

The QRC's Part 4 Mark-up

Part 4: Negotiation Framework

4.1 Overview

- (a) The granting of Access will be underpinned by an Access Agreement that will be developed and finalised as part of the negotiation framework.
- (b) **Part 4** addresses the process by which a prospective Access Seeker may apply for, negotiate and develop an Access Agreement. In particular, under **Part 4**:
 - (i) a prospective Access Seeker may obtain Preliminary Information prior to submitting an application for Access from the Website or, if Capacity Information is required, by lodging a request with Aurizon Network (**clause 4.2**).
 - (ii) an Access Application by an Access Seeker must be provided in the appropriate form. By submitting an Access Application the Access Seeker agrees to be bound by this Undertaking. Aurizon Network will provide notice of any incorrectly completed sections or missing information and may request additional evidence regarding the use of Access Rights and to assess Capacity Allocation (**clause 4.3**).
 - (iii) Aurizon Network will provide an Acknowledgement Notice and confirm preparation of an IAP once additional information or a properly completed Access Application is received. In specified circumstances the negotiation process may be suspended (**clause 4.4**).
 - (iv) Aurizon Network will develop an appropriate IAP for the Access Rights sought. The Access Seeker may notify Aurizon Network regarding concerns about the IAP (**clause 4.6**).
 - (v) an Access Seeker must provide notification to Aurizon Network if it intends to progress its Access Application, based on the arrangements within the IAP (**clause 4.7**).
 - (vi) where multiple Access Applications for the same Access Rights are made, **clause 4.8** provides a mechanism for determining who shall be treated as the Access Seeker. In these circumstances, Aurizon Network may disclose certain information without breaching its confidentiality obligations (**clause 4.8**).
 - (vii) The Negotiation Period commences once the notification of intent to progress an Access Application is provided by the Access Seeker. Specific issues are to be addressed during the Negotiation Period. Aurizon Network may provide Additional Information to the Access Seeker (**clause 4.10**).
 - (viii) Aurizon Network may issue a Negotiation Cessation Notice to an Access Seeker in certain circumstances (**clause 4.12**).
- (c) A diagrammatic representation of the negotiation framework is set out in **schedule H**.
- (d) **Part 4** must be read in conjunction with the processes outlined in **Part 7** and **Part 8**.
- (e) Any Dispute regarding a decision made or notice given by Aurizon Network under this **Part 4** must be referred to the QCA and notified to Aurizon Network

within ten (10) Business Days after the Access Seeker or Train Operator receives notice of Aurizon Network's decision or notice.

- (f) The time between the issuing of a dispute notice and the date of the finding (or such longer time as may be determined by the QCA in the resolution of the Dispute) will be added to the original period of negotiation for the purpose of determining the nine (9) Month period referred to in **clause 4.10.1(c)(iv)(A)** or **4.10.1(f)(iv)**, as applicable.

4.2 Initial enquiries

- (a) Prior to submitting an Access Application, a prospective Access Seeker may meet with Aurizon Network to discuss the Access Application process and to seek clarification of the process as outlined in this Undertaking.
- (b) Aurizon Network must promptly provide prospective Access Seekers with information regarding the Access Application process. All Preliminary Information and the application form(s) for Access Applications must be displayed on the Website.
- (c) A prospective Access Seeker may lodge a request for Capacity Information with Aurizon Network and Aurizon Network must provide that Capacity Information within ten (10) Business Days after receiving that request.
- (d) Aurizon Network must keep the Preliminary Information and the Capacity Information current and accurate.

4.3 Access Application

- (a) Requests for Access must be submitted to Aurizon Network in the form of an Access Application.
- (b) By submitting an Access Application the Access Seeker agrees to be bound by all the provisions of this Undertaking as they relate to Access Seekers.
- (c) If applicable, Aurizon Network must, within ten (10) Business Days after receipt of a purported Access Application, notify the Access Seeker that:
 - (i) the purported Access Application has not been properly completed and specify the information required to make the application complete and compliant; or
 - (ii) Aurizon Network requests more evidence or information, to the extent reasonably required;
 - (A) regarding the Access Seeker's ability to utilise the requested Access Rights (on the basis of the factors listed in **clause 4.12(c)**); or
 - (B) to assess [Capacity allocation related issues] and to prepare an IAP. **[Note: referring to "Capacity related issues" is broad and unclear. We consider this should be defined by reference to the relevant parts of Part 7 and if applicable, Part 8.]**
- (d) A person receiving a notice under **clauses 4.3(c)(i)** or **4.3(c)(ii)** must provide the revised Access Application, the requested evidence or information or a notice that satisfies the Non-availability Requirements within twenty (20) Business Days of Aurizon Network's notice or request, as applicable, or such other period as may be agreed.
- (e) If the revised Access Application, evidence or information or notice satisfying the Non-availability Requirements referred to in **clause 4.3(d)** is not provided to Aurizon Network within the required time period, Aurizon Network may notify the relevant person that Aurizon Network will take no further action in relation

to the request for Access and that the request for Access is deemed to be withdrawn. A notice under this **clause 4.3(e)** does not prevent a person from submitting a new request for Access.

- (f) Without otherwise affecting Aurizon Network's discretion to give a notice under **clause 4.3(e)**, Aurizon Network must provide notice to the relevant person that it will not take any further action in relation to a request for Access if that request for Access relates to a Transfer and the evidence referred to in **clause 6(f)** of **schedule B** has not been provided.
- (g) A person does not fail to comply with a request under **clause 4.3(c)** if the Non-availability Requirements are satisfied.

~~**[Note: A Railway Operator should only be able to apply for access where supported by an identified Customer.]**~~

[Note: To ensure a Customer on whose behalf an access application is being submitted is aware of that access application, the QRC recommends adopting clause 4.3(h) and (i) of the "Part 4 Mark-up" included in the QRC's October 2014 Submission.]

4.4 Acknowledgement of Access Application

- (a) Within ten (10) Business Days of:
 - (i) receiving a properly completed Access Application; or
 - (ii) any further evidence or information requested under **clause 4.3(c)** (or a notice satisfying the Non-availability Requirements),whichever is the later, Aurizon Network will give the relevant Access Seeker a notice (**Acknowledgement Notice**):
 - (iii) acknowledging receipt of the Access Application;
 - (iv) confirming that Aurizon Network will prepare an IAP for the requested Access; and
 - (v) confirming the date Aurizon Network received the later of the properly completed Access Application or any further evidence or information requested under **clause 4.3(c)** (or a notice satisfying the Non-availability Requirements), as applicable.
- (b) Subject to confirmation under the Acknowledgement Notice:
 - (i) the Access Seeker's Access Application will be deemed to have been received for the purposes of this Undertaking; and
 - (ii) if relevant, the Access Seeker will be deemed to have joined the Queue in respect of the Access Rights sought,on the later of the date the Access Seeker:
 - (iii) submits a properly completed Access Application;
 - (iv) provides any further evidence or information requested under **clause 4.3(c)(ii)** to Aurizon Network (or provides a notice satisfying the Non-availability Requirements); or
 - (v) notifies Aurizon Network under **clause 4.4(c)(ii)**.
- (c) If an Access Application is received by Aurizon Network which is, in part, for Access Rights which cannot be provided in the absence of an Expansion and:
 - (i) Aurizon Network can satisfy part of the Access Rights sought by the Access Seeker without an Expansion, then Aurizon Network will notify

- the Access Seeker of the portion of the Access Rights being sought which can be provided without an Expansion within ten (10) Business Days after receipt of the Access Application; and
- (ii) the Access Seeker notifies Aurizon Network it requires the Access Application to be separated, then:
 - (A) the Access Rights that can be provided without an Expansion will be deemed to be the subject of one Access Application made on the date of the Access Seeker's notice under this **clause 4.4(c)(ii)**;
 - (B) the Access Rights that can be provided only with an Expansion will be deemed to be the subject of a second Access Application made on the date of the Access Seeker's notice under this **clause 4.4(c)(ii)**;
 - (C) the separation of the Access Application into two Access Applications will occur automatically and without reference to the process under **clause 4.5**; and
 - (D) **clause 4.4(b)** applies to both Access Applications.
- (d) If an Access Application is received by Aurizon Network and:
- (i) Aurizon Network cannot satisfy any part of the Access Rights sought by the Access Seeker without an Expansion;
 - (ii) on receipt of a notice under **clause 4.4(c)(i)** the Access Seeker notifies Aurizon Network it requires the Access Application to be treated as one application for all Access Rights sought; or
 - (iii) on receipt of a notice under **clause 4.4(c)(i)**, an Access Application for Access Rights that requires an Expansion is deemed to be lodged in accordance with **clause 4.4(c)(ii)(B)**,
- then:
- (iv) **clauses 8.2 to 8.10** will apply;
 - (v) the negotiation process for Access can be suspended (before or after the provision of an IAP) by either Aurizon Network or the relevant Access Seeker giving notice to the other (provided that a notice given under this clause must give reasons for the suspension); and
 - (vi) a suspension of the negotiation process under **clause 4.4(d)(v)** continues until either:
 - (A) Aurizon Network and the Access Seeker have agreed on [how an Expansion is to be funded in accordance with **clause 8.8**]; or **[Note: consider referencing capacity from an Expansion that Aurizon Network is contractually committed to construct and where that contractually committed capacity is capable of providing the Access Rights sought by the Access Seeker.]**
 - (B) a determination of a relevant Dispute specifies what Expansion is required and how that Expansion is to be funded; or
 - (C) Aurizon Network and the Access Seeker agree to restart or continue negotiations for Access in parallel with any negotiations over funding of the required Expansion.
- (e) If an Access Application is received by Aurizon Network and Aurizon Network considers (acting reasonably) that the Capacity is constrained, it must advise the Access Seeker and provide reasons why such constraint cannot be mitigated except through an Expansion.

- (f) Where a Provisional Capacity Allocation (as defined under **clause 8.5(b)(ii)**) has been granted to an Access Seeker, Aurizon Network may, acting reasonably and in good faith, suspend negotiations with other Access Seekers for [corresponding Access Rights] pending the outcome of negotiations with the holder of the Provisional Capacity Allocation. **[Note: “corresponding Access Rights” is unclear and uncertain. It may be clearer to describe this by reference to Access Rights that cannot be provided (without an Expansion) if the PCA proceeds and an Access Agreement is executed.]**
- (g) Subject to **clause 4.4(c)**, if Aurizon Network receives an Access Application for Access Rights which commence on a date more than five years after the date on which the relevant Access Application would be deemed to have been received by Aurizon Network under **clause 4.4(b)**, then Aurizon Network may reject the Access Application. Rejection of the Access Application does not restrict the relevant Access Seeker from submitting a new Access Application for the same Access Rights at a later date.
- (h) Where Aurizon Network notifies an Access Seeker that Aurizon Network is rejecting the Access Seeker’s Access Application under **clause 4.4(g)** (**Rejection Notice**):
- (i) the rejection will take effect ten (10) Business Days after Aurizon Network gives the Rejection Notice; and
 - (ii) all time periods and obligations relating to the Access Application are suspended.
- (i) When Aurizon Network suspends the negotiation process in accordance with **clause 4.4(d)**, Aurizon Network:
- (i) may request at intervals not more than every six (6) Months that the Access Seeker confirm, in writing:
 - (A) the Access Seeker’s ongoing requirement for the Access Rights;
 - (B) the reasonable likelihood that the Access Seeker will be able to utilise the requested Access Rights at the proposed date of commencement of those Access Rights (on the basis of the factors listed in **clause 4.12(c)**) and provide any relevant information or evidence requested by Aurizon Network (acting reasonably); and
 - (C) any material change to the information contained in their Access Application or provided in respect of the matters referred to in **clause 4.3(d)**; and
 - (ii) must within 10 Business Days of becoming aware of a change, inform the Access Seeker in writing of any changes to an Expansion that will impact the Access Seeker’s Access Application.
- (j) If the document or information referred to in **clause 4.4(i)(i)** is not provided to Aurizon Network within twenty (20) Business Days of Aurizon Network’s request, Aurizon Network may notify the relevant person that Aurizon Network will take no further action in relation to the request for Access and that the request for Access is deemed to be withdrawn. A notice under this **clause 4.4(j)** does not prevent a person from submitting a new request for Access.
- (k) The Access Seeker does not fail to comply with a request under **clause 4.4(i)(i)** if the Non-availability Requirements are satisfied.

4.5 Revisions to an Access Application

- (a) An Access Seeker may by written request to Aurizon Network (acting reasonably and in good faith) vary its Access Application at any time after receipt of an Acknowledgement Notice in accordance with this **clause 4.5**.
- (b) If the requested variation to the Access Application is not a Material Variation, then the Access Application is varied as requested by the Access Seeker and the process under this Undertaking for the Access Application will continue provided that:
 - (i) where a variation under **clause 4.5(a)** is received prior to Aurizon Network giving an IAP to the relevant Access Seeker; and
 - (ii) Aurizon Network has already commenced preparing the IAP,Aurizon Network may, by notice to the Access Seeker, extend the date by which it must give the IAP to the Access Seeker by a period of no more than five (5) Business Days.
- (c) If Aurizon Network considers a requested variation is a Material Variation, then Aurizon Network must, within ten (10) Business Days of receipt of the proposed variation under **clause 4.5(a)**, give notice to the Access Seeker of:
 - (i) its reasons for considering the variation is a Material Variation;
 - (ii) the extent to which it is possible to separate the Access Application (as varied) so that one Access Application may proceed without containing a Material Variation;
 - (iii) the extent to which the Material Variation causes or contributes to the Access Application relating to Access Rights which cannot be provided in the absence of an Expansion and the extent that Available Capacity exists which can satisfy part of the Access Rights sought by the Access Application with the proposed Material Variation; and
 - (iv) the date by when Aurizon Network (acting reasonably) estimates that it will issue an IAP or revised IAP (as applicable) to accommodate the Material Variation.
- (d) If, within five (5) Business Days after receipt of a notice under **clause 4.5(c)**, the Access Seeker:
 - (i) notifies Aurizon Network that it wishes to continue with the Material Variation, subject to **clause 4.5(e)**, Aurizon Network will use reasonable endeavours to accommodate the Material Variation including by issuing an IAP or a revised IAP (as applicable) in accordance with this **clause 4.5** within a reasonable time following receipt of any information requested under **clause 4.5(f)(ii)** and having regard to all relevant circumstances including:
 - (A) the nature and extent of the Material Variation; and
 - (B) the effect that the Material Variation has or would have had on any processes already carried out, or to be carried out, by Aurizon Network or the Access Seeker in accordance with this **Part 4** (including the extent of inconsistency with any parameters or other information upon which a relevant Capacity Analysis has been based) or any other provision of this Undertaking;
 - (ii) notifies Aurizon Network that it requires the Access Application to be separated (so that one Access Application may proceed without a Material Variation), then:

- (A) in respect of the Access Rights that can be provided without being a Material Variation, the Access Application will be taken to be varied to that extent and the process under this Undertaking for that Access Application will continue in accordance with **clause 4.5(b)**; and
 - (B) the Access Rights that cannot be provided without a Material Variation will be deemed to be the subject of a second Access Application and the process set out in **clause 4.5(d)(i)** will apply; or
- (iii) either:
- (A) notifies Aurizon Network that it does not wish to continue with any variation to the Access Application; or
 - (B) does not give Aurizon Network a notice under this **clause 4.5(d)**,
- then the Material Variation is deemed to be withdrawn and negotiations for Access Rights outlined in this **Part 4** will proceed without the Material Variation.
- (e) If a Material Variation causes or contributes to the Access Application relating to Access Rights which cannot be provided in the absence of an Expansion and the Access Seeker notifies Aurizon Network that it wishes to continue with the Material Variation under **clause 4.5(d)(i)**, then:
- (i) to the extent that Available Capacity exists which can satisfy part of the Access Rights sought by the Access Application with the proposed Material Variation, the IAP or revised IAP (as applicable) to be prepared under **clause 4.5(d)(i)** will be prepared only in relation to that portion of the Access Rights that can be provided in the absence of an Expansion (based on an Initial Capacity Assessment); or
 - (ii) if Aurizon Network cannot satisfy any part of the Access Rights sought by the Access Seeker without an Expansion, **clause 4.5(j)** will apply.
- (f) If an IAP or revised IAP (as applicable) must be prepared by Aurizon Network under this **clause 4.5**, then:
- (i) it must be accompanied by or include a statement drawing to the Access Seeker's attention the requirements under **clause 4.5(h)** and the potential consequence under **clause 4.5(i)**;
 - (ii) Aurizon Network may request the Access Seeker to provide more evidence or information, to the extent reasonably required:
 - (A) regarding the Access Seeker's ability to utilise the requested Access Rights (on the basis of the factors listed in **clause 4.12(c)**); or
 - (B) to assess [Capacity allocation related issues] and to prepare the IAP or the revised IAP (as applicable); **[Note: As above, capacity allocation related issues should be more clearly defined.]**
 - (iii) the Access Seeker must provide any requested evidence or information or a notice that satisfies the Non-availability Requirements as soon as reasonably practicable (but within no more than twenty (20) Business Days of Aurizon Network's request for that evidence or information or such other period as may be agreed); and
 - (iv) if the evidence or information or a notice is not provided to Aurizon Network within the required time period under **clause 4.5(f)(iii)**, then:

- (A) Aurizon Network's obligations in relation to preparing the IAP or the revised IAP (as applicable) in response to the Material Variation cease;
 - (B) the Material Variation is deemed to be withdrawn; and
 - (C) negotiations for Access Rights outlined in this **Part 4** will proceed without the Material Variation.
- (g) A person does not fail to comply with a request under **clause 4.5(f)(ii)** if the Non-availability Requirements are satisfied.
- (h) The Access Seeker must, within ten (10) Business Days after being given the IAP or revised IAP (as applicable) issued by Aurizon Network under this **clause 4.5** in response to a Material Variation, notify Aurizon Network that it intends to continue to negotiate for Access Rights in accordance with this Undertaking either:
- (i) on the basis of the IAP or the revised IAP (as applicable) issued by Aurizon Network under this **clause 4.5** in response to a Material Variation; or
 - (ii) without the Material Variation to the Access Application.
- (i) If an Access Seeker notifies Aurizon Network in accordance with **clause 4.5(h)(ii)**, the Material Variation is deemed to be withdrawn and negotiations for Access Rights outlined in this Part 4 will proceed without the Material Variation.

[Note: Given the reinstatement of the queuing mechanism, a new request for Access should not be deemed to be made where the same Access Application is progressing without the Material Variation. This would particularly be concerning where the original Access Application was at a later stage of the negotiations. In those circumstances restarting the negotiation process would create additional work and unnecessary delays and negatively impact on the Access Seeker's priority to Access.]

- (j) If:
- (i) Aurizon Network has received a notice under **clause 4.5(h)(i)** and there was a portion of the Material Variation that could not be provided in the absence of an Expansion (based on an Initial Capacity Assessment) under **clause 4.5(e)(i)**;
 - (ii) **clause 4.5(e)(ii)** applies; or
 - (iii) the Access Seeker does not notify Aurizon Network in accordance with **clause 4.5(h)**,
- then the following apply:
- (iv) on written notice by Aurizon Network, the relevant Access Application (including the Material Variation), or in the case of **clause 4.5(j)(i)** the relevant portion of the Access Application (including the relevant portion of the Material Variation), is deemed to be withdrawn by the Access Seeker and, for clarity, the negotiation process under this **Part 4** will cease in respect of that Access Application, or in the case of **clause 4.5(j)(i)** the relevant portion of the Access Application; and
 - (v) the Access Seeker will be required to submit a new Access Application if it wishes to continue to seek Access in respect of the whole or any part of the Access Application withdrawn under **clause 4.5(j)(iv)**. ***[Note: There are a number of issues with assessing what the new access request date should be in these circumstances. We consider a better approach is to require the***

Access Seeker to submit a new Access Application at its discretion.]

- (k) If a change described in **clause 4.9.1(c)(ii)** or **4.9.1(c)(iii)** constitutes a Material Variation, references in this **clause 4.5** to Access Seeker will be taken to refer to the incoming Access Seeker from the date when the incoming Access Seeker replaces the existing Access Seeker in accordance with **clause 4.9.1(c)(ii)** or **4.9.1(c)(iii)** as applicable.
- (l) Subject to **clause 4.5(i)**, the negotiation process under this **Part 4** is suspended for the period:
 - (i) from (and including) the time that the Access Seeker requested the Material Variation; and
 - (ii) until (and including) the time when:
 - (A) the request for Material Variation is deemed to be withdrawn under **clause 4.5(d)(iii)**, **clause 4.5(f)(iv)**, **clause 4.5(f)(iv)(B)** or **clause 4.5(i)**; or
 - (B) following the issue of a IAP or a revised IAP in response to the Material Variation under this **clause 4.5**, Aurizon Network is notified under **clause 4.5(h)**,

(Suspension Period).

4.6 Indicative Access Proposal

- (a) Aurizon Network will review the information received and assess the Access Application to develop an IAP for the type of Access Rights being sought and having regard to the appropriate form of Access Agreement referred to in **clause 5.1(c)**.
- (b) The IAP will outline:
 - (i) the Rollingstock and Rollingstock Configuration;
 - (ii) the relevant operating characteristics;
 - (iii) an Initial Capacity Assessment (which is subject to confirmation by a Capacity Analysis prepared in accordance with **clause 4.10.2(a)(v)**) together with Aurizon Network's assumptions regarding Rollingstock, section run times and loading and unloading times used in preparing that assessment (but, for clarity and efficiency, Aurizon Network may use all or part of any pre-existing Capacity assessment to the extent that it is appropriate to do so);
 - (iv) whether any other requests for Access exist that, if approved, would affect Aurizon Network's ability to grant the Access Rights sought by the Access Seeker;
 - (v) an initial estimate of the Access Charge applicable to the Train Service proposed and details of how the initial estimate has been calculated including where **clauses 6.2.1(b)**, **6.2.2** or **6.2.3** apply details of how those clauses have been applied in calculating the initial estimate;
 - (vi) details of any further information reasonably required from the Access Seeker in preparation for the negotiation stage; and
 - (vii) where the grant of Access Rights will require the construction of an Expansion, information identifying the likely need for an Expansion and identifying the Expansion including likely timeframes, to the

extent that this information exists and is reasonably available to, and can lawfully be provided by, Aurizon Network.

- (c) The IAP contains indicative arrangements only and does not oblige Aurizon Network to provide Access.
- (d) Subject to **clause 4.5(l)**, Aurizon Network will provide the IAP to the Access Seeker within 20 Business Days of the date of the Acknowledgement Notice. However, where, due to the complexity of the Access Application or other extenuating circumstances, it is not reasonable to provide an IAP within that period, Aurizon Network may, by notice to the Access Seeker (to be given as soon as practicable and in any case no later than fifteen (15) Business Days after the Acknowledgement Notice), extend the period for the giving of an IAP by up to a further twenty (20) Business Days. This period may be further extended by agreement between Aurizon Network and the Access Seeker.
- (e) Unless otherwise agreed by Aurizon Network and the Access Seeker, the IAP expires sixty (60) Business Days after the later of:
 - (i) the date of its provision to the Access Seeker; and
 - (ii) the date of issue of a revised IAP (if any) under **clause 4.6(g)**,
provided that where:
 - (iii) the negotiation process has been suspended under **clauses 4.4(d)** or **clause [Error! Reference source not found.4.1.1\(a\)](#)**; and
 - (iv) Aurizon Network provided the IAP to the Access Seeker prior to that suspension commencing,
the expiry date is extended by the period during which the negotiation process was suspended.
- (f) If the Access Seeker believes, acting reasonably, that the IAP has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, the Access Seeker will notify Aurizon Network of its concerns in writing within twenty (20) Business Days of being provided with the IAP, or such other timeframe as Aurizon Network and the Access Seeker agree.
- (g) Aurizon Network will respond to the concerns of any Access Seeker notified under **clause 4.6(f)** including, where appropriate, by making revisions to the IAP:
 - (i) within ten (10) Business Days after being notified under **clause 4.6(f)**;
or
 - (ii) if due to the complexity of the concerns or other extenuating circumstances it is not reasonable to provide a response within that ten (10) Business Day period, a reasonable period notified by Aurizon Network to the Access Seeker within five (5) Business Days after the Access Seeker's notice to Aurizon Network under **clause 4.6(f)**.

4.7 Notification of intent

- (a) If an Access Seeker intends to progress its Access Application on the basis of the arrangements outlined in the IAP, the Access Seeker must notify Aurizon Network of its intention, prior to the expiry of the IAP in accordance with **clause 4.6(e)**. Notification must be in the form set out in the IAP.
- (b) Where an Access Seeker does not notify Aurizon Network under **clause 4.7(a)** the Access Application and the IAP are deemed to be withdrawn on the IAP's expiry date.

4.8 Multiple applications for the same Access

- (a) If more than one party has submitted an Access Application for the same Access Rights and:
- (i) one of the parties that has applied for Access is the Customer Access Seeker:
 - (A) this Undertaking and Aurizon Network will treat the Customer Access Seeker as the sole Access Seeker and the other relevant Access Seekers' Access Applications for the same Access Rights as having been withdrawn; and
 - (B) Aurizon Network must negotiate solely with that Customer Access Seeker; or
 - (ii) the only parties that applied for Access are Railway Operators then, to the extent that each Railway Operator is either:
 - (A) currently engaged in negotiations with a Customer in respect of a potential haulage agreement in respect of the Access Rights being sought; or
 - (B) a party to an existing haulage agreement with the Customer in respect of the Access Rights being sought;then:
 - (C) this Undertaking and Aurizon Network will treat the Railway Operators as Access Seekers; and
 - (D) Aurizon Network will negotiate with each of those Railway Operators until an alternative Railway Operator is (or Railway Operators are) nominated in writing by the Customer to Aurizon Network.
- (b) If **clause 4.8(a)(ii)** applies and the relevant Customer nominates a relevant Railway Operator prior to Aurizon Network preparing an IAP for each of the relevant Railway Operators, Aurizon Network may prepare an IAP only for the Railway Operator nominated by the Customer.
- (c) Aurizon Network may, for the purpose of **clause 4.8(a)**, disclose to the Customer that an Access Application by an Access Seeker in respect of that Customer has been received (that disclosure will not constitute a breach of the confidentiality obligations owed by Aurizon Network under **Part 3**).
- (d) Access Applications that constitute Mutually Exclusive Access Applications will be dealt with in accordance with clause 7.5.

[Note: consider clarifying that Aurizon Network is not required to enter into an Access Agreement with a Railway Operator until a nomination by the Customer is received.]

4.9 Requirements for Customers, Customer Access Seekers and Train Operators

4.9.1 Customers and Customer Access Seekers

- (a) A Customer Access Seeker may (in its absolute discretion) give written notice to Aurizon Network nominating a Train Operator (**Nominee Operator**) to act on its behalf for the purpose of assisting the Customer Access Seeker with its Access Application including in negotiations with Aurizon Network for the requested Access. Unless the Customer Access Seeker's nomination expressly indicates otherwise or the nomination is revoked by notice to Aurizon Network:

- (i) the Nominee Operator will, for the purpose of this Undertaking, be taken to be the Customer Access Seeker's agent in relation to the Access Application including for the giving of any notices that may or are required to be given under this Undertaking (but not for the execution of any Access Agreement or other agreement); and
 - (ii) despite any other provision to the contrary in this Undertaking, any information disclosed to the Nominee Operator by Aurizon Network or disclosed to Aurizon Network by the Nominee Operator will be treated as though it was disclosed to or by the Customer Access Seeker, as applicable.
- (b) If Aurizon Network receives notices from both the Nominee Operator and the Customer Access Seeker in respect of the same requirement under this Undertaking or the same subject matter, the Nominee Operator's notice is of no effect and will be disregarded by Aurizon Network.
- (c) At any time during negotiations under this **Part 4**:
- (i) a Customer Access Seeker may withdraw any nomination made under **clause 4.9.1(a)** or replace that nomination by nominating a different Train Operator to act on its behalf;
 - (ii) a person may take over an Access Seeker's Access Application where that person is the Customer for that Access Seeker; or
 - (iii) a Customer Access Seeker may nominate a Railway Operator to take over that Customer Access Seeker's Access Application provided that the Railway Operator will continue to seek Access Rights for the benefit of that Customer,
- by notice to Aurizon Network and to the relevant Train Operator, Railway Operator or Access Seeker (as applicable).
- (d) From the date on which Aurizon Network is given a notice under:
- (i) **clause 4.9.1(c)(i)** withdrawing a nomination, the relevant Train Operator will cease to be a Nominee Operator for the purpose of **clause 4.9.1(a)** and Aurizon Network must immediately cease providing the Train Operator with any information in respect of the relevant Access Application;
 - (ii) **clause 4.9.1(c)(i)** nominating a different Train Operator, that Train Operator will become the Nominee Operator (replacing the Railway Operator who was previously nominated) for the purpose of **clause 4.9.1(a)** and Aurizon Network must immediately cease providing the exiting Train Operator with any information in respect of the relevant Access Application;
 - (iii) **clause 4.9.1(c)(ii)**, the Customer will become the Access Seeker (replacing the existing Access Seeker) for the relevant Access Application; or
 - (iv) **clause 4.9.1(c)(iii)** and a notice from the relevant Railway Operator accepting the Customer Access Seeker's nomination, the Railway Operator will become the Access Seeker (replacing the existing Customer Access Seeker) for the relevant Access Application.
- (e) If a person becomes the Access Seeker for an Access Application (replacing the existing Access Seeker) under **clause 4.9.1(d)(iii)** or **4.9.1(d)(iv)** (as applicable), that person by doing so agrees to be bound by all the provisions of this Undertaking as they relate to Access Seekers.
- (f) If a transfer of an Access Application occurs in accordance with **clause 4.9.1(d)(iii)** or **4.9.1(d)(iv)**, then:

- (i) Aurizon Network must provide the incoming Access Seeker with a copy of:
 - (A) the Access Application;
 - (B) notices and other documents (including any IAP) given to or by the outgoing Access Seeker by or to Aurizon Network as expressly required to be given in accordance with this Undertaking; and
 - (C) any other documents exchanged between Aurizon Network and the outgoing Access Seeker that are material to the Access Application and any related negotiations,
 except to the extent that providing that information would be in breach of Aurizon Network's confidentiality obligations under **Part 3**; and
- (ii) on Aurizon Network's written request, the incoming Access Seeker must provide to Aurizon Network or procure for Aurizon Network:
 - (A) appropriate replacement information to the extent reasonably required; or
 - (B) authority from the outgoing Access Seeker that Aurizon Network may continue to use the relevant information provided by the outgoing Access Seeker, in relation to the Access Application and any related negotiations.

4.9.2 Train Operators

- (a) A request by a prospective Train Operator for Aurizon Network to enter into a Train Operations Deed must be provided in writing and:
 - (i) identify the relevant Customer Access Seeker; and **[Note: The intention of this clause is to ensure that the relevant customer is identified. This needs to be made clearer given that the definition of Access Holder and Access Seeker now includes a Train Operator.]**
 - (ii) contain the information required by an Access Application and any other information reasonably required by Aurizon Network to assess the request and complete the Train Operations Deed.
- (b) A negotiation process will apply to the prospective Train Operator as specified in **clause 4.10**.
- (c) By submitting a request under **clause 4.9.2(a)** the prospective Train Operator agrees to be bound by all the provisions of this Undertaking as they relate to Train Operators.

4.10 Negotiation process

4.10.1 Negotiation Period

- (a) A Negotiation Period in respect of:
 - (i) an Access Seeker's Access (including negotiation of the terms and conditions of the relevant Access Agreement in accordance with **Part 5**) commences on the date on which the Access Seeker notifies Aurizon Network in accordance with **clause 4.7**; or
 - (ii) a Train Operator's Train Operations Deed commences on the date that Train Operator has provided to Aurizon Network all of the relevant information referred to in **clause 4.9.2**.
- (b) Once the Negotiation Period has commenced the Access Seeker or Train Operator, as applicable, and Aurizon Network will begin negotiations as soon

as reasonably possible in relation to an Access Agreement or Train Operations Deed (as applicable).

- (c) An Access Seeker's Negotiation Period ceases on:
- (i) the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
 - (ii) Aurizon Network receiving notification by the Access Seeker that it no longer wishes to proceed with its Access Application;
 - (iii) Aurizon Network issuing a Negotiation Cessation Notice to the Access Seeker under **clause 4.12(a)**;
 - (iv) the date:
 - (A) nine (9) Months after the commencement of the Negotiation Period except where **clause 4.10.1(c)(iv)(B)** applies; or
 - (B) where the negotiation process has been suspended in accordance with **clause Error! Reference source not found.4.1.1(a)**, nine (9) Months, plus the number of days of the Suspension Period, after the commencement of the Negotiation Period,unless:
 - (C) both parties agree to extend the Negotiation Period, in which case the Negotiation Period will continue until the expiry of the agreed extended period; or
 - (D) a Dispute arises between the parties in relation to this **Part 4**, in which case, the Negotiation Period will continue until the Dispute's resolution; or
 - (v) subject to **clause 4.10.1(d)**, Aurizon Network no longer being able to offer Access to the Access Seeker under the terms of the IAP, either because of:
 - (A) Available Capacity being reduced; or
 - (B) Infrastructure Enhancements subsequently committed to adversely impacting the ability to develop Infrastructure Enhancements contemplated by the IAP,or as otherwise provided in accordance with this Undertaking.

- (d) If:
- (i) Aurizon Network can no longer offer Access to the Access Seeker under the terms of the relevant IAP because of a reason set out in **clause 4.10.1(c)(v)(A)** or **4.10.1(c)(v)(B)**; and
 - (ii) either the remaining Available Capacity can satisfy part of the Access Rights sought by the Access Seeker or the contemplated Infrastructure Enhancements can be altered to provide all or part of the Access Rights sought,

Aurizon Network will notify the Access Seeker of that event and the portion of the Access Rights being sought which can be provided and:

- (iii) in that notice, provide the Access Seeker with an objective, evidence-based explanation as to why Available Capacity is being reduced or Infrastructure Enhancements subsequently committed to adversely impacting the ability to develop Infrastructure Enhancements contemplated by the IAP;
- (iv) if requested by the Access Seeker within ten (10) Business Days after the Access Seeker is given such a notice, prepare and issue to the

Access Seeker a revised IAP in accordance with **clause 4.6** in relation to that portion of the Access Rights that can be provided; and

- (v) if, within ten (10) Business Days after being given the revised IAP, the Access Seeker notifies Aurizon Network that it intends to continue to negotiate for Access Rights on the basis of the revised IAP, the negotiation process outlined in this **Part 4** will recommence from that point.

Aurizon Network's obligation under this **clause 4.10.1(d)**, to the extent that it relates to Infrastructure Enhancements, is subject to Aurizon Network's obligations under **Part 8** and Aurizon Network is not required to do anything in accordance with this **clause 4.10.1(d)** that would cause or contribute to it failing to comply with **Part 8**.

- (e) For the avoidance of doubt:
 - (i) to the extent that all or part of the Access Rights sought by the Access Seeker cannot be provided due to there being insufficient remaining Available Capacity or the contemplated Infrastructure Enhancements cannot be sufficiently altered as contemplated by **clause 4.10.1(d)(ii)**; or
 - (ii) the negotiation process is not recommenced under **clause 4.10.1(d)(v)** in respect of all or part of the Access Rights sought by the Access Seeker,

then the Negotiation Period in respect of those relevant Access Rights will have ceased and any future request by the Access Seeker in respect of those Access Rights be treated as a new Access Application.

- (f) A Train Operator's Negotiation Period ceases on:
 - (i) the execution of the Train Operations Deed;
 - (ii) Aurizon Network receiving notification by the Train Operator that it no longer wishes to negotiate or enter into the Train Operations Deed;
 - (iii) Aurizon Network issuing a Negotiation Cessation Notice to the Train Operator under **clause 4.12**;
 - (iv) the expiration of nine (9) Months from the date that the Train Operator is nominated by the relevant Access Holder or Access Seeker, as the case may be, unless:
 - (A) both parties agree to extend the Negotiation Period, in which case the Negotiation Period will continue until the expiry of the agreed extended period; or
 - (B) a Dispute arises between the parties in relation to this **Part 4**, in which case, the Negotiation Period will, subject to **clause 4.12**, continue until the Dispute's resolution;
 - (v) the Access Seeker being given a Negotiation Cessation Notice in respect of its Access Application; or
 - (vi) a notice is given by Aurizon Network under **clause 4.11(d)**.

4.10.2 Issues to be addressed during negotiation

- (a) During the Negotiation Period, Aurizon Network and the Access Seeker or Train Operator, as applicable, will negotiate and endeavour to agree on the elements comprising, for an Access Seeker, the relevant form of Access Agreement referred to in **clause 5.1(c)** for the type of Access Rights being sought or, for a Train Operator, the matters to be completed in the relevant Train Operations Deed. In order to facilitate this process:

- (i) an Access Seeker must (if it has not done so already) nominate its Train Operator by notice to Aurizon Network;
 - (ii) Aurizon Network must provide to the Access Seeker Additional Information (together with any requested Capacity Information) relevant to the rail corridor applicable to the Access Seeker's Access Application and that information must be the most current available to Aurizon Network and be provided within a reasonable timeframe;
 - (iii) the Access Seeker (or its Nominated Train Operator) must prepare an Operating Plan;
 - (iv) Aurizon Network must provide an Access Charge, determined in accordance with the pricing principles set out in **Part 6** including advice as to whether Aurizon Network has applied **clause 6.3.1(b)** or **clause 6.4** in determining the Access Charge and if so:
 - (A) the factor associated with the Access Seeker's proposed Access that results in a different cost or risk to Aurizon Network;
 - (B) the impact that the factor has on the Access Charge; and
 - (C) how that impact on the Access Charge was determined;
 - (v) Aurizon Network must undertake a Capacity Analysis and an investigation of operational impacts and any Expansions necessary to accommodate Access by the Access Seeker are to be advised by Aurizon Network except to the extent that Aurizon Network considers that such matters are not required;
 - (vi) Aurizon Network must provide the definition of the relevant Train Service Entitlement and, where applicable, the initial timetable for the proposed Train Services; and
 - (vii) the Access Seeker (or its nominated Train Operator) must demonstrate that the Rollingstock and Rollingstock Configurations for which the Access Rights are applicable are subject to certificates of compliance or a Compliance Statement (as that term is defined in the Standard Access Agreement), as applicable, with the Rollingstock Interface Standards.
- (b) Without limiting the matters that an Access Seeker or a Train Operator and Aurizon Network may address during the Negotiation Period, Aurizon Network (jointly with the Access Seeker or Train Operator) will, or will commence to, conduct an Interface Risk Assessment and prepare an IRMP during the Negotiation Period in accordance with the provisions set out in a Standard Access Agreement in respect of such matters:
- (i) if requested by the Access Seeker or Train Operator; and
 - (ii) it is reasonably necessary to do so prior to the Access Seeker or Train Operator and Aurizon Network executing an Access Agreement or Train Operations Deed, as applicable.
- (c) It would be reasonably necessary to conduct an Interface Risk Assessment for the purposes of **clause 4.10.2(b)** where there are material differences between proposed and existing operations and:
- (i) the relevant Access relates to the transportation of coal from a new mine or load out facility;
 - (ii) the Access Seeker (or, the relevant Train Operator) is seeking to operate new Rollingstock, is not an Access Holder or is not currently operating Rollingstock on the Rail Infrastructure; or

- (iii) the proposed operation, movement, provisioning or other operational aspects of the Train Services, or proposed Rollingstock, relating to the requested Access Rights will differ from existing Train Services operated on the Rail Infrastructure by the Access Seeker (or the relevant Train Operator) including where:
 - (A) there are reversing or special shunting movements that will be necessary for the proposed Train Services;
 - (B) there is a different driver methodology that applies to, or number of train drivers for, the Trains for the proposed Train Services;
 - (C) the Trains for the proposed Train Services will have a different operating direction (including loading or unloading direction) from that which the relevant Rail Infrastructure, loading or unloading facility or other relevant infrastructure was designed for (for example, entering a balloon loop in the opposite direction to what the balloon loop was designed for);
 - (D) the Trains for the proposed Train Services are proposed to operate at a speed greater than any speed limit or speed restriction that applies at any point on the Rail Infrastructure to be used by the Train Services;
 - (E) the proposed Train Services will not be able to meet nominated section running times for the relevant Reference Train Service or, if there is no relevant Reference Train Service, the section running times that typically apply to the relevant Rail Infrastructure;
 - (F) the Rail Infrastructure is required to be extended, enhanced, expanded, augmented duplicated or replaced in order for the relevant Access Rights to be used – for example, the installation of open door sensors; and
 - (G) there has been a change in the Access Seeker's (or relevant Train Operator's) or Aurizon Network's accreditation or safety management system under the Rail Safety Act.
- (d) During the Negotiation Period Aurizon Network may seek further information that is reasonably required to address any matters referred to in this **clause 4.10.2** or information or evidence of the Access Seeker's ability to utilise the requested Access Rights (on the basis of the factors listed in **clause 4.12(c)**) and from other providers of infrastructure to be used as an entry or exit point to the Rail Infrastructure such as owners or operators of unloading facilities. The Access Seeker must provide the information and evidence requested within twenty (20) Business Days of the request (or such other period as may be agreed with Aurizon Network) and facilitate the provision of such information from Third Parties, as applicable.
- (e) The Access Seeker does not fail to comply with a request by Aurizon Network under **clause 4.10.2(d)** where the Non-availability Requirements are satisfied.
- (f) In respect of the details required to be developed by the parties in accordance with **clauses 4.10.2(a)** and **4.10.2(b)**, the parties may agree, for example:
 - (i) to finalise certain aspects after the execution of the Access Agreement or the Train Operations Deed, as applicable;
 - (ii) to make the commencement of Train Services under the Access Agreement or the Train Operations Deed, as applicable, subject to the satisfaction of conditions (including, for example, the completion of schedules to the Access Agreement or the securing of access

rights to an unloading facility or the securing of access to adjoining infrastructure); or

- (iii) to include mechanisms in the Access Agreement or the Train Operations Deed, as applicable, to address any subsequent cost or operating impacts arising in connection with the matters referred to in **clauses 4.10.2(f)(i)** and **4.10.2(f)(iii)** that have not been expressly addressed either as part of the relevant Reference Train Service or in the negotiation of the relevant Access Agreement or Train Operations Deed.

4.11 Negotiation of Access Agreements and Train Operations Deeds

- (a) Each Access Holder or Access Seeker:
 - (i) may be present and participate in any negotiation between Aurizon Network and a Train Operator for a Train Operations Deed (and subsequent Operating Plan) in respect of the Access Holder's Access Rights (or Access Seeker's Access Rights when the relevant Access Agreement is entered into);
 - (ii) may not participate in negotiations between Aurizon Network and a Train Operator that relate to Access Rights for a different Access Holder or Access Seeker; and
 - (iii) may require Aurizon Network to permit their Train Operator to be present at and participate in all negotiations between Aurizon Network and the Access Holder or Access Seeker for Access Rights proposed to be wholly or partially utilised by that Train Operator.
- (b) In negotiating an Access Agreement and for the purposes of this **Part 4** if the Access Holder or Access Seeker does not provide required information regarding Rollingstock and Rollingstock Configurations for the required Train Services, Aurizon Network may assume:
 - (i) a Reference Train Service in respect of the Rollingstock and Rollingstock Configurations; and
 - (ii) such other Above Rail operational matters as are reasonably necessary (having regard to any existing standard manner of conducting Above Rail Services on the relevant parts of the Rail Infrastructure).
- (c) If one or more Train Operations Deeds are negotiated between Aurizon Network and the relevant Train Operator(s), the Train Operations Deed(s) must not (alone, or in aggregate if there is more than one) grant rights to utilise the Rail Infrastructure that exceed the corresponding Access Rights granted, or to be granted, to the relevant Access Holder or Access Seeker.
- (d) If, for whatever reason (except by reason of execution of the Access Agreement):
 - (i) negotiations in respect of the Access Agreement expire or are terminated; or
 - (ii) the Access Seeker ceases to be an Access Seeker in respect of the Access Rights that relate to the relevant Train Operations Deed; or
 - (iii) where the Access Holder has already executed an Access Agreement, the Access Holder ceases to be an Access Holder in respect of the Access Rights that relate to the relevant Train Operations Deed,

then Aurizon Network will, by notice to the Train Operator, terminate its negotiations in respect of the corresponding Train Operations Deed.

4.12 Cessation of negotiations

- (a) At any time during a Negotiation Period, Aurizon Network (acting reasonably):
- (i) may give a Negotiation Cessation Notice to an Access Seeker or a Train Operator, as applicable, if:
 - (A) the Access Seeker or Train Operator, as applicable, fails to comply (after being issued with any notices required under this Undertaking) with the relevant obligations and processes contained in this Undertaking, and such non-compliance is material;
 - (B) there is no reasonable likelihood that the Access Seeker or the Train Operator will comply with the terms and conditions of an Access Agreement or Train Operations Deed, as applicable, in a material way;
 - (C) the Access Seeker or Train Operator, as applicable, fails to comply with **clause 4.4(i)**;
 - (D) the Access Seeker or Train Operator, as applicable, has no genuine intention of obtaining Access Rights or has no reasonable likelihood of utilising Access at the level sought;
 - (E) subject to **clause 11.1.4(e)**, the Access Seeker or Train Operator, as applicable, does not comply with a determination of an expert in accordance with **clause 11.1.4**; or
 - (F) the Access Seeker or the Train Operator, as applicable, does not comply with a determination of the QCA under **clause 11.1.5** in relation to a Dispute, and
 - (ii) must give a Negotiation Cessation Notice to an Access Seeker where:
 - (A) the Access Seeker's Customer notifies Aurizon Network that they no longer agree to the Access Seeker negotiating an Access Agreement based on the transport of their coal; or
 - (B) if the relevant Access Application relates to a Transfer, either the Transferor's Customer (if any) or the Transferee's Customer (if any) notifies Aurizon Network that they no longer agree to the Transfer.
- For the avoidance of doubt, an Access Holder's or Access Seeker's negotiations of an Access Agreement are not affected if negotiations of a Train Operations Deed between Aurizon Network and a Train Operator nominated by the Access Holder or Access Seeker under **clause 4.8(a)(ii)(D)** cease.
- (b) Without limitation to **clause 4.12(a)(i)(B)**, **clause 4.12(a)(i)(B)** is deemed, if:
- (i) the Access Seeker or the Train Operator, as applicable, is subject to an Insolvency Event; or
 - (ii) the Access Seeker or the Train Operator, as applicable, or a Related Party of the Access Seeker or Train Operator, is currently, or has in the previous two years been, in Material Default of:
 - (A) any Access Agreement or Train Operations Deed, as applicable; or
 - (B) any other agreement where its performance under that other agreement is relevant to its likely performance under any

proposed Access Agreement or Train Operations Deed, as applicable.

- (c) Without limitation to **clause 4.12(a)(i)(D)**:
- (i) **clause 4.12(a)(i)(D)** is deemed satisfied in relation to an Access Seeker or Train Operator (as applicable) in relation to coal carrying Train Services, where:
- (A) for an Access Seeker, the Access Seeker:
- (1) is seeking Access Rights that will be used for a person other than the Access Seeker (that is, a person who will be a Customer); and
- (2) has no reasonable likelihood of having a Customer for those Access Rights (provided that any consideration of reasonable likelihood must disregard the effect of granting the Access Rights to the Access Seeker on the Access Seeker's ability to attract a Customer in the future); or
- (B) for a Train Operator, the Train Operator ceases to be a Train Operator for the relevant Access Seeker or Access Holder; or
- (ii) where **clause 4.12(c)(i)** does not apply, the following factors must be considered in relation to whether **clause 4.12(a)(i)(D)** is satisfied:
- (A) whether the Access Seeker (or its Customer) has secured, or is reasonably likely to secure, Supply Chain Rights;
- (B) except where the Access Seeker is a Railway Operator, whether the Access Seeker has secured, or is reasonably likely to secure, a rail haulage agreement for the operation of the Train Services the subject of the Access Application;
- (C) whether the Access Seeker or its Railway Operator is reasonably likely to have facilities (including Rollingstock, provisioning facilities, maintenance facilities and storage facilities) to enable it to run Train Services to utilise the Access Rights sought;
- (D) whether the Train Operator no longer meets the criteria outlined in **clauses 4.8(a)(ii)(A)** and **4.8(a)(ii)(B)**; and
- (E) where the Access Rights are sought to transport the output of a mine, whether the anticipated output of the mine is reasonably likely to support utilisation of the Access Rights sought and all relevant existing Access Rights relevant to that mine.
- (d) If a party disputes the giving of a Negotiation Cessation Notice, it will be deemed to have been issued only if and when the Dispute is resolved in Aurizon Network's favour.