charges with the remaining components of Access Charges being charged to each Operator. This Agreement contains a number of provisions which include alternative drafting to be selected based on the election made by the End User.}~~

~~(a) The End User~~ Holder must pay to Aurizon Network the ~~{Access Charges/TOP Charges}~~ and any other charges (if any) as calculated in accordance with this Agreement.

~~(b) For the avoidance of doubt, the End User must pay to Aurizon Network the TOP Charges if:~~

~~(i) no Train Operations Agreement is executed on or before the Commitment Date; or~~

~~(e)(a) there is no Train Operations Agreement in place.~~

~~(e)(b)~~ (b) Where a Train Service is taken to be cancelled under a Train Operations Agreement 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 Agreement 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.

### 4.25.2 Invoicing

- (a) As soon as reasonably practicable after the end of each Billing Period, Aurizon Network must give to the ~~End User~~Access Holder an invoice for:
  - (i) the ~~{Access Charges/TOP Charges}~~ for that Billing Period; ~~and~~plus
  - (ii) any amounts payable but unpaid by the ~~End User~~Access Holder to Aurizon Network under this Agreement, and which have not previously been invoiced, as at the end of the Billing Period.
- (b) If clause 5.6 applies, Aurizon Network ~~is not required to~~must give the ~~End User~~Access Holder an invoice under ~~clause 4.2(a)~~5.2(a) after the end of a Billing Period even if no amount is required to be invoiced under ~~clause 4.2(a)~~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 ~~End User~~Access Holder an invoice for the TOP ~~Charges~~Charge (if any) for the Year during which this Agreement terminated or expired.
- (d) Each invoice given under this **clause 4.25.2** 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 deducted under clause 5.6, particulars must include the amounts against which the deduction is applied).

### 4.35.3 Payment

- (a) Subject to **clause 4.45.4**, the ~~End User~~Access Holder must:
  - (i) pay to Aurizon Network the amount claimed in an invoice given under ~~clause 4.2~~5.2 within 10 Business Days after the invoice is given to the ~~End User~~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 ~~End User~~Access Holder in the invoice for this purpose (whether or not those bank accounts are in the name of Aurizon Network); or
      - ~~(C) — such other payment method as Aurizon Network may reasonably require from time to time.~~
      - ~~(1)(2) Without limiting clause 4.3(b), specifies in the End User must, if directed by Aurizon Network in an invoice given under clause 4.2, pay the amount claimed in that invoice by direct deposit into more than one bank account specified in that invoice (whether or not those bank accounts are in the name of Aurizon Network), in the amounts specified in that invoice. (acting reasonably).~~

- (b) Any payment by the ~~End User~~Access Holder of an amount payable under this Agreement in accordance with ~~a direction given by Aurizon Network under clause 4.3(e)~~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).

#### 4.45.4 Disputes

- (a) ~~If the End User genuinely and in good faith~~Any Disputes in connection with an amount claimed in an invoice ~~given by Aurizon Network under clause 4.2;~~
- (i) ~~the End User may, within 10 Business Days after Aurizon Network gives the End User the invoice, give Aurizon Network a Dispute Notice under clause 24.1; and~~
- (i) if the Dispute must be resolved in accordance with clause 24; and
- (ii) which is not resolved in accordance with ~~clause 24.224.2, then may be referred by~~ either Party ~~may refer the Dispute~~ to an Expert for determination in accordance with ~~clause 24.3~~24.3.
- (b) Despite ~~clause 4.4(a)~~5.4(a), if an amount claimed in an invoice given by Aurizon Network under ~~clause 4.25.2~~ is Disputed, ~~the End User then unless the total amount of the invoice 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 4.3(a)~~5.3(a)(i).
- (c) Upon resolution of any Dispute about an amount claimed in an invoice given by Aurizon Network ~~under clause 4.2,~~ 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 ~~End User~~Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with ~~clause 4.55.5~~ (from the date when the amount in Dispute would have been due and payable under ~~clause 4.3(a)~~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 ~~End User~~Access Holder to Aurizon Network within 20 Business Days after the resolution of the Dispute; or
- (ii) less than the amount paid by the ~~End User~~Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with ~~clause 4.5 (as if Aurizon Network was the End User, and the End User was Aurizon Network, for the purposes of clause 4.5)~~5.5 (from the date when the amount in Dispute was paid by the ~~End User~~Access Holder until the date on which the credit is applied or the amount is paid (as applicable) under this ~~clause 4.4(e)(ii)~~5.4(c)(ii)), must be:
- (A) applied by Aurizon Network as credit in favour of the ~~End~~

~~User~~Access Holder against the amount claimed in the next invoice to be issued by Aurizon Network to the ~~End~~Access Holder under **clause 4.25.2** after the resolution of the Dispute (and, if necessary, to subsequent invoices issued by Aurizon Network under **clause 4.25.2** until the amount of the difference (including any interest) has been fully credited in favour of the ~~End~~Access Holder against amounts payable under invoices issued by Aurizon Network to the ~~End~~Access Holder under **clause 4.25.2**); or

- (B) if there will be no further invoices issued by Aurizon Network to the ~~End~~Access Holder under **clause 4.25.2** 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 ~~End~~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).

#### **4.55.5 Interest on overdue payments and Disputed amounts**

- (a) Without prejudice to the rights, powers and remedies of ~~Aurizon Network~~a Party under this Agreement or otherwise at Law, if for any reason ~~the End~~a Party does not pay an amount payable under or in connection with this Agreement on or before the due date for payment, then ~~the End~~that Party must pay interest ~~to Aurizon Network~~ on the outstanding amount calculated in accordance with this **clause 4.55.5**.
- (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 4.4(c)(i)5.4(c)(i), 4.4(c)(ii)5.4(c)(ii) and 4.5(b)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.

#### **4.65.6 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.

#### **4.75.7 Consequences of failure to comply with Performance Levels**

~~[This clause 4.7 to be included where] if an Operator nominated by the Access Holder *is paying all of the Access Charges.*~~

- (a) ~~If an Operator under this Agreement~~ does not comply with the ~~performance levels~~Performance Levels imposed on it under a Train Operations ~~Agreement~~Deed, then, subject to **clause 4.4**, ~~the End~~5.4, ~~the Access Holder~~ must pay to Aurizon Network the amount (if any) determined in accordance with the relevant Train Operations ~~Agreement~~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 ~~End~~

User 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~~ Performance Levels imposed on it under a Train Operations Agreement Deed, then Aurizon Network will credit to the End User Access Holder the amount (if any) determined in accordance with the relevant Train Operations Agreement 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 End User Access Holder becoming entitled to that amount, ~~provided that if there is no next Billing Period, then Aurizon Network must pay such amount to the End User within 10 Business Days after receipt of an invoice from the End User, 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 (after application of any other set-off or other credit owed to the Access Holder) 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.

## 56 Security

### 5.16.1 Requirement to provide Security after Commencement Date

- (a) This **clause 5.16.1** only applies if **item 33** of ~~schedule 1~~ **Schedule 1** states that it applies.
- (b) On or before ~~that~~ the date ~~that is~~ 10 Business Days prior to the Commitment Date, the End User Access Holder must deliver Security to Aurizon Network which satisfies the requirements of this **clause 56** for an amount of not less than the Security Amount.

### 5.26.2 Requirement to provide Security on certain events occurring

- (a) If at any time during the Term when the End User Access Holder is not required to provide Security to Aurizon Network under this **clause 56**:
- ~~(b) the End User ceases to have an Acceptable Credit Rating;~~
- (i) ~~the End User Access Holder~~ the End User 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 ~~and does not pay that amount (together with any interest) or~~ within a further period of

five Business Days after Aurizon Network gives written notice to the End-User Access Holder requiring payment; or

- (ii) Aurizon Network considers, ~~(acting reasonably,)~~ that the End-User 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 End-User 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 56** 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.

### **5.36.3 Requirement to provide Security for the Security Amount**

- (a) If the End-User Access Holder is required to provide Security under this **clause 56**, 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 End-User Access Holder is required to provide Security under this **clause 56**; and
  - (ii) the Security provided by the End-User Access Holder to Aurizon Network under this **clause 56** is for an amount which is less than the Security Amount (including due to Aurizon Network having recourse to the Security under **clause 5.66.6**),

then the End-User 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 56** so that Security is provided and maintained for an aggregate amount of not less than the Security Amount.

### **5.46.4 Requirement to provide Security for additional Train Service Type**

Without limiting **clause 5.36.3**, if:

- (a) at any time during the Term:
  - (i) ~~schedule 2~~ **Schedule 2** is varied to include an additional Train

Service Type; or

- (ii) the Train-~~Service~~ Description for an existing Train Service Type is varied;
- (b) at the time of the variation referred to in **clause 6.4(a)** the ~~End~~ User Access Holder is required to provide Security under this **clause 56**; and
- (c) at the time of the variation referred to in **clause 6.4(a)** the Security provided by the ~~End User~~ Access Holder to Aurizon Network under this **clause 56** 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-~~Service~~ 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 ~~End User~~ 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 56** 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).

#### **5-56.5 Replacement of Security**

The ~~End User~~ Access Holder may, with Aurizon Network's consent, replace any Security provided by the ~~End User~~ Access Holder under this **clause 56** with replacement Security which satisfies the requirements of this **clause 56**.

#### **5-66.6 Recourse to Security**

Aurizon Network may have recourse to the Security ~~where the End User in respect of any amount which the Access Holder fails to pay any amount payable by the End User to Aurizon Network under, or in connection with,~~ this Agreement:

- ~~(a) if the amount is payable by a specified due date, by the due date for payment; or~~
- (a) if the Access Holder fails to pay the amount by the due date for payment under this Agreement, Aurizon Network notifies the Access Holder of the payment default and the Access Holder fails to remedy the payment default within 10 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 ~~due date, within a reasonable period~~ and the Access Holder fails to make payment within 10 Business

Days after Aurizon Network has requested payment of ~~the relevant~~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).

### **5.76.7 Review of requirement to provide Security**

If at any time during the Term, the ~~End User~~Access Holder:

- (a) is required to provide Security under this **clause 56**; and
- (b) considers that its financial circumstances have changed such that it should no longer be required to provide Security,

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

### **5.86.8 Return of Security**

Aurizon Network must return to the ~~End User~~Access Holder (and, where appropriate, give the ~~End User~~Access Holder any necessary releases in relation to) any Security provided by the ~~End User~~Access Holder under this **clause 56**:

- (a) subject to Aurizon Network's rights of recourse to the Security under ~~clause 5.6, promptly~~6.6, promptly and in any event within 10 Business Days after the date of termination or expiry of this Agreement;
- (b) on the ~~End User~~Access Holder delivering to Aurizon Network any replacement Security under ~~clause 5.3(b)(iv)~~6.3(b)(iv), 5.4(e)~~6.4(c)(iv) or 5.5~~6.5 which satisfies the requirements of this **clause 56**; or
- (c) if, after a review pursuant to **clause 5.76.7**, Aurizon Network considers, acting reasonably, that it is no longer necessary for the ~~End User~~Access Holder to provide Aurizon Network with Security under this **clause 5.6**.

### **5.9 Provision of Security by an Operator**

- ~~(a) Aurizon Network must promptly notify the End User of any failure by an Operator to adequately provide any security the Operator is required to provide under a Train Operations Agreement.~~
- ~~(b) Aurizon Network agrees that the End User may at any time, without having any obligation to do so, provide security for an Operator and that, for any period during which the End User provides security which meets the requirements of the relevant Train Operations Agreement, Aurizon Network shall accept that that satisfies the Operator's obligations to provide security under the Train Operations Agreement.~~
- ~~(c) For the avoidance of doubt, to the extent that the End User has exercised its right to provide security on behalf of an Operator in accordance with clause 5.9(b) and Aurizon Network has treated the provision of such security as satisfying the Operator's obligation to provide security under its Train Operations Agreement, the End User agrees that Aurizon Network may have recourse to that security as if it were provided by the Operator under the terms of its Train Operations Agreement. To the extent any such security is to be repaid, returned or released in accordance with clause 9.8 of the Operator's Train Operations~~



Agreement, it will be repaid, returned or released to, and any necessary releases will be provided to, the End User.

## ~~5.10 — Impact on operation of Train Services~~

The End User must:

- ~~(a) — if **clause 5.1** applies, ensure that no Operator operates any Train Services until the End User has complied with **clause 5.1** (including **clause 5.3(a)** as it applies to **clause 5.1**);~~
- ~~(b) — if the End User is required to provide additional Security or replacement Security under **clause 5.4**, ensure that no Operator operates any Train Services of the affected Train Service Type until the End User has complied with **clause 5.4** (including **clause 5.3(a)** as it applies to **clause 5.4**); and~~
- ~~(c) — ensure that no Operator operates any Train Services at any time while the End User is in breach of **clause 5.2** or **5.3(b)** (including **clause 5.3(a)** as it applies to **clause 5.2** or **5.3(b)**).~~

## ~~6 — Resumption of Access Rights~~

### ~~6.1 — Information Request Notice~~

- ~~(a) — If Aurizon Network considers that a Resumption Trigger Event for a Train Service Type has occurred, Aurizon Network may give the End User a notice (**Information Request Notice**) requesting such information in relation to the suspected Resumption Trigger Event as Aurizon Network may reasonably require.~~
- ~~(b) — If Aurizon Network gives the End User an Information Request Notice, the End User must:
  - ~~(i) — within 10 Business Days after Aurizon Network gives the Information Request Notice to the End User, provide to Aurizon Network the information requested in the Information Request Notice; and~~
  - ~~(ii) — if required by Aurizon Network, meet with Aurizon Network to discuss the suspected Resumption Trigger Event for the applicable Train Service Type.~~~~

### ~~6.2 — Proposed Resumption Notice~~

- ~~(a) — Subject to **clause 6.2(b)**, if Aurizon Network considers that a Resumption Trigger Event for the Train Service Type has occurred, then Aurizon Network may, regardless of whether or not Aurizon Network has given the End User an Information Request Notice in respect of that Resumption Trigger Event or whether or not the End User has responded to such an Information Request Notice, give the End User a notice (**Proposed Resumption Notice**) specifying:
  - ~~(i) — reasonable details of the Resumption Trigger Event;~~
  - ~~(ii) — the Access Rights for the Train Service Type which Aurizon Network considers to be Underutilised Access Rights for the Train Service Type in respect of the Resumption Trigger Event; and~~
  - ~~(iii) — that Aurizon Network is considering resuming the whole or part of~~~~

~~the Underutilised Access Rights for the Train Service Type.~~

- ~~(b) Aurizon Network must not give a Proposed Resumption Notice in respect of a Resumption Trigger Event for a Train Service Type specified in **paragraph (a)** of the definition of Resumption Trigger Event more than 40 Business Days after the end of the applicable four consecutive Quarters referred to in **paragraph (a)** of that definition.~~

### ~~6.3~~ **Response to Proposed Resumption Notice**

~~Within 15 Business Days after Aurizon Network gives the End User a Proposed Resumption Notice (**Proposed Resumption Response Period**), the End User may give Aurizon Network a notice which seeks to demonstrate the extent to which, and the likelihood of:~~

- ~~(a) the End User being able to utilise via the Operators; and  
(b) the End User needing to utilise,~~

~~the whole or part of the Underutilised Access Rights for the Train Service Type specified in the Proposed Resumption Notice for the operation of Train Services for the Train Service Type.~~

### ~~6.4~~ **Resumption Notice**

- ~~(a) If Aurizon Network has a reasonable expectation of:~~

- ~~(i) a sustained alternative demand for the whole or part (as applicable) of the Resumable Access Rights for the Train Service Type; or  
(ii) receiving a commercial benefit which Aurizon Network considers is sufficiently material to justify the resumption of the whole or part (as applicable) of the Resumable Access Rights for the Train Service Type,~~

~~then Aurizon Network may, subject to **clause 6.4(b)**, by notice to the End User (**Resumption Notice**), resume that part of the Resumable Access Rights for the Train Service Type in respect of which Aurizon Network has a reasonable expectation of a sustained alternative demand or receiving a commercial benefit (as applicable) (**Resumed Access Rights**).~~

- ~~(b) A Resumption Notice must:~~

- ~~(i) not be given more than 20 Business Days after the end of the Proposed Resumption Response Period (and any Resumption Notice given after the end of that period will be of no effect); and  
(ii) specify:~~

## 7 ~~full details of the Resumed~~ 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 which form part of this Agreement under **clause 3**.

(b) 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

~~(A)(B)the outcome of the Dispute is that the Access Rights for the Train Service Type; and may be resumed,~~

~~(B) the date on which the resumption will take effect (which must be at least 10 Business Days after the Resumption Notice is given to the End User) (**Resumption Date**).~~

~~(c) If a Resumption Notice is given under this **clause 6.4**, the Resumed Access Rights for the Train Service Type will, subject to **clause 6.5** and **clause 6.6**, cease to form part of the Access Rights for the Train Service Type on and from the Resumption Date (including for the purpose of the calculation of Access Charges) other than for the purpose of calculating any TOP Charges that are payable as a result of the non-utilisation of any of the Resumed Access Rights prior to the Resumption Date. [Square bracketed text to be deleted where the End User is only paying TOP Charges]~~

### **6.5 Dispute**

~~(a) If Aurizon Network gives the End User a Resumption Notice, the End User may, not later than 10 Business Days after the Resumption Notice is given to the End User, give Aurizon Network a Dispute Notice under **clause 24** which Disputes the validity of the Resumption Notice, including:~~

~~(i) the existence of the Resumption Trigger Event for the Train Service Type;~~

~~(ii) the existence and extent of the Underutilised Access Rights for the Train Service Type;~~

~~(iii) the existence or extent of the Resumable Access Rights for the Train Service Type; or~~

~~(iv) the reasonableness of the expectation of sustained alternative demand or Aurizon Network receiving a commercial benefit (as applicable) referred to in **clause 6.4(a)**;~~

~~in accordance with **clause 24** and, if the Parties fail to resolve the Dispute by agreement, the Dispute must be referred to an Expert for resolution in accordance with **clause 24.3**.~~

- (b) ~~If the End User gives Aurizon Network a Dispute Notice which Disputes the validity of a Resumption Notice within the time referred to in **clause 6.5(a)**, then the resumption of the Resumed Access Rights for the Train Service Type set out in the relevant Resumption Notice:~~
- ~~(i) will not take effect until the later of the Resumption Date and 10 Business Days after the resolution of the Dispute; and~~
  - ~~(ii) will then only take effect to the extent that the resumption is consistent with the resolution of the Dispute.~~
- (c) ~~If Aurizon Network gives the End User a Resumption Notice and the End User does not give Aurizon Network a Dispute Notice which Disputes the validity of the Resumption Notice within the time referred to in **clause 6.5(a)**, then:~~
- ~~(i) the End User must not give Aurizon Network a Dispute Notice under **clause 24** which Disputes any matter referred to in **clause 6.5(a)**; and~~
  - ~~(ii) any such Dispute Notice which is given by the End User will be taken to be of no effect.~~

## **6.6 — Withdrawal of Resumption Notice**

- (a) ~~Aurizon Network may, in its absolute discretion, withdraw a Resumption Notice at any time before the later of:~~
- ~~(i) the Resumption Date; and~~
  - ~~(ii) if the End User Disputes the Resumption Notice under **clause 6.5**, the date of the resolution of that Dispute.~~
- (b) ~~If Aurizon Network withdraws a Resumption Notice under **clause 6.6(a)**, the resumption of the Access Rights for the Train Service Type set out in that Resumption Notice will not take effect.~~

## **6.7 — Effect on Operator nominations**

- (a) ~~Within the later of:~~
- ~~(i) two Business Days after the Resumption Notice is given to the End User; and~~
  - ~~(ii) if the End User gives a notice in accordance with **clause 6.5** Disputing a proposed resumption, two Business Days after the resolution of the Dispute;~~

~~the End User~~the Access Holder may give notice to Aurizon Network and each affected Operator in accordance with **clause 3.4(a)**~~4.5(a)~~ to vary the Access Rights which the ~~End User~~Access Holder has allocated to an Operator to take into account ~~the Resumed Access Rights~~any resumption of Access Rights determined or agreed under the Resumption Provisions which form part of this Agreement under **clause 3** or as determined under the relevant dispute resolution process.

- (b)~~(c)~~ Except to the extent that the ~~End User~~Access Holder has given a notice as contemplated in **clause 6.7(a)** ~~in respect of the Resumed Access Rights, the Resumed~~8(b), 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 ~~End User~~[Access Holder](#) has not nominated an Operator; and
- (ii) if, after the operation of ~~clause 6.7(b)(i)~~, ~~8(c)(i)~~, there is an Over-Allocation for the relevant Train Service Type, ~~clause 3.64.7~~ applies in respect of that Over-Allocation.

~~(c) — As soon as practicable after the expiry of the period referred to in clause 6.7(a), Aurizon Network must, in respect of each Train Service Type affected by the Resumed Access Rights:~~

- ~~(i) — issue a notice to the End User setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in schedule 2 of this Agreement; and~~
- ~~(ii) — issue a notice to each affected Operator and the End User setting out the changes to the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of the relevant affected Operator’s Train Operations Agreement.~~

## 7.9 Reduction of Conditional Access Rights due to Capacity Shortfall

### 7.19.1 Application

- (a) This ~~clause 71.1(a)~~ only applies in respect of a Train Service Type if the Train ~~Service~~-Description for that Train Service Type specifies that this ~~clause 71.1(a)~~ applies in respect of that Train Service Type.
- (b) If this ~~clause 71.1(a)~~ applies in respect of a Train Service Type, this ~~clause 71.1(a)~~ 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)~~.

### 7.29.2 Conditional Access Rights

If this ~~clause 71.1(a)~~ 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 ~~Service~~-Description for that Train Service Type; ~~and~~
- (b) despite the Train Service Commitment Date specified in the Train ~~Service~~ 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 ~~Service~~-Description for the Conditional Access Rights; and
  - (ii) the date upon which all Segments of the Expansion are completed

and commissioned.

### ~~7.3 Capacity Assessment~~

- ~~(a) Subject to **clause 7.3(e)**, Aurizon Network must, within six months after the completion and commissioning of an Expansion referred to in **clause 7.2**, undertake an assessment (**Capacity Assessment**) in respect of that Expansion to determine, in accordance with **clause 7.3(b)**, the change in Existing Capacity (**Capacity Change**) for each Segment of the Expansion.~~
- ~~(b) For the purposes of **clause 7.3(a)**, the Capacity Change for each Segment of an Expansion is the amount which is:~~
- ~~(i) the Existing Capacity of the Segment of the Expansion as a result of the Expansion being undertaken; less~~
  - ~~(ii) the Existing Capacity of the Segment of the Expansion if the Expansion had not been undertaken,~~
- ~~using consistent Operating Parameters.~~
- ~~(c) Aurizon Network may defer a Capacity Assessment in respect of an Expansion until such time as Aurizon Network reasonably considers that the Expansion Infrastructure is fully operational and the demand conditions are such that a reasonable Capacity Assessment can be undertaken.~~

### ~~7.4 Determination of Reduced Conditional Access Rights for Segments~~

~~Within a reasonable time after the completion of a Capacity Assessment in respect of an Expansion, Aurizon Network must:~~

- ~~(a) determine whether or not there is a Capacity Shortfall for any Segment of the Expansion; and~~
- ~~(b) in respect of any Segment of the Expansion for which there is a Capacity Shortfall, calculate the Reduced Conditional Access Rights for that Segment in accordance with the following formula:~~

$$\text{RCAR} = \text{EAR} \times \frac{\text{GAR}_{(\text{Original})}}{\sum \text{GAR}_{(\text{Original})}}$$

~~where:~~

~~RCAR = the Reduced Conditional Access Rights for the relevant Segment of the Expansion (expressed as a number of Train Services and rounded down to the nearest even number of whole Train Services)~~

~~EAR = the lesser of:~~

- ~~(b) the sum of CC and IAC; and~~
- ~~(c)  $\sum \text{GAR}_{(\text{Original})}$ ,~~

~~(expressed as a number of Network Train Services)~~

~~CC = the Capacity Change for the relevant Segment of the Expansion (expressed as a number of Network Train~~

- Services)
- IAC = the amount (expressed as a number of Network Train Services) specified as the “Initial Available Capacity” for the Segment in the Train Service Description for the Conditional Access Rights
- $CAR_{(Original)}$  = the Conditional Access Rights (expressed as a number of Train Services)
- $\Sigma CAR_{(Original)}$  = the sum of:
- (a) the Conditional Access Rights (expressed as a number of Network Train Services); and
  - (b) for each Other Conditional Access Holder for the Segment of the Expansion, the Other Conditional Access Holder’s Other Conditional Access Rights for the Expansion (expressed as a number of Network Train Services).

## ~~7.5~~ ~~Consequences of Capacity Shortfall~~

~~Within a reasonable time after the completion of a Capacity Assessment in respect of an Expansion, Aurizon Network must give the End User a notice (**Capacity Assessment Notice**) which specifies:~~

- ~~(a) the Conditional Access Rights which are conditional upon the completion and commissioning of the Expansion;~~
- ~~(b) the amount of the Capacity Change for each Segment of the Expansion (as determined by Aurizon Network under **clause 7.3(a)**);~~
- ~~(c) whether or not there is a Capacity Shortfall in respect of any Segment of the Expansion;~~
- ~~(d) if there is a Capacity Shortfall in respect of any Segment of the Expansion, the Reduced Conditional Access Rights for each such Segment of the Expansion (calculated in accordance with the formula in **clause 7.4**), including reasonable details of the calculation of the Reduced Conditional Access Rights for each such Segment; and~~
- ~~(e) that, with effect on the date that is 10 Business Days after the Capacity Assessment Notice is given to the End User, the Conditional Access Rights will be taken to be varied to be the lowest of the Reduced Conditional Access Rights for a Segment of the Expansion referred to in **clause 7.5(d)**.~~

## ~~7.6~~ ~~Disputes~~

- ~~(a) If Aurizon Network gives the End User a Capacity Assessment Notice in respect of Conditional Access Rights, the End User may, within 20 Business Days after Aurizon Network gives the Capacity Assessment Notice to the End User, give Aurizon Network a Dispute Notice which Disputes the Capacity Assessment Notice in accordance with **clause 24**.~~

- ~~(b) — If a Dispute referred to in **clause 7.6(a)** is not resolved in accordance with **clause 24.2**, then the Parties must refer the Dispute to an Expert to determine (unless otherwise agreed between the Parties):~~
- ~~(i) — the amount of the Capacity Change for each Segment of the Expansion;~~
  - ~~(ii) — whether or not there is a Capacity Shortfall in respect of any Segment of the Expansion; and~~
  - ~~(iii) — if there is a Capacity Shortfall in respect of any Segment of the Expansion, the Reduced Conditional Access Rights for each such Segment of the Expansion (calculated in accordance with the formula in **clause 7.4**), including reasonable details of the calculation of the Reduced Conditional Access Rights for each such Segment.~~
- ~~(c) — If the End User does not give Aurizon Network a Dispute Notice referred to in **clause 7.6(a)** within the time referred to in **clause 7.6(a)**, then:~~
- ~~(i) — the End User must not give Aurizon Network a Dispute Notice Disputing the relevant Capacity Assessment Notice or the variation of the Conditional Access Rights under this **clause 7**;~~
  - ~~(ii) — any such Dispute Notice which is given by the End User will be taken to be of no effect; and~~
  - ~~(iii) — the End User will not have, and must not make, any Claim against Aurizon Network in respect of that Dispute.~~
- ~~(d) — If Aurizon Network is of the opinion that:~~
- ~~(i) — a Dispute referred to in **clause 7.6(a)**, or the outcome or consequences of that Dispute, may be relevant to Other Conditional Access Holders for an Expansion; or~~
  - ~~(ii) — a dispute referred to in a provision of an Access Agreement with an Other Conditional Access Holder for an Expansion which is equivalent **clause 7.6(a)**, or the outcome or consequences of that dispute, may be relevant to the End User under this Agreement,~~
- ~~then:~~
- ~~(iii) — Aurizon Network will invite all of the Other Conditional Access Holders for the Expansion to participate in the dispute resolution process under this Agreement, or will invite the End User and each Other Conditional Access Holder for the Expansion to participate in the dispute resolution process under the relevant Other Conditional Access Holder's Access Agreement (as applicable); and~~
  - ~~(iv) — Aurizon Network, the End User and the Other Conditional Access Holders will be bound by the outcome of the dispute irrespective of whether or not the End User and the Other Conditional Access Holders (as applicable) choose to actively participate in the dispute.~~
- ~~(e) — If the End User is, in accordance with this **clause 7.6**, a party to, or is invited to participate in, a dispute that has been referred to an Expert under this **clause 7.6** or a provision equivalent to this **clause 7.6** under any other Access Agreement, then the Expert must, amongst any other~~



~~matters determined by the Expert, determine the matters specified in **clause 7.6(b)** (unless otherwise agreed between the parties to the dispute).~~

## ~~7.7~~ **Variation to Conditional Access Rights**

~~If Aurizon Network gives the End User a Capacity Assessment Notice in respect of Conditional Access Rights, then the Conditional Access Rights will be taken to be varied to be the lowest of the Reduced Conditional Access Rights for a Segment of the Expansion:~~

~~as:~~

- ~~(a) specified in the Capacity Assessment Notice; or~~
- ~~(b) if the End User is, in accordance with **clause 7.6**, a party to, or is invited to participate in, a dispute that has been referred to an Expert under **clause 7.6** or a provision equivalent to **clause 7.6** under any other Access Agreement, as agreed or determined through the dispute resolution process;~~

~~with effect on the later of:~~

- ~~(c) the date that is 10 Business Days after the Capacity Assessment Notice is given to the End User; and~~
- ~~(d) if the End User gives the Aurizon Network a Dispute Notice referred to in **clause 7.6(a)** or the End User is otherwise invited to participate in the dispute resolution process under the relevant Other Conditional Access Holder's Access Agreement in accordance with **clause 7.6(d)**, the date that is 10 Business Days after the Parties agree a resolution to, or the date that is 10 Business Days after the Expert notifies the Parties of its determination of, the dispute.~~

## 7.89.3 **Effect on Operator nominations**

(a) Within the later of:

- (i) two Business Days after the Capacity Assessment Notice is given to the ~~End User;~~ Access Holder in accordance with the Conditional Access Provisions which form part of this Agreement under **clause 3**; and
- (ii) if the ~~End User gives~~ Access Holder disputes the ~~Aurizon Network a Dispute~~ Capacity Assessment Notice ~~referred to in **clause 7.6(a)** or~~ the End User is otherwise invited to participate in the dispute resolution process under the relevant Other Conditional Access Holder's Access Agreement in accordance with ~~**clause 7.6(d)**~~, two Business Days after the resolution of the Dispute,

the ~~End User~~ Access Holder may ~~give notice to~~ notify Aurizon Network and each affected Operator in accordance with ~~**clause 3.4(a)**~~ **4.5(a)** to vary the Access Rights which the ~~End User~~ Access Holder has allocated to an Operator to take into account the variation to the Conditional Access Rights under the Conditional Access Provisions which form part of this Agreement under **clause 7.3**.

(b) Except to the extent that the ~~End User~~ 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~~ [the Conditional Access Provisions which form part of this Agreement under clause 73](#) for each affected Train Service Type, the variation to the Conditional Access Rights for each affected Train Service Type:

- (i) ~~firstly~~, are deemed to reduce the Access Rights for that Train Service Type for which the ~~End User~~ [Access Holder](#) has not nominated an Operator; and
- (ii) if, after the operation of ~~clause 7.8(b)(i)~~ **9.3(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, ~~clause 3.64.7~~ **applies** in respect of that Over-Allocation.

- ~~(c) — As soon as practicable after the expiry of the period referred to in clause 7.8(a), Aurizon Network must, in respect of each Train Service Type affected by the variation to the Conditional Access Rights:~~
  - ~~(i) — issue a notice to the End User setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in schedule 2 of this Agreement; and~~
  - ~~(ii) — issue a notice to each affected Operator and the End User setting out the changes to the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of the relevant affected Operator’s Train Operations Agreement.~~

#### **7.99.4 Future capacity developments**

If any Conditional Access Rights are varied under this **clause 71.1(a)**, the ~~End User~~ [Access Holder](#) acknowledges and agrees that Aurizon Network will only be obliged to develop additional Capacity, and to grant the ~~End User access rights~~ [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)~~.

## ~~8 — Reduction [Relinquishment](#) of Nominated Monthly Train Services if Maximum Payload exceeded~~

### ~~8.1 — Notification of reduction of Nominated Monthly Train Services~~

- ~~(a) — If, at a point in time (**Assessment Date**), the Average Annual Payload for a Train Service Type operated by a particular Operator (**Defaulting Operator**) exceeds the Maximum Payload for that Train Service Type, then Aurizon Network may, within 20 Business Days after the Assessment Date, give the End User and the Defaulting Operator a notice (**Reduction Notice**) in respect of the Affected Train Service Type.~~

- ~~(b) — The Reduction Notice must:~~

- ~~(i) — specify:~~
  - ~~(A) — the Average Annual Payload for the Affected Train Service Type as at the Assessment Date;~~
  - ~~(B) — the Revised Nominal Payload for the Affected Train Service Type;~~
  - ~~(C) — the Revised Maximum Payload for the Affected Train Service~~

Type; and

~~(D) the Revised Nominated Monthly Train Services for the Affected Train Service Type,~~

~~including reasonable details of the calculation of those amounts; and~~

~~(ii) notify the End User and the Defaulting Operator that, with effect on the date specified in the Reduction Notice (which date must not be less than three months after the date the Reduction Notice is given to the End User and the Defaulting Operator):~~

~~(A) the Nominal Payload for the Affected Train Service Type will be taken to be varied to be the Revised Nominal Payload for that Affected Train Service Type (as specified in the Reduction Notice);~~

~~(B) the Maximum Payload for the Affected Train Services Type will be taken to be varied to be the Revised Maximum Payload for that Affected Train Service Type (as specified in the Reduction Notice); and~~

~~(C) the Nominated Monthly Train Services for the Affected Train Service Type will be taken to be varied to be the Revised Nominated Monthly Train Services for that Affected Train Service Type (as specified in the Reduction Notice).~~

## ~~8.2 Determining the Affected Train Service Type~~

~~(a) If the relevant Train Service Type (**Split Train Service Type**) operated by the Defaulting Operator which has exceeded the Maximum Payload is also operated by another Operator (**Non-Defaulting Operator**):~~

~~(i) the Train Service Type operated by the Defaulting Operator (**New Train Service Type**); and~~

~~(ii) the Train Service Type operated by the Non-Defaulting Operator (**Original Train Service Type**),~~

~~are deemed to be two different Train Service Types on the basis that:~~

~~(iii) the “Nominated Monthly Train Services (for a 30 day Month)” for the New Train Service Type is deemed to be the “Nominated Monthly Train Services (for a 30 day Month)” allocated to the Defaulting Operator in respect of the Split Train Service Type as at the Assessment Date;~~

~~(iv) the “Nominated Monthly Train Services (for a 30 day Month)” for the Original Train Service Type is deemed to be the “Nominated Monthly Train Services (for a 30 day Month)” which was not allocated to the Defaulting Operator in respect of the Split Train Service Type as at the Assessment Date; and~~

~~(v) subject to **clauses 8.2(a)(iii)** and **8.2(a)(iv)**, the Train Service Description for:~~

~~(A) the New Train Service Type; and~~

~~(B) the Original Train Service Type,~~

~~is otherwise the same as for the Split Train Service Type.~~

~~(b) The **Affected Train Service Type** is:~~

- ~~(i) if **clause 8.2(a)** applies, the New Train Service Type operated by the Defaulting Operator; and~~
- ~~(ii) in any other case, the Train Service Type operated by the Defaulting Operator which has exceeded the Maximum Payload.~~

### ~~8.3 Calculation of Revised Nominal Payload~~

~~The Revised Nominal Payload for an Affected Train Service Type is the amount which is 98% of the maximum Payload of the Train Services operated by the Defaulting Operator of the Relevant Rollingstock Configuration for the Train Service Type (rounded to the nearest whole tonne) which was the Relevant Rollingstock Configuration for the Train Service Type which was most used in the operation of Train Services for the Affected Train Service Type by the Defaulting Operator during the 12 month period ending on the Assessment Date.~~

### ~~8.4 Calculation of Revised Maximum Payload~~

~~The Revised Maximum Payload for an Affected Train Service Type is the amount (expressed as tonnes) calculated in accordance with the following formula:~~

$$\text{RMP} = \text{RNP} \times \text{CF}$$

~~where:~~

~~RMP = the Revised Maximum Payload for the Affected Train Service Type (rounded to the nearest whole tonne)~~

~~RNP = the Revised Nominal Payload for the Affected Train Service Type~~

~~CF = 1.02 (or such other conversion factor agreed between the Parties)~~

### ~~8.5 Calculation of Revised Nominated Monthly Train Services~~

~~The Revised Nominated Monthly Train Services for an Affected Train Service Type is the number of Train Services calculated in accordance with the following formula:~~

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

~~where:~~

~~RNMTS = the Revised Nominated Monthly Train Services for the Affected Train Service Type~~

~~Loaded Train Services =  $\text{IT/RNP}$  (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 the Train Service Type~~
- ~~RNP = the Revised Nominal Payload for the Affected Train Service Type~~

## **8.6 — Dispute**

- ~~(a) — If Aurizon Network gives the End User a Reduction Notice in respect of an Affected Train Service Type, the End User may, within 20 Business Days after Aurizon Network gives the Reduction Notice to the End User, give Aurizon Network a Dispute Notice which Disputes the Reduction Notice in accordance with **clause 24**.~~
- ~~(b) — If a Dispute referred to in **clause 8.6(a)** is not resolved in accordance with **clause 24.2**, then the Parties must refer the Dispute to an Expert to determine:~~
- ~~(i) — the Average Annual Payload for the Affected Train Service Type as at the relevant Assessment Date; and~~
  - ~~(ii) — if the Expert determines that the Average Annual Payload for the Affected Train Service Type as at the relevant Assessment Date exceeds the Maximum Payload for the Train Service Type:~~
    - ~~(A) — the Revised Nominal Payload for the Affected Train Service Type;~~
    - ~~(B) — the Revised Maximum Payload for the Affected Train Service Type; and~~
    - ~~(C) — the Revised Nominated Monthly Train Services for the Affected Train Service Type.~~
- ~~(c) — If the End User does not give Aurizon Network a Dispute Notice referred to in **clause 8.6(a)** within the time referred to in **clause 8.6(a)**, then:~~
- ~~(i) — the End User must not give Aurizon Network a Dispute Notice Disputing the relevant Reduction Notice or the variation of the Nominal Payload, Maximum Payload or the Nominated Monthly Train Services for the relevant Affected Train Service Type under this **clause 8**;~~
  - ~~(ii) — any such Dispute Notice which is given by the End User will be taken to be of no effect; and~~
  - ~~(iii) — the End User will not have, and must not make, any Claim against Aurizon Network in respect of that Dispute.~~

## **8.7 — Variation to Train Service Description**

~~If Aurizon Network gives the End User and the Defaulting Operator a Reduction Notice in respect of a Train Service Type, then:~~

- ~~(a) — the Nominal Payload for the Train Service Type operated by the Defaulting Operator will be taken to be the Revised Nominal Payload for the Train Service Type;~~

~~(b) the Maximum Payload for the Train Service Type operated by the Defaulting Operator will be taken to be varied to be the Revised Maximum Payload for the Train Service Type; and~~

~~(c) the Nominated Monthly Train Services for the Train Service Type operated by the Defaulting Operator will be taken to be varied to be the Revised Nominated Monthly Train Services for the Train Service Type,~~

~~as:~~

~~(d) specified in the relevant Reduction Notice; or~~

~~(e) if **clause 8.6(a)** applies, agreed or determined through the Dispute resolution process under **clause 24**,~~

~~with effect on the later of:~~

~~(f) the date specified in the relevant Reduction Notice; and~~

~~(g) if the End User gives Aurizon Network a Dispute Notice referred to in **clause 8.6(a)**, the date agreed through the Dispute resolution process, or the date the Expert notifies the Parties of his or her determination, under **clause 24**.~~

### ~~8.8 Variation to Train Operations Agreements~~

~~Where there is a variation to a Train Service Description in accordance with **clause 8.7**:~~

~~9.10 the End User will be deemed to have given a notice to Aurizon Network to reduce the number of Nominated Monthly Train Services the Defaulting Operator may operate for that Train Service Type utilising the Access Rights under a Train Operations Agreement in accordance with the Reduction Notice; and~~

~~(a) Aurizon Network shall provide written notice of that reduction to the Defaulting Operator as soon as practicable and shall:~~

~~(i) issue a notice to the End User setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in **schedule 2** of this Agreement for each of:~~

~~(A) the Affected Train Service Type; and~~

~~(B) the Original Train Service Type (if applicable); and~~

~~(ii) issue a notice to the Defaulting Operator and the End User setting out the changes to the Train Service Description and the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of the Defaulting Operator’s Train Operations Agreement.~~

### ~~9.2 No prejudice to other rights~~

~~This **clause 8** does not prejudice Aurizon Network’s other rights and remedies in respect of any non-compliance by the End User, Defaulting Operator or any~~

~~other Operator with the Train Service Description for a Train Service Type.~~

## ~~10 — End User initiated increase to Maximum Payload~~

### ~~10.1 — Request for increased Maximum Payload~~

- ~~(a) — At any time during the Term, the End User may give Aurizon Network a notice requesting that Aurizon Network consider increasing the Maximum Payload for a Train Service Type (**Notice of Enquiry**).~~
- ~~(b) — A Notice of Enquiry must specify:
  - ~~(i) — subject to **clause 9.1(c)**, the proposed increased Maximum Payload for the relevant Train Service Type;~~
  - ~~(ii) — the date on which the End User proposes that the proposed increased Maximum Payload for that Train Service Type take effect; and~~
  - ~~(iii) — if **clause 9.2(c)** would apply to the giving of a Variation Request Notice, details of the proposed Rollingstock Configuration for the Train Service Type (including the maximum Payload of the proposed Rollingstock Configuration).~~~~
- ~~(c) — The proposed increased Maximum Payload for a Train Service Type specified in a Notice of Enquiry must not exceed:
  - ~~(i) — the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload; or~~
  - ~~(ii) — if the Maximum Payload for the Train Service Type exceeds the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload, the maximum Payload of the proposed Rollingstock Configuration for the Train Service Type specified in the Notice of Enquiry.~~~~

### ~~10.2 — Response Notice and Variation Request Notice~~

- ~~(a) — Within 20 Business Days after the End User gives Aurizon Network a Notice of Enquiry in respect of a Train Service Type, Aurizon Network must give the End User a notice (**Response Notice**) specifying:
  - ~~(i) — whether or not the proposed increased Maximum Payload for the Train Service Type specified in the Notice of Enquiry can be accommodated; and~~
  - ~~(ii) — if so:
    - ~~(A) — the Revised Nominal Payload for that Train Service Type (calculated as the amount (rounded to the nearest whole tonne) which is 98% of the Maximum Payload for the Train Service Type specified in the Notice of Enquiry);~~
    - ~~(B) — the Revised Nominated Monthly Train Services for that Train Service Type (calculated in accordance with **clause 8.5** as if the Revised Nominal Payload for the Train Service Type for the purpose of that calculation is the Revised Nominal Payload calculated in accordance with **clause 9.2(a)(ii)(A)**);~~~~~~

- ~~(C) — the difference between the Nominated Monthly Train Services for the Train Service Type and the Revised Nominated Monthly Train Services for the Train Service Type (**Surplus Access Rights**);~~
  - ~~(D) — the Relinquishment Fee that would be payable under **clause 11** in respect of the relinquishment of the Surplus Access Rights by the End User; and~~
  - ~~(E) — the earliest date on which the increase in the Maximum Payload for the Train Service Type could take effect.~~
- ~~(b) — Within 20 Business Days after Aurizon Network gives the End User a Response Notice that specifies that the proposed increased Maximum Payload for a Train Service Type specified in the Notice of Enquiry can be accommodated, the End User may give Aurizon Network a notice (**Variation Request Notice**) which:~~
- ~~(i) — requests that Aurizon Network increase the Maximum Payload for the Train Service Type to the proposed increased Maximum Payload specified in the Notice of Enquiry with effect on a date specified in the notice (which date must not be earlier, or more than six months later, than the date specified in the relevant Response Notice in accordance with **clause 9.2(a)(ii)(E)**); and~~
  - ~~(ii) — sets out the details of any changes to the nominations previously given under **clause 3.3** or **3.4** to take into account the relinquishment of the Surplus Access Rights.~~
- ~~(c) — If the proposed increased Maximum Payload for a Train Service Type specified in a Notice of Enquiry exceeds the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload, then the End User must not give Aurizon Network a Variation Request Notice in respect of the Train Service Type unless, at the same time, each Operator which operates Train Services in respect of that Train Service Type also gives Aurizon Network an Authorisation Request Notice (as defined in that Operator's Train Operations Agreement) in respect of a proposed Rollingstock Configuration which has a maximum Payload which is the same as the proposed increased Maximum Payload.~~

### **10.3 — Consequences of a Variation Request Notice**

- ~~(a) — If the End User gives Aurizon Network a Variation Request Notice in respect of a Train Service Type, then the End User will be taken, at the same time, to have given Aurizon Network a Notice of Intention to Relinquish in respect of which:~~
  - ~~(i) — the Nominated Access Rights will be taken to be the Surplus Access Rights for the Train Service Type specified in the relevant Response Notice; and~~
  - ~~(ii) — the Relinquishment Date will be taken to be the date specified in the Variation Request Notice.~~
- ~~(b) — Subject to **clause 9.2(c)**, if the End User gives Aurizon Network a Variation Request Notice in respect of a Train Service Type, then:~~



- ~~(i) — the Maximum Payload for the Train Service Type will be taken to be varied to be the proposed increased Maximum Payload for the Train Service Type (as specified in the relevant Notice of Enquiry);~~
- ~~(ii) — the Nominal Payload for the Train Service Type will be taken to be varied to be the Revised Nominal Payload for the Train Service Type (as specified in the relevant Response Notice); and~~
- ~~(iii) — the Nominated Monthly Train Services for the Train Service Type will be taken to be varied to be the Revised Nominated Monthly Train Services for the Train Service Type (as specified in the relevant Response Notice);~~

~~with effect on the latest of:~~

- ~~(iv) — the date specified in the Variation Request Notice;~~
- ~~(v) — if **clause 9.2(c)** applies, the date the proposed Rollingstock Configuration for the Train Service Type specified in the Authorisation Request Notice becomes an Authorised Rollingstock Configuration for the Train Service Type; and~~
- ~~(vi) — the date the End User pays Aurizon Network the Relinquishment Fee in respect of the relinquishment of the Surplus Access Rights.~~

## ~~11 — Reduction of Nominated Monthly Train Services if Nominal Payload increased~~

### ~~11.1 — Notice of Intention to Increase Nominal Payload~~

- ~~(a) — Subject to **clause 10.1(b)**, at any time during the Term, Aurizon Network may give the End User a notice of Aurizon Network's intention to increase the Nominal Payload for a Train Service Type (**Notice of Intention to Increase Nominal Payload**).~~
- ~~(b) — Aurizon Network must not give a Notice of Intention to Increase Nominal Payload for a Train Service Type unless Aurizon Network has first consulted with all relevant Access Holders and relevant Railway Operators about options for increasing the capacity of the relevant part of the Network on which Train Services for the Train Service Type are operated.~~
- ~~(c) — If Aurizon Network gives a Notice of Intention to Increase Nominal Payload to the End User, Aurizon Network must also give a copy of that Notice of Intention to Increase Nominal Payload to each affected Operator (if any).~~
- ~~(d) — A Notice of Intention to Increase Nominal Payload must:
  - ~~(i) — specify:
    - ~~(A) — the increased Nominal Payload (**Revised Nominal Payload**) for the Train Service Type (as determined by Aurizon Network in its discretion); and~~
    - ~~(B) — the Revised Maximum Payload for the Train Service Type; and~~
    - ~~(C) — the Revised Nominated Monthly Train Services for the Train~~~~~~

~~Service Type,~~

~~including reasonable details of the calculation of those amounts;~~

- ~~(ii) specify the date (**Effective Date**) on which the variations specified in the Notice of Intention to Increase Nominal Payload will take effect (provided that such Effective Date must not be less than 18 months (or such other period as agreed between the Parties) after the date on which Aurizon Network gives the Notice of Intention to Increase Nominal Payload to the End User); and~~
- ~~(iii) notifying the End User that, subject to **clause 10.5**, with effect on the Effective Date:
  - ~~(A) the Nominal Payload for the Train Service Type will be taken to be varied to be the Revised Nominal Payload for the Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload);~~
  - ~~(B) the Maximum Payload for the Train Services Type will be taken to be varied to be the Revised Maximum Payload for that Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload); and~~
  - ~~(C) the Nominated Monthly Train Services for that Train Service Type will be taken to be varied to be the Revised Nominated Monthly Train Services for that Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload).~~~~

### ~~11.2 Calculation of Revised Maximum Payload~~

~~The Revised Maximum Payload for a Train Service Type is the amount (expressed as tonnes) calculated in accordance with the following formula:~~

$$\text{RMP} = \text{RNP} \times \text{CF}$$

~~where:~~

~~RMP = the Revised Maximum Payload for the Train Service Type (rounded to the nearest whole tonne)~~

~~RNP = the Revised Nominal Payload for the Train Service Type as specified in the relevant Notice of Intention to Increase Nominal Tonnage~~

~~CF = 1.02 (or such other conversion factor agreed between the Parties)~~

### ~~11.3 Calculation of Revised Nominated Monthly Train Services~~

~~The Revised Nominated Monthly Train Services for a Train Service Type is the number of Train Services calculated in accordance with the following formula:~~

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

where:

- ~~RNMTS = the Revised Nominated Monthly Train Services for the Train Service Type~~
- ~~Loaded Train Services =  $\lceil \text{IT/RNP} \rceil$  (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 the Train Service Type~~
- ~~RNP = the Revised Nominal Payload for the Train Service Type as specified in the relevant Notice of Intention to Increase Nominal Payload~~

#### ~~11.4 — Dispute in relation to variations to Train Service Description~~

- ~~(a) — If Aurizon Network gives the End User a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, the End User may, within 20 Business Days after Aurizon Network gives the Notice of Intention to Increase Nominal Payload to the End User, give Aurizon Network a Dispute Notice which Disputes:~~
- ~~(i) — the Revised Maximum Payload for the Train Service Type; and/or~~
  - ~~(ii) — the Revised Nominated Monthly Train Services for the Train Service Type,~~
- ~~specified in the Notice of Intention to Increase Nominal Payload in accordance with **clause 24**.~~
- ~~(b) — The End User must not Dispute the Revised Nominal Payload specified in a Notice of Intention to Increase Nominal Payload and any Dispute Notice which is given by the End User in respect of such a Dispute will be taken to be of no effect.~~
- ~~(c) — If a Dispute referred to in **clause 10.4(a)** is not resolved in accordance with **clause 24.2**, then the Parties must refer the Dispute to an Expert to determine:~~
- ~~(i) — the Revised Maximum Payload for the Train Service Type; and~~
  - ~~(ii) — the Revised Nominated Monthly Train Services for the Train Service Type,~~
- ~~in each case, based on the Revised Nominal Payload specified in the Notice of Intention to Increase Nominal Payload.~~
- ~~(d) — If the End User does not give Aurizon Network a Dispute Notice referred to in **clause 10.4(a)** within the time referred to in **clause 10.4(a)**, then:~~
- ~~(i) — the End User must not give Aurizon Network a Dispute Notice Disputing the~~
  - ~~(A) — the Revised Maximum Payload for the Train Service Type;~~

and/or

~~(B) the Revised Nominated Monthly Train Services for the Train Service Type;~~

~~specified in the Notice of Intention to Increase Nominal Payload;~~

~~(ii) any such Dispute Notice which is given by the End User will be taken to be of no effect; and~~

~~(iii) the End User will not have, and must not make, any Claim against Aurizon Network in respect of that Dispute.~~

#### **~~11.5 Withdrawal of Notice of Intention to Increase Nominal Payload~~**

~~(a) Aurizon Network may, in its absolute discretion, withdraw a Notice of Intention to Increase Nominal Payload at any time before the date which is 10 months before the Effective Date.~~

~~(b) If Aurizon Network withdraws a Notice of Intention to Increase Nominal Payload under **clause 10.5(a)**, the variations to the Nominal Payload, Maximum Payload and Monthly Nominated Train Services for the Train Service Type set out in the Notice of Intention to Increase Nominal Payload will not take effect.~~

#### **~~11.6 Variation to Train Service Description~~**

~~If Aurizon Network gives the End User a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, then, unless the Notice of Intention to Increase Nominal Payload is withdrawn under **clause 10.5**, with effect on the Effective Date:~~

~~(a) the Nominal Payload for the Train Service Type will be taken to be varied to be the Revised Nominal Payload for the Train Service Type;~~

~~(b) the Maximum Payload for the Train Service Type will be taken to be varied to be the Revised Maximum Payload for the Train Service Type; and~~

~~(c) the Nominated Monthly Train Services for the Train Service Type will be taken to be varied to be the Revised Nominated Monthly Train Services for the Train Service Type;~~

~~as:~~

~~(d) specified in the relevant Notice of Intention to Increase Nominal Payload; or~~

~~(e) if **clause 10.4(e)** applies, agreed or determined through the Dispute resolution process under **clause 24**.~~

#### **~~11.7 Variation of Train Operations Agreements and Operator nominations~~**

~~If Aurizon Network gives the End User a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, then, unless the Notice of Intention to Increase Nominal Payload is withdrawn under **clause 10.5**, with effect on the Effective Date the End User will be deemed to have given a notice to Aurizon Network in accordance with **clause 3.4(a)** varying the Access Rights which the End User has allocated to each Operator under a Train Operations Agreement in respect of that Train Service Type:~~

- ~~(a) — if the End User has only nominated one Operator, so as to be consistent with the Revised Nominal Payload, Revised Maximum Payload and Revised Nominated Monthly Services for the Train Service Type set out in the relevant Notice of Intention to Increase Nominal Payload; and~~
- ~~(b) — if the End User has nominated multiple Operators, so as to ensure that, in aggregate, the train service descriptions under those Train Operations Agreements for that Train Service Type are consistent with the Revised Nominated Payroll, Revised Maximum Payload and Revised Nominated Monthly Services for the Train Service Type set out in the relevant Notice of Intention to Increase Nominal Payload (based on a consistent variation of those train service descriptions, having regard to the proportion of all Train Services for that Train Service Type allocated to each Operator).~~

## ~~12 — Relinquishment of Access Rights~~

### ~~12.1 — Notice of Intention to Relinquish~~

~~Unless otherwise specified in this Agreement, the End User [The Access Holder](#) may relinquish some or all of the Access Rights in accordance with [the Relinquishment Provisions which form part of this Agreement under clause 11.3](#).~~

- ~~(a) — The End User must give Aurizon Network reasonable notice of the End User's intention to relinquish any of its Access Rights (**Notice of Intention to Relinquish**).~~
- ~~(b) — A Notice of Intention to Relinquish must specify:
  - ~~(i) — the Access Rights, by reference to each Train Service Type, which the End User intends to relinquish (**Nominated Access Rights**);~~
  - ~~(ii) — the details of any changes to the nominations previously given under **clause 3.3** or **3.4** to take into account the relinquishment of the Nominated Access Rights; and~~
  - ~~(iii) — the date (**Relinquishment Date**) on which, and the period for which, the Nominated Access Rights are to be relinquished (provided that such Relinquishment Date must not be more than two years after the date on which the End User gives the Notice of Intention to Relinquish to Aurizon Network).~~~~

### ~~12.2 — Relinquishment subject to Relinquishment Fee~~

- ~~(a) — The relinquishment of any Nominated Access Rights in accordance with this **clause 11** is conditional on the End User's payment of the Relinquishment Fee to Aurizon Network.~~
- ~~(b) — Aurizon Network must:
  - ~~(i) — calculate the Relinquishment Fee; and~~
  - ~~(ii) — notify the End User of the amount of the Relinquishment Fee and how the Relinquishment Fee was calculated,~~at the following times:
  - ~~(iii) — if the End User is considering relinquishing some or all of the Access Rights but has not given Aurizon Network a Notice of Intention to Relinquish in respect of those Access Rights, promptly~~~~

- following a request by the End User; and
- (iv) if the End User has given Aurizon Network a Notice of Intention to Relinquish, not less than five Business Days before the Relinquishment Date.
- (c) The End User must pay the Relinquishment Fee specified in a notice given under **clause 11.2(b)(ii)**, or agreed or determined through the Dispute resolution process under **clause 24**, on or before the Relinquishment Date.
- (d) If the calculation of the Relinquishment Fee changes after Aurizon Network notifies the End User under **clause 11.2(b)** but before the End User seeks to pay the Relinquishment Fee, then:
  - (i) Aurizon Network must advise the End User of the revised Relinquishment Fee and the circumstances giving rise to the change in the calculation; and
  - (ii) the End User must pay the revised Relinquishment Fee (to the extent not already paid).

### **12.3 Determination of the Relinquishment Fee**

- (a) The **Relinquishment Fee** is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges (ATPY) for the relevant Train Service Types that would have been payable for the remainder of the Term assuming:
  - (i) the Nominated Access Rights were not relinquished; and
  - (ii) the relevant Train Services were not operated for the End User for a reason other than Aurizon Network Cause,

**(PV Amount)** less the amount which is the product of the PV Amount and the greater of:

  - (iii) 0.5; and
  - (iv) the Reduction Factor.
- (b) If the calculation of the Relinquishment Fee requires information about future events (for example, assumptions about Reference Train Services or Train Services), then Aurizon Network:
  - (i) may make reasonable assumptions about those future events so as to calculate the maximum amount of aggregate TOP Charges (ATPY) for the relevant Train Service Types that could potentially be payable, provided that:
    - (A) if an Access Charge Rate is based on a Reference Tariff, Aurizon Network must not make assumptions about the amount of future Reference Tariffs applicable to that Access Charge Rate; and
    - (B) if an Access Charge Rate has been determined in accordance with the pricing principles in Part 6 of the Access Undertaking, where there is not yet a Reference Tariff for the Access Charge Rate but it is reasonably anticipated by Aurizon Network that a Reference Tariff applicable to that

~~Access Charge Rate will be made or approved, Aurizon Network may make reasonable assumptions about the amount of the anticipated Reference Tariff and the variation that Aurizon Network could make to that Access Charge Rate to apply in the future in accordance with **schedule 4** (if applicable) when the anticipated Reference Tariff is made or approved;~~

- ~~(ii) — may assume that each of the Access Charge Rates (as at the Relinquishment Date) will escalate, on each 1 July, at the rate of 2.5% per annum for the remainder of the Term; and~~
- ~~(iii) — must notify the End User of all assumptions made by Aurizon Network under this **clause 11.3(b)** provided that nothing in this **clause 11.3(b)** requires Aurizon Network to breach any duty of confidentiality owed to a third party.~~

~~(c) — Where:~~

- ~~(i) — the Reduction Factor is calculated in accordance with **clause 13.1(b)**; and~~
- ~~(ii) — the Reference Tariff in relation to the Nominated Access Rights includes a System Discount or System Premium,~~

~~then the Relinquishment Fee must be further adjusted by Aurizon Network to account for any consequential decrease or increase (as applicable) in the System Discount or System Premium (as applicable) that would otherwise result in Aurizon Network under recovering or over recovering (as applicable) amounts from the End User due to the application of the System Discount or System Premium (as applicable).~~

~~(d) — Despite any other provision in this **clause 11.3**, if the Relinquishment Fee is calculated to be an amount that is less than zero, then the Relinquishment Fee will be zero.~~

~~(e) — If the End User disputes the calculation of the Relinquishment Fee notified by Aurizon Network to the End User under this **clause 11** (including any assumptions made by Aurizon Network in calculating the Relinquishment Fee), then:~~

- ~~(i) — the End User may refer the matter to an Expert to determine the Relinquishment Fee in accordance with this **clause 11.3**; and~~
- ~~(ii) — in determining the Relinquishment Fee, the Expert must make reasonable assumptions that Aurizon Network was entitled to make in calculating the Relinquishment Fee under this **clause 11.3**.~~

## **12.4 — Timing**

~~The Nominated Access Rights which are the subject of a Notice of Intention to Relinquish under **clause 11.1** will not be relinquished and the terms of this Agreement will continue to apply in respect of the Nominated Access Rights until the later of:~~

- ~~(a) — the date the End User pays the Relinquishment Fee to Aurizon Network; and~~
- ~~(b) — the Relinquishment Date.~~

## ~~13~~11 Transfer of Access Rights by ~~End User~~Access Holder

### ~~13.1~~ **Notice of Intention to Transfer**

~~(a) Unless otherwise specified in this Agreement, the End User~~The Access Holder may Transfer all or part of the Access Rights to itself or a Third Party in accordance with ~~this clause 12.~~

~~If the End User intends to Transfer all or~~Provisions which form part of the Access Rights to itself or a Third Party (each a **Transferee**), the End User must give Aurizon Network reasonable notice of its intention to do so (**Notice of Intention to Transfer**).this Agreement under clause 3.

~~(b) A Notice of Intention to Transfer must:~~

~~(i) specify full details of the proposed Transfer including:~~

~~(A) the Access Rights which the End User proposes to Transfer (**Nominated Access Rights**);~~

~~(B) the details of any changes to the nominations previously given under **clause 3.3** or **3.4** to take into account the proposed Transfer of the Nominated Access Rights~~

~~(C) the date (**Transfer Date**) on which, and the period for which (**Transfer Period**), the Nominated Access Rights are proposed to be Transferred (provided that such Transfer Date must not be less than three months (or such other period as agreed between the Parties), and more than two years, after the date on which the End User gives the Notice of Intention to Transfer to Aurizon Network);~~

~~(D) the identity of the Transferee; and~~

~~(E) the access rights proposed to be granted to the Transferee as part of the proposed Transfer, provided that such access rights must not use more than the Available Capacity that will be created by the relinquishment of the Nominated Access Rights as part of the proposed Transfer (**Transferred Access Rights**);~~

~~(ii) specify any Ancillary Access Rights requested to be granted to the Transferee for the Transfer Period in addition to the Transferred Access Rights (**Requested Ancillary Access Rights**);~~

~~(iii) include any other information in relation to the Transferee and the proposed Transfer reasonably required by Aurizon Network;~~

~~(iv) if the Transferee is not the End User, be accompanied by evidence that the Transferee consents to the Transfer of the Transferred Access Rights and the grant of the Requested Ancillary Access Rights (if any) proposed to be granted to the Transferee; and~~

~~(v) be in the form (if any) required by Aurizon Network.~~

### ~~13.2~~ **Limitation on discretion to refuse Transfer**

~~If the End User gives a Notice of Intention to Transfer under **clause 12.1**, then~~



- ~~(a) — the End User will be taken to have relinquished the Nominated Access Rights under this Agreement; and~~
- ~~(b) — the Transferred Access Rights and the Requested Ancillary Access Rights (if any) will be granted to the Transferee for the Transfer Period under the Transferee Access Agreement;~~

provided that:

- ~~(c) — the Transferred Access Rights and the Requested Ancillary Access Rights (if any) are for Cyclic Traffic;~~
- ~~(d) — Aurizon Network and the End User have entered into an agreement, in a form reasonably acceptable to Aurizon Network, to vary the terms of this Agreement to address the relinquishment of the Nominated Access Rights (including, for the avoidance of doubt, variations to the Access Charge Rates);~~
- ~~(e) — the Transferred Access Rights and the Requested Ancillary Access Rights (if any) are granted under a new or varied access agreement between Aurizon Network and the Transferee (**Transferee Access Agreement**) that:
  - ~~(i) — has, to Aurizon Network's satisfaction, been negotiated and agreed in accordance with the requirements of the Access Undertaking; and~~
  - ~~(ii) — except for a condition in relation to the grant of the Transferred Access Rights and the Requested Ancillary Access Rights (if any) taking effect under this **clause 12**, is unconditional and binding upon the Transferee;~~~~
- ~~(f) — Aurizon Network's obligation to provide, and the Transferee's right to utilise, the Transferred Access Rights and the Requested Ancillary Access Rights (if any) under the Transferee Access Agreement does not commence until the later of:
  - ~~(i) — the date upon which the End User pays the Transfer Fee to Aurizon Network; and~~
  - ~~(ii) — the Transfer Date;~~~~
- ~~(g) — the Transferee has demonstrated to the reasonable satisfaction of Aurizon Network that the Transferee:
  - ~~(i) — will hold, or will have the benefit of, Supply Chain Rights (as if the Transferee was the End User and an Operator was an operator for the Transferee for the purposes of that definition) for the commencement of operation of Network Train Services utilising the Transferred Access Rights and the Requested Ancillary Access Rights (if any); and~~
  - ~~(ii) — is reasonably likely to continue to hold, or have the benefit of, those Supply Chain Rights for the whole of the Transfer Period. In determining whether the Transferee will continue to hold, or have the benefit of, the relevant Supply Chain Rights for the purposes of this **clause 12.2(g)(ii)**, the Parties are to assume, if the Transferee or the holder of those Supply Chain Rights has an option granted in~~~~

its favour to renew such Supply Chain Rights or extend the term of such Supply Chain Rights, that such option to renew or extend is exercised;

- ~~(h) — the End User has complied with this **clause 12**;~~
- ~~(i) — the End User and the Transferee have complied with any requirements under the Access Undertaking in relation to the Transfer and the grant of the Requested Ancillary Access Rights (if any);~~
- ~~(j) — giving effect to the Transfer and the grant of the Requested Ancillary Access Rights (if any) will not cause Aurizon Network to breach the Access Undertaking; and~~
- ~~(k) — Aurizon Network has sufficient capability in its Infrastructure to grant the Transferred Access Rights and Requested Ancillary Access Rights (if any) to the Transferee without adversely affecting Aurizon Network's ability to comply with its obligations to Advanced Access Seekers and Access Holders.~~

### ~~13.3 — Transfer subject to Transfer Fee~~

- ~~(a) — The Transfer of any Nominated Access Rights in accordance with this **clause 12** is conditional on the payment of the Transfer Fee by the End User to Aurizon Network.~~
  - ~~(b) — Aurizon Network must:
    - ~~(i) — calculate the Transfer Fee; and~~
    - ~~(ii) — notify the End User of the amount of the Transfer Fee and how the Transfer Fee was calculated,~~at the following times:
    - ~~(iii) — if the End User is considering Transferring some or all of the Access Rights but has not given Aurizon Network a Notice of Intention to Transfer in respect of those Access Rights, promptly following a request by the End User; and~~
    - ~~(iv) — if the End User has given Aurizon Network a Notice of Intention to Transfer, not less than five Business Days before the Transfer Date.~~~~
- ~~(c) — The End User must, on or before the Transfer Date, pay the Transfer Fee specified in a notice given under **clause 12.3(b)(ii)**, or agreed or determined through the Dispute resolution process under **clause 24**.~~
- ~~(d) — If the calculation of the Transfer Fee changes after Aurizon Network notifies the End User under **clause 12.3(b)** but before the End User seeks to pay the Transfer Fee, then:
  - ~~(i) — Aurizon Network must advise the End User of the revised Transfer Fee and the circumstances giving rise to the change in the calculation; and~~
  - ~~(ii) — the End User must pay the revised Transfer Fee (to the extent not already paid).~~~~
- ~~(e) — If the End User has not paid the Transfer Fee with 20 Business Days after the latest of:~~

- ~~(i) — the Transfer Date;~~
- ~~(ii) — the date Aurizon Network gives the End User a notice under **clause 12.3(d)**; and~~
- ~~(iii) — the date that Aurizon Network gives the End User a valid tax invoice in respect of the Transfer Fee;~~

~~then Aurizon Network may give the End User a notice (**Transfer Cancellation Notice**) with respect to Nominated Access Rights specified in the Notice of Intention to Transfer given by the End User under **clause 12.1(b)**.~~

- ~~(f) — If Aurizon Network gives the End User a Transfer Cancellation Notice, then:
  - ~~(i) — the Notice of Intention to Transfer given by the End User under **clause 12.1(b)** is deemed to have never been given by the End User;~~
  - ~~(ii) — the Nominated Access Rights that were the subject of the Notice of Intention to Transfer will not be Transferred to the Transferee; and~~
  - ~~(iii) — the terms of this Agreement will continue to apply in respect of the Nominated Access Rights that were the subject of the Notice of Intention to Transfer.~~~~
- ~~(g) — The giving of a Transfer Cancellation Notice in respect of the Transfer of Nominated Access Rights does not prevent the End User from subsequently giving Aurizon Network a new Notice of Intention to Transfer in respect of the same Nominated Access Rights.~~

## 12 Reduction Factor

### **13.4 — Determination of the Transfer Fee**

- ~~(a) — The **Transfer Fee** is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges (ATPY) for the relevant Train Service Types that would have been payable for the remainder of the Term assuming:
  - ~~(i) — the Nominated Access Rights were not transferred; and~~
  - ~~(ii) — the Train Services were not operated for the End User for a reason other than Aurizon Network Cause;~~~~(PV Amount) less the amount which is the product of the PV Amount and the Reduction Factor.~~~~
- ~~(b) — If Aurizon Network requires information about future events (for example, assumptions about Reference Train Services or Train Services) to calculate the Transfer Fee, then Aurizon Network:
  - ~~(i) — may make reasonable assumptions about those future events so as to calculate the maximum amount of aggregate TOP Charges (ATPY) for the relevant Train Service Types that could potentially be payable, provided that:
    - ~~(A) — if an Access Charge Rate is based on a Reference Tariff, Aurizon Network must not make assumptions about the~~~~~~

amount of future Reference Tariffs applicable to that Access Charge Rate; and

(B) ~~if an Access Charge Rate has been determined in accordance with the pricing principles in Part 6 of the Access Undertaking, where there is not yet a Reference Tariff for the Access Charge Rate but it is reasonably anticipated by Aurizon Network that a Reference Tariff applicable to that Access Charge Rate will be made or approved, Aurizon Network may make reasonable assumptions about the amount of the anticipated Reference Tariff and the variation that Aurizon Network could make to that Access Charge Rate to apply in the future in accordance with **schedule 4** (if applicable) when the anticipated Reference Tariff is made or approved;~~

(ii) ~~may assume that each of the Access Charge Rates (as at the Transfer Date) will escalate, on each 1 July, at the rate of 2.5% per annum for the remainder of the Term; and~~

(iii) ~~must notify the End User of all assumptions made by Aurizon Network under this **clause 12.4(b)** provided that nothing in this **clause 12.4(b)** requires Aurizon Network to breach any duty of confidentiality owed to a third party.~~

(c) ~~Where:~~

**13.512.1** ~~\_\_\_\_\_ the Reduction Factor is calculated in accordance with clause 13.1(b); and~~

(i) ~~If Nominated Access Rights are intended to be relinquished or transferred under the Reference Tariff in relation to the Nominated Access Rights includes a System Discount or System Premium,~~

~~then the Relinquishment Provisions or the Transfer Fee Provisions which form part of this Agreement under **clause 3**, the Reduction Factor must be further adjusted by Aurizon Network to account for any consequential decrease or increase (as applicable) in the System Discount or System Premium (as applicable) that would otherwise result in Aurizon Network under-recovering or over-recovering (as applicable) amounts from the End User due to the application of the System Discount or System Premium (as applicable).~~

(b) ~~Despite any other provision in this **clause 12.4**, if:~~

(i) ~~the Transfer Fee is calculated to be an amount that is less than zero; or~~

(ii) ~~the Nominated Access Rights to be Transferred are to be Transferred for a period which, when aggregated with the sum of the periods of all previous Transfers of Access Rights for Train Services for Train Service Types with the same Origin and Destination and with a Transfer Period (for each such Transfer) within the three year period ending on the last day of the Transfer Period, is less than two years,~~

~~then the Transfer Fee will be zero.~~

~~(c) — If the End User disputes the calculation of the Transfer Fee notified by Aurizon Network to the End User under this **clause 12** (including any assumptions made by Aurizon Network in calculating the Transfer Fee), then:~~

~~(i) — the End User may refer the matter to an Expert to determine the Transfer Fee in accordance with this **clause 12.4**; and~~

~~(ii) — in determining the Transfer Fee, the Expert must make reasonable assumptions that Aurizon Network was entitled to make in calculating the Transfer Fee under this **clause 12.4**.~~

### ~~13.6 — Timing~~

~~Subject to **clause 12.2**, the Nominated Access Rights which are the subject of a Notice of Intention to Transfer under **clause 12.1** will not be Transferred to the Transferee and the terms of this Agreement will continue to apply in respect of the Nominated Access Rights until the later of:~~

~~(a) — the date upon which the End User pays the Transfer Fee to Aurizon Network; and~~

~~(b) — the Transfer Date.~~

### ~~13.7 — Obligation to act diligently~~

~~Aurizon Network must act in a diligent and timely manner in dealing with a proposed Transfer under this **clause 12**.~~

## ~~14 — Reduction Factor~~

### ~~14.1 — Determination of the Reduction Factor~~

~~(a) — If:~~

~~(i) — Nominated Access Rights are intended to be relinquished under **clause 11** or **12**;~~

~~an Access Holder has executed an Access [Provisions which form part of this Agreement](#) (or a variation to this Agreement or any other existing Access Agreement) in respect of access rights that Aurizon Network could not grant to that Access Holder without using the Available Capacity to be created by the relinquishment of the Nominated Access Rights under **clause 11** or **12**, [under clause 3](#).~~

~~(ii) — Aurizon Network's provision of the access rights referred to in **clause 13.1(a)(ii)** will commence on and from the date of the relinquishment of the Nominated Access Rights under **clause 11** or **12**;~~

~~(iii) — the relevant Train Services of the End User and the Network Train Services of the Access Holder are coal-carrying Network Train Services; and~~

~~(iv) — the Access Holder's Network Train Services that will use the access rights referred to in **clause 13.1(a)(ii)** will operate predominantly in and have an unloading facility that is a Nominated Unloading Facility for a Reference Train Service in the same Coal System as the Train Services of the End User that used the Nominated Access Rights to be relinquished under **clause 11** or **12**;~~

then the Reduction Factor is an amount calculated as follows:

$$TOP_B / TOP_A$$

where:

~~TOP<sub>A</sub> is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges (ATPY) that would have been payable for the remainder of the Term assuming:~~

~~(A) the Nominated Access Rights were not to be relinquished under **clause 11** or **12**; and~~

~~(B) an Operator did not operate for the End User the relevant Train Services for a reason other than Aurizon Network Cause; and~~

~~TOP<sub>B</sub> is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges (ATPY) that would be payable in accordance with this Agreement or the other Access Agreement (as applicable) referred to in **clause 13.1(a)(ii)** assuming the Access Holder's Network Train Services using the access rights referred to in **clause 13.1(a)(ii)** were not operated by or for the Access Holder for a reason other than Aurizon Network Cause during the same period as the remainder of the Term.~~

~~(b) If:~~

~~(i) Nominated Access Rights are intended to be relinquished under **clause 11** or **12**; and~~

~~(ii) **clauses 13.1(a)(ii)** and **13.1(a)(iii)** are both satisfied but **clause 13.1(a)(iv)** or **13.1(a)(v)** is not satisfied, then the Reduction Factor is an amount calculated as follows:~~

$$A / B$$

where:

~~A is the annual train kilometres over that part of the Common Corridor attributable to the Access Holder's Network Train Services to be operated using the access rights referred to in **clause 13.1(a)(ii)**; and~~

~~B is the annual train kilometres over the Infrastructure attributable to the Train Services operated using the Nominated Access Rights to be relinquished under **clause 11** or **12**;~~

~~provided that to the extent that the Access Holder's average contribution to Common Costs per train kilometre for its relevant Network Train Services is less than the End User's average contribution to Common Costs per train kilometre for its relevant Train Services, the Reduction Factor will be decreased in proportion to that relative contribution.~~

~~(c) If:~~

- ~~(i) Nominated Access Rights are intended to be relinquished under **clause 11 or 12**; and~~
- ~~(ii) **clauses 13.1(a) and 13.1(b)** do not apply, the Reduction Factor is zero.~~
- ~~(d) If Aurizon Network requires information about future events to calculate the Reduction Factor (for example, assumptions about Reference Train Services or Train Services), then Aurizon Network:~~
  - ~~(i) may make assumptions about those future events so as to calculate the maximum amount of aggregate TOP Charges (ATPY) that could potentially be payable, provided that:~~
    - ~~(A) if an Access Charge Rate is based on a Reference Tariff, Aurizon Network must not make assumptions about the amount of future Reference Tariffs applicable to that Access Charge Rate; and~~
    - ~~(B) if an Access Charge Rate has been determined in accordance with the pricing principles in Part 6 of the Access Undertaking, where there is not yet a Reference Tariff for the Access Charge Rate but it is reasonably anticipated by Aurizon Network that a Reference Tariff applicable to that Access Charge Rate will be made or approved, Aurizon Network may make assumptions about the amount of the anticipated Reference Tariff and the variation that Aurizon Network could make to that Access Charge Rate to apply in the future in accordance with **schedule 4** (if applicable) when the anticipated Reference Tariff is made or approved; and~~
  - ~~(ii) may assume that each of the Access Charge Rates (as at the Transfer Date) will escalate, on each 1 July, at the rate of 2.5% per annum for the remainder of the Term.~~

#### **14.212.2 Replacement Access Agreement**

If Aurizon Network identifies an opportunity for it to enter into an Access Agreement with an existing or prospective ~~Access Holder~~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 11 or 12**~~ the Relinquishment Provisions or the Transfer Provisions which form part of this Agreement under **clause 3** (as applicable), Aurizon Network will not unreasonably delay the process for negotiating and executing an Access Agreement with that existing or prospective ~~Access Holder~~Network Customer.

### **1513 Resumptions, reductions, relinquishments and transfers - General**

#### **15.113.1 Termination where no Access Rights remain**

- (a) Where Access Rights have been resumed, reduced, relinquished or transferred in accordance with this Agreement (including under the Resumption Provisions, the Conditional Access Provisions, the Relinquishment Provisions and the Transfer Provisions which form part of this Agreement under **clause 3** and **clauses 61.1, 7, 8, 9, 101.1(a), 111,**

~~12 and 25.4(a) and 25.6~~) to the extent that there is no longer any Access Rights remaining the subject of this Agreement, then Aurizon Network ~~is entitled to~~ may terminate this Agreement by notice to the ~~End User~~ Access Holder (without prejudice to those provisions which are stated to survive this Agreement).

- (b) Any termination under this ~~clause 14.1~~13.1 is without prejudice to any rights of any Party which accrued on or before termination.

### ~~15.2~~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 6, 7, 8, 9, 10, 11, 12 and 25.4~~the Resumption Provisions, the Conditional Access Provisions, the Relinquishment Provisions and the Transfer Provisions which form part of this Agreement under ~~clause 3 and clauses 1.1, 1.1(a), 1, (a) and 25.6~~), then for the avoidance of doubt:

- (a) the ~~End User's~~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 ~~End User's~~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 ~~End User~~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 ~~Charges~~Charge payable in respect of the part of the Year prior to the resumption, reduction, relinquishment or transfer).

### ~~15.3~~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 ~~End User~~Access Holder in connection with any resumption, reduction, relinquishment or transfer of Access Rights in accordance with ~~clauses 6~~the Resumption Provisions, the Conditional Access Provisions, the Relinquishment Provisions and the Transfer Provisions which form part of this Agreement under ~~clause 3 and clauses 1.1, 7, 8~~1.1(a), 9, 10, 11, 12(a) and ~~25.4~~25.6.
- (b) The ~~End User~~Access Holder releases Aurizon Network from any Claim for loss or damage referred to in ~~clause 14.3(a)~~13.3(a) that the ~~End User~~Access Holder may otherwise have.



## ~~16.14~~ Consequences of a failure of an Operator to satisfy conditions

### ~~16.14.1~~ 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 [AgreementDeed](#); or
  - (ii) the commencement of Train Services for a Train Service Type under clause 10.3 of its Train Operations [AgreementDeed](#); and
- (b) Aurizon Network has given a notice to the [End User Access Holder](#) and the Defaulting Operator in accordance with clause 10.2(c)(iv)(B) or clause 10.3(c)(iv)(A)(1) (as applicable) of the Defaulting Operator's Train Operations [AgreementDeed](#),

then, on such notice being given by Aurizon Network:

- (c) the [End User 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)(iv)(A) of the Defaulting Operator's Train Operations [AgreementDeed](#), 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)(iv)(A)(1iii) of the Defaulting Operator's Train Operations [AgreementDeed](#), 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 [AgreementDeed](#); and
- (d) without limiting the [End User's Access Holder's](#) rights under **clauses 3.34.3 and 3.44.5**, the [End User Access Holder](#) will have the right under **clauses 4.3(b) and 3.44.5** 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.

### ~~16.214.2~~ Reversing changes to Train **Service** 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 [AgreementDeed](#); and
- (ii) Aurizon Network has given a notice to the [End User Access Holder](#) and the Defaulting Operator in accordance with clause 10.3(c)(iv)(B)(1) of the Defaulting Operator's Train Operations [AgreementDeed](#),

[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-Service 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 ~~Service~~ Description for the relevant Train Service Type will be taken to be the Train-Service Description for the relevant Train Service Type in force immediately before the variation took effect.

## ~~17.15~~ 17.15 Compliance

### ~~17.15.1~~ 17.15.1 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, ~~the terms of the Access Undertaking~~.

### ~~17.2~~ 17.2 Compliance with Aurizon Network's Accreditation

~~(a) Despite any other provision of this Agreement, Aurizon Network will not be in breach of this Agreement with respect to any act or omission to the extent that the act or omission is reasonably required in order for Aurizon Network to:~~

- ~~(i) comply with its Accreditation; or~~
- ~~(ii) ensure that its Accreditation is not at risk of:~~
  - ~~(A) amendment such that it cannot perform its role as rail infrastructure manager for the Infrastructure; or~~
  - ~~(B) suspension, cancellation or revocation.~~

~~(b) The End User must not do or fail to do anything which the End User knows, or ought reasonably to know, would be likely to result in:~~

- ~~(i) the amendment of Aurizon Network's Accreditation such that Aurizon Network cannot perform its role as rail infrastructure manager for the Infrastructure; or~~
- ~~(ii) the suspension, cancellation or revocation of Aurizon Network's Accreditation.~~

(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)).

### ~~17.315.2~~ 17.315.2 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; ~~and~~
- (b) all licences and permits affecting ~~the~~its operations ~~of Aurizon~~;

~~(b)(c) the Network-[Management Principles](#); and~~

#### **17.4 — Compliance with IRMP**

~~The End User must participate in the Interface Risk Assessment under each Train Operations Agreement and comply with the IRMP to the extent it is expressed to impose obligations upon the End User.~~

~~(d) [any Environmental Authority it holds from time to time.](#)~~

#### **17.515.3 Non-compliance by Operator with Train Service**

##### **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 ~~Service~~ 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 ~~Service~~ Description for the remainder of the Term; ~~and~~

~~(iii) [Aurizon Network provided a copy of the request to the Defaulting Operator to the Access Holder on or about the same time as providing it to the Defaulting Operator.](#)~~

then, without limiting any right Aurizon Network has to suspend or terminate the Train Services for a Train Service Type under ~~the~~ [Train Operations Agreement Deed](#), Aurizon Network must promptly ~~notify the End User of any such non-compliance and failure to demonstrate future consistent compliance with the relevant Train Services Description;~~

~~(iv) [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](#)~~

~~(v) [commence consultation with the Access Holder and the Defaulting Operator in respect of 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 [Agreement Deed](#), before taking any steps under **clause 16.5(e)15.3(c)**, Aurizon Network ~~shall~~ [must provide the Access Holder with at least 20 Business Days from the date of the Notice of Defaulting Operator to:](#)

~~(i) [provide the End User with at least 20 Business Days from commencement of consultation with the End User and the Defaulting Operator to:](#)~~

~~(ii)(i) [unless the Train Services for a Train Service Type have been terminated under a Train Operations Agreement Deed, procure the Defaulting Operator to rectify the non-compliance notified under clause 16.5\(a\);15.3\(a\); or](#)~~

~~(iii)(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 ~~Agreement~~Deed, provide the ~~End User~~Access Holder prior notice of any action Aurizon Network intends to take under ~~clause 16.5(e)~~15.3(c).

- (c) If, following the provision of ~~notice~~the Notice of Defaulting Operator under ~~clause 16.5(a)~~15.3(a) and taking of the steps in clause ~~16.5(b)~~15.3(b), the ~~End User~~Access Holder has not nominated an alternative Operator ~~in accordance with clause 16.5(b)(i)(B)~~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 ~~Service~~Description under the Train Operations ~~Agreement~~Deed for the remainder of the term of that Train Operations ~~Agreement~~Deed, Aurizon Network ~~will be entitled to:~~may:
- (i) vary the ~~applicable~~Train Service~~Description~~ for the ~~Affected~~applicable 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 ~~Service~~Description (~~ignoring 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) vary the Access Charge Rates to fully compensate Aurizon Network for:~~
    - ~~(A) any reasonable increase in cost or risk to Aurizon Network; or~~
    - ~~(B) any increase in utilisation of the Capacity,~~~~as a result of the Train Service Description as varied under this clause 16.5 when compared to the Train Service Description prior to the variation; and~~
  - ~~(iii) reasonably vary:~~
    - ~~(A) this Agreement in accordance with clauses 33.2(g)~~32.3(f), ~~33.2(h)~~32.3(g) and ~~33.2(i)~~; and
    - ~~(B) the Defaulting Operator's Train Operations Agreement in accordance with clause 14.2 of that Train Operations Agreement;~~
  - ~~(iv)~~(ii) ~~32.3(h)~~32.3(h) to reflect the impact of the change in the applicable Train ~~Service~~Description.
- ~~(d)~~ If Aurizon Network varies the ~~applicable~~Train Service~~Description~~ for ~~the~~a Affected Train Service Type under ~~clause 16.5(e)(i)~~15.3(c)(i), it ~~shall:~~
- ~~(e)~~(d) ~~must~~ issue a notice to the ~~End User~~Access Holder setting out the changes to the "Nominated Monthly Train Services (for a 30 day Month)" set out in ~~schedule 2~~Schedule 2 of this Agreement ~~for each of:~~

- (A) ~~the Affected Train Service Type; and~~
  - (B) ~~the Original Train Service Type (if applicable); and~~
  - (ii) ~~issue a notice to the Defaulting Operator and the End User setting out the changes to the Train Service Description and the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of the Defaulting Operator’s Train Operations Agreement.~~
- (f)(e) ~~For the avoidance of doubt, the End User~~ The Access Holder is entitled to dispute any variation proposed by Aurizon Network pursuant to **clause 16.5(c)** ~~this clause~~ **15.3** in accordance with the process set out in **clause 33.2(i)** ~~32.3(h)~~.

### **17.6 — Determining the Affected Train Service Type**

- (a) ~~If the relevant Train Service Type (**Split Train Service Type**) in respect of which the Defaulting Operator has failed to comply with the relevant Train Service Description is also operated by another Operator (**Non-Defaulting Operator**):~~
  - (i) ~~the Train Service Type operated by the Defaulting Operator (**New Train Service Type**); and~~
  - (ii) ~~the Train Service Type operated by the Non-Defaulting Operator (**Original Train Service Type**);~~

~~are deemed to be two different Train Service Types on the basis that:~~

  - (iii) ~~the “Nominated Monthly Train Services (for a 30 day Month)” for the New Train Service Type is deemed to be the “Nominated Monthly Train Services (for a 30 day Month)” allocated to the Defaulting Operator in respect of the Split Train Service Type as at the date on which notice is given by Aurizon Network of any action it intends to take under **clause 16.5(c)**;~~
  - (iv) ~~the “Nominated Monthly Train Services (for a 30 day Month)” for the Original Train Service Type is deemed to be the “Nominated Monthly Train Services (for a 30 day Month)” which was not allocated to the Defaulting Operator in respect of the Split Train Service Type as at the date on which notice is given by Aurizon Network of any action it intends to take under **clause 16.5(c)**; and~~
  - (v) ~~subject to **clauses 16.6(a)(iii)** and **16.6(a)(iv)**, the Train Service Description for:~~
    - (A) ~~the New Train Service Type; and~~
    - (B) ~~the Original Train Service Type;~~

~~is otherwise the same as for the Split Train Service Type.~~
- (b) ~~The **Affected Train Service Type** is:~~
  - (i) ~~if **clause 16.6(a)** applies, the New Train Service Type operated by the Defaulting Operator; and~~
  - (ii) ~~in any other case, the Train Service Type in respect of which the Defaulting Operator has failed to comply with the relevant Train Service Description.~~

## ~~18.16~~ 18.16 Weighbridges and Overload Detectors

### ~~18.1~~ 18.1 ~~Exceeding Maximum Desirable Gross Tonnage~~

~~If any Wagon or Train operated by an Operator for the End User is determined by a Weighbridge or Overload Detector to be in excess of the relevant Maximum Desirable Gross Tonnage, then Aurizon Network may impose any Operational Constraints which Aurizon Network considers to be reasonable in the circumstances.~~

### ~~18.216.1~~ 18.216.1 Verification

- ~~(a) If the Party that is not responsible for the a Weighbridge or Overload Detector, as specified in ~~item 5 of schedule 3~~, reasonably believes that ~~any~~ is located en route between an Origin and Destination for a Train Service Type, the Party responsible for that Weighbridge or Overload Detector may be inaccurate, that Party may by notice to the other Party require the other Party to procure the testing of the accuracy of (as specified in item 5 of Schedule 3) must use reasonable endeavours to ensure that such Weighbridge or Overload Detector.~~
- ~~(b)(a) As soon as reasonably practicable after being given a notice under ~~clause 17.2(a)~~, the Party responsible for the is operational, calibrated and available to weigh Trains operated over such Weighbridge or Overload Detector, as specified in ~~item 5 of schedule 3~~, must use reasonable endeavours to procure a suitably qualified person to:-~~
- ~~(i) test the calibration of the relevant Weighbridge or Overload Detector (as applicable); and~~
  - ~~(ii) make any adjustments required to correct the calibration of the Weighbridge or Overload Detector (as applicable).~~
- ~~(b) Unless Aurizon Network may vary at any time the numbers and locations of Weighbridges and Overload Detectors, subject to providing reasonable notice to the Access Holder.~~
- ~~(c) If a party to the Train Operations Deed gives a notice under clause 17.5 of the Train Operations Deed, then:~~
- ~~(iii)(i) subject to clause 1.1(a), unless otherwise determined by calibration testing under clause ~~17.2(b)~~, 17.5 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 ~~17.2(a)~~ 17.5(a) of the Train Operations Deed until the testing referred to in clause ~~17.2(b)~~ 17.5(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~~

- (c) ~~Except in the case of manifest error or fraud, the determination of the where the person conducting the test in accordance with clause ~~17.2(b)~~ will be final and binding on the Parties.~~
- ~~(ii) Where the person conducting the test in accordance with clause ~~17.2(b)~~ 17.5(b) of the Train Operations Deed determines that the Weighbridge or Overload Detector (as applicable) is measuring within the tolerances specified in item ~~5~~ 5 of Schedule 3 of ~~schedule 3, 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 ~~17.2(a) and 17.5(a) of the Access Charges will be determined from that date in accordance with ~~schedule 4/ schedule 4 of each~~ Train Operations Agreement]. The Deed.~~~~
- ~~(iii) If clause 1.1(a) applies in respect of a Weighbridge, the invoice for Access Charges for the Billing Period immediately following the Billing Period in which ~~such~~ the determination in clause 1.1(a) 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 17.2(e)~~ 16.1(c)(i).~~
- (d) ~~The cost of conducting the test in accordance with clause ~~17.2(b)~~ must be borne by:~~
- ~~(i) the Party responsible for the Weighbridge or Overload Detector as specified in ~~item 5 of schedule 3~~ if the Weighbridge or Overload Detector is determined to be not measuring within the tolerances specified in ~~item 5 of schedule 3~~; or~~
- ~~(ii) the Party giving notice under ~~clause 17.2(a)~~ if the Weighbridge or Overload Detector is determined to be measuring within the tolerances specified in ~~item 5 of schedule 3~~ (and, to the extent that the Party responsible for the Weighbridge or Overload Detector has paid any costs of conducting the test, the Party giving the notice must reimburse the Party responsible for the Weighbridge or Overload Detector such reasonable costs of conducting the test).~~

### **18.3 — No Claim**

- (a) ~~Despite any other provision in this Agreement, neither Party (**first Party**) is liable to the other Party for any damage, loss, cost or expense that the other Party may suffer or incur as a result of the first Party, in good faith, acting on the basis of any mass determined in accordance with this Agreement.~~
- (b) ~~Despite any other provision in this Agreement, neither Party will have any Claim against the other Party as a result of, or arising from, any delay to or cancellation of Train Services as a result of the operation of this **clause 17** or clause 19.3 of a Train Operations Agreement.~~

## 19.17 Infrastructure management

### 19.17.1 Notifications

- (a) ~~The End User must notify Aurizon Network as~~ 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 ~~of which the End User becomes aware.~~
- (b) The ~~End User:~~ 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 ~~End User:~~ Access Holder; and
  - (ii) must notify Aurizon Network as soon as reasonably practicable after the ~~End User's~~ Access Holder's Staff or ~~End User's officers~~ 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 ~~End User, End User's~~ Access Holder, the Access Holder's Staff or ~~End User's officers~~ 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.~~
    - (C) any harm to the Environment caused or contributed to by the Access Holder's use of its Access Rights 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.

### 19.217.2 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 ~~the End User's Staff or~~ Aurizon Network's Staff or the Access Holder's Staff (as applicable) cooperate, fully with any Investigation ~~to the extent reasonably necessary for the conduct of the Investigation in accordance with the Investigation Procedures.~~
- (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)** and that it has nominated an Interface Representative under this **clause 18.2** at all times during the Term.

## 2019 Insurance by ~~End User~~Access Holder

### 20.119.1 Maintain insurance policies

Before the commencement of Train Services, the ~~End User~~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.

### 20.219.2 Required insurance policies

The ~~End User~~Access Holder must effect and maintain insurance for the risks and on the terms specified in ~~schedule 5~~Schedule 5.

### 20.319.3 Disclosure of insurance policies

The ~~End User~~Access Holder must:

provide to Aurizon Network evidence of the insurance policies effected and maintained pursuant to this **clause 1919** (including evidence that the cover provided under those insurance policies complies with this **clause 1919** and of the currency of those insurance policies)-) to Aurizon Network's reasonable satisfaction:

- ~~(a) if requested by Aurizon Network, provide to Aurizon Network copies of such insurance policies; and~~
- ~~(b) if requested by Aurizon Network, permit Aurizon Network to inspect such policies of insurance at a location in Brisbane;~~
- ~~to Aurizon Network's reasonable satisfaction:~~
- ~~(e)(a) at least 10 Business Days before the commencement of Train Services;~~
- ~~(e)(b) within 10 Business Days after renewal of each insurance policy during the Term; and~~
- ~~(e)(c) within 10 Business Days after being requested to do so in writing by Aurizon Network.~~

#### **20.419.4 Failure to disclose insurance policies**

Without prejudice to Aurizon Network's other rights and remedies in respect of such default, if the ~~End User~~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 ~~End User~~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 ~~End User~~Access Holder to Aurizon Network.

#### **20.519.5 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 ~~End User~~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~~**Schedule 5**.

#### **20.619.6 End UserAccess Holder not to render policy void**

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

#### **20.719.7 Compliance**

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

#### **20.819.8 Notice of potential claims**

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

- (a) notify Aurizon Network as soon as practicable after the making of any ~~claim~~Claim under any insurance policy required by this Agreement ~~to the extent that such claim is in connection with this Agreement;~~
- (b) notify Aurizon Network of ~~that event~~the Claim in reasonable detail; and
- (c) ~~thereafter~~ keep Aurizon Network informed of subsequent developments concerning any ~~claim.~~Claim.

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

### **20.9 19.9 Access Holder to pay all excess/deductibles**

- (a) The ~~End User~~Access Holder must, in respect of any ~~claims~~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 19.9~~.
- (b) If the ~~End User~~Access Holder fails to pay any ~~excesses/deductibles~~excess/deductible provided for in any insurances effected in accordance with this ~~clause 19.9~~, Aurizon Network may pay the relevant ~~excesses/deductibles~~excess/deductible and any amount so paid will be a debt due from the ~~End User~~Access Holder to Aurizon Network.

### **20.10 19.10 Settlement of claims**

~~Upon settlement of~~ If:

- (a) Aurizon Network makes a claim 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 any policy required by this Agreement covering 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 received owed by the Access Holder to Aurizon Network must be paid to Aurizon Network to from the ~~extent that~~ monies are owed received by the ~~End User to Aurizon Network in respect of~~ Access Holder under the ~~relevant damage at~~ policy against which the ~~time of settlement~~ Access Holder made a Claim.

## **21 20 Indemnities**

### **21.1 20.1 Indemnity ~~by End User~~ for personal injury and property damage**

Subject to ~~clause 21.2~~ and clause 21, ~~the End User~~ each Party is solely liable for, and releases, indemnifies and will keep indemnified ~~Aurizon Network~~ the other Party, its directors and ~~Aurizon Network's~~ Staff against, all Claims of any nature suffered or incurred by, or made or brought against, ~~Aurizon Network~~ the other Party, its directors or ~~Aurizon Network's~~ Staff in respect of:

- (a) any loss of, damage to or destruction of ~~real or personal~~ 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 by a Third Party against, Aurizon Network, Aurizon Network's directors or Aurizon Network's Staff 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 ~~End User~~Access Holder; or
- (d) any negligent act or omission of, the ~~End User~~Access Holder or the ~~End User's~~Access Holder's Staff in connection with this Agreement.

## **21.2 Indemnity by Aurizon Network for personal injury and property damage**

~~Subject to **clauses 20.3** and **21**, Aurizon Network is solely liable for, and releases, indemnifies and will keep indemnified the End User, its directors and the End User's Staff against, all Claims of any nature suffered or incurred by, or made or brought against, the End User, its directors or the End User's Staff in respect of:~~

- ~~(a) any loss of, damage to or destruction of real or personal property (including property of the End User); 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 Aurizon Network; or~~
- ~~(d) any negligent act or omission of Aurizon Network or Aurizon Network's Staff in connection with this Agreement.~~

## **21.3 Indemnity by End User for certain liabilities to third parties**

~~(a) Despite **clause 20.2**, the End User is solely liable for, and releases, indemnifies and will keep indemnified Aurizon Network, its directors and Aurizon Network's Staff against, all Claims of any nature suffered or incurred by, or made or brought against, Aurizon Network, its directors or Aurizon Network's Staff in respect of:~~

- ~~(i) any loss of, damage to or destruction of real or personal property; or~~
- ~~(ii) personal injury to or death of any person,~~

~~(b) (d) where such person or property is being transported on a Train Service in each case caused by or contributed to (to the extent of the contribution) by any breach of this Agreement by the End User or any negligent act or~~

~~omission of, the End User or the End User's Staff in connection with this Agreement.~~

### **21.420.3 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.

### **21.520.4 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.

## **22.21 Limitations and exclusions of liability**

### **22.121.1 Exclusion of Consequential Loss**

Except as expressly provided otherwise in **clause 27.27** or the IRMP Provisions which form part of this Agreement under clause 3, 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).

### **22.221.2 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 ~~twelve~~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.

### **22.321.3 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 ~~End User~~Access Holder for any Claim, and the ~~End User~~Access Holder must not make any Claim against Aurizon Network, ~~its~~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 ~~End User~~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 ~~21~~19.2(a) of a Train Operations ~~Agreement~~Deed or Aurizon Network's negligence in performing those obligations.

#### **22.421.4 Claims and exclusions in respect of non-provision of access**

(a) ~~Despite~~Subject to clause 21.4(b), only and despite any other provision of this Agreement, Aurizon Network, ~~its~~Aurizon Network's directors and Aurizon Network's Staff are not liable to the ~~End User~~Access Holder for any Claim, and the ~~End User~~Access Holder must not make any Claim against Aurizon Network, ~~its~~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 ~~End User~~Access Holder at the Scheduled Time in the Train Schedule ~~unless~~.

~~(a)~~(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 ~~use reasonable endeavours to~~ reschedule the relevant Train Service if required to do so under a Train ~~Services Agreement~~Operations Deed; and
- (ii) ~~if~~ the failure by Aurizon Network to make the Infrastructure available was caused by or was the result of an Operational Constraint, that Operational Constraint resulted from a breach of this Agreement by Aurizon Network or the negligence of Aurizon Network; and
- (iii) the failure by Aurizon Network to make the Infrastructure available was ~~a result of~~not permitted under this Agreement or the relevant Train Operations Deed or was attributable to a breach of this Agreement by, or negligent act or omission of, Aurizon Network; and
- (iv) the failure by Aurizon Network to make the Infrastructure available was not attributable to:
  - (A) ~~the End User or the End User's~~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 [the Conditional Access Provisions which form part of this Agreement under clause 73](#),

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
- (v) 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 ~~Agreement~~[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(d)(i)21.4(b)(iv)(A) to 21.4(d)(viii)21.4(b)(iv)(H)**) exceeds [five percent of the Allowable Thresholdtotal 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 ~~Agreement~~[Deed](#), but the failure to make the Infrastructure available is of a magnitude which is beyond the scope of that performance and adjustment regime.

## **22.521.5 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 ~~negligence~~[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, ~~that Operational Constraint resulted from a breach of this Agreement by the Defaulting Party; and:~~
- (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 the relevant Train Operations Deed 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 ~~End-User~~Access Holder - the ~~End-User's~~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) a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor; or
  - (vi) 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 ~~Agreement~~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 ~~Agreement~~Deed, but the delays are of a magnitude which is beyond the scope of that performance and adjustment regime.

## 22.621.6 **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)**.

## 22.721.7 **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 ~~Agreement~~Deed, any delays or cancellations of Train Services caused by or resulting from Operational Constraints ~~shall~~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 [End User 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 [End User Access Holder](#) and the [End User 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 ~~22.6~~[20.4\(i\)](#) of a Train Operations [Agreement Deed](#).
- (c) If Aurizon Network takes action in accordance with clause ~~22.6~~[20.4\(e\)](#) of a Train Operations [Agreement Deed](#), then Aurizon Network ~~shall have~~[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 [End User Access Holder](#) as a result of the exercise by Aurizon Network of its rights under clause ~~26~~[23](#) of a Train Operations [Agreement Deed](#), provided that Aurizon Network complies with ~~clause 26.5~~[the relevant provisions under the IRMP regarding conduct of a Train Operations Agreement an audit or inspection](#).

## ~~23~~[22](#) Determination of liability and loss adjustment

### ~~23.1~~[22.1](#) Determination of liability

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

- (a) as agreed between the Parties;
- (b) subject to ~~clause 22.1(e)~~[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~~[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.

### ~~23.222.2~~ Loss Adjuster

Subject to ~~clause 1~~, where a matter is to be referred to a loss adjuster in accordance with ~~clause 22.1~~[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 ~~to~~ 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 [End User 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**:
  - ~~(iv)~~ (i) is not permitted to act until the loss adjuster has given written notice of the acceptance of the appointment to both Parties;
  - ~~(v)~~ (ii) ~~any loss adjuster appointed under this clause 22.2~~ 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
  - ~~(vi)~~ (iii) ~~any person nominated as a loss adjuster under this clause 22.2~~ is deemed to be and act as an expert and not an arbitrator, and the ~~law~~ [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.

### **23.322.3 Parties to assist loss adjuster**

- (a) Each Party must ensure to the best of its ability that the loss adjuster appointed under **clause 22.222.2** 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 22.222.2** 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.

### **23.422.4 Decision of the loss adjuster**

- (a) The loss adjuster appointed under **clause 22.222.2** will determine the quantum of the relevant Claim and the liability of the [End User 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.

### **23.522.5 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.

## **24.23 Material Change**

### **24.123.1 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 affects the financial position of Aurizon Network or the cost to Aurizon Network of performing its obligations or exercising its rights under this Agreement and/or a Train Operations [Agreement Deed](#), then Aurizon Network ~~may~~**must** notify the ~~End User [and each relevant Operator]~~[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 [and each relevant Operator]~~**23.1(a)(i)**, [the Parties](#) must meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement ~~[and the relevant Train Operations 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 ~~[and each relevant Operator]~~ 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~~**clause 24.3**.

~~[Square bracketed text in (a)(i)-(iii) is only included where End User is only paying TOP Charges.]~~

- (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 which form part of this Agreement under clause 3 will provide for the consequences of Material Change.

## **24.223.2 Parties' obligations continue**

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

## **25.24 Disputes**

### **25.124.1 Method**

If any claim, dispute or question (**Dispute**) arises under this Agreement ~~or in relation to the Access Rights~~, then unless otherwise expressly provided to the contrary in this Agreement, such Dispute must be resolved in accordance with this ~~clause 24.24~~**clause 24.24** and either Party may give to the other Party a notice ~~in writing~~ (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in accordance with this ~~clause 24.24~~**clause 24.24**.

### **25.224.2 ~~Chief executive~~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.
- ~~(i) — the chief executive officer of Aurizon Network (or their nominee);~~  
~~and~~  
~~(ii) — the chief executive officer of the End User (or their nominee).~~
- (b) Within 10 Business Days after a Dispute Notice is given, the officers referred to in ~~clause 24.2(a)~~**clause 24.2(a)** must meet to resolve the Dispute.
- (c) Meetings referred to in ~~clause 24.2(b)1.1(a)(i)~~ 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 (Resolution Period) after:
- (i) the date that ~~officers~~the authorised representatives first meet to resolve the Dispute in accordance with ~~clause 24.2(b)1.1(a)(i)~~**clause 24.2(b)1.1(a)(i)**; or
- (ii) if the ~~officers~~authorised representatives do not meet within the time required under ~~clause 24.2(b)1.1(a)(i)~~**clause 24.2(b)1.1(a)(i)**, the date the Dispute Notice is given,

then the relevant Dispute may, by agreement between ~~Aurizon Network and the End User~~the Parties within 10 Business Days of expiration of the

Resolution Period, be referred for ~~resolution~~determination by an Expert in accordance with ~~clause 24.3~~**24.3** or by arbitration in accordance with ~~clause 24.4~~**24.4**.

- (e) If the Parties fail to agree, within 10 Business Days of expiration of the Resolution Period, whether to refer the Dispute to an Expert or to arbitration, either Party may refer the Dispute to the courts of the State in accordance with **clause 24.6**.

### ~~25.3~~**24.3** Expert

Subject to ~~clause 33.1~~**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 financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia;~~
- (A) if the Parties agree the Dispute is purely of a financial or accounting nature; or
- (B) a technical nature,
- the President (for the time being) of the Resolution Institute ~~of Arbitrators and Mediators~~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)~~**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 ~~End User~~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 ~~shall~~must act as an expert and not an arbitrator and the ~~law~~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 ~~practical~~ practicable, all information and materials in their possession or control requested by the Expert and attending any hearing convened by the Expert.

#### **25.424.4 Arbitration**

- (a) Subject to **clause 33.132.1**, 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 of Arbitrators. 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.

#### **25.524.5 Queensland Competition Authority (QCA)**

Subject to **clause 33.132.1**, the Parties may agree to refer, and where required by this Agreement must refer, any Dispute to the QCA.

## **25.6 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**;~~
  - ~~(c) (b) referred to arbitration by agreement of the Parties in accordance with **clause 24.4**;~~ nor
  - ~~(d) (c) referred to the QCA in accordance with **clause 24.5**,~~
- then either Party may refer the Dispute ~~must be referred~~ to the courts of the State.

## **26 25 Force Majeure**

### **26.1 25.1 Notice of Force Majeure ~~Event under a Train Operations Agreement~~**

~~Aurizon Network agrees to:~~

- ~~(a) provide to the End User a copy of any notice provided by either Aurizon Network or an Operator in respect of the Force Majeure Event; and~~
- ~~(b) send a notice of invitation to the End User for, and provide the End User with a reasonable opportunity to participate in, any meeting which Aurizon Network and an Operator may have in respect of the Force Majeure Event.~~

### **~~26.2~~ ~~Suspension of obligations~~**

- ~~(a) If, by reason of a Force Majeure Event, Aurizon Network is~~ 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 Aurizon Network must, as soon as reasonably practicable after it becomes aware of the Force Majeure Event, give the Access Holder prompt (and, in any event, within 5 Business Days after it becomes aware of the event or circumstance causing the Force Majeure Event) notice (which may be provided in electronic form) of the Force Majeure Event including:
  - (i) details of the Force Majeure Event and (if applicable) that part of the Nominated Network affected or likely to be affected; and
  - (ii) the details of the obligations affected or likely to be affected.
- ~~(b) Aurizon Network must provide the Access Holder with a further notice as soon as reasonably practicable and in any event within 2 Business Days of the notice provided under clause 25.1(a) if the notice provided in clause 25.1(a) either is in electronic form or does not include the following information:~~
  - (i) the information in clause 25.1(a); and
  - (ii) full particulars of all relevant matters including:
    - (A) details of the action Aurizon Network has taken to remedy the situation and details of the action that Aurizon Network



proposes to take to remedy the situation (to the extent that they are known); and

~~(A)~~(B)a reasonable estimate of the time during which Aurizon Network will be (or is 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 will be suspended during that time to the extent that the performance of such obligations is prevented or hindered bydue to the Force Majeure Event.

(c) Without prejudice to its rights under this **clause 25.1**, 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 above.

(d) Aurizon Network must:

(i) include the Access Holder (and its Customer, if any) and its Train Operator, if any, in any meeting which Aurizon Network may have in respect of the Force Majeure Event; and

(ii) provide a copy of any notice given to the Access Holder to that Access Holder's Customer, if any, and Train Operator, if any.

## 25.2 Suspension of obligations

(a) Subject to compliance with the requirements of **clause** Error! Reference source not found., Aurizon Network's obligations under this Agreement are suspended during the time and to the extent that Aurizon Network's performance of its obligations is prevented or hindered by the Force Majeure Event.

(b) If the notice is not provided in accordance with **clause 25.1(a) or 25.1(b)**, then the obligations of Aurizon Network under this Agreement will be suspended on and from the later of the time the notice requirements of **clause 25.1(a) and 25.1(b)** are satisfied.

## 25.3 Duty to mitigate

(a) Subject to **clause 25.3(b)**, Aurizon Network must use all reasonable endeavours to remedy or overcome the effect of the Force Majeure Event affecting its obligations under this Agreement as soon as possible and must attempt to:

(i) mitigate the effect of the Force Majeure Event; and

(ii) identify alternative viable means of performing its obligations, including the provision of the Access Rights affected (if applicable).

(b) Aurizon Network is not obliged to settle any strike, lockout or other labour dispute other than on terms acceptable to it.

## ~~26.3~~25.4 End of period of Force Majeure Event

~~Subject to **clauses 25.4 and 25.6**, the~~The suspension of the obligations of Aurizon Network due to a Force Majeure Event ends when, but only to the extent that, Aurizon Network is ~~able to resume full performance of~~ no longer

prevented or hindered from performing, whether wholly or in part, its obligations under this Agreement by reason of the relevant Force Majeure Event, at which time ~~it must:~~ Aurizon Network must as soon as reasonably practicable:

- (a) issue a notice to the ~~End User~~ Access Holder advising ~~that~~ the extent to which it is recommending the performance of its obligations; and
- (b) recommence the performance of its obligations ~~– to the extent outlined in the notice.~~

## **26.425.5 Reduction of Access Rights due to loss or damage to Nominated Network**

- (a) If:
  - (i) any part of the Nominated Network specified in ~~item 2 of schedule 3.2 of Schedule 3~~ is damaged or destroyed by a Force Majeure Event; and
  - (ii) in Aurizon Network's reasonable opinion the cost of repairing such damage or destruction or replacing that part of the Nominated Network is not economic on the basis of the then and committed future utilisation of that part of the Nominated Network,

then Aurizon Network may, by notice, advise the ~~End User~~ Access Holder (and its Customer, if applicable), other affected Access Holders (as defined in the Access Undertaking), each affected Railway Operator and the QCA of:

- (iii) the estimated cost of effecting the necessary repairs or replacement; ~~and~~
  - (iv) the level of insurance available to effect the necessary repairs and replacement;
  - (v) a detailed explanation as to why the cost of repairing or replacing is not economic; and
  - ~~(iv)~~ (vi) Aurizon Network's intention to not repair or replace the relevant part of the Nominated Network unless the ~~End User~~ Access Holder and any other Access Holders (or their Customers or Railway Operator (or any of its customers) Operators, as applicable) using that part of the Nominated Network pay the ~~amounts specified by Aurizon Network towards~~ difference between the cost of effecting amount of insurance available to effect the necessary repairs or replacement ~~– and the actual anticipated cost to effect those repairs or replacements.~~
- (b) If the ~~End User~~ Access Holder (or an its Customer or Operator under a Train Operations Agreement, as applicable) notifies Aurizon Network that:
    - (i) it agrees to bear the whole ~~of the~~ incremental cost of necessary repairs or replacement; ~~or (after the amount of insurance available has been applied); or~~
    - (ii) it agrees to bear that part requested by Aurizon Network of the incremental cost of necessary repairs or replacement (and subject to Aurizon Network being satisfied that all other relevant Access Holders (or their Customers or Railway Operators (or their

~~customers, as applicable~~) have also agreed to bear their respective part of such costs) (after the amount of insurance available has been applied),

then Aurizon Network will proceed with the repairs or replacement within a reasonable time after:

- (iii) if clause ~~25.4(b)(i)~~ 25.5(b)(i) applies, receipt by Aurizon Network from the ~~End User~~ Access Holder (or its Customer or Operator) of payment of the relevant amount; and
- (iv) if clause ~~25.4(b)(ii)~~ 25.5(b)(ii) applies, receipt by Aurizon Network from the ~~End User~~ Access Holder (or a relevant Railway its Customer or Operator (or, if applicable, its customer) of the last payment of the relevant amount.

(c) ~~Where the End User~~ If an Access Holder (or an its Customer or Operator under a Train Operations Agreement, as applicable) pays to Aurizon Network ~~the whole of the estimated cost,~~ any of the costs under clause 25.5(b), on completion of the necessary repairs or replacement:

- (i) Aurizon Network must, within a reasonable time, refund to the ~~End User~~ party who made such payment any amount by which the amount paid ~~by the End User (or, if applicable, an Operator)~~ that party exceeds the actual cost; or
- (ii) ~~the End User~~ the Access Holder (or its Customer or Operator, if applicable) must, within a reasonable time, pay to Aurizon Network the amount by which the actual cost exceeds proportionately the amount agreed to be paid by ~~the End User (or, if applicable, an Operator)~~ that party.

(as applicable).

(d) If, within 40 Business Days after receipt of a notice from Aurizon Network under ~~clause 25.4(a)~~ 25.5(a), the ~~End User~~ Access Holder (or its Customer or Operator, as applicable) has not given notice to Aurizon Network ~~pursuant to under clause 25.4(b) (or each Operator has not given Aurizon Network an equivalent notice under its Train Operations Agreement) indicating that it agrees to pay the whole, or that part requested by Aurizon Network, of the cost of the necessary repairs or replacement,~~ 25.5(b), then Aurizon Network may, by giving not less than 20 Business ~~Days~~ Days' notice in writing to the ~~End User~~ Access Holder (Nominated Network FM Reduction Notice), reduce the Access Rights by the FM Access Rights, in which case, the FM Access Rights will cease to form part of the Access Rights of the Access Holder on and from the date specified in the ~~notice~~ Nominated Network FM Reduction Notice (which must be at least 20 Business Days from the date of the ~~notice~~ Nominated Network FM Reduction Notice).

## **26.525.6 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 ~~End User~~ Access Holder, the ~~End User~~ Access Holder may give written notice to Aurizon Network and each affected Operator in accordance with ~~clause 3.4(a)~~ 4.5(a) to vary the Access

Rights which the ~~End User~~[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 ~~End User~~[Access Holder](#) has given a notice as contemplated in **clause 25.6(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 ~~End User~~[Access Holder](#) has not nominated an Operator; and
  - (ii) if, after the operation of **clause 25.6(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, **clause 3.64.7** applies in respect of that Over-Allocation.
- (c) As soon as practicable after the expiry of the period referred to in **clause 25.6(a)**, Aurizon Network must issue a notice to the ~~End User~~[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~~**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 ~~Agreement~~[Deed](#).

## ~~26.6~~25.7 **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 ~~End User~~[Access Holder](#) may terminate this Agreement by 20 Business ~~Days~~[Days](#)’ notice to Aurizon Network and ~~clauses 25.3, 25.4~~ and ~~25.4~~**25.5** apply without prejudice to any of the rights of the Parties which accrued before the date of such termination.

## ~~27.2~~26 **Suspension**

### ~~27.1~~26.1 **Suspension of Access Rights**

If a Suspension Event specified in ~~schedule 6~~**Schedule 6** occurs, Aurizon Network may, by notice in writing to the ~~End User~~[Access Holder](#) and the relevant Operator (~~which may be given before or immediately after the suspension~~) (**Suspension Notice**), suspend the Access Rights of the ~~End User~~.

### ~~27.2~~ **Suspension due to suspension under End User Agreement**

~~If, any of the End User’s rights under the End User Agreement are suspended under an End User Agreement for any reason, then Aurizon Network may, by~~

~~notice in writing to the End User (which may be given before or immediately after the suspension) (also a **Suspension Notice**), suspend the right of the End User to have an Operator operate for it Train Services of any affected Train Service Type~~Access Holder.

### **27.326.2 Details of suspension**

A Suspension Notice given by Aurizon Network to the ~~End User~~Access Holder and the relevant Operator under **clause 26.1** ~~or 26.2~~ must set out:

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

### **27.426.3 Effect of suspension**

The suspension of any rights under this **clause 26** does not affect or suspend any other obligation of the ~~End User~~Access Holder, including the obligation to pay ~~[Access Charges/~~TOP Charges] under this Agreement, and is without prejudice to Aurizon Network's other rights and remedies in respect of that or any other default.

### **27.526.4 Duration of suspension**

The suspension of any rights under **clause 26.1** ~~or 26.2~~**26.1** continues until such time as the ~~End User~~Access Holder has remedied the relevant default or non-compliance ~~and, where appropriate, taken action to prevent its recurrence~~notified in the Suspension Notice.

### **27.626.5 Suspension of an Operator's rights under a Train Operations Agreement**Deed

- (a) The ~~End User~~Access Holder acknowledges that, under a Train Operations AgreementDeed, 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 ~~End User~~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 AgreementDeed and the ~~End User~~Access Holder will have the right to nominate an alternate Operator to operate the affected services in accordance with ~~clause 3.3~~**4.3** or **4.4**.
- (c) The suspension of any of an Operator's rights under a Train Operations AgreementDeed does not affect or suspend any obligation of the ~~End User~~Access Holder, including the obligation to pay ~~[Access Charges/~~TOP Charges] under this Agreement.

## **2827 Liability for wrongful suspension**

Where Aurizon Network suspends some or all of the ~~End User's~~Access Holder's Access Rights or an Operator's rights under a Train Operations

AgreementDeed, Aurizon Network will be liable to the End-UserAccess 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 ~~shall~~must bear the burden of establishing that a reasonable person in Aurizon Network's position could have formed that view);
- (b) where the suspension is of an Operator's rights under a Train Operations AgreementDeed, the End-User'sAccess Holder's loss or damage is not, and has not been, included in a claim by the Operator in respect of that suspension; and
- (c) the End-UserAccess Holder has used all reasonable endeavours to mitigate the loss or damage arising from the suspension.

## 29.28 Termination

### 29.128.1 Termination of Agreement

- (a) Subject to ~~clause 28.1(b)~~28.1(b) and without limiting any rights of termination contained elsewhere in this Agreement, Aurizon Network may, by notice in writing to the End-UserAccess Holder, terminate this Agreement if a Termination Event specified in ~~schedule 6~~Schedule 6 occurs.
- (b) If there is a Corresponding Suspension Event in respect of the Termination Event referred to in ~~clause 28.1(a)~~28.1(a), then Aurizon Network may only exercise its rights under ~~clause 28.1(a)~~28.1(a) if it has first exercised its right of suspension in respect of the Corresponding Suspension Event under ~~clause 26~~26.

### 29.228.2 Termination by the End-UserAccess Holder

Without limiting any rights of termination contained elsewhere in this Agreement, the End-UserAccess 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 End-UserAccess 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 End-UserAccess 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 End-UserAccess Holder gives Aurizon Network notice of the default.

### ~~29.3~~28.3 **Grounds for termination to be specified**

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

### ~~29.4~~28.4 **Obligations and other rights upon termination or expiry**

- (a) Neither termination of this Agreement by a Party ~~pursuant to~~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~~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 ~~End~~End ~~User~~User ~~Access Holder~~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.

## ~~30~~29 **Assignment**

### ~~30.1~~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 ~~End~~End ~~User~~User ~~Access Holder~~Access Holder, provided that:
  - (i) the Assignee is Accredited; and
  - ~~(i)~~(ii) Aurizon Network procures that the Assignee covenants with the ~~End~~End ~~User~~User ~~Access Holder~~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)~~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.

### ~~30.2~~29.2 **Assignment by the ~~End~~End ~~User~~User ~~Access Holder~~Access Holder**

- (a) The ~~End~~End ~~User~~User ~~Access Holder~~Access Holder may not Assign its rights or obligations under this Agreement other than in accordance with this **clause 29.2**.
- (b) The ~~End~~End ~~User~~User ~~Access Holder~~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 ~~End~~End ~~User~~User ~~Access Holder~~Access Holder which is capable of performing the obligations of the ~~End~~End ~~User~~User ~~Access Holder~~Access Holder under this Agreement, provided that:

- (A) the [End-User 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 [End-User's 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 [End-User 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 [End-User Access Holder](#) under this Agreement.
- (c) Any Assignment by the [End-User 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 [End-User 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 56** for an amount of not less than the Security Amount.
- (d) Subject to **clause 29.2(e)**, if a Change in Control of the [End-User 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 [End-User's 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 [End-User 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 the Transfer Provisions which form part of this Agreement under **clause 3**.

### **30.329.3** 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 2929** 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 ~~the~~this Agreement except in accordance with this **clause 2929**.

## ~~31.30~~30 GST

### ~~31.130.1~~31.130.1 **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.

### ~~31.230.2~~31.230.2 **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.

### ~~31.330.3~~31.330.3 **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.

### ~~31.430.4~~31.430.4 **Timing of GST payment**

The recipient will pay the amount referred to in **clause 30.330.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

### ~~31.530.5~~31.530.5 **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 30.3.30.3**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

### ~~31.630.6~~31.630.6 **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 30.330.3** 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.

### ~~31.730.7~~31.730.7 **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.

## ~~32.31~~ Confidentiality

### ~~32.131.1~~ Confidentiality

Subject to **clause ~~31.231.2~~**, 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.

### ~~32.231.2~~ 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 ~~Agreement~~[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 ~~Arrangement~~[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- [\(as amended by any Change in Access Undertaking\)](#).

### **32.331.3 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.

### 32.431.4 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.

### 32.531.5 Survival

Without limiting **clause 35.134.1**, this **clause 31** survives the destruction ~~of Confidential Information and the delivery up~~ or return of Confidential Information in accordance with this Agreement.

### 32.631.6 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.

## ~~33 Intellectual property and permitted use of Confidential Information~~

- ~~(a) Subject to **clause 32(b)**, all intellectual property rights in any material supplied or made available by one Party (**first Party**) to the other Party remains the intellectual property of the first Party and cannot be reproduced or used for any purpose other than the purpose for which it was supplied without the prior written approval of the first Party.~~
- ~~(b) Notwithstanding **clauses 31** and **32(a)**, the End User grants to Aurizon Network an irrevocable, perpetual, non-exclusive, royalty-free license to use, modify and reproduce the Confidential Information for purposes in connection with:
  - ~~(i) any capacity assessment being undertaken;~~
  - ~~(ii) the investigation and planning of Maintenance Work;~~
  - ~~(iii) the investigation and planning of Infrastructure Enhancements; and~~
  - ~~(iv) Aurizon Network complying with its obligations under the Access Undertaking.~~~~

## 3432 Relationship with Train Operations ~~Agreement~~Deed

### 34.132.1 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 2422.1** 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 33.1(a)~~**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~~ **clause 22.1 or 24, as applicable**, 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 ~~Agreement~~**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 ~~End User~~**Access Holder** is notified of a matter to be referred to an Adjudicator in accordance with a Train Operations ~~Agreement~~**Deed**, then the ~~End User~~**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~~**clauses 22.1 and 24** do not apply to any claim, dispute, question or liability involving the ~~End User~~**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, ~~shall~~**will** be final and binding upon the ~~End User~~**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:
  - (i) Aurizon Network must promptly provide a copy of the notice to the Access Holder; and
  - (ii) 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.

### **34.232.3 Amendments due to changes to Train Operations**

#### **Agreement Deed**

If:

- (a) modified or additional Rollingstock or Rollingstock Configurations are authorised under a Train Operations **Agreement Deed**;
- (b) the Performance Levels specified in a Train Operations **Agreement 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 **Agreement Deed**;
- ~~(d) the Train **Service** Description under a Train Operations **Agreement Deed** is varied;~~
- ~~(e)(d) [the Access Charges or Access Charge Rates under a Train Operations **Agreement** are varied]; or [delete if all Access Charges are to be paid by the End User;] or~~
- ~~(f)(e)~~ a Train Operations **Agreement Deed** is otherwise amended as a result of or in connection with any of the matters in paragraphs (a) to (e),

then:

- ~~(g)(f)~~ the Parties must amend this Agreement (including, but not limited to, by Aurizon Network varying the Access Charge Rates or Train **Service** Description) as reasonably necessary to reflect the change or variation to the Train Operations **Agreement Deed** and otherwise comply with this Agreement (including, for example, the **End User 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;
- ~~(h)(g)~~ Aurizon Network must advise the **End User Access Holder** of any variations to the Access Charge Rates payable by the **End User Access Holder** as a result of that change or variation; and
- ~~(i)(h)~~ where ~~Aurizon Network and~~ the **End User 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 24.524.5**,

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

#### **34.332.4** Notice to ~~End User~~ Access Holder

- (a) If any of the matters referred to in ~~clauses 33.2(a)~~ **32.3(a)** to ~~33.2(f)~~ **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 ~~End User~~ Access Holder of the proposal as soon as practicable; and
  - (ii) the ~~End User~~ 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 ~~End User~~ 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 33.2(a) to 33.2(f), then the End User~~ **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~~ **24.5**.

### **35.33** Notices

#### **35.133.1** 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 ~~Aurizon Network~~ the Parties, be in electronic form.

#### **35.233.2** 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 ~~Aurizon Network~~ the Parties, sent by email to the Party's current email address for service.

#### **35.333.3** Deemed Notice

~~A~~ Subject to clause 33.5, a Notice given in accordance with this ~~clause 33.33~~ **33.33** 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.

### **35.433.4 Addresses for notices**

- (a) Each Party's address for notices is as set out in **item 2 of ~~schedule~~ 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.

## **3634 General**

### **36.134.1 Survival**

This **clause 3534** and **clauses 4, 51.1(a), 14, 17.36, 13, 191.1(a), 21, 2122, 2224, 2428, 28, 30 and 30, 31 and 33** survive the expiration or termination of this Agreement.

### **36.234.2 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 ~~End User~~Access Holder must provide each Operator with a copy of any written agreement to variations or amendments to this Agreement.

### **36.334.3 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 ~~whatever, and no~~ No Party is liable to any other Party in respect of those matters.
- (c) ~~The End User~~Neither Party has ~~not~~ relied on any representations made by ~~Aurizon Network~~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.



#### **36.434.4 Counterparts**

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

#### **36.534.5 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.

#### **36.634.6 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.

#### **36.734.7 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.

#### **36.834.8 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.

#### **36.934.9 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.

#### **36.1034.10 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.

#### **36.1134.11 Duty**

- (a) The [End User 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 [End User Access Holder](#) must, [within 10 Business Days after receiving such demand](#), reimburse Aurizon Network the amount paid ~~upon demand~~.

~~36.12~~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.

~~36.13~~34.13 **Computation of time**

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

~~36.14~~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 35.14~~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 35.14(a)(i)~~34.14(a)(i) and ~~35.14(a)(ii)~~34.14(a)(ii).

~~36.15~~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.

### ~~36.16~~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.

### ~~36.17~~34.17 **Third Party Land**

The ~~End User~~Access Holder acknowledges that:

- (a) the land specified in **item 44** of ~~schedule 3~~**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 ~~End User~~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 ~~End User~~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 ~~End User~~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.

### ~~36.18~~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.

### ~~36.19~~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 ~~Queensland~~the State.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in ~~Queensland~~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.

### ~~36.20~~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~~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).

## 3735 Most favoured nation status

### 37.135.1 ~~\_\_\_\_\_~~ Notice of contravention of price differentiation limitations

If the ~~End User~~Access Holder (Claimant Access Holder) believes on reasonable grounds that:

- (a) Aurizon Network has entered into an Access Agreement with another ~~Access Holder~~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 ~~for Access~~ 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 ~~End User~~Claimant Access Holder may provide written notification to Aurizon Network which must include the reasons why the ~~End User~~Claimant Access Holder considers this to be the case.

### **37.235.2 Aurizon Network's response**

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

- (a) whether or not Aurizon Network agrees that the Access Agreement with the other ~~Access Holder~~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 ~~Access Holder~~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 36.235.2**, Aurizon Network must advise the ~~End User~~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 ~~End User~~Claimant Access Holder, including the amount of the proposed reduced Access Charges.

### **37.335.3 Disputes**

If the ~~End User~~Access Holder does not agree with Aurizon Network's response ~~to the End User's notification under clause 36.1,~~ the dispute must be referred to an Expert for resolution in accordance with **clause 24.324.3**.

### **37.435.4 Interaction with other ~~Access Holders~~Network Customers**

If:

- (a) another ~~Access Holder provides~~Network Customer notifies Aurizon Network ~~with notification~~ that it believes that some or all of the ~~End User's~~Claimant Access Holder's Train Services are a "Like Train Service" as defined in the other ~~Access Holder's~~Network Customer's Access Agreement to a Network Train Service operated by the other ~~Access Holder~~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 [End User 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.

## **38.36** ~~JV Participants and liability~~

~~{Drafting note: Optional clause to be included if the End User is a Joint Venture.}~~

### **38.136.1** ~~Applicability~~

This **clause 37.36** only applies if **item 55** of **schedule 1** ~~Schedule 1~~ states that it applies.

### **38.236.2** ~~Warranty~~

The [End User 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.

### **38.336.3** ~~JV Participants and percentage interests~~

- (a) The percentage interest of the JV Participants in the Joint Venture will be as notified ~~in writing~~ by the [End User Access Holder](#) to Aurizon Network from time to time, ~~in accordance with this Agreement~~.
- (b) As at the ~~date of this Agreement~~ [Commencement Date](#), the respective percentage interests of the JV Participants in the Joint Venture are as specified in **item 77** of **schedule** ~~Schedule 1~~.

### **38.436.4** ~~Liability of JV Participants~~

- (a) The liability of each JV Participant under this Agreement will, subject to **clause 37.4(e)** ~~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) ~~If Subject to clause 36.4(e), if~~ a JV Participant is in default of a Financial Obligation, and the [End User 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 [End User 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 [End User Access Holder](#) under **clause 37.4(e)** ~~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)**.

### **38.536.5 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** 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** )  
**ACN**ABN 78 132 181 116: )  
)

.....  
Company Secretary/Director

.....  
Director

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

.....  
Name of Director (print)

Date .....

**Executed by [the End User]** )  
**ACN**Access Holder ABN [insert]: )  
)

.....  
Company Secretary/Director

.....  
Director

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

.....  
Name of Director (print)

Date .....



# Schedule 1 ~~Schedule 1~~ – Reference schedule

## ~~Reference schedule~~

Item	Description	Details
<b><del>End User</del> <u>Access Holder</u> details</b>		
1	<del>End User</del> <u>Access Holder</u>	Name: [insert] ABN: [insert]
<b>Particulars for Notices</b>		
2	<b>Address for Notices</b>	<b>Aurizon Network</b> Address: [insert] Facsimile: [insert] Email: [insert] Attention: [insert]  <b><del>End User</del></b> <b><u>Access Holder</u></b> [insert] Address: [insert] Facsimile: [insert] Email: [insert] Attention:
<b>Security details</b>		
3	Does clause <del>5.16.1</del> apply?	[yes/no]
4	<b>Security Amount</b>	The Security Amount (if applicable), at a time, will be an amount <u>estimated by Aurizon Network (acting reasonably) as</u> equivalent to the maximum amount of aggregate TOP Charges ( <del>ATPY</del> ) for all Train Service Types under this Agreement that could potentially be payable <del>during the applicable Year</del> <u>in up to 6 months</u> assuming:  (a) all of the Train Services were not operated for the <del>End User</del> <u>Access Holder</u> during <del>that Year</del> <u>the applicable period</u> ; and  (b) the reason that the Train Services are not operated is not as a result of <u>an</u> Aurizon Network Cause.
<b>[Joint Venture]</b>		
5	Does clause 36 apply?	[yes/no]

Item	Description	Details	
6	Name of Joint Venture	[insert name of Joint Venture or "Not Applicable" if no Joint Venture]	
7	JV Participants and percentage interests	<b>Name of JV Participant</b>	<b>Percentage Interest</b>
		[insert name]:	[insert interest]%
		[insert name]:	[insert interest]%
		[insert name]:	[insert interest]%

# Schedule 2 ~~Schedule 2~~ – Train Descriptions

## ~~Train Service Descriptions~~

### Part A – Matters applicable to specific Train Service Types

#### 1 Train Service Type #1

##### 1.1 Key characteristics Applicable Reference Tariff

[insert name of applicable type of Reference Tariff]

##### ~~1.1.2~~ 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

<u>Do the Conditional Access Provisions apply?</u>	[yes/no] <u>[if yes, insert description of Expansion]</u>
--	--

###### Operator(s)

<u>Name:</u>	[insert]
<u>Address:</u>	[insert]
<u>Facsimile:</u>	[insert]
<u>Email:</u>	[insert]
<u>Attention:</u>	[insert]

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

###### Details of route and facilities

Origin	[insert]
--------	----------

**Details of route and facilities**

Destination	[insert]
Loaded distance from Origin to Destination (km)	[insert]
Empty distance from Destination to Origin (km)	[insert]
Loading Facility	[insert]
Unloading Facility	[insert]
Depot	[insert]
<del>Through</del> 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 <b>appendix A</b> to this <del>schedule 2</del> <b>Schedule 2</b> .
---------------------------------	--

**Nominated Monthly Train Services**

Nominated Monthly Train Services	The Nominated Monthly Train Services for the Train Service Type is set out in <b>appendix B</b> to this <del>schedule 2</del> <b>Schedule 2</b> .
----------------------------------	---

**Maximum Payload**

Maximum Payload	The Maximum Payload for the Train Service Type is set out in <b>appendix B</b> to this <del>schedule 2</del> <b>Schedule 2</b> .
-----------------	--

**Reference Tariff Type**

Reference Tariff Type	[insert name of applicable type of Reference Tariff]
-----------------------	--

**Conditional Access Rights**

Does <del>clause 7</del> apply?	[yes/no]
	[If yes, insert description of Expansion]

**Operator(s)**

#### Details of route and facilities

Name:	[insert]
Address:	[insert]
Faecsimile:	[insert]
Email:	[insert]
Attention:	[insert]

#### 1.21.4 Special operating restrictions

Without limiting the special operating restrictions which are specified in **item 1.2** of **Part B** of **schedule 2** **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]

#### 1.31.5 Cycle description

Subject to:

- any Train Control Direction given to the Operator in respect of a Train Service;
- any exceptions which are specified in **part B** of this **schedule 2** **Schedule 2** as being applicable to all Train Service Types; and
- 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.

#### 1.41.6 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~~**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~~**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~~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



# Appendix A to Schedule 2 - Sectional Running Times

## ~~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 ~~Section~~Sectional Running Times: Reference Train Services

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

#### Standard ~~Section~~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 ~~Section~~Sectional Running Times: Non- Reference Train Services

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

#### Standard ~~Section~~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

## Appendix B to Schedule 2 – Nominated Monthly Train Services

### 1 Train Service Type #1

<b>Nominated Monthly Train Services (for a 30 day Month)</b>	[insert]
<b>Maximum Payload</b>	[insert] tonnes
<b>Nominal Payload</b>	[insert] tonnes
<b>Indicative Tonnage (for a 30 day Month)</b>	[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 ~~as specified in the relevant Notice of Intention to Increase Nominal Payload~~

# Appendix C to Schedule 2

Conditional Access Rights

# 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

# 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 ~~25.4~~25.2

For the purpose of **clause 25.425.2**, 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 25.425.2** 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 ~~Schedule 4~~ – Access Charges

## ~~Access Charges~~

### 1 Definitions

#### 1.1 Definitions

~~In this schedule 4:~~

In this Schedule 4:

**Access Charge Rates** for a Train Service Type means the rates specified in ~~item 22 of this schedule 4 for the~~ Schedule 4 for that Train Service Type.

~~Access Charges:~~

Access Charges for the purposes of this Schedule 4 means:

- (a) for a Billing Period means the amount calculated in accordance with ~~item 3.1 of this schedule 4~~ 3.1 of this Schedule 4 for the Billing Period; and
- (b) for a Train Service Type for a Billing Period means the amount calculated in accordance with ~~item 3.2 of this schedule 4~~ 3.2 of this Schedule 4 for the Train Service Type and Billing Period.

~~Access Holder Access Agreement has the meaning given in the Access Undertaking.~~

**Adjustment Charge** for a Billing Period means the amount calculated and approved as an Adjustment Charge (as defined in the Access Undertaking) in accordance with ~~item 3.10 of this schedule 4 for the~~ the Access Undertaking for that Billing Period.

**Advice Date** in respect of a Change in Reference Tariff Provisions means the date on which the QCA's decision making or approving the Change in Reference Tariff Provisions is first published by the QCA.

~~Allocated Tariff 1 Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with item 3.5 of this schedule 4 for the Train Service Type and Billing Period.~~

~~Allocated Tariff 2 Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with item 3.6 of this schedule 4 for the Train Service Type and Billing Period.~~

**Change in Reference Tariff Provisions** means any change (including variation, repeal or replacement) of:

- (a) the Reference Tariff Provisions; or
- (b) the Reference Tariffs (including the creation of a new Reference Tariff), made or approved by the QCA from time to time.



**Corresponding Train Service** for a Train Service Type means a Network Train Service which:

- (a) has an origin and destination which is the same as the Origin and Destination for the Train Service Type;
- (b) has the same End User for the Train Service Type; and
- (c) is subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type,

and operated under an Access Agreement.

~~**Electric Energy Charge** for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.8** of this **schedule 4** for the Train Service Type and Billing Period.~~ **[Note: The definition of “Electric Energy Charge” may be deleted if the End User is only paying TOP Charges.]**

~~**Electric Tariff Charge** for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.7** of this **schedule 4** for the Train Service Type and Billing Period.~~ **[Note: The definition of “Electric Tariff Charge” may be deleted if the End User is only paying TOP Charges.]**

**End User** means in respect of Network Train Services operated in relation to an origin to destination, the person who is either ~~the “Customer” (as defined under the Access Undertaking) for those Network Train Services or the Access Holder for those Network Train Services (but who has no “Customer” (as defined under the Access Undertaking))~~ under an Access Agreement.

~~**Escalation Date** means each 1 July.~~

~~**Gross Tonnes** for a Train Service (whether loaded or empty) operated for a Train Service Type means the amount which is the sum of:~~

- ~~(a) for each locomotive comprised in the Train Service, the Maximum Gross Mass for that locomotive;~~
- ~~(b) for each loaded or partly loaded Wagon comprised in the Train Service:
  - ~~(i) if there is a functioning Weighbridge located on route between the Origin and Destination for the Train Service Type, the mass of the Wagon as determined at such Weighbridge (provided that if there is more than one functioning Weighbridge located on route between the Origin and Destination for the Train Service Type, the mass will be determined by the Weighbridge that is located closest to the Origin for the Train Service Type); and~~
  - ~~(ii) if there is no functioning Weighbridge located on route between the Origin and Destination for the Train Service Type, the amount (expressed in tonnes rounded to two decimal places) calculated in accordance with the following formula for each loaded or partly loaded Wagon comprising the Train Service:~~~~

$$\text{(MGM - TW) x LEF + TW}$$

where:

- MGM** = the Maximum Gross Mass for the Wagon
- TW** = the Tare Weight for the Wagon

~~LEF~~ = the Loading Efficiency Factor for the Train Service

- ~~(c) for each empty Wagon comprised in the Train Service, the Tare Weight for the Wagon; and~~
- ~~(d) for all other Rollingstock comprised in the Train Service, the Maximum Gross Mass for the Rollingstock.~~
- (a) the “Customer” (as defined under the Access Undertaking) for those Network Train Services; or
- (b) if there is no “Customer” (as defined under the Access Undertaking), the Access Holder for those Network Train Services under an Access Agreement.

Expansion Tariff has the meaning given in the Access Undertaking.

Gross Tonnes has the meaning given in the Access Undertaking.

**Gtk** for an operated Train Service (whether loaded or empty) for a Train Service Type means the amount which is the Gross Tonnes for the Train Service for the Train Service Type multiplied by:

- (a) if the Train Service was operated from the Origin to Destination for the Train Service Type, the number of kilometres of the loaded distance from Origin to Destination for the Train Service Type as specified in the Train Service Description for that Train Service Type; or
- (b) if the Train Service was operated from the Destination to Origin for the Train Service Type, the number of kilometres of the empty distance from the Destination to Origin for the Train Service Type as specified in the Train Service Description for that Train Service Type. **[Note: The definition of “Gtk” may be deleted if the End User is only paying TOP Charges.]**

**Gtk Forecast** has the meaning given in the Access Undertaking.

~~**Incremental Capacity Charge** for a Train Service Type for a Billing Period means **Net Tonnes** has the amount calculated meaning given in accordance with item 3.4 of this schedule 4 for the Train Service Type and Billing Period.~~

~~**Incremental Maintenance Charge** for a Train Service Type for a Billing Period is the amount calculated in accordance with item 3.3 of this schedule 4 for the Train Service Type and Billing Period. **[Note: This definition of “Incremental Maintenance Charge” may be deleted if the End User is only paying TOP Charges.]**~~

~~**Load Variation Table** means a table published by Aurizon Network with respect to the relevant Reference Train Service or Train Service Type identifying allowable overloads for Wagons and bogies and specifying relevant Operational Constraints and additional charges, where applicable, for such overloads.~~

~~**Loading Efficiency Factor** for a loaded Train Service means:~~

- ~~(a) if a loading efficiency factor is not specified in Aurizon Network’s Access Undertaking, 98%; or~~
- ~~(b) if a loading efficiency factor (however described) is specified in Aurizon Network’s Access Undertaking, the loading efficiency factor specified in~~

~~Aurizon Network's Access Undertaking (expressed as a percentage).~~

~~**Net Tonnes** for a Train Service (whether loaded or empty) operated for a Train Service Type means:~~

~~(c) the Gross Tonnes for the Train Service; less~~

~~(d) the sum of:~~

~~(i) for each locomotive comprised in the Train Service, the Maximum Gross Mass for the locomotive;~~

~~(ii) for each Wagon (whether loaded or empty) comprised in the Train Service, the Tare Weight for the Wagon; and~~

~~for all other Rollingstock (whether loaded or empty) comprised in the Train Service, the Tare Weight for the Rollingstock.~~

**Nominal Train Payload** has the meaning given in the Access Undertaking.

**Ntk** for a Train Service (whether loaded or empty) operated for a Train Service Type means the amount which is the Net Tonnes for the Train Service multiplied by:

- (a) if the Train Service was operated from the Origin to Destination for the Train Service Type, the number of kilometres of the loaded distance from Origin to Destination for the Train Service Type as specified in the Train Service Description for that Train Service Type; or
- (b) if the Train Service was operated from the Destination to Origin for the Train Service Type, the number of kilometres of the empty distance from the Destination to Origin for the Train Service Type as specified in the Train Service Description for that Train Service Type.

~~**Operator Access Agreement** has the meaning given in the Access Undertaking.~~

~~**[QCA Levy Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with item 3.9 of this schedule 4 for the Train Service Type and Billing Period.] [Note: The definition of "QCA Levy Charge" may be deleted if the End User is only paying TOP Charges.]**~~

**Reference Train Path** or **RTP** has the meaning given to the term "rtp" in the Access Undertaking.

**Review Date** in respect of a Change in Reference Tariff Provisions means the first day of the Month during which the Change in Reference Tariff Provisions takes effect.

**Schedule 4 Variation Notice** has the meaning given in **item 5.2(a)5.2(a)** of this ~~schedule 4.~~ **Schedule 4.**

~~**Tariff Gtk** in respect of a Train Service Type means has the aggregate of the "gtk" (as defined meaning given in the Access Undertaking) for all coal carrying Network Train Services that are subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type.~~

**TOP Charge:**

- (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, subject to item 5.2 of this Schedule 4, the amount calculated in accordance with item 44 of this ~~schedule 4~~ **Schedule 4** for the Train Service Type and Year.

~~Train Operations Agreement has the meaning given in the Access Undertaking.~~

**1.2 Access Charge Rates definitions**

In this ~~schedule 4~~, **Schedule 4**, a reference to any Access Charge Rate for a Train Service Type means the Access Charge Rate as varied ~~or escalated~~ from time to time in accordance with this Agreement.

**1.3 Final Year of Agreement**

~~In this schedule 4~~ For the purposes of this Schedule 4, if this Agreement does not end on 30 June of any Year, the final Year of this Agreement will be the twelve (12-month) Month period commencing on the 1 July occurring before the date of the expiration or termination of this Agreement and ending on the 30 June occurring after the date of the expiration or termination of this Agreement.

**2 Access Charge Rates**

~~[Where the End User is only paying TOP Charges, delete rows for AT1, AT5, EC and QL]~~

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

Description of Access Charge Rate	Definition	Access Charge Rate (ex GST)	
		\$	Unit
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.]

### 3 ~~Calculations for~~ Calculations for Access Charges ~~Charge~~

#### 3.1 Calculation of Access Charges for Billing Period

The Access ~~Charge~~ Charges for a Billing Period is the sum of each of the following for the Billing Period:

- the Access Charge for each Train Service Type ~~for~~ operated during the Billing Period ~~(as calculated in accordance with item 3.23.2 of this schedule 4 for each Train Service Type for the Billing Period);~~ Schedule 4; and
- the Adjustment Charge (if any) applicable to the Billing Period.

#### 3.2 Calculation of Access Charges for Train Service Type ~~and Billing Period~~

~~[Where the End User is only paying TOP Charges, delete (a), (e), (f), (g) and (i)]~~

The Access ~~Charge~~ Charges for a Train Service Type ~~for a Billing Period is~~ calculated as:

$$\left( AT_1 \times \frac{gtk}{1000} \right) + (AT_2 \times rtp) + \left( AT_3 \times \frac{ntk}{1000} \right) + (AT_4 \times nt) + \left( AT_5 \times \frac{egtk}{1000} \right) + \left( EC \times \frac{egtk}{1000} \right) + (QCALevy \times nt) + TOPCharge$$

where:

- AT<sub>1</sub> is the ~~sum of each of~~ incremental maintenance tariff specified as the AT<sub>1</sub> input in the following Access Charge Rates for the relevant Train Service Type and Billing Period;
- ~~AT<sub>2</sub>~~ is the ~~Incremental Maintenance Charge;~~
- ~~incremental capacity tariff specified as the Incremental Capacity Charge;~~
- ~~(b)~~ AT<sub>2</sub> input in the Allocated Tariff 1 Access Charge; Rates for the relevant Train Service Type;
- ~~the Allocated Tariff 2 Charge;~~
- ~~the Electric Tariff Charge;~~

- (g) ~~the Electric Energy Charge;~~
- (h) ~~the QCA Levy Charge; and~~
- (c) AT<sub>3</sub> is an allocative tariff specified as the AT<sub>3</sub> input in the Access Charge Rates for the relevant Train Service Type;
- (d) AT<sub>4</sub> is an allocative tariff specified as the AT<sub>4</sub> input in the Access Charge Rates for the relevant Train Service Type;
- (e) AT<sub>5</sub> is the electric access tariff specified as the AT<sub>5</sub> input in the Access Charge Rates for the relevant Train Service Type;
- (f) EC is the electric energy charge which is initially (from the Commencing Date) as specified as the EC input in the Access Charge Rates for the relevant Train Service Type, and after the Commencing Date as otherwise published by Aurizon Network on the Website on or about each 31 May during the Term after Aurizon Network seeks and obtains the QCA's approval for a new electric energy charge (taking into account any over or under recovery in the previous Year);
- (g) QCALevy is the QCA levy charge specified as the QL input in the Access Charge Rates for the relevant Train Service Type;
- (+)(h) TOPCharge is, if the Billing Period is a Billing Period ending on 30 June, the TOP Charge for ~~the~~each Train Service Type for the Year in which that 30 June occurs; and

### ~~3.3 Calculation of Incremental Maintenance Charge~~

~~[This item 3.3 (Calculation of gtk, rtp, ntk, nt, egtk is the sum of Incremental Maintenance Charge) may be deleted if the End User is only paying TOP Charges.]~~

- (a)(i) ~~The Incremental Maintenance Charge~~ the gtk, rtp, ntk, nt, egtk, as applicable, for aall Train Service Type Services for athe relevant Train Service Type operated during the relevant Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$\text{IMC} = (\text{AT}_1 \times \text{GTK}) / 1000$$

where:

- IMC = the Incremental Maintenance Charge for the relevant Train Service Type and Billing Period
- AT<sub>1</sub> = AT<sub>1</sub> for the relevant Train Service Type
- GTK = the amount which is the sum of the Gtk for all Train Services for the relevant Train Service Type operated during the relevant Billing Period

### ~~3.4 Calculation of Incremental Capacity Charge~~

~~The Incremental Capacity Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:~~

$$\text{ICC} = \text{AT}_2 \times \text{RTP}$$

where:

- IGC = the Incremental Capacity Charge for the relevant Train Service Type and Billing Period
- $AT_2$  =  $AT_2$  for the relevant Train Service Type
- RTP = the sum of number of Reference Train Paths used by an individual Train Service for that Train Service Type operated during the relevant Billing Period

### **3.5 Calculation of Allocated Tariff 1 Charge**

The Allocated Tariff 1 Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ALT1 = (AT_3 \times NTK) / 1000$$

where:

- ALT1 = the Allocated Tariff 1 Charge for the relevant Train Service Type and Billing Period
- $AT_3$  =  $AT_3$  for the relevant Train Service Type
- NTK = the amount which is the sum of the Ntk for all Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period

### **3.3 Clarification matters for calculation of Access Charges**

- (a) The Access Charge is GST exclusive.
- (b) For clarity, for the purposes of this **Schedule 4**, a Train Service is a one way Train Service, that is, the journey from the Origin to the Destination is one Train Service, and the return journey from the Destination to the Origin is a second Train Service.
- (c) For clarity, to the extent that the calculation of gtk and nt for a Train Service require a weight for the relevant Train or any Rollingstock comprised in that Train, weights may be nominal or actual weights, or a combination of nominal and actual weights provided that, unless otherwise agreed by Aurizon Network:
- (i) any nominal weights will be as set out or calculated in this Agreement; and
- (ii) actual weight will only be used where:
- (A) the gross weight (in tonnes) of loaded or partly loaded wagons needs to be determined;
- (B) there is a functioning weighbridge or weightometer (verified under the *National Measurement Act 1960 (Cth)*) located en route between the origin and destination for the Train Service;
- (C) Aurizon Network has agreed that the weighbridge or weightometer can be used to weigh wagons for the purpose

of calculating Access Charges; and

(D) the relevant wagons can actually be weighed by that weighbridge or weightometer.

## 4 Calculation of ~~Allocated Tariff 2~~ TOP Charge

The ~~Allocated Tariff 2~~ Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ALT2 = AT_4 \times NT$$

where:

ALT2 = the ~~Allocated Tariff 2~~ Charge for the relevant Train Service Type and Billing Period

AT<sub>4</sub> = ~~AT<sub>4</sub>~~ for the relevant Train Service Type

NT = the amount which is the sum of the Net Tonnes for all Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period

### 4.1 ~~Calculation of Electric Tariff Charge~~

~~[This item 3.7 (Calculation of Electric Tariff Charge) may be deleted if the End User is only paying TOP Charges.]~~

The ~~Electric Tariff~~ Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ET = (AT_5 \times eGTK) / 1000$$

where:

ET = the ~~Electric Tariff~~ Charge for the relevant Train Service Type and Billing Period

AT<sub>5</sub> = ~~AT<sub>5</sub>~~ for the relevant Train Service Type

eGTK = the amount which is the sum of the GtK for all electric locomotive hauled Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period

### 4.2 ~~Calculation of the Electric Energy Charge~~

~~[This item 3.8 (Calculation of the Electric Energy Charge) may be deleted if the End User is only paying TOP Charges.]~~

The ~~Electric Energy~~ Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:}]

$$EEC = (EC \times eGTK) / 1000$$

where:



- EEG = the Electric Energy Charge for the relevant Train Service Type and Billing Period
- EC = EC for the relevant Train Service Type
- eGTK = the amount which is the sum of the G<sub>tk</sub> for all electric locomotive-hauled Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period

### 4.3 Calculation of QCA Levy Charge

*[This item 3.9 (Calculation of QCA Levy Charge) may be deleted if the End User is only paying Take or Pay charges]*

The QCA Levy Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$QLC = QL \times NT$$

where:

- QLC = the QCA Levy Charge for the relevant Train Service Type and Billing Period
- QL = QL for the relevant Train Service Type
- NT = the amount which is the sum of the Net Tonnes for all Train Services (loaded and empty) for the relevant Train Service Type operated during the Billing Period

### 4.4 Calculation of Adjustment Charge

Adjustment Charges (if any) for a Billing Period will be calculated and approved in accordance with the Access Undertaking.

## 5 Calculation of TOP Charge

### 5.1 Variables used in formulas in this item 4

If a variable (for example, "ATPY" and "NTSY") used in a formula in this **item 4** of **schedule 4** is defined for that formula, unless provided otherwise, that variable has the same meaning in each other formula in which it is used in this **item 4** of **schedule 4**.

#### 5.24.1 System test Test

- (a) This **item 4.24.1** of **schedule 4** **Schedule 4** only applies to a Train Service Type which has a Reference Tariff Type which is a 'System Reference Tariff' (as defined in the Access Undertaking).
- (b) Subject to **item 4.2(a)** **items 4.1(a) and 5.2** of this **schedule 4**, **Schedule 4**, the TOP Charge for a Train Service Type for a Year will be zero if:

$$TGtkY > (FGtkY - NGtkY)$$

where:

- TG<sub>tk</sub>Y = the Tariff G<sub>tk</sub> for that Train Service Type for the relevant

Year

FGtkY = the Gtk Forecast for the relevant Year

NGtkY = the “gtk” (as defined in the Access Undertaking) not achieved due to the non-operation of Network Train Services (that are subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type) for Aurizon Network Cause for the relevant Year.

Calculation of

### 5.34.2 TOP Charge

(a) ~~Subject to item 4.2 of this schedule 4 (if item 4.2 of this schedule 4 applies), the~~ If the TOP Charge for a Train Service Type for a Year is ~~the amount (expressed in dollars) calculated in accordance with the following formula (provided that, if the amount calculated in accordance with the following formula is less than~~ not zero, ~~as a result of the operation of item 4.1 of this Schedule 4,~~ the TOP Charge for ~~the~~ that Train Service Type for the Year, subject to item 5.2 of this Schedule 4, ~~is calculated as follows:~~

- (i) ~~first, the maximum potential TOP Charge will be zero);~~ calculated based on items 4.2(c) to 4.2(d) of this Schedule 4; and

$$ATP = ATPY - ORA - AHRA - SXRA$$

where:

ATP = ~~the TOP Charge for the relevant Train Service Type and Year~~

ATPY = ~~ATPY for the relevant Train Service Type and Year calculated in accordance with item 4.4 of this schedule 4~~

ORA = ~~ORA for the relevant Train Service Type and Year calculated in accordance with item 4.5 of this schedule 4~~

AHRA = ~~The sum of AHRA for each relevant Operator for the relevant Train Service Type and Year calculated in accordance with item 4.6 of this schedule 4~~

SXRA = ~~SXRA for the relevant Train Service Type and Year calculated in accordance with item 4.7 of this schedule 4~~

### 5.4 Calculation of ATPY

- (ii) ~~ATPY~~ second, that maximum potential TOP Charge will be adjusted by applying each of:

(A) item 4.2(f) (Mine capping); and

(B) item 4.2(g) to (i) (Tariff capping).

as applicable and in that order to determine the actual TOP Charge for that Train Service Type.

~~(a)~~ (b) If the TOP Charge for a Train Service Type for a Year is ~~the amount~~

calculated in accordance with the following formula not zero as a result of the operation of item 4.1 of this Schedule 4, the TOP Charge for that Train Service Type for the Year:

$$\text{ATPY} = \text{AT}_2 * \text{RTP} * (\text{GNTSY} - \text{NNTSY} - \text{NTSY}) + \text{AT}_3 * (\text{GNTKY} - \text{NNTKY} - \text{NTKY}) / 1000 + \text{AT}_4 * (\text{CNTY} - \text{NNTY} - \text{NTY})$$

where:

- ~~AT<sub>2</sub> = AT<sub>2</sub> for the relevant Train Service Type~~
- ~~RTP = the Reference Train Path for the relevant Train Service Type~~
- ~~GNTSY = the number of Train Services for the relevant Train Service Type that the Operator was entitled to operate during the relevant Year~~
- ~~NNTSY = the number of Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause~~
- ~~NTSY = the number of Train Services (loaded and empty) for the relevant Train Service Type that were operated during the relevant Year~~
- ~~AT<sub>3</sub> = AT<sub>3</sub> for the relevant Train Service Type~~
- ~~GNTKY = the sum of the Ntk that would have been determined for the relevant Year had all of the Train Services for the relevant Train Service Type that the Operator was entitled to operate during the relevant Year been operated, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the GNTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Service Description for the relevant Train Service Type~~
- ~~NNTKY = the sum of the Ntk of the Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NNTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Service Description for the relevant Train Service Type~~
- ~~NTKY = the sum of the Ntk for all Train Services for the relevant Train Service Type operated during the relevant Year, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Service Description for the relevant~~

- ~~Train Service Type~~
- ~~AT4 = AT<sub>4</sub> for the relevant Train Service Type~~
- ~~CNTY = the sum of the Nt that would have been determined for the relevant Year had all of the Train Services for the relevant Train Service Type that the Operator was entitled to operate during the relevant Year been operated, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the CNTSY for loaded Train Services for the relevant Train Service Type~~
- ~~NNTY = the sum of the Nt of the Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NNTSY for loaded Train Services for the relevant Train Service Type~~
- ~~NTY = the sum of the Nt for all Train Services for the relevant Train Service Type operated during the relevant Year, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NTSY for loaded Train Services for the relevant Train Service Type~~

### ~~5.5 Calculation of ORA – the ‘mine cap’~~

~~ORA for a Train Service Type for a Year is the amount calculated in accordance with the following formula (if the amount calculated in accordance with the following formula is less than zero, the ORA for the Train Service Type for the Year will be zero):~~

~~$$ORA = XORA \times \frac{(ICCCNTSY_m + ALT1CNTSY_m + ALT2CNTSY_m)}{\sum_o^n (ICCCNTSY_o + ALT1CNTSY_o + ALT2CNTSY_o)}$$~~

~~where:~~

- ~~XORA = for a Train Service Type for a Year is the amount which is the lesser of:~~
- ~~(a) the ATPY for the relevant Train Service Type for the relevant Year; and~~
  - ~~(b) the sum of the ICG<sub>CTS</sub>, ALT1<sub>CTS</sub> and ALT2<sub>CTS</sub> earned by Aurizon Network for Corresponding Train Services for the Train Service Type operated by, or for, a different Access Holder which exceed the number of Corresponding Train Services which that Access Holder was entitled to operate, or have operated for it, during the relevant Year (provided that such amount earned by Aurizon Network has not already been taken into account, or will not be taken into account, in the calculation of “ORA”~~

under a corresponding provision of another Access Agreement)

- ~~ALT1<sub>CTS</sub> = in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>3</sub>”~~
- ~~ALT2<sub>CTS</sub> = in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>4</sub>”~~
- ~~IGC<sub>CTS</sub> = in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>2</sub>”~~
- ~~ALT1<sub>CNTSY</sub> = in respect of a Corresponding Train Service, that part of the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>3</sub>”~~
- ~~ALT2<sub>CNTSY</sub> = in respect of a Corresponding Train Service, that part of the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>4</sub>”~~
- ~~IGC<sub>CNTSY</sub> = in respect of a Corresponding Train Service, that part of the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>2</sub>”~~
- ~~m = the relevant Train Service Type in this Agreement in respect of a Corresponding Train Service where NTSY is less than CNTSY~~
- ~~e = all Corresponding Train Services in other Access Agreements where NTSY is less than CNTSY~~
- ~~CNTSY = as defined in **item 4.4** of this **schedule 4**~~

NTSY = as defined in ~~item 4.4~~ of this ~~schedule 4~~

## ~~5.6 Calculation of AHRA – the ‘operator cap’ for Access Holders~~

~~AHRA for each Operator for the relevant Train Service Type for a Year is the amount calculated in accordance with the following formula (provided that:~~

- ~~(a) if the amount calculated in accordance with the following formula is less than zero, the AHRA for the Train Service Type for the Year will be zero; and~~
- ~~(b) if AHRA for the Train Service Type for the Year exceeds ATPY – ORA for the Train Service Type for the Year, AHRA for the Train Service Type for the Year will equal ATPY – ORA for the Train Service Type for the Year);~~

$$\text{AHRA}_j = (\text{XRVAH}_i - \text{AHORA}) \times \frac{(\text{ATPY}_j - \text{ORA}_j)}{\sum_i^n (\text{ATPY}_i - \text{ORA}_i)}$$

where:

- ~~Relevant Network Train Services = Network Train Services (that are subject to the same type of Reference Tariff as the Reference Tariff Type for the relevant Train Service Type) that the Operator is entitled to operate during the relevant Year under an Operator Access Agreement, a Train Operations Agreement or an Access Holder Access Agreement of which the Operator is a party, in each case, executed after 1 October 2010~~
- ~~XRVAH = the sum of the ICC<sub>i</sub>, ALT1<sub>i</sub> and ALT2<sub>i</sub> earned by Aurizon Network for Relevant Network Train Services operated by the Operator which exceeds the number of Relevant Network Train Services~~
- ~~AHORA = the sum of any ORA amounts calculated under this Agreement or another Access Agreement which are attributable to Corresponding Train Services~~
- ~~ATPY = ATPY for the relevant Train Service Type and Year calculated in accordance with ~~item 4.4~~ of this ~~schedule 4~~~~
- ~~ORA = ORA for the relevant Train Service Type and Year calculated in accordance with ~~item 4.5~~ of this ~~schedule 4~~~~
- ~~ICC<sub>i</sub> = the part of the access charges payable to Aurizon Network in respect of the operation of Network Train Service in grouping i which are calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>2</sub>”~~
- ~~ALT1<sub>i</sub> = the part of the access charges payable to Aurizon Network in respect of the operation of Network Train Service in grouping i which are calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>3</sub>”~~
- ~~ALT2<sub>i</sub> = the part of the access charges payable to Aurizon Network in respect of the operation of Network Train Service in~~

grouping i which are calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT<sub>4</sub>”

- i = either:
- (a) subject to **item 4.8** of this **schedule 4**, the Relevant Network Train Services in a relevant group as nominated in writing by the Operator to Aurizon Network for the purposes of this **item 4.6** of **schedule 4** by 31 May of the relevant Year; or
  - (b) the group of the remaining Relevant Network Train Services not nominated by the Operator under **paragraph (a)**
- j = For each Operator, the relevant Train Services Type for the relevant Year in grouping i

### **5.7 Calculation of SXRA—the ‘tariff cap’**

SXRA for a Train Service Type for a Year is the amount calculated in accordance with the following formula (if the amount calculated in accordance with the following formula is less than zero, the SXRA for the Train Service Type for the Year will be zero):

$$SXRA_k = (TR - AR) \times \frac{(ATPY_k - ORA_k - AHRA_k)}{\sum_p^n (ATPY_p - ORA_p - AHRA_p)}$$

where:

- TR = the sum of the following amounts for the relevant Reference Tariff Type for the relevant Year:
- (c) the sum of the access charges Aurizon Network is entitled to earn from “AT<sub>2.4</sub>” (as defined in the Access Undertaking) under this Agreement or other Access Agreements for coal carrying Network Train Services which were subject to the relevant Reference Tariff Type and operated in the relevant Year;
  - (d) the sum of any “Transfer Fees” or “Relinquishment Fees” (each as defined under the Access Undertaking) applicable to the relevant Reference Tariff Type that Aurizon Network is entitled to earn and which will be included in the calculation of the “Revenue Adjustment Amounts” for “AT<sub>2.4</sub>” (each as defined under the Access Undertaking) for the relevant Year;
  - (e) the amount for “Take or Pay charges” (as defined under the Access Undertaking) for coal carrying Network Train Services that Aurizon Network is entitled to earn under an Access Agreement executed before 30 June 2006 in accordance with those Access Agreements for the relevant Year; and

- (f) ~~ATPY (as defined in this formula below),~~  
~~less~~
- (g) ~~the sum of ORA and AHRA (each as defined in this formula below).~~
- AR = ~~the “Allowable Revenue” for “AT<sub>2-4</sub>” (each as defined in the Access Undertaking) for the relevant Reference Tariff Type for the relevant Year~~
- ATPY = ~~the amount of “ATPY” that Aurizon Network was entitled to earn in relation to coal carrying Network Train Services under this Agreement or other Access Agreements renewed or executed on or after 30 June 2006 for the relevant Year (where “ATPY” is calculated in accordance with the Standard Access Agreement approved as at the date this Agreement or the relevant Access Agreement was renewed or executed)~~
- ORA = ~~the amount of ORA that is calculated under this Agreement and other Access Agreement for coal carrying Network Train Services renewed or executed on or after 1 October 2010 for the relevant Year (where “ORA” is calculated in accordance with the Standard Access Agreement approved at the date that this Agreement or the relevant Access Agreement was renewed or executed)~~
- AHRA = ~~the amount of AHRA that is calculated under this Agreement and other Access Agreements for coal carrying Network Train Services renewed or executed on or after 1 October 2010 for the relevant Year (where “AHRA” is calculated in accordance with the Standard Access Agreement approved at the date that this Agreement or the relevant Access Agreement was renewed or executed)~~
- p = ~~this Agreement and other Access Agreements executed or renewed after 30 June 2006~~
- k = ~~the relevant Train Services Type for the relevant Year~~

## **5.8 ~~End User support for relevant groups~~**

- (a) ~~For the purposes of determining the relevant group “i” in **item 4.6** of this **schedule 4**, the Operator must have, in accordance with item 4.2 of schedule 4 of its Train Operations Agreement:~~
- (i) ~~at the time it nominates the relevant group, confirm to Aurizon Network that the Operator has the End User’s support for the nomination of the relevant group; and~~
- (ii) ~~if requested by Aurizon Network, provide such evidence as reasonably required by Aurizon Network to verify the End User’s support for the nomination of the relevant group.~~
- (b) ~~If the Operator fails to comply with the matters set out in **item 4.8(a)(i)** or **4.8(a)(ii)** of this **schedule 4**, the Operator is deemed not to have made the relevant nomination for the purposes of **paragraph (a)** in determining~~



the relevant group "i" in ~~item 4.6~~ of this ~~schedule 4~~.

## ~~5.9~~ — ~~Entitlement to operate~~

~~Without limiting clause 1.3, for the purpose of any calculations under this schedule 4, an Operator is taken to be entitled to operate all Train Services for a Train Service Type on and from the Train Service Commitment Date for that Train Service Date, even if:~~

- ~~(i) the End User is determined for each Year;~~
- ~~(ii) is invoiced for each Year following completion of that Year; and~~
- ~~(iii) must not be less than zero.~~

~~(c) The maximum potential TOP Charge for a Train Service Type will be calculated as the amount which is 100% of the amount calculated as:~~

$$\frac{(AT_2 \times rtp \times NTS) + \left( AT_3 \times \frac{ntk}{1000} \right) + (AT_4 \times nt)}{1000}$$

~~where:~~

- ~~(i) each of AT2, AT3 and AT4 are the incremental capacity tariffs specified as the AT2, AT3 and AT4 inputs in the Access Charge Rates for the relevant Train Service Type;~~
- ~~(ii) the nt and ntk (as applicable) are calculated by:
  - ~~(A) the aggregate nt and ntk (as applicable) that would have been achieved for the relevant Year had the full contracted entitlement been railed for the relevant Train Service Type; less~~
  - ~~(B) the aggregate nt and ntk (as applicable) not railed for the relevant Year due to the non-operation of Train Services for an Aurizon Network Cause; less~~
  - ~~(C) the aggregate nt and ntk (as applicable) railed for the relevant Year; and~~~~
- ~~(iii) NTS is calculated as:
  - ~~(A) the number of Train Services for the relevant Train Service Type that the Access Holder would have operated for the relevant Year had the full contracted entitlement been railed; less~~
  - ~~(B) the number of those Train Services that either:
    - ~~(1) were not able to be operated solely as a result of an Aurizon Network Cause; or~~
    - ~~(2) were operated (whether loaded or empty) during that Year.~~~~~~
- ~~(d) To calculate nt and ntk for the purpose of **item 4.2(c)(ii)** of this **Schedule 4**, Aurizon Network must:
  - ~~(i) identify the number of Train Services for the relevant Train Service Type that would have operated under this Agreement had the full contracted entitlement been used; and~~~~

(ii) determine the number of Train Services for the relevant Train Service Type that did not operate under that contracted entitlement due to an Aurizon Network Cause, provided that if the Access Holder has more than one Access Agreement for the same origin to destination pair, Aurizon Network will allocate those Train Services as between this Agreement and the other Access Agreements in the order in which those Access Agreements were executed (unless the relevant Access Holder has nominated a different order, in which case that order will be applied),

and calculate the nt and ntk by using the Nominal Train Payload applicable for the relevant Reference Tariff.

(e) For the purpose of calculating TOP Charges, the Access Holder's entitlement to operate Train Services is, without limitation, determined by reference to the Train Services that could have been operated in accordance with this Agreement including even if:

(i) where the Access Holder is not a Train Operator:

(A) the Access Holder has not nominated ~~an~~ a Train Operator to utilise Access Rights relevant to all or any of the Train Services ~~for that Train Service Type;~~

(B) either:

(1) the ~~End User~~ Access Holder must ensure ~~an~~ a Train Operator does not operate; or

~~(1)(2)~~ Aurizon Network suspends the right of the ~~End User~~ Access Holder to have ~~an~~ a Train Operator operate, ~~all or any Train Service for that Train Service Type; or~~

all or any of the Train Services; or

(C) under ~~a~~ the relevant Train Operations Agreement, ~~Deed,~~ either:

(1) the relevant Train Operator must not operate; or

~~(1)(2)~~ Aurizon Network suspends the right of the relevant Train Operator to operate, ~~all or any Train Service for that Train Service Type unless, and to the extent that:~~

all or any of the ~~reason why~~ Train Services; or

(ii) where the Access Holder is a Train Operator, the Access Holder must not operate, or Aurizon Network suspends the right of the Access Holder to operate, all or any of the Train Services,

except to the extent of any express exceptions specified in this Agreement for the purpose of calculating the TOP Charge where the Access Holder is taken to not have an entitlement to operate the relevant Train Service Type.

### Mine capping

(f) If:

- (i) Train Services operated in relation to a Train Service Type in respect of an End User under this Agreement, has not exceeded the Train Service Entitlement in this Agreement; and
- (ii) there is another Access Agreement (excluding Access Agreements executed or renewed prior to 1 October 2010) (**Other Agreement**) with Corresponding Train Services that have been exceeded.

then the TOP Charge under this Agreement will be reduced by the amount of the additional revenue from Access Charges for AT2-4 from those excess Train Services under the Other Agreement but only to the extent that:

- (iii) both that Take or Pay liability and those Access Charges are set by reference to the same Reference Tariff;
- (iv) the additional revenue under the Other Agreement has not been utilised to reduce the Take or Pay liability under another Access Agreement (other than this Agreement or the Other Agreement); and
- (v) the additional revenue from the Other Agreement can only be used for a reduction of TOP Charge under this **item 4.2(f)** of this **Schedule 4**, in respect of the Year in which that additional revenue arose and cannot be accrued, rolled over or otherwise used to reduce a TOP Charge for any other Year.

#### **Tariff capping**

(g) **Item 4.2(h)** of this **Schedule 4**, must only be applied after **item 4.2(f)** of this **Schedule 4**, (if applicable) has been applied.

(h) Subject to **items 4.2(i)**, and to **item 4.2(f)** of this **Schedule 4**, (if applicable) having first been applied, if the Total Actual Revenue (as defined in the Access Undertaking) for AT<sub>2-4</sub> in relation to Access Charges all Access Agreements set by reference to the relevant Reference Tariff for a Train Service Type less the aggregate amount of Tariff Take or Pay (as defined in the Access Undertaking) that Aurizon Network is entitled to earn from all Access Agreements executed or renewed on or after 30 June 2006 (other than any ~~Train Services for that Train Service Type is due to the Operator's failure to comply with clause 10.2(a) of the relevant Train Operations~~ new or varied Access Agreement to the extent entered or varied as part of transferring Access Rights from existing Access Agreements in place on the day immediately prior to 30 June 2006 under a provision of the Access Agreement which permits the transfer of Access Rights) (**Total Revenue**) is:

- (i) greater than or equal to the Allowable Revenue (as defined in the Access Undertaking) for AT<sub>2-4</sub> in relation to the relevant Reference Tariff, the TOP Charge is not payable for that Year under this Agreement for the relevant Train Service Type; or
- (ii) less than the Allowable Revenue (as defined in the Access

Undertaking) for AT<sub>2-4</sub> in relation to the Reference Tariff for the relevant Train Service Type:

(A) Aurizon Network must calculate the aggregate amount of Tariff Take or Pay (as defined in the Access Undertaking) that Aurizon Network is entitled to earn from all Full Take or Pay Agreements (as defined in the Access Undertaking) (Total Actual Take or Pay); and

(B) if the Total Actual Take or Pay exceeds the amount by which the Allowable Revenue for AT<sub>2-4</sub> in relation to the relevant Reference Tariff exceeds the Total Revenue from Access Charges set by reference to the relevant Reference Tariff (Maximum Take or Pay Amount), then:

(1) Aurizon Network will calculate for each relevant Access Holder, the proportion that the Access Holder's Tariff Take or Pay amount bears to the Total Actual Take or Pay (Proportion); and

(2) the TOP Charge will be reduced by an amount equal to the Access Holder's Proportion of the Maximum Take or Pay Amount.

(i) In determining what Aurizon Network would be entitled to earn for the purposes of **item 4.2(h) of Schedule 4**, Aurizon Network is deemed to have contracted on the terms of the relevant Standard Access Agreement (as defined under the Applicable Undertaking) that applied on the date of execution or renewal of an Access Agreement, except for:

(i) those Access Agreements which have been altered by agreement from that form in a manner consistent with the terms of any Approved Undertaking or approval of the QCA, in which case Aurizon Network's entitlement will be calculated in accordance with the terms of such Access Agreements; and

(ii) a New Access Agreement to the extent entered into as part of transferring Access Rights from an Old Access Agreement executed under the 2001 Undertaking, under a provision of the Access Agreement which permits the transfer of Access Rights, in which case Aurizon Network's entitlement to Tariff Take or Pay amounts will be calculated on the basis that Aurizon Network has contracted on the terms of the relevant Standard Access Agreement (as defined under the 2001 Undertaking) that applied on the date of execution of that Old Access Agreement; and

~~the Operator's failure to comply with clause 10~~The capitalised terms used in this **item 4.2(a)** of **Schedule 4** have the meaning given them in the relevant Access Undertaking.

### **4.3 TOP Charge on Expansion Tariff**

(a) This item 4.3 of **Schedule 4** applies if the Access Charge Rates include a rate set by reference to an Expansion Tariff.

(b) The TOP Charge for each Train ~~Operations Agreement~~ Service Type will

be calculated in accordance with:

(i) the formulae in **item 4.2(c) of Schedule 4**; plus

(ii)  $AT_5 \times \text{egtk} / 1000$ ;

where:

AT<sub>5</sub> is the electric access tariff specified as the AT<sub>5</sub> input in the Access Charge Rates for the relevant Train Service Type; and

egtk is calculated by:

(A) the aggregate egtk that would have been achieved for the relevant Year had the full contracted entitlement been railed for the relevant Train Service Type; less

(B) the aggregate egtk not railed for the relevant Year due to the non-operation of that Train Service Type for an Aurizon ~~Network's breach of clause 10.2~~ Network Cause; less

(C) the aggregate egtk railed for the relevant Year; provided always that the amount of TOP Charge for the Year must not be less than zero.

(c) In order to calculate egtk for the purposes of **item 4.3(b)** of ~~the relevant Train Operations Agreement~~ **Schedule 4**, Aurizon Network must:

(i) identify the number of Train Services that would have operated had the full contracted entitlement been used;

(ii) determine the number of Train Services that did not operate under that contracted entitlement due to an Aurizon Network Cause; and

(iii) convert this to egtk by using the Nominal Train Payload for the relevant Reference Tariff as reasonably determined by Aurizon Network.

(d) For clarity:

(i) there is no Take or Pay trigger test, that is **item 4.1 of Schedule 4** does not apply; and

~~(iii)~~(ii) there are no capping mechanisms, that is **items 4.2(f) to 4.2(i) of Schedule 4** do not apply.

## 65 Review of schedule 4

### 6.15.1 Acknowledgment

The Parties agree that **items 22 to 44** of this ~~schedule-4~~ **Schedule 4** were determined by reference to the Reference Tariff Provisions as at:

- (a) if the Train Service Type was a Train Service Type as at the Commencement Date – the Commencement Date; or
- (b) if ~~schedule-2~~ **Schedule 2** was varied to include the Train Service Type – the date ~~schedule-2~~ **Schedule 2** was varied to include the Train Service Type.

## **6.25.2 Review of schedule 4**

- (a) Within 20 Business Days after the Advice Date for a Change in Reference Tariff Provisions, Aurizon Network ~~may~~**must** give the ~~End User~~**Access Holder** a notice (**Schedule 4 Variation Notice**) specifying variations to:
- (i) the Access Charge Rates for any Train Service Type;
  - (ii) the TOP Methodology; and
  - (iii) any other aspect of this ~~schedule~~**Schedule 4**.
- (b) In considering any variations to this ~~schedule 4~~**Schedule 4** under ~~item 5.2(a)~~**5.2(a)** of this ~~schedule 4~~**Schedule 4** as a result of a Change in Reference Tariff Provisions, Aurizon Network must have regard to, ~~amongst any other relevant matters:~~
- ~~(i) any pre-existing differences between the Access Charge Rates and the Reference Tariffs;~~
  - ~~(ii) any increased costs or risk to be incurred by Aurizon Network as a result of the Change in Reference Tariff Provisions;~~
  - ~~(iii)~~**(i)** any change to Reference Tariffs (including new Reference Tariffs);
  - ~~(iv)~~**(ii)** any change to the methodology for calculating take or pay charges under the Access Undertaking;
  - ~~(v)~~**(iii)** any change to the characteristics of the Reference Train Service;
  - ~~(vi)~~**(iv)** any differences between the Train Service Description for a Train Service Type and the characteristics of the Reference Train Service;
  - ~~(vii)~~**(v)** any change to RTP for the Train Service Type or its calculation;
  - ~~(viii)~~**(vi)** other related factors in the Reference Tariff Provisions; and
  - ~~(ix)~~**(vii)** the Access Undertaking.

## **6.35.3 Dispute**

- (a) If Aurizon Network gives the ~~End User~~**Access Holder** a Schedule 4 Variation Notice in respect of a Change in Reference Tariff Provisions, the ~~End User~~**Access Holder** may, within 10 Business Days after Aurizon Network gives the Schedule 4 Variation Notice ~~to the End User~~, give Aurizon Network a Dispute Notice which Disputes the variations specified in the Schedule 4 Variation Notice in accordance with **clause 24.24**.
- ~~(b) If the End User gives Aurizon Network a Dispute Notice referred to in item 5.3(a) 5.3(a) of this schedule 4, then, at the meeting referred to in clause 24.2, the chief executive officers (or their nominees) must negotiate in good faith to attempt to resolve the Dispute.~~
- ~~(c)~~**(b)** If a Dispute referred to in ~~item 5.3(a) of this schedule 4~~**Schedule 4** is not resolved in accordance with ~~clause 24.24.2~~**clause 24.24.2**, then the Parties must refer the Dispute to an Expert to determine the Dispute in accordance with ~~clause 24.324.3~~**clause 24.324.3** and ~~item 5.4 of this schedule~~**Schedule 4**.

~~(d)~~(c) If the End User Access Holder does not give Aurizon Network a Dispute Notice referred to in ~~item 5.3(a) of this schedule 4~~item 5.3(a) of this Schedule 4 within the time referred to in ~~item 5.3(a) of this schedule 4~~item 5.3(a) of this Schedule 4, then:

- (i) the variations specified in the Schedule 4 Variation Notice will take effect on the Review Date for relevant the Change in Reference Tariff Provisions;
- (ii) the End User Access Holder must not give Aurizon Network a Dispute Notice Disputing the variations specified in the Schedule 4 Variation Notice;
- (iii) any such Dispute Notice which is given by the End User Access Holder will be of no effect; and
- (iv) the End User Access Holder must not make any Claim against Aurizon Network in respect of that Dispute.

#### **6.45.4 Expert determination**

If a Dispute referred in ~~item 5.3(a)~~item 5.3(a) of this ~~schedule 4~~Schedule 4 is referred to an Expert, then:

- (a) promptly after the date the Dispute is referred to the Expert, Aurizon Network must provide the Expert with documentation to support the variations specified in the Schedule 4 Variation Notice;
- (b) the Expert must:
  - (i) undertake to keep confidential all matters coming to its knowledge by reason of the Expert's appointment and performance of its duties, other than that already in the public domain; and
  - (ii) not include such information in its reasons for reaching the determination;
- (c) the Expert must review the documentation provided by Aurizon Network under ~~item 5.4(a)~~item 5.4(a) of this ~~schedule 4~~Schedule 4 and determine whether or not the variations specified in the Schedule 4 Variation Notice are ~~reasonable as a result of~~consistent with the Access Undertaking and the relevant Change in Reference Tariff Provisions;
- (d) if the Expert determines that the variations specified in the Schedule 4 Variation Notice are ~~reasonable as a result of~~consistent with the Access Undertaking and the relevant Change in Reference Tariff Provisions, the variations will take effect on the Review Date for the relevant Change in Reference Tariff Provisions;
- (e) if the Expert determines that the variations specified in the Schedule 4 Variation Notice are not ~~reasonable as a result of~~consistent with the Access Undertaking and the relevant Change in Reference Tariff Provisions, then:
  - (i) the Expert must use reasonable endeavours to attempt to reach agreement with Aurizon Network as to, and failing such agreement must determine, the variations to this ~~schedule~~Schedule 4 which are reasonable as a result of the relevant Change in Reference Tariff Provisions, having regard to:

- (A) the matters specified in ~~item 5.2(b)~~5.2(b) of this ~~schedule 4~~Schedule 4; and
  - (B) any other matters which a Party submits that the Expert should have regard to in determining the Dispute.
- (ii) the variations agreed between the Expert and Aurizon Network, or determined by the Expert, in accordance with ~~item 5.4(e)(i)~~5.4(e)(i) of this ~~schedule 4~~Schedule 4 will take effect on the Review Date for the relevant Change in Reference Tariff Provisions.
- (f) Despite ~~clause 24.3(i)~~24.3(j), the costs of the Expert (and the costs of any advisers to the Expert) will be borne by:
- (i) the ~~End User~~Access Holder if the Expert determines that the variations specified in the Schedule 4 Variation Notice are reasonable as a result of the relevant Change in Reference Tariff Provisions;
  - (ii) Aurizon Network if the Expert determines that the variations specified in the Schedule 4 Variation Notice are not reasonable as a result of the relevant Change in Reference Tariff Provisions; or
  - (iii) in such other proportion as the Expert may otherwise determine.

## ~~7~~ Escalation of Access Charge Rates

### ~~7.1~~ Escalation

- (a) ~~Subject to item 6.1(b) of this schedule 4, the Access Charge Rates (except for QL) and any other charges under this Agreement will be varied on each Escalation Date, in accordance with the following formula:~~

$$ACR_n = ACR_{n-1} * CPI_n / CPI_{n-1}$$

where:

~~ACR<sub>n</sub> means the varied value of the relevant Access Charge Rate or other charge;~~

~~ACR<sub>n-1</sub> means the value of the relevant Access Charge Rate or other charge immediately prior to the relevant Escalation Date;~~

~~CPI<sub>n</sub> means the Consumer Price Index Brisbane (Australian Bureau of Statistics Publication No.6401.0), as first published, for the Quarter the midpoint of which is six months prior to the midpoint of the Quarter commencing on the relevant Escalation Date for which the variable ACR<sub>n</sub> is being determined; and~~

~~CPI<sub>n-1</sub> means the Consumer Price Index Brisbane (Australian Bureau of Statistics Publication No.6401.0), as first published, for the Quarter the midpoint of which is 18 months prior to the midpoint of the Quarter commencing on the relevant Escalation Date for which the variable ACR<sub>n</sub> is being determined.~~



~~(b) — An Access Charge Rate will not be varied on an Escalation Date under **item 6.1(a)** of this **schedule 4** if, within the 12 months prior to the relevant Escalation Date, the Reference Tariff(s) for the 12 months commencing on the Escalation Date which are applicable to the Access Charge Rate have been escalated to take account of the annual change in the consumer price index and/or any other applicable price index.~~

## ~~7.2 — Review of index~~

~~(a) — If a Party is of the reasonable opinion that the index used in the formula in **item 6.1** of this **schedule 4** is no longer suitable because:~~

~~(i) — it ceases to be published; or~~

~~(ii) — it ceases to be published at sufficiently regular intervals, or is likely to cease to be published at sufficiently regular intervals, for the purpose of the formula in **item 6.1** of this **schedule 4**; or~~

~~(iii) — the method of calculation of the index changes in a material way from the method applicable as at the Commencement Date (or the date the index was last varied under this **item 6.2** of this **schedule 4**),~~

~~then that Party may notify the other Party of its opinion that the index is no longer suitable.~~

~~(b) — If a Party gives a notice to the other Party under **item 6.2** of this **schedule 4**, the Parties must negotiate in good faith to attempt to agree to vary the application of the index or to adopt an alternative index and failing agreement within 30 Business Days of such notice being given, then the matter must be referred to an Expert to determine a variation to the application of the index or an alternative index in accordance with **clause 24.3**.~~

~~(c) — If the dispute is resolved after the next Escalation Date, the Parties agree to retrospectively adjust any Access Charges invoiced since that date to be consistent with the outcome of the dispute resolution.~~

# Schedule 5

Insurance

## Schedule 5 – Insurance

### 1 Workers compensation insurance

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

~~Schedule 6~~

Schedule 6 ~~Suspension Events and Termination Events~~

## – Suspension Events and Termination Events

Item	Suspension Event	Termination Event
1	The <del>End User</del> <u>Access Holder</u> 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default- <u>(and always subject to clause 5.4).</u>	The <del>End User</del> <u>Access Holder</u> 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default- <u>(and always subject to clause 5.4).</u>
2	An Insolvency Event occurs in respect of the <del>End User</del> <u>Access Holder</u> .	An Insolvency Event occurs in respect of the <del>End User</del> <u>Access Holder</u> and continues for a period of at least 40 Business Days.
3	The <del>End User</del> <u>Access Holder</u> fails to: (a) effect or maintain the insurances required under <b>clause 19.219.2</b> ; or (b) provide evidence of the insurances required under <b>clause 19.219.2</b> having been effected and maintained, and such default continues for at least five Business Days after Aurizon Network <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.	The <del>End User</del> <u>Access Holder</u> fails to: (a) effect or maintain the insurances required under <b>clause 19.219.2</b> ; or (b) provide evidence of the insurances required under <b>clause 19.219.2</b> having been effected and maintained, and such default continues for at least 20 Business Days after Aurizon Network <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.
4	The <del>End User</del> <u>Access Holder</u> 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.	The <del>End User</del> <u>Access Holder</u> 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.
5	The <del>End User</del> <u>Access Holder</u> purports to Assign any of its rights or interests in this Agreement other than as permitted in this Agreement.	The <del>End User</del> <u>Access Holder</u> purports to Assign any of its rights or interests in this Agreement other than as permitted by this Agreement.
6	The <del>End User</del> <u>Access Holder</u> fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the <del>End User</del> <u>Access Holder</u> , 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.	The <del>End User</del> <u>Access Holder</u> fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the <del>End User</del> <u>Access Holder</u> , 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 <del>gives</del> <u>notifies</u> the <del>End User</del> <u>Access Holder</u> of the default.



|

Schedule 7~~Schedule 7~~ – Pro forma Access  
Interface Deed



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[Aurizon Network Pty Ltd](#)

---

[\[Insert Customer\]](#)

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# [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 (**Aurizon Network**)

[insert] of [insert address] (Customer)

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## Background

A Aurizon Network and the Access Holder are parties to the Access Agreement.

AB Aurizon Network and the Access Holder (in its capacity as the 'Operator' under the Train Operations Deed) are also parties to the Train Operations Deed.

## ~~Pro forma Train Operations Agreement~~

C ~~[Insert Standard Train Operations]~~ The Access Holder (in its capacity as 'Operator') and the Customer are parties to the Rail Haulage Agreement ~~as~~.

D In accordance with the Access Agreement, the Parties enter into this Deed to create a contractual relationship between Aurizon Network 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 Agreement** means the Access Agreement [insert] between Aurizon Network and the Access Holder dated on or about the date of this Deed, as amended from time to time.

**Access Agreement Liability Provisions** has the meaning given in clause 2.4(a).

**Access Holder** means [insert].

**Access Rights** means rights of access granted by Aurizon Network to the Access Holder under the Access Agreement.

**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) as in force at the time of entering into the Access Agreement.

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

**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) in respect of a breach of this Deed, loss or damage that does not naturally, according to the usual course of things, arise from the breach, but Consequential Loss does not include any of the following Claims to the extent that the applicable 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.

**Financial Obligation** means any obligation of the Customer to pay, or cause to be paid, an amount of money.

**Haulage Services** means the haulage services provided by the Access Holder 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.

**Joint Venture** means the unincorporated joint venture (if any) between the JV Participants specified in Item 2 of Schedule 1.

**JV Participants** means the entities (if any) specified in Item 3 of Schedule 1.

**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 Access Holder and the Customer for the provision of rail haulage services to the Customer and for which purpose the Access Holder 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 Aurizon Network, 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; or
  - (ii) the Customer's mine or other production facility (if any) or any loading or unloading facility to which the Haulage Services relate.

## **1.2 Definitions in the Access Undertaking**

Words or expressions which are used and not defined in this Deed, but are defined in the Access Undertaking have the meaning given to them in the Access Undertaking.

## **1.3 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) subject to **clause 5**, 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.

## **1.4 Headings**

Headings do not affect the interpretation of this Deed.

# **2 Relations between the Parties**

## **2.1 No liability for Consequential Loss**

A Party (**first Party**) is not liable to the other Party, and the other Party must not make any Claim against the first Party under or in connection with this Deed, 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 this Deed, 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 for personal injury and property damage and duty to mitigate**

(a) Subject to **clauses 2.1 and 2.4**, each Party (indemnifying 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 due to or arising out of the Access Agreement or this Deed in respect of:

- (i) any loss of or damage to or destruction of property (including property of the other Party); or
- (ii) personal injury to or death of any person,

in each case caused by or (to the extent of the contribution) contributed to by:

- (iii) the wilful default; or
- (iv) any deliberate or negligent act or omission of,

the indemnifying Party or the directors or Staff of the indemnifying Party in connection with this Deed, the Access Agreement or the Access Rights.

## **2.3 Extent of Aurizon Network's liability to Customer for non-**

## Consequent Loss

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

### 2.4 Exclusions of liability in Access Agreement apply

- (a) 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, Aurizon Network or the Access Holder (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) (**Access Agreement Liability Provision**) will also operate to regulate, exclude or limit:
- (i) the liability of Aurizon Network or the Customer (as applicable); and
  - (ii) the making of a Claim against, Aurizon Network or the Customer (as applicable) by the other Party under or in connection with this Deed or the Access Agreement,
- on the basis that all references to the Access Holder in the Access Agreement Liability Provisions will be deemed to include a reference to the Customer (unless **clause 2.4(b) or 2.4(c)** applies).
- (b) If an Access Agreement Liability Provision refers to or requires the Access Holder or Aurizon Network and the Access Holder to agree anything:
- (i) the matter to be agreed solely relates to the Claim or subject of the Claim by the Customer; and
  - (ii) the matter has not, before the Claim is first notified to the other Party, been agreed by Aurizon Network and the Access Holder,
- the reference to, or requirement for, the agreement of the Access Holder or the Access Holder and Aurizon Network in the Access Agreement Liability Provision (as applied under **clause 2.4(a)**) is to be read as if it was a reference to the agreement of the Customer or the agreement of the Customer and Aurizon Network (as applicable).
- (c) If:
- (i) an Access Agreement Liability Provision refers to or requires the Access Holder or Aurizon Network and the Access Holder to agree anything;
  - (ii) the matter to be agreed relates (solely or partly) to the Claim or subject of the Claim by the Customer; and
  - (iii) the matter has, before the Claim is first notified to the other Party, been agreed by Aurizon Network and the Access Holder,
- the Access Agreement Liability Provision (as applied under **clause 2.4(a)**) must be read subject to the matter as agreed by Aurizon Network and the Access Holder.
- (d) The Customer acknowledges that it has been provided with a copy of the Access Agreement Liability Provisions by the Access Holder.



(e) For the avoidance of doubt, nothing in this **clause 2.4** operates to make the Customer liable or to increase any otherwise existing liability, or to entitle Aurizon Network to make any Claim against the Customer, for or to satisfy (whether in full or in part) any liability or obligation of the Access Holder or any act or omission of the Access Holder, its directors or Staff.

## **2.5 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 **clause 2** applies.

## **2.6 Acceptance of benefit**

To the extent that the Rail Haulage Agreement or the Access Holder's (in its capacity as 'Operator') conditions of carriage with the Customer includes any exclusion or limitation of liability for Aurizon Network's benefit, this **clause 2.6** constitutes Aurizon Network's notice to the Customer of Aurizon Network's acceptance of the benefit of any such exclusion or limitation of liability for the purposes of ~~the Aurizon Network Access Undertaking at the time of execution of the End User Access Agreement.~~ section 55 of the *Property Law Act 1974* (Qld).

## **2.7 No effect on other arrangements**

Nothing in this Deed, including **clauses 2.1, 2.3 and 2.4**, will operate to limit, exclude or qualify any liability or obligation of:

- (a) one Party to the other Party arising under or in connection with any agreement or deed (other than this Deed) to which Aurizon Network and the Customer are parties, whether alone or together with one or more other persons; or
- (b) any liability or obligation of the Access Holder (in its capacity as 'Operator') to the Customer arising under or in connection with the Rail Haulage Agreement or the Haulage Services.

## **2.8 General provisions regarding indemnities**

- (a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the Parties.
- (b) It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity in this Deed.

## **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 GST

- (a) In this **clause 4.5**:
  - (i) words and expressions which are not defined in this Deed but which have a defined meaning in GST Law have the same meaning as in the GST Law;
  - (ii) GST Law has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.
- (b) If GST is or will be imposed on a supply made under or in connection with this Deed by a Party (Supplier), the Supplier may, to the extent that the consideration otherwise provided for that supply is not stated to include an amount in respect of GST on the supply:
  - (i) increase the consideration otherwise provided for that supply under this Deed by the amount of that GST; or
  - (ii) otherwise recover from the recipient of the supply the amount of that GST.

(c) Subject to **clause 4.5(d)**, the recipient of the supply will pay the amount referred to in **clause 4.5(b)** in addition to, and at the same time that, the consideration for the supply is to be provided under this Deed.

(d) The Supplier must deliver a tax invoice to the recipient of the supply before the Supplier is entitled to payment of any amount under **clause 4.5(b)**.

#### **4.6 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.

#### **4.7 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.

#### **4.8 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.

#### **4.9 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.

#### **4.10 Liability**

Subject to **clause 5**, an obligation of two or more persons binds them separately and together.

## 5 JV Participants and liability

### 5.1 Applicability

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

### 5.2 Warranty

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

### 5.3 JV Participants and percentage interests

- (a) The percentage interest of the JV Participants in the Joint Venture will be as notified by the Customer to Aurizon Network from time to time.
- (b) As at the date the Customer executes and delivers this Deed, the respective percentage interests of the JV Participants in the Joint Venture are as specified in Item 3 of Schedule 1.

### 5.4 Liability of JV Participants

- (a) The liability of each JV Participant under this Deed will subject to **clause 5.4(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 Deed that are not Financial Obligations.
- (c) Subject to **clause 5.4(e)**, if a JV Participant is in default of a Financial Obligation and the Customer has not given notice to Aurizon Network identifying the defaulting JV Participant within 5 Business Days after the date Aurizon Network notifies the Customer 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 Customer under **clause 5.4(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 the Financial Obligation is a payment obligation which does not have a specified due date, then **clause 5.4(c)** comes into effect only if:
  - (i) Aurizon Network notified 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 5.4(e)(i)**.

**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 .....

# Schedule 1

## Joint Venture

<u>1</u>	<u>Does clause 5.4 apply?</u>	<u>[yes/no]</u>
<u>2</u>	<u>Name of Joint Venture</u>	<u>[insert name of Joint Venture or "Not Applicable" if no Joint Venture]</u>
<u>3</u>	<u>JV Participants and percentage interests</u>	<u>Name of JV Participant</u> <u>Percentage Interest</u> <u>[insert name] [insert interest]%</u> <u>[insert name] [insert interest]%</u> <u>[insert name] [insert interest]%</u>