
QR Network Pty Ltd ACN 132 181 116

[***] ABN

End User Access Agreement (Coal)

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SCHEDULES

- SCHEDULE 1 TRAIN SERVICE ENTITLEMENTS**
- SCHEDULE 2 NOMINATED NETWORK**
- SCHEDULE 3 CALCULATION OF TOP CHARGES**
- SCHEDULE 4 INSURANCE**
- SCHEDULE 5 CONFIDENTIALITY DEED**
- SCHEDULE 6 PRO FORMA TRAIN OPERATIONS AGREEMENT**

Date

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Parties

QR Network Pty Ltd ACN 132 181 116 of 305 Edward Street, Brisbane, Queensland (“**QR Network**”)

The party specified in Item 1 of the **Reference Schedule** (“**End User**”)

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Recitals

- A QR Network is responsible for the provision of the Infrastructure and Train Control.
- B The End User wishes to secure non-exclusive rights of access to the Nominated Network for the operation of Train Services by an Operator (or Operators) appointed by the End User.
- C QR Network has agreed to grant non-exclusive rights to the End User 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.
- D The Parties may enter into separate agreements for the provision of services by QR Network to the End User other than the Access Rights.

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Agreed terms

1 Definitions and Interpretation

1.1 Definitions

In this Agreement, unless inconsistent with the context, the following words and expressions shall have the respective following meanings:

“Access Agreement” means an agreement between QR Network and an Access Holder for the provision of rights of access to all or any part of the Infrastructure.

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“Access Charges” means the charges payable to QR Network by an Operator for Operational Rights pursuant to a Train Operations Agreement.

“Access Holder” has the meaning given in QR Network’s Access Undertaking.

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“Access Rights” means the rights of access to the Nominated Network granted pursuant to this Agreement (whether or not allocated to an Operator from time to time);

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“Access Rights Reduction” has the meaning given to that term in Clause 4.5(a)(iv)(D)(2);

“Accreditation” means accreditation in accordance with Part 5 of the Transport (*Rail Safety*) Act 2010 (Qld) and **“Accredited”** means to have Accreditation;

“Adjustment Charge” means an Adjustment Charge (as defined in QR Network’s Access Undertaking) approved by the QCA from time to time in respect of the End User;

“Agreement” or **“this Agreement”** means this document including the Reference Schedule and all annexures, Schedules and exhibits to it;

“Allowable Threshold” means [a % agreed between the Parties] of the total number of Train Services scheduled for a Billing Period;

“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 excluding the nomination of an Operator by the End User and the execution of a Train Operations Agreement, and **“Assignment”** and **“Assignee”** shall have comparable meanings;

“Authority” means the Crown, 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 that lawfully exercise jurisdiction over QR Network (but excluding any holding company of QR Network);

“Available Capacity” means Capacity excluding all Committed Capacity except Committed Capacity that will cease being Committed Capacity prior to the time in respect of which that Capacity is being assessed;

“Average Below Rail Transit Time Factor” means for each group of Train Services referred to in Table 1.4 of **Schedule 1**, the sum of all actual Below Rail Transit Times for all Train Services operated divided by the sum of the Sectional Running Times for all of those relevant Train Services in the relevant year;

“Base Access Charges” means the Base Access Charges specified in **Schedule 3** and incorporates the elements thereof;

“Below Rail Transit Time” means, for the relevant Train Service travelling from Origin to Destination or from Destination to Origin, the sum of:

(a) the relevant Sectional Running Times;

(b) delays to the Train Service from its scheduled Train path in the DTP, where that delay can be attributed directly to QR Network but excluding:

(i) cancellations;

(ii) delays resulting from compliance with a Passenger Priority Obligation; and

(iii) delays resulting from a Force Majeure Event;

(c) the time taken in crossing other Trains (to the extent that such time is not contributed to by a Railway Operator or Force Majeure Events and is not otherwise included in paragraph (a) of this definition); and

(d) delays due to Operational Constraints directly caused by the activities of QR Network in maintaining the Infrastructure or due to a fault or deficiency in the Infrastructure provided such delays are not contributed to by a Railway Operator or Force Majeure Events and are not otherwise included in paragraph (b) or (c) of this definition;

“Billing Period” means the period of a Month;

“Board of Inquiry” means a board of inquiry established under the *Transport (Rail Safety) Act 2010* (Qld);

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

“Capacity” means the aggregate of all Existing Capacity and all Planned Capacity;

“Central Queensland Coal Region” means the rail corridors:

- (a) from the ports at Hay Point and Dalrymple Bay to Blair Athol mine, North Goonyella mine, Hail Creek mine and the junction with the Gladstone to Gregory mine corridor;
- (b) from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Gregory, Rolleston and Minerva mines;
- (c) from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Moura mine and the loading facility for Baralaba mine in the vicinity of Moura mine;
- (d) from the port of Abbot Point to Newlands mine; and
- (e) all branch lines directly connecting coal mine loading facilities to the abovementioned corridors;

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“Change in Existing Capacity” has the meaning given to that term in Clause 4.5(a)(i);

“Change in Law” means:

- (a) any amendment, repeal, modification or enactment of any Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Authority;
- (d) the imposition of a requirement for authorisations not required as at the date of this Agreement;
- (e) 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; or
- (f) 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 which are materially less favourable than those attached to the original authorisation;

“Change in Relevant Taxes” means:

- (a) the imposition of a new Relevant Tax;
- (b) an increase in the rate of a Relevant Tax; or
- (c) a change in the basis of calculation of a Relevant Tax;

“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;

“**Commencement Date**” means the date of execution of this Agreement as specified in Item 2 of the **Reference Schedule**;

“**Committed Capacity**” means that portion of the Capacity:

- (a) that is required:
 - (i) to meet the Train Service Entitlements of Railway Operators; and
 - (ii) to comply with any Passenger Priority Obligations; and
- (b) arising from a user funded expansion to the extent that a person has a right of first refusal in accordance with clause 7.5.5 of QR Network’s Access Undertaking and has not waived that right.

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“**Common Corridor**” means that part of the Infrastructure that was utilised by the End User for the Train Services for which Access Rights are being relinquished and will also be utilised by the new access holder’s Train Services.

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“**Commitment Date**” means the date on which the Access Rights will be available to the End User as specified in Item 4 of the **Reference Schedule**;

“**Common Costs**” means those costs associated with the provision of Infrastructure that are not Incremental Costs for any particular Train service using that Infrastructure;

“**Conditional Access Holders**” has the meaning given to that term in Clause 4.5(a);

“**Conditional Access Rights**” has the meaning given to that term in Clause 4.5(a);

“**Consequential Loss**” means, subject to paragraph (e) and (f) below:

- (a) any special, indirect or consequential loss;
- (b) any economic loss in respect of any claim in tort;
- (c) any loss of profits, production, revenue, use, contract, opportunity, reputation or goodwill, any wasted overheads or any damage to credit rating whatsoever; and
- (d) any loss arising out of any Claim by a Third Party,

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but **Consequential Loss** does not include:

- (e) 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
- (f) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;

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“**Corporation**” has the meaning assigned to it by the Corporations Act;

“**Corporations Act**” means the *Corporations Act 2001* (Cwth);

“**Dangerous Goods**” means any substance or article prescribed as Dangerous Goods under the Dangerous Goods Code;

“**Dangerous Goods Code**” means the following codes prepared by the Federal Office of Road Safety of the Commonwealth Department of Transport and Communications as amended or varied from time to time or any other codes developed to replace or supplement them:

- (a) the Australian Code for the Transport of Dangerous Goods by Road and Rail;
- (b) the Australian Code for the Transport of Explosives by Road and Rail; and
- (c) the Code of Practice for the Safe Transport of Radioactive Material.

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“**Default Rate**” means the Commonwealth Bank of Australia’s reference rate being the “Reference Rate” quoted by the Commonwealth Bank of Australia (or any successor bank) for borrowers with overdrafts of \$100,000 or more on any relevant date as published in the Australian Financial Review (or in the event that such a rate is not so quoted or published at or in respect of any relevant date, such other similar rate to the “Reference Rate” specified by a major commercial bank agreed between the Parties) plus 2%;

“**Destination**” means the destination or destinations described in **Schedule 1**;

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“**Discount Rate**” means the allowable rate of return utilised in the determination of Reference Tariffs from time to time;

“**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 Rail Transport Operator adopting efficient practices in the provision of the Infrastructure to the required service standard, having regard to any matters particular to the environment in which QR Network operates, and including any transitional arrangements agreed between QR Network and the QCA to reflect the transition from QR Network’s actual cost to that efficient cost;

“**Emergency Possession**” is similar to a Planned Possession except that this possession is required to rectify a serious fault with the Infrastructure that is considered dangerous to either a Railway Operator’s and/or QR Network’s Staff, or where severe speed restrictions have been imposed affecting the scheduled Train services of Railway Operators. Such possession must be carried out less than seven (7) days from the detection of the problem;

“**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;

“**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;

“**Environmental Harm**” means serious or material environmental harm or environmental nuisance as defined in the *Environmental Protection Act 1994* (Qld);

“**Environmental Investigation and Risk Management Report**” means the environmental investigation and risk management report referred to in prepared in accordance with a Train Operations Agreement for inclusion in Part 1 of Schedule 9 of that Train Operations Agreement;

“**Escalation Date**” means the dates on which the TOP Charges and other charges payable by the End User to QR Network under this Agreement are to be escalated in accordance with **Schedule 3**;

“**Evaluation Period**” means:

- (a) when in reference to an individual 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 Train service;

(b) when in reference to a combination of Train services for the purpose of determining a Reference Tariff to apply for some or all of those Train services, the period for which that Reference Tariff will apply; or

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(c) when in reference to a combination of Train services other than 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 Train services comprising the combination of Train services, provided that such period does not exceed ten (10) years;

“Existing Capacity” means the existing capability of the Infrastructure (in absence of any new Infrastructure or modification to existing Infrastructure) to accommodate Train services, after:

(a) providing for QR Network’s reasonable requirements for the exclusive utilisation of that Infrastructure for the purposes of performing activities associated with the maintenance, repair or enhancement of Infrastructure, including operation of work Trains; and

(b) for Infrastructure within the Central Queensland Coal Region, taking into account the Supply Chain Operating Assumptions applicable for that Infrastructure;

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“First Escalation Date” means the Escalation Date (if any) identified as the First Escalation Date in Clause 1.2 of **Schedule 3** for each Train Service type;

“Force Majeure Event” means any cause, event or circumstance or combination of causes, events or circumstances which:

(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,

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and 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 Parties are a party to industrial action or would be able to influence or procure the settlement of such industrial action;

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(e) act of God;

(f) war, invasion, terrorist act, act of foreign enemies, hostilities (whether war be 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, earthquake, washaway, landslide, explosion or other catastrophe, epidemic and quarantine restriction; and
- (m) delay of a supplier due to any of the foregoing whether any such cause of delay exists before, at the time, or after the date of this Agreement;

“**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* (Cwth);

“**GST Inclusive Reimbursement**” is the amount calculated by the formula:

$$(A - C) \times (1+B)$$

Where:

- A = the GST inclusive amount paid by a Party for a Reimbursable Item;
- B = the rate of GST (expressed as a decimal) applicable at the time the calculation is made; and
- C = any GST input tax credit that the Party can claim in respect of that Reimbursable Item;

“**Incident**” means any Network Incident involving the activities of an Operator;

“**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 Train service or combination of 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 access rights;

“**Individual Coal System**” means the relevant one of the following:

- (a) that Infrastructure comprising the rail corridor from the port of Abbot Point to Newlands mine, and all branch lines directly connecting coal mine loading facilities to that corridor, with the exception of the corridor beyond Newlands mine to North Goonyella mine (and beyond);
- (b) that Infrastructure comprising the rail corridor from the ports at Hay Point and Dalrymple Bay to Hail Creek mine, Blair Athol mine, North Goonyella mine and the junction with the Gregory mine branch line and all branch lines directly connecting coal mine loading facilities to those corridors, with the exception of:
 - (i) the branch line to Gregory mine; and
 - (ii) the corridor beyond North Goonyella mine to Newlands mine (and beyond);
- (c) that Infrastructure comprising the rail corridor from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Gregory,

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Rolleston and Minerva mines and all branch lines directly connecting coal mine loading facilities to that corridor with the exception of the corridor to Oaky Creek (and beyond) and the corridor to Moura mine (and beyond); or

- (d) that Infrastructure comprising the rail corridor from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Moura mine and the loading facility for Baralaba mine in the vicinity of Moura mine, and all branch lines directly connecting coal mine loading facilities to that corridor but excluding the corridor to Blackwater (and beyond);

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“**Infrastructure**” means all rail transport infrastructure (as defined in the Transport Infrastructure Act) for which QR Network is the owner, lessee, or operator, the use of which is declared, pursuant to section 250(1)(a) of the *Queensland Competition Authority Act 1997* (Qld), for the purposes of Part 5 of the *Queensland Competition Authority Act 1997* (Qld);

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“**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 place it in voluntary liquidation or to appoint an administrator unless the resolution is withdrawn within fourteen (14) 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 one Month;
- (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 fourteen (14) days after it is made; or
- (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;

“**Interface Coordination Plan**” has the meaning given in the applicable Train Operations Agreement;

“**Interface Risk Management Plan**” has the meaning given in the applicable Train Operations Agreement;

“**Intermediate Train Plan**” or “**ITP**” means a plan that details the scheduled times for all Train services and Planned Possessions, Urgent Possessions and Emergency Possessions on a specified part of the Infrastructure on each day of the relevant period;

“**Land**” means the land on which the Nominated Network is situated and which is:

- (a) land owned or controlled by QR Network; or
- (b) land in respect of which entry is required to be given by QR Network as part of the definition of “Access” in QR Network’s Access Undertaking (as that provision is amended, varied or replaced from time to time);

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“**Landowner**” has the meaning given to that term in Clause 17.18;

“Law” or “Laws” includes:

- (a) the provisions of any statute, rule, regulation, code, proclamation, ordinance or by-law, present or future, whether State, Commonwealth or otherwise; and
- (b) any requirement, condition, notice, consent, accreditation, order or direction or similar thing of any statutory, public or other competent 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.

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“**Load Variation Table**” means a table published by QR Network in 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;

“**Maintenance Work**” means any work involving repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Infrastructure (other than 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. It is 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;~~

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“**Master Book of Rules**” means QR Network’s standards for Safeworking Procedures;

“**Material Change**” has the meaning given to that term in Clause 10.1(a);

“**Maximum Allowable Gross Tonnage**” means the maximum allowable gross tonnage for a Wagon, Wagon bogie or Train as specified in Schedule 4 of the relevant Train Operations Agreement;

“**Maximum Desirable Gross Tonnage**” means the maximum desirable gross tonnage for a Wagon as specified in Schedule 4 of the relevant Train Operations Agreement;

“**Month**” means calendar month, and “**Monthly**” has a corresponding meaning;

“**Network Incident**” means any Rollingstock derailment, Rollingstock disablement or breakdown, accident, collision or any other unplanned occurrence on the Infrastructure which causes or could cause injury to any person, damage to property or Environmental Harm or a disruption to or cancellation by QR Network of any Train Movement;

“**Network Management Principles**” has the meaning given in the applicable Train Operations Agreement;

“**Noise Planning Levels**” means the planning levels for railways referred to in the QR Code of Practice: Railway Noise Management;

“**Nominated Access Rights**” means the Access Rights the End User intends to relinquish or transfer for the purposes of Clauses 4.2(b)(i) and 4.2(c)(i) (as applicable);

“Nominated Annual Train Services” means the number of Train Services that the are entitled to be operated for the End User during any one (1) year for each Train Service type as specified in **Schedule 1** or as varied in accordance with this Agreement;

“Nominated Monthly Train Services” means the number of Train Services that are entitled to be operated for the End User during any one (1) month period for each Train Service type as specified in **Schedule 1** or as varied in accordance with this Agreement;

“Nominated Network” means that part of the Infrastructure detailed in Part 1 of **Schedule 2**;

“Nominated Weekly Train Services” means the number of Train Services that are entitled to be operated for the End User during any one (1) week period as specified in **Schedule 1** or as varied in accordance with this Agreement;

“Notice of Intention to Relinquish” has the meaning given to that term in Clause 4.2(b);

“Notice of Intention to Transfer” has the meaning given to that term in Clause 4.2(c);

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

“One Way Train Service” means a Train Service operating in one direction only on the Nominated Network either from Origin to Destination or from Destination to Origin as the case may be;

“Operational Constraint” means an Operational Constraint as defined by a Train Operations Agreement;

“Operator” means an Accredited Railway Operator that is nominated by the End User in accordance with Clause 2.3(b), who is contracted by the End User to operate the Train Services for the End User in accordance with the relevant nomination – but only to the extent of the relevant nomination;

“Origin” means the origin or origins described in **Schedule 1**;

“Other Dwell Times” means, for any other designated activity, the time period from when a Train Service arrives at a specified point until it has completed all relevant activities, is ready to depart from that point and has advised the relevant QR Network Train Controller accordingly;

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

“Passenger Priority Obligations” means the obligations of a Rail Transport Operator pursuant to sections 265 and 266 of the Transport Infrastructure Act;

“Performance Levels” means Performance Levels as defined by a Train Operations Agreement;

“Planned Capacity” means the increase in Existing Capacity that is expected to result from any new Infrastructure or a modification to existing Infrastructure that QR Network is committed to construct;

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“Planned Dwell Times” means any of Time at Mine, Time at Unloading Facility, Time at Depot and Other Dwell Times specified in the Train Schedule;

“Planned Possession” means the temporary closure and/or occupation by QR Network of a part of the Infrastructure including, but not limited to, closure of Track or isolation of any electrical overhead traction system for the purpose of carrying out Maintenance Work, Enhancement or other work on or in the proximity of the Infrastructure which may affect the safety of any person or property where such closure, occupation or isolation is entered into the MTP and adversely impacts upon the operation of Train services;

“QR Network Cause” means where QR Network is unable to make Infrastructure available for the operation of Train Services in accordance with a Railway Operator’s access rights under an access agreement for the operation of Train services on the Infrastructure, as a result of :

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(a) Planned Possessions, Emergency Possessions or Urgent Possessions;

(b) a Force Majeure Event; or

(c) any other action by QR Network which directly resulted in the Infrastructure not being so available,

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provided that the above reasons are not in any way attributable to:

(d) a Railway Operator; or

(e) QR Network complying with its Passenger Priority Obligations.

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“QR Network Train Controller” means the person nominated by QR Network as the supervisor of Train Movements on the relevant part of the Nominated Network;

“QR Network’s Access Undertaking” means the access undertaking submitted by QR Network to the Queensland Competition Authority and approved by the Queensland Competition Authority under the *Queensland Competition Authority Act 1997* (Qld) from time to time;

“QR Network’s Right of Way” means the strip of property on which earthworks, traction wiring equipment, tunnels, bridges, fences and track are constructed for the operation of Rollingstock. Where the at grade boundaries for the Right of Way are not readily identifiable they will be regarded as being at least ten (10) metres from the centre line of the track;

“QR Network’s Staff” means the employees, contractors and agents of QR Network and any other person under the control or supervision of QR Network involved in the provision of Access Rights;

“Quarter” means each period of three (3) consecutive Months commencing 1 January, 1 April, 1 July or 1 October in each year, and **“Quarterly”** has a corresponding meaning;

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

“Rail Transport Operator” has the meaning given to that term in the *Transport (Rail Safety) Act 2010* (Qld);

“**Railway Operator**” means, as the context allows:

- (a) any party that holds rights of access to all or any part of the Infrastructure (including, but not limited to, the End User), whether or not that party is an Accredited rail transport operator; and
- (b) any Accredited rail transport operator (including, but not limited to, an Operator);

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“**Reduction Factor**” means:

- (a) if:
 - (i) a new Access Holder or a Transferee has executed an Access Agreement (or a variation to an existing Access Agreement) in respect of Access Rights that QR Network could not have provided without using the whole or part of the Nominated Access Rights; and
 - (ii) QR Network’s provision of the Access Rights under that Access Agreement commenced, for a new Access Holder:
 - (A) who is not a Transferee, after QR Network was given the Notice of Intention to Relinquish but prior to the payment to it of the Relinquishment Fee; or
 - (B) who is a Transferee on and from the Transfer Date,
- then:
- (iii) for the purpose of calculating the Relinquishment Fee, if:
 - (A) the relevant Train Services of the End User and the Train services of the new Access Holder or Transferee are coal carrying Train Services; and
 - (B) the Transferee’s or new Access Holder’s Train Services that will use the Nominated Access Rights will operate predominantly in and have an unloading facility that is a nominated unloading facility for a Reference Train Service in, the same Individual Coal System as the Train Services of the End User that used those Nominated Access Rights,

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an amount calculated as follows:

$$TOP_B / TOP_A$$

where:

TOP_A is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the TOP Charges that would have been payable for the remainder of the term of this Agreement (“**Remainder of the Original Term**”) if the Nominated Access Rights were not relinquished but an Operator did not operate the relevant Train Services; and

TOP_B is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the Take or Pay amount that would be payable in accordance with the new access holder’s or Transferee’s access agreement (in relation to the whole or part of the Nominated Access Rights) if the new Access Holder’s or Transferee’s Train services using the Nominated Access Rights

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were not operated by or for the new Access Holder or Transferee during the same period as the Remainder of the Original Term; or

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(iv) if paragraph (a)(iii) does not apply, an amount calculated as follows:

A / B

where:

A is the annual train kilometres over that part of the Common Corridor attributable to the new Access Holder's or Transferee's Train Services in respect of which access rights could not have been provided without using the whole or part of the Nominated Access Rights; and

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B is the annual train kilometres over the Infrastructure attributable to the Train Services operated under the Nominated Access Rights,

provided that to the extent that the new Access Holder's average contribution to Common Costs per train kilometre for its relevant Train service is less than the average contribution to Common Costs per train kilometre for relevant Train Service of the End User the Reduction Factor will be decreased in proportion to that relative contribution; or

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(b) in all other circumstances, zero (0).

“Reference Tariff” means an access charge (including any System Premium) applicable to a specified Reference Train Service over a specified part of the Infrastructure as specified in QR Network's Access Undertaking;

“Reference Tariff Schedule” means the schedule attached to QR Network's Access Undertaking which includes the Reference Tariffs and the details of the application of the Reference Tariffs for a particular Reference Train Service;

“Reference Train Service” means a notional Train service identified in respect of a Reference Tariff and conforming to certain criteria, including carrying a specified commodity type, operating between specified geographical areas and conforming to specified technical characteristics, operational characteristics and contract terms and conditions;

“Reimbursable Item” means an item of expense incurred by either Party in respect of which that Party is entitled under this Agreement to be reimbursed by the other Party;

“Related Body Corporate” has the meaning given to that term in the Corporations Act;

“Relevant Escalation Date” means the Escalation Date occurring immediately prior to the last day of the Billing Period for which the invoice for the Access Charges payable in respect of that Billing Period is being prepared;

“Relevant Tax” means any tax, charge, levy, duty, impost, rate, royalty or imposition which is imposed on QR Network by, or payable by QR 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 to that term in Clause 4.2(b)(ii);

“Relinquishment Fee” means:

(a) the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the TOP Charges that would have been payable for the remainder of the Term if the Nominated Access Rights were not relinquished but the relevant Train Services did not operate less the product of that amount and:

(i) if the Nominated Access Rights to be relinquished are for coal carrying Train Services operating in the Central Queensland Coal Region and are not to be transferred to a Transferee, the greater of the Reduction Factor and 0.5; or

(ii) if paragraph (a)(i) of this definition does not apply, the Reduction Factor, provided that:

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(b) if that calculation requires information about future events (for example, assumptions about Reference Train Services or Train Services), QR Network

(i) may make assumptions about those future events so as to calculate the maximum amount of aggregate annual TOP Charges that could potentially be payable (provided that QR Network will not make assumptions about the amount of future Reference Tariffs);

(ii) must assume that the forecast inflation rate is 2.5%; and

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(c) where:

(i) the Reduction Factor is calculated in accordance with paragraph (a)(iii) of the definition of Reduction Factor; and

(ii) the Reference Tariff in relation to the Nominated Access Rights includes a System Premium,

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then the amount under paragraph (a) of this definition must be further adjusted by QR Network to account for any consequential increase in the System Premium that would otherwise result in QR Network over recovering amounts from the End User due to the application of the System Premium; and

(d) notwithstanding any other provision in this definition if:

(i) a calculation results in an amount that is less than zero (0); or

(ii) the Nominated Access Rights to be relinquished:

(A) are for coal carrying Train Services operating in the Central Queensland Coal Region; and

(B) are to be transferred to a Transferee for a period of less than two (2) years and only used by that Transferee for coal carrying Train Services operating in the Central Queensland Coal Region,

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then the amount is deemed to be zero (0).

“Resumption Notice” has the meaning given to that term in Clause 4.1(a);

“Review Date” means the date determined as the Review Date pursuant to Clause 2.1.2 of **Schedule 3**;

“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 (an Operator’s) Rollingstock includes Rollingstock which is owned, hired or leased by the Operator, supplied by a contractor of the Operator or is otherwise in the possession or control of the or 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;

“Schedule” means a schedule to this Agreement and any other schedule which amends, replaces or substitutes a schedule to this Agreement issued from time to time by QR Network pursuant to Clause 17.20;

“Scheduled Time” means the time of arrival or departure for a Train Movement at specified locations on the Nominated Network as detailed in the Train Schedule or as amended or altered by QR Network from time to time on the day of operation pursuant to the Network Management Principles provided that such amendments or alterations do not result in a notice for cancellation by an Operator pursuant to Clause 6.3(d) of the General Conditions of Contract of a Train Operations Agreement;

“Sectional Running Times” means the time period measured from the time a Train Service passes the signal controlling entry into a track section between two relevant specified locations on the Nominated Network to the time the Train Service arrives at the signal controlling entry into the next track section between two relevant specified locations on the Nominated Network, and does not include an allowance for Planned Dwell Times;

“Security Amount” means an amount equal to:

- (a) initially, the amount specified in Item 5 of the **Reference Schedule**; and
- (b) thereafter, as increased or decreased in accordance with Clause 3.4;

“Security” has the meaning given to that term in Clause 3.4(a);

“Security Interest Rate” means the “Cash Rate: average 11am rate” as published in the Australian Financial Review (or in the event that such a rate is not so quoted or published at or in respect of any relevant date, such other similar rate included in another publication agreed between the Parties) less 0.5%;

“State” means the State of Queensland;

“Stowage” means the short-term storage of Trains on the Nominated Network at locations specified by QR Network but does not include storage of individual items of Rollingstock or the long-term storage of Trains;

“Supply Chain Operating Assumptions” means QR Network’s assumptions on matters such as coal supply chain operating mode, operating parameters for each element of the coal supply chain, interface losses between each element of the coal supply chain, coal supply chain flexibility requirements, live run losses and other operating parameters;

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“**System GtK**” means the actual GtK achieved by all coal carrying Train services to the extent those Train services travel on the relevant Individual Coal System over the relevant period;

“**System Premium**” means the amount specified as such for the relevant Reference Train Service in QR Network’s Access Undertaking from time to time;

“**Take or Pay**” means the charge for contracted Train services where the contracted Train services are not used by the relevant Railway Operator, and for the End User is calculated as ATP in Part 4 of **Schedule 3**;

“**TOP Charges**” means the charges determined in accordance with **Schedule 3** payable to QR Network by the End User in relation to the Access Rights and any interest payable in relation to such charges pursuant to this Agreement;

“**Tax Invoice**” has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cwth);

“**Term**” means the term of this Agreement, commencing on the Commencement Date and ending on the Termination Date;

“**Termination Date**” means the date specified in Item 3 of the Reference Schedule or such earlier date upon which this Agreement is terminated pursuant to the provisions of this Agreement;

“**Third Party**” means a person other than the End User or QR Network;

“**Time at Depot**” means the period from when a Train Service arrives at the entry signal to the depot until it has completed all activities at the depot, is ready to depart the depot and has advised the relevant QR Network Train Controller accordingly;

“**Time at Mine**” means the time period from when a Train Service arrives at the entry signal to the specified mine loading facility until it has completed loading, has presented at the exit signal, is ready to depart the facility and has advised the relevant QR Network Train Controller accordingly;

“**Time at Unloading Facility**” means the time period from when a Train Service arrives at the entry signal to the specified unloading facility until it has completed unloading, presented at the exit signal, is ready to depart the facility and has advised the relevant QR Network Train Controller accordingly;

“**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;

“**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 QR Network’s information systems;
- (b) reporting of incidents occurring on the Infrastructure;
- (c) managing incidents occurring on the Infrastructure from within a Train Control centre;
- (d) field Incident management;

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(e) yard control services; and

(f) exchanging information with Railway Operators;

“**Train Movement**” means the operation of a Train on the Infrastructure by an Operator, QR Network or any Railway Operator;

“**Train Operations Agreement**” means an agreement between QR Network and an Operator in the form of the agreement contained in **Schedule 6** pursuant to which QR Network agrees that the Operator may utilise Access Rights as allocated to the Operator by the End User, 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 QR Network prior to the day of operation in accordance with an Interface Coordination Plan under a Train Operations Agreement showing the programmed times of arrival or departure for Train Movements at specified locations on the Infrastructure;

“**Train Service**” means the running of a Train between specified origins and destinations by an Operator (including any Stowage) in accordance with a Train Service Description;

“**Train Service Description**” means the description of a Train Service detailed in Part 1 of **Schedule 1**;

“**Train Service Entitlement**” means a Railway Operator’s entitlement under an access agreement to operate a specified number and type of Train Services over the Infrastructure within a specified time period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified transport service;

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“**Train Service Levels**” means collectively the Nominated Weekly Train Services, the Nominated Monthly Train Services and the Nominated Annual Train Services specified in **Schedule 1**;

“**Transfer Date**” has the meaning given to that term in Clause 4.2(c)(ii);

“**Transferee**” has the meaning given to that term in Clause 4.2(c);

“**Transport Infrastructure Act**” means the *Transport Infrastructure Act 1994* (Qld);

“**Urgent Possession**” is similar to a Planned Possession, except that such a possession is required to correct problems that are considered potentially dangerous and as a result, the possession must be carried out between seven (7) days and three (3) Months from the detection of the problem;

“**Wagon**” means any Rollingstock designed to carry any load other than passengers;

“**Year**” (when used with a capital) means the period from (and including) the first day of the Month in which the Commitment Date occurs to (but not including) the first anniversary thereof, and from every twelve (12) Month period thereafter except that the last year will end on the date of expiry 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) a reference to:
- (i) a person includes a firm, unincorporated association, corporation or other entity, government or statutory body and conversely;
 - (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) time is to local time in Queensland;
 - (viii) “A\$”, “\$” or “dollars” is a reference to the lawful currency of Australia;
 - (ix) this or any other document or agreement includes the document or agreement as varied, amended or replaced from time to time and notwithstanding any changes in the identity of the Parties;
 - (x) any thing (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;
 - (xi) a Clause or Schedule is to a clause or schedule to this Agreement (as amended from time to time in accordance with this Agreement);
 - (xii) any legislation or to 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;
 - (xiii) any Authority, association or body whether statutory or otherwise shall, in the event of any such Authority, association or body ceasing to exist or being re-constituted, re-named or replaced or the powers or functions thereof being transferred to any other Authority, association or body, be deemed to refer respectively to the Authority, association or body established or constituted in lieu thereof or as nearly as may be succeeding to the powers or functions thereof;
- (e) for the avoidance of doubt, 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; and
- (f) if there is any inconsistency between matters contained in a Schedule and any other provisions of the Agreement, the other provisions of the Agreement prevail. If there is any inconsistency between matters contained in QR

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Network's Access Undertaking and this Agreement, the provisions of this Agreement prevail.

2 Access Rights

2.1 Grant of Access Rights

In consideration of the End User agreeing to pay the TOP Charges and other payments to be made to QR Network by the End User, QR Network grants, and will provide, Access Rights to the End User in accordance with the Train Service Description for the operation of Train Services by an Operator on and from the Commitment Date on the terms in, and subject to the conditions of, this Agreement.

2.2 Nature and Scope of Access Rights

- (a) The Access Rights granted under Clause 2.1 are non-exclusive contractual rights and do not give the End User any right, title or interest of any proprietary nature in the Nominated Network.
- (b) The Parties acknowledge and agree QR Network is required to provide the End User with certain benefits, rights and services in accordance with Clause 2.4(e) of, and the definition of "Access" in, QR Network's Access Undertaking, and to the extent that these requirements are relevant to the End User's Access Rights it is intended the terms on which they are provided are detailed in this Agreement.

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2.3 Exercise of Access Rights

- (a) The Parties acknowledge and agree that::
- (i) the grant of the Access Rights to the End User in accordance with this Agreement does not entitle the End User to itself operate Train Services on the Nominated Network; and
- (ii) the End User can only utilise the Access Rights by nominating an Operator from time to time, in accordance with Clause 2.3(b), to use Access Rights, allocated to that Operator by the End User, under the terms of a Train Operations Agreement (and may nominate more than one Operator).
- (b) Subject to Clause 2.3(f), the End User may, from time to time, provided that it is not in material breach of any of its obligations under this Agreement, upon giving at least 30 days prior written notice to QR Network, nominate an Operator (for a period of not less than three months and comprised only of whole Months) to utilise all or part of the Access Rights by written notice to QR Network which:
- (i) specifies the name, ABN, address and contact details of the Operator;
- (ii) specifies the Access Rights which the End User wishes to allocate to the Operator for the Operator to use in providing Train Services for the End User;
- (iii) specifies the first day and the last day of the period for which the Access Rights are to be allocated to the Operator; and
- (iv) is accompanied by either:

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(A) a Train Operations Agreement (in duplicate), duly executed by the Operator, which reflects in **Schedule 1** the Access Rights which the End User wishes to allocate to the Operator; or

(B) a statement identifying the Operator's applicable Train Operations Agreement and evidence that the Operator agrees to the relevant nomination,

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provided that at no time can the Access Rights allocated by the End User to any Operators exceed, in aggregate, the End User's Access Rights under this Agreement.

(c) Notwithstanding any other provision in this Agreement, QR Network is not obliged to accept, or act on, any nomination of an Operator by the End User if that Operator is in material breach of any of its obligations under an existing Train Operations Agreement and unless QR Network is satisfied that Operator is:

- (i) financially sound; and
- (ii) otherwise capable of performing the obligations of the operator under a Train Operations Agreement.

(d) Upon receipt of:

(i) a Train Operations Agreement in accordance with Clause 2.3(b)(iv)(A), QR Network must execute both copies of the Train Operations Agreement and return one copy to the Operator; and

(ii) a statement and evidence in accordance with Clause 2.3(b)(iv)(B), QR Network must vary the relevant Train Operations Agreement to include the relevant Access Rights.

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(e) The End User may, from time to time, upon giving at least 30 days prior written notice to QR Network:

(i) vary any nomination previously given by the End User under Clause 2.3(b) so as to vary either or both of the following:

(A) the Access Rights which the End User has allocated to the Operator (provided that at no time can the Access Rights allocated by the End User to any one or more Operators exceed, in aggregate, the End User's Access Rights under this Agreement); or

(B) the period for which the Access Rights are to be allocated to the Operator (provided that the period for which Access Rights are allocated to the Operator cannot be less than three months, must only be comprised of whole Months and cannot extend beyond the Termination Date); or

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(ii) withdraw any nomination previously given by the End User under Clause 2.3(b).

(f) If at any time:

(i) the End User intends to:

(A) nominate an Operator to utilise all or part of the Access Rights; or

(B) vary a nomination previously given by the End User under Clause 2.3(b); and

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- (ii) the Train Services of the relevant Operator will have a Train Service Description different from that contemplated in **Schedule 1**,

then, prior to nominating the Operator or varying the nomination, QR Network and the End User must negotiate and agree any amendments to this Agreement (including any amendments to the Access Rights and the Base Access Charges) 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. No amendment to the Access Rights that results in the End User being granted increased rights to access the Nominated Network has any effect unless and until the End User and QR Network have complied with QR Network's Access Undertaking (including with respect to the allocation of those increased Access Rights).

- (g) If at any time:

- (i) the Access Rights of the End User are reduced (including under Clause 4.1 or Clause 4.5), or relinquished or transferred (under Clause 4.2); and

(ii) as a result of such reduction, relinquishment or transfer of Access Rights the Access Rights allocated by the End User to any one or more Operators under this Clause 2.3 exceed, in aggregate, the End User's Access Rights under this Agreement,

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then, unless the End User gives notice to QR Network in accordance with Clause 2.3(e) varying the nominations previously given by the End User under Clause 2.3(b), the End User will be deemed to have given such a notice reducing the Access Rights which the End User has allocated to the relevant Operator or Operators to the extent necessary. Such reduction will be taken to be pro rata where there is more than one relevant Operator.

- (h)

- (i) 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 2.3(e), or is deemed to vary or withdraw its allocation of Access Rights to an Operator in accordance with clause 2.3(g), the End User must pay to QR 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 this clause 2.3 is subject to and conditional on the End User's payment of the Adjustment Charges to QR Network.

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2.4 Renewal

- (a) If the End User gives notice to QR Network not less than twelve (12) Months prior to the Termination Date of its intention to seek a renewal of the Term, QR Network will consult with the End User in good faith to negotiate an extension or renewal of the Term provided always that:

- (i) subject to any provision to the contrary in QR Network's Access Undertaking, the End User will not be granted priority over any other party seeking access to the Nominated Network; and
 - (ii) the chief executive of the Department of Transport and Main Roads has a right in priority to the End User and any other party seeking access to reserve the capacity which is committed to the End User under this Agreement with effect on and from the Termination Date for existing or proposed regularly scheduled passenger services.
- (b) The Parties acknowledge and agree:
- (i) that the right to seek a renewal, transfer or relinquishment of the Access Rights is exercisable by the End User; and
 - (ii) that an Operator has no right to renew, transfer (subject to Clauses 22.2 and 22.3 of the General Conditions of Contract of the Operator's Train Operations Agreement) or relinquish to QR Network any part of the Access Rights allocated to that Operator by the End User, whether under the Operator's Train Operations Agreement or QR Network's Access Undertaking.

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2.5 Interaction of rights

The Parties acknowledge and agree:

- (a) that to the extent that the Operator's rights under the Train Operations Agreement or QR Network's Access Undertaking in relation to the Access Rights allocated to the Operator are inconsistent with the End User's rights in relation to those Access Rights under this Agreement or QR Network's Access Undertaking, the End User's rights and the exercise of those rights prevail to the extent of the inconsistency; and
- (b) that if there is any doubt as to whether a reference to the "Access Holder" under QR Network's Access Undertaking is a reference to the End User or the Operator, then the following principles will apply:
 - (i) only one, not both, of the End User and the Operator is the "Access Holder";
 - (ii) whether the End User or the Operator is the "Access Holder" will be determined based on which of those party's rights or obligations under this Agreement or the relevant Train Operations Agreement (as applicable) are the most consistent with the relevant rights or obligations under QR Network's Access Undertaking; and
 - (iii) if the application of Clause 2.5(b)(ii) is not determinative of whether the End User or the Operator is the "Access Holder", then the Operator is the "Access Holder".

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3 Charges

3.1 Obligation to pay charges

The End User must pay to QR Network:

- (a) the TOP Charges at the times and in the manner set out in this Agreement;

(b) any other charges or amounts payable in accordance with this Agreement; and

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(c) on demand and without prejudice to the rights, powers and remedies of QR Network under this Agreement or otherwise at Law, interest at the Default Rate calculated on daily balances and payable daily on any amount outstanding in respect of an invoice, including any disputed amount which is subsequently determined to be payable to QR Network, from the day after the invoice is due to be paid until the date that the amount outstanding is paid in full, and all interest payable but unpaid at the end of each Month shall be capitalised by QR Network and such capitalised amount shall itself bear interest at the Default Rate.

3.2 Invoicing

Unless agreed otherwise between the Parties:

(a) QR Network will provide to the End User an invoice for the TOP Charges and any other charges or amounts payable by the End User under this Agreement as soon as practicable after the end of each relevant Billing Period or, where this Agreement has expired or terminated on a date other than 30 June and the invoice is for annual TOP Charges, as soon as practicable after the first 30 June following that expiration or termination.

(b) The first Billing Period will commence on the Commitment Date and end on the last day of the Month in which the Commitment Date falls, and each subsequent Billing Period during the Term will commence on the day following the last day of the immediately preceding Billing Period.

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(c) Subject to Clause 3.2(d), the End User must pay to QR Network the amount of the invoice referred to in Clause 3.2(a) within fourteen (14) days after receipt of the invoice.

(d) Where the End User bona fide disputes an amount or amounts claimed in an invoice it shall give notice of that dispute (setting out in detail the grounds for its objection) to QR Network within fourteen (14) days after receipt of the invoice. Notwithstanding the End User's objection to any amounts claimed in an invoice, the End User must pay to QR Network the undisputed portion of the amount or amounts claimed in the relevant invoice together with 50% of the disputed portion within fourteen (14) days after receipt of the invoice.

(e) Any dispute as to the amount claimed in an invoice shall be resolved by an expert in accordance with Clause 11.3. Upon resolution of such dispute in accordance with Clause 11.3:

(i) the End User must pay to QR Network the amount (if any) determined to be payable by the End User to QR Network together with the interest on that amount calculated in accordance with Clause 3.1(c) within fourteen (14) days after being notified of the expert's determination; or

(ii) QR Network must credit to the End User in the form of a deduction from the invoice for TOP Charges and other charges for the Billing Period immediately following a resolution in accordance with Clause 11.3 any amount found to have been overpaid by the End User together with interest on that amount at the Default Rate calculated on daily balances from the date of payment of the amount overpaid to the date of such credit. Such interest payable but unpaid at the end of each Month shall

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be capitalised and such capitalised amount shall itself bear interest at the Default Rate.

- (f) When providing the End User with an invoice which includes, in whole or part, an amount for an annual TOP Charge, QR Network shall provide the End User with information on how QR Network determined the amount of the annual TOP Charge.

3.3 GST

- (a) Unless otherwise stated, all amounts payable or other consideration to be provided under this Agreement are exclusive of GST.
- (b) If a Party is required to pay GST on any amount payable or other consideration to be provided under this Agreement, then the other Party must pay to that Party an amount equal to the GST payable on the same date as the payment giving rise to the GST.
- (c) If the supply of a Reimbursable Item under this Agreement is subject to GST, then a Party must pay the other Party in respect of that Reimbursable Item the GST Inclusive Reimbursement.
- (d) Each invoice prepared pursuant to Clause 3.2(a) shall take the form of a Tax Invoice.
- (e) If the amount of GST paid or payable by a Party ('the supplier') on any supply under this Agreement differs from the amount on account of GST paid by the other Party ('recipient'), because the Commissioner of Taxation lawfully adjusts the value of taxable supply for the purpose of calculating GST, then the amount paid by the recipient will be adjusted accordingly by a further payment by the recipient to the supplier or the supplier to the recipient, as the case requires.

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3.4 Obligation to Provide Security

- (a) The End User must deliver to QR Network, prior to the operation of Train Services, and maintain during the Term security for the performance of the End User's obligations under this Agreement in the form of:
- (i) an unconditional and irrevocable bank guarantee (or equivalent), for the Security Amount, in favour of QR Network issued by a bank holding a current Australian banking licence and with a credit rating acceptable to QR Network; or
- (ii) any other security reasonably acceptable to QR Network, and containing such terms and conditions as are reasonably acceptable to QR Network ("**Security**").
- (b) Where the End User has delivered a Security to QR Network in the form of cash, QR Network will pay interest to the End User annually at the Security Interest Rate published on the day the Security is provided. The Security Interest Rate shall be reset on the first Business Day of each Month ("**Reset Date**") for that Month. Such interest shall be capitalised at each Reset Date and such capitalised interest shall itself bear interest at the Security Interest Rate.
- (c) The End User may, with QR Network's consent, replace any Security provided by the End User in accordance with this Clause 3.4 with replacement Security.

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If the End User replaces any existing Security with a replacement Security then QR Network will release the existing Security in accordance with Clause 3.6(b).

(d) The provision and continuance of the Security (or of any additional or replacement Security provided by the End User in accordance with Clause 3.4(c) or Clause 3.4(f)) is a condition of the performance by QR Network of its obligations under this Agreement.

(e) If at any time during the Term the End User is not required to give QR Network a Security in accordance with this Agreement and QR Network does not hold a Security from the End User, the End User must provide a Security within fourteen (14) days after receipt of a notice from QR Network where:

(i) an event of default by the End User in regard to payment of any amount due under this Agreement has occurred, that event of default is not the subject of a bona fide dispute between the Parties and such default continues for seven (7) days after notice of such default from QR Network; or

(ii) in the event of an Assignment or at any time during the Term, if QR Network is reasonably of the opinion that the End User is:

(A) no longer financially sound;

(B) no longer able to meet its debts as and when they fall due; or

(C) not otherwise capable of performing its obligations under this Agreement.

(f) If at any time during the Term the Security held by QR Network is less than the Security Amount (including for reasons that QR Network has drawn on or applied the Security in accordance with Clause 3.5), the End User must increase the Security by the amount determined by QR Network as required to ensure that the Security is for the Security Amount, and deliver to QR Network an additional or replacement Security to reflect the change within fourteen (14) days after receipt of notice from QR Network.

(g) If the End User considers its financial circumstances have changed such that a Security would no longer be required, the End User may request QR Network in writing (but not more than once in any twelve (12) Month Period) to review the creditworthiness of the End User and QR Network will undertake such a review.

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3.5 Exercise of Security

The Security will be held by QR Network as security for the performance of the obligations of the End User under this Agreement and may be called upon by QR Network in any circumstances where QR Network suffers direct loss or damage as a result of default by the End User under this Agreement and is entitled to be compensated for such loss or damage under this Agreement.

3.6 Return of Security

QR Network must repay or return to the End User (and where appropriate provide to the End User any necessary releases in relation to) any Security provided by the End User under Clause 3.4:

- (a) subject to QR Network's rights of recourse to the Security in Clause 3.5, promptly after the Termination Date;
- (b) on receipt of an additional or replacement Security provided by the End User in accordance with Clause 3.4(c) or 3.4(f); or
- (c) following a review pursuant to Clause 3.4(g), QR Network, acting reasonably, finds that it is not necessary for the End User to provide QR Network with a Security.

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3.7 Weighbridges and overload detectors

- (a) Notwithstanding any other provision in this Agreement, neither Party will be liable to the other for any damage, loss, cost or expense that the other may suffer or incur as a result of that Party, in good faith, acting on the basis of any mass determined in accordance with a Train Operations Agreement.
- (b) Notwithstanding any other provision in this Agreement, neither Party shall 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 Clause 3(i) of the General Conditions of Contract of a Train Operations Agreement.

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4 Reduction, Relinquishment and Transfer of Access Rights

4.1 Reduction of Access Rights

- (a) If, for any reason other than the occurrence of a Force Majeure Event or the failure of QR Network to make the Access Rights available, at least eighty-five percent (85%) of the Train Services that are entitled to be operated for the End User are not operated over any four (4) consecutive Quarters, in accordance with the Train Service Description for that period, then QR Network may within forty (40) Business Days, give the End User written notice ("**Resumption Notice**"):
 - (i) of that underutilisation;
 - (ii) that QR Network is considering reducing the End User's Access Rights from a nominated date ("**Date of Resumption**") to the extent of that underutilisation; and
 - (iii) requesting the End User to demonstrate a sustained requirement for the Access Rights that have not been utilised.
- (b) If a Resumption Notice is given to the End User and:
 - (i) the End User has not demonstrated to QR Network's reasonable satisfaction, within 21 days of receiving the Resumption Notice, a sustained requirement for the Access Rights that were not utilised; and
 - (ii) QR Network is satisfied that it can demonstrate that it has a reasonable expectation of:
 - (A) a sustained alternative demand for the capacity used by the Access Rights in question; or
 - (B) receiving a commercial benefit sufficiently material to justify the resumption of the Access Rights in question,

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then:

(iii) QR Network must notify the End User of whether QR Network has decided to proceed with the resumption and, if QR Network has decided to proceed, whether QR Network has decided to reduce the level of the resumption, or nominate a later date for the Date of Resumption, from that given in the Resumption Notice; and

(iv) if QR Network has decided to proceed with the resumption, the End User's entitlement to operate Train Services (through the Operator) shall be reduced to the level specified in the Resumption Notice with effect on and from the Date of Resumption (except to the extent that those matters have been varied in accordance with Clause 4.1(b)(iii)).

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(c) If the End User does not agree with the reduction of the End User's entitlement proposed by QR Network pursuant to Clause 4.1(a), the End User may, within twenty eight (28) days of receipt of the Resumption Notice, notify QR Network in writing that it disputes the proposed reduction in which case the End User may refer the dispute for determination by an expert in accordance with Clause 11.3. The expert will determine whether the conditions for a reduction in Access Rights set out in Clause 4.1(a) have been met and whether the End User has demonstrated, to QR Network's reasonable satisfaction, a sustained requirement for that part of the Access Rights to which the reduction would apply. The reduction proposed in the Resumption Notice will not take effect until resolution of the dispute and then only to the extent that the reduction is consistent with the expert's determination.

(d) QR Network may withdraw the Resumption Notice at any time prior to the later of the Date of Resumption and fourteen (14) days following the resolution of the dispute.

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(e) In the event that the End User's Access Rights are reduced in accordance with this Clause 4.1, the Agreement (including the Base Access Charges) will be varied accordingly.

(f) The End User shall have no claim or entitlement to compensation as a result of any reduction in Access Rights pursuant to this Clause 4.1.

4.2 Relinquishment and Transfer of Access Rights

(a) The End User may relinquish or transfer its Access Rights in accordance with this Clause 4.2.

(b) If the End User intends to relinquish Access Rights, the End User must give QR Network reasonable notice of its intention to do so ("**Notice of Intention to Relinquish**") specifying:

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(i) the Nominated Access Rights; and

(ii) subject to Clause 4.2(d), the date ("**Relinquishment Date**") on which and the period for which the Nominated Access Rights are to be relinquished; and

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(c) If the End User intends to transfer all or part of its Access Rights to an Access Seeker (as defined in QR Network's Access Undertaking) (the "**Transferee**"), the End User must give QR Network reasonable notice of its intention to do so ("**Notice of Intention to Transfer**"), specifying:

- (i) the Nominated Access Rights;
 - (ii) subject to Clause 4.2(d), the date (“**Transfer Date**”) on which and the period for which the Nominated Access Rights are to be transferred; and
 - (iii) the identity of the Transferee.
- (d) The period from the giving of the Notice of Intention to Relinquish until the Relinquishment Date, or the period from giving of the Notice of Intention to Transfer until the Transfer Date, must not:
- (i) exceed two (2) years, where the Nominated Access Rights are for coal carrying Train Services operating in the Central Queensland Coal Region; or
 - (ii) exceed six (6) months, where Clause 4.2(d)(i) does not apply.
- (e) If the End User wishes to relinquish or transfer Nominated Access Rights, the End User must pay a Relinquishment Fee to QR Network. The relinquishment or transfer of any Nominated Access Rights in accordance with this clause is subject to and conditional on the End User’s payment of the Relinquishment Fee to QR Network.
- (f) The End User immediately prior to paying the Relinquishment Fee (but not less than 5 Business Days prior to the Relinquishment Date or Transfer Date), must request QR Network to calculate the Relinquishment Fee. Upon being so requested, QR Network will calculate the Relinquishment Fee in accordance with clause 1.1. Subject to Clause 4.2(g), QR Network will notify the End User as soon as reasonably practical of the Relinquishment Fee and how it was calculated.
- (g) If the calculation of the Relinquishment Fee changes during the period from the time QR Network notifies the End User under Clause 4.2(f) to the End User seeking to pay the Relinquishment Fee, then QR Network:
- (i) may refuse to accept that payment (and, if so, the Relinquishment Fee is deemed not to have been paid by the End User); and
 - (ii) must advise the End User of the correct Relinquishment Fee and the circumstances giving rise to the change in the calculation.
- (h) The terms of this Agreement will continue to apply in respect of the Nominated Access Rights until the later of:
- (i) the End User paying the Relinquishment Fee to QR Network; and
 - (ii) the Relinquishment Date or Transfer Date.
- (i) Where QR Network identifies an opportunity for it to enter into an access agreement with an existing or prospective Railway Operator that would result in a lessening of the End User’s Relinquishment Fee, QR Network will not unreasonably delay the process for negotiating and executing an access agreement with that existing or prospective Railway Operator.
- (j) In the event of a transfer of Access Rights under this Clause, QR Network will transfer the applicable Nominated Access Rights provided that:

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- (i) the access rights sought by the Transferee are for the same type of Train Service Entitlement (i.e. cyclic traffic) as the Nominated Access Rights;
- (ii) corresponding access rights are included in a new or varied access agreement with the Transferee;
- (iii) QR Network's obligation to provide access, for all or part of the period specified in Clause 4.2(c)(ii), under that new or varied access agreement in respect of the relevant access rights commences on and from the later of the End User paying the Relinquishment Fee to QR Network and the Transfer Date;
- (iv) QR Network is satisfied that the new or varied access agreement has been developed in accordance with the requirements of QR Network's Access Undertaking;
- (v) the End User complies with Clauses 4.2(c) and (e); and
- (vi) QR Network has sufficient capability in its Infrastructure so that it can do so without adversely affecting other Third Parties who are seeking access to QR Network's Infrastructure or its ability to comply with its obligations to Third Parties with existing rights to access Infrastructure.

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4.3 Termination where all Access Rights reduced, relinquished or transferred

Where Access Rights have been reduced, relinquished or transferred in accordance with this Agreement to the extent that there is no longer any Access Rights, QR Network will be entitled to terminate this Agreement.

4.4 Forecasts

- (a) For the purposes of permitting QR Network to plan for the maintenance and upgrading of the Infrastructure, the End User will, within thirty (30) days after being requested to do so by QR Network (such requests to be made not more than once in any three (3) Month period), provide to QR Network a forecast in writing representing the End User's best estimate for the next six (6) year period specified by QR Network in its request of:
 - (i) the number and frequency of Train Services it will require its Operators to operate; and
 - (ii) the gross tonnage it will require its Operators to transport,
 such forecast of the above information to be made up of:
 - (iii) a forecast for each Month of the first year of such period; and
 - (iv) a forecast for each of the remaining five (5) years of such period.
- (b) QR Network will, within sixty (60) days after being requested to do so by the End User (such requests to be made not more than once in any six (6) Month period), provide to the End User forecasts of planned major Enhancements relating to the Nominated Network for each of the next six (6) years.
- (c) The information and/or forecasts provided pursuant to Clauses 4.4(a) or (b) shall be prepared and supplied in good faith however the information and/or forecasts shall not be a representation or warranty as to the accuracy of the

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information and/or forecasts itself and the parties have no liability in any respect for the information and/or forecasting.

4.5 Reduction of Access Rights where insufficient capacity created

- (a) Notwithstanding any other provision in this Agreement, if QR Network grants access rights (“**Conditional Access Rights**”) to Railway Operators (including the Access Rights to the End User under this Agreement) (“**Conditional Access Holders**”) that are conditional on the completion of particular Enhancements, then:
- (i) after the commissioning of the last of the relevant Enhancements, QR Network will, subject to Clause 4.5(b), undertake an assessment of the change in Existing Capacity arising as a result of those Enhancements (“**Change in Existing Capacity**”) where Change in Existing Capacity is measured as the Existing Capacity at that time, less the Existing Capacity of the system in the absence of the Enhancement, using consist Supply Chain Operating Assumptions;
 - (ii) the assessment must be done expeditiously with an evaluation period of no more than six months following commissioning;
 - (iii) if that assessment indicates that the Change in Existing Capacity is not due to an Enhancement, then Conditional Access Rights will not be reduced;
 - (iv) if the Change in Existing Capacity is due to an Enhancement but:
 - (A) that assessment indicates that the Change in Existing Capacity is less than the Planned Capacity for those Enhancements at the time when the Conditional Access Rights were granted; and
 - (B) that Change in Existing Capacity is not sufficient to provide all of the Conditional Access Rights to all of the Conditional Access Holders and rectify any existing deficit of Available Capacity to Committed Capacity in respect of the relevant Infrastructure,
 then:
 - (C) the Conditional Access Rights of the End User will be reduced on a pro rated basis, to a proportion of the Capacity that is:
 - (1) the Change in Existing Capacity;
 - (2) less the Capacity required to be provided to existing non-conditional End User to rectify any existing deficit of Available Capacity to Committed Capacity in respect of the relevant Infrastructure; and
 - (3) by reference to the proportion that those Conditional Access Rights bear to the aggregate of the Conditional Access Rights for all of the Conditional Access Holders;
 - (D) QR Network will notify the End User:
 - (1) of the assessment that has been undertaken; and
 - (2) of the reduction in its Conditional Access Rights (“**Access Rights Reduction**”) and the basis of that calculation; and

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- (3) that each of the Conditional Access Holders together will be placed in a queue (or returned to the queue if one already exists) in accordance with QR Network's Access Undertaking and be given a starting position in the queue based on the date of their original Access Application (as defined in QR Network's Access Undertaking), but only to the extent of their Access Rights Reduction unless they notify QR Network within 30 days that they do wish to seek the additional Access Rights.
- (b) QR Network may defer an assessment for the purposes of Clause 4.5(a) until such time as QR Network reasonably considers that the relevant Enhancements are fully operational and the demand conditions are such that a reasonable assessment can be undertaken.
- (c) If the End User is notified of a reduction in the End User's Conditional Access Rights, then, subject to Clause 4.5(f), the End User's Conditional Access Rights are reduced in accordance with that notice and this Agreement (including the Train Service Description) is taken to be amended to the extent necessary to give effect to that reduction.
- (d) Subject to Clause 4.5(e), any dispute between the Parties in connection with the operation of this Clause 4.5 (including the pro rating of the End User Conditional Access Rights) may be referred by either Party to the QCA for resolution in accordance with the dispute resolution provisions that apply in respect of the determination of disputes by the QCA under QR Network's Access Undertaking.
- (e) If QR Network is of the opinion that:
- (i) a dispute which arises in connection with this Clause 4.5, or the outcome or consequences of that dispute, may be relevant to other Conditional Access Holders; or
 - (ii) a dispute which arises under a provision equivalent to this Clause 4.5 of an access agreement with another Conditional Access Holder, or the outcome or consequences of that dispute, may be relevant to the End User under this Agreement,
- then:
- (iii) QR Network will invite the other Conditional Access Holders to participate in the dispute resolution process under this Agreement, or will invite the End User to participate in the dispute resolution process under the relevant access agreement with the other Conditional Access Holder (as applicable); and
 - (iv) QR 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.
- (f) If the End User is, in accordance with this Clause 4.5, a party to, or is invited to participate in, a dispute that has been referred to the QCA in connection with the operation of this Clause 4.5, then:

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- (i) a reduction of the End User's Conditional Access Rights in accordance with this Clause 4.5 will not take effect until the resolution of that dispute and then only to the extent that the reduction is consistent with the QCA's determination; and
- (ii) QR Network's obligations under this Agreement to the extent of the End User Access Rights Reduction are suspended until the resolution of that dispute.
- (g) This Clause 4.5 only applies to the extent that it is not inconsistent with QR Network's Access Undertaking and does not oblige QR Network to do or not to do anything that would cause QR Network to fail to comply with QR Network's Access Undertaking.

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5 Performance levels

- (a) In the event that an Operator
 - (i) does not comply in any material respect with the Train Service Description under a Train Operations Agreement; and
 - (ii) the Operator has failed to demonstrate to the reasonable satisfaction of QR Network when requested to do so, that the Operator will consistently comply with the Train Service Description under a Train Operations Agreement for the remainder of the Term of that Train Operations Agreement,

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then, following consultation with the Operator and the End User, QR Network will be entitled to:

- (iii) vary the Train Service Description to a level it reasonably expects to be achievable for the remainder of the Term having regard to the extent of previous compliance with the Train Service Description (ignoring, for the purpose of assessing previous compliance, any non-compliance to the extent that the non-compliance was attributable to a Railway Operator (other than the End User or an Operator) or to QR Network); and
- (iv) vary this Agreement in accordance with Clauses 16.2(g), 16.2(h) and 16.2(i) to reflect the impact of the change in the Train Service Description.
- (v) For the avoidance of doubt, the End User is entitled to dispute any variation proposed by QR Network pursuant to Clause 5(a), in accordance with the process set out in Clause 16.2(i).

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6 Infrastructure management

- (a) The End User must notify QR Network as soon as is reasonably practicable 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 :
 - (i) must not cause any Obstruction or permit to continue any Obstruction caused by the End User and

- (ii) must notify QR Network as soon as reasonably practicable after the End User's Staff discover or become aware of: any Obstruction; or anything which may cause or contribute to the occurrence of an Incident or Obstruction.

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7 Insurance by the End User

7.1 Maintain Insurance Policies

The End User must, prior to the first nomination of an Operator, at the End User's expense take out and subsequently maintain current at all times during the Term insurance with a Corporation licensed to conduct insurance business in Australia (or otherwise reasonably acceptable to QR Network) those policies of insurance required by this Agreement.

7.2 Required Insurance Policies

The End User must take out and maintain insurance for the risks and on the terms specified in **Schedule 4**.

7.3 Disclosure of Insurance Policies

The End User must provide to QR Network evidence of the insurance policies effected pursuant to this Clause 7 or, if requested by QR Network, copies of such insurance policies, to QR Network's reasonable satisfaction:

- (a) at least fourteen (14) days prior to the commencement of Train Services;
- (b) upon renewal of each insurance policy during the Term; and
- (c) whenever reasonably requested to do so in writing by QR Network.

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7.4 Failure to Disclose Insurance Policies

If the End User, whenever required to do so under this Agreement, fails to produce to QR Network evidence to the reasonable satisfaction of QR Network of insurances that have been effected or maintained by it, QR Network may:

- (a) effect and maintain the insurance and pay the premiums and any amount so paid will be a debt due from the End User to QR Network; and/or
- (b) terminate this Agreement pursuant to Clause 14.1(d).

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7.5 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 and QR 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 QR Network (which consent shall not be unreasonably withheld or delayed); and
- (c) include the terms and be for the amounts referred to in **Schedule 4**.

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7.6 End User Not to Render Policy Void

The End User must not render any of the insurances effected in accordance with this Clause 7 void or voidable or liable to refusal of any claim.

7.7 Compliance

The End User must at all times comply with the terms and conditions of all insurance policies effected pursuant to this Clause 7.

7.8 Notice of Potential Claims

In addition to any other obligation on the End User pursuant to this Agreement, the End User must notify QR Network as soon as practicable after the occurrence of any claim under any insurance policy required by this Agreement, notify QR Network of that event in reasonable detail and thereafter keep QR Network informed of subsequent developments concerning any claim.

7.9 End User to pay all excess/deductibles

The End User must in respect of any claims by it or any other insured for which it is responsible, pay and bear, all excesses/deductibles provided for in any insurances effected in accordance with this Clause 7.

7.10 Settlement of Claims

Upon settlement of a claim under any policy required by this Agreement covering damage to Infrastructure the monies received must be paid to QR Network unless the End User has already partially or totally indemnified QR Network for the relevant damage, in which case the monies shall be paid to the End User or Operator (as applicable) but only to the extent that QR Network has been indemnified.

8 Indemnities and Liabilities

8.1 Indemnity by End User

Subject to Clause 8.3, the End User is solely liable for and releases, indemnifies and will keep indemnified QR Network, its directors and QR Network's Staff against all Claims of any nature suffered or incurred by or made or brought against QR Network, its directors or QR Network's Staff due to or arising out of this Agreement or a Train Operations Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of QR Network) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the End User or End User's Staff.

8.2 Indemnity by QR Network

Subject to Clause 8.3, QR Network is solely liable for and releases, indemnifies and will keep indemnified the End User, its directors and 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 due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of the End User) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of QR Network or QR Network's Staff.

8.3 Liability to Third Parties

Notwithstanding Clause 8.1 or Clause 8.2, the End User is solely liable for and releases, indemnifies and will keep indemnified QR Network, its directors and QR Network's Staff against all Claims due to or arising out of this Agreement in respect

of damage to or loss of any property or personal injury to or death of any person where such person or property is being transported on Train Services except to the extent that such damage, loss, injury or death is caused by or contributed to (to the extent of the contribution) by the wilful default or any deliberate or negligent act or omission of QR Network or QR Network's Staff.

8.4 Liability from Infrastructure Standard

Notwithstanding any other provision of this Agreement, QR Network will not be liable to the End User and the End User will not have or make any Claim against QR Network in respect of any loss of or damage to real or personal property, including property of the End User, or personal injury to or death of any person or 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, cost or expense results directly from the failure of QR Network to perform its obligations under Clause 7.2(a) of the General Conditions of Contract of the Train Operations Agreement.

8.5 Defence of Claims

The Parties shall render each other all reasonable assistance in the defence of any Claim made against a Party by a Third Party arising out of any Incident or other event giving rise to a Claim.

8.6 Continuation of Indemnities

The releases and indemnities contained in this Clause 8 for the benefit of either Party continue in full force and effect as to any Claims occurring or arising from any act occurring during the Term notwithstanding the termination of this Agreement whether by expiration of time or otherwise.

8.7 Determination of Liability

In the event of an Incident involving the End User or any other event which results or could result in a Claim by or against the End User or QR Network, liability as between the End User and QR Network shall for the purposes of this Clause 8 be determined:

- (a) as agreed between the Parties;
- (b) failing such agreement within one (1) Month of either Party giving notice to the other requiring agreement on liability, by a loss adjuster appointed pursuant to Clause 8.8; or
- (c) where the amount of the Claim exceeds the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) and either Party is dissatisfied with the report of the loss adjuster, by a Court of competent jurisdiction.

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8.8 Loss Adjuster

Subject to Clause 16.1, where a matter is to be referred to a loss adjuster in accordance with Clause 8.7 then the following provisions of this Clause shall apply:

- (a) The loss adjuster shall be appointed by the Parties, or in default of such appointment within fourteen (14) days after the need to appoint a loss adjuster, by the President of The Chartered Institute of Loss Adjusters Australasian Division.
- (b) In any event, the loss adjuster shall:

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- (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 his function as a loss adjuster, he being required to fully disclose any such interest or duty before his appointment; and
 - (iii) not be an employee of the End User, any Operator or QR Network or of a Related Body Corporate of any of them.
- (c) The loss adjuster appointed pursuant to this Clause 8.8 shall not be permitted to act until he has given written notice of the acceptance of his appointment to both Parties.
- (d) Any loss adjuster appointed pursuant to this Clause 8.8 shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and the performance of his duties.
 - (e) Any person nominated as a loss adjuster hereunder shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the Commercial Arbitration Act 1990 (Qld) shall not apply to him or his determination or the procedures by which he may reach his determination.
 - (f) Each Party must ensure to the best of its ability that the loss adjuster is given the opportunity to interview any employee, agent or contractor (including employees, agents or contractors of an Operator) 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.
 - (g) Each Party must make available to the loss adjuster any files, documents, data, recordings or other information that may be of use to, or is requested by, the loss adjuster for the purposes of his investigation.
 - (h) The loss adjuster will determine the quantum of the relevant Claim and the liability of the End User and/or QR Network in respect of such Claim and shall provide a copy of his report on such matters to each of the Parties within a reasonable time after his appointment.
 - (i) In the absence of manifest error, the decision of the loss adjuster shall be 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 the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00).

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8.9 Costs

Subject to Clause 16.1, the costs of the loss adjuster shall be borne by the Parties in such proportions as liability is determined by the loss adjuster or where the liability is determined by a Court, in such proportions as liability is determined by the Court.

9 Limitation of Liability

9.1 No Liability for Consequential Loss

Neither Party shall in any circumstances be liable to the other for (and the indemnities in Clauses 8.1 and 8.2 shall not extend to) any Consequential Loss.

9.2 Limitation on Claims

Neither Party shall make any Claim against the other in respect of the neglect or default of that Party under the Agreement unless:

- (a) notice of the Claim has been given to the other within twelve (12) Months of the occurrence of the event or circumstance out of which such Claim arises; and
- (b) the amount of the Claim exceeds ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) 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 Party may proceed for the full amount of the Claim and is not limited to only so much of the Claim as exceeds the required threshold of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00)).

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9.3 Claims in respect of non-provision of Access

The End User shall not have or make any Claim against QR Network in respect of the non-provision of access or cancellation of any Train Service unless, and shall only have a claim to the extent that:

- (a) a Train Service is cancelled as a result of a failure by QR Network to make the Infrastructure available for an Operator to operate the Train Service at the Scheduled Time in the Train Schedule and QR Network was unable to schedule the Train Service at a reasonable alternative time; and
- (b) the failure by QR Network to make the Infrastructure available was a result of a breach of this Agreement by QR Network, or negligence on the part of QR Network; and
- (c) the failure by QR Network to make the Infrastructure available is not attributable to:
 - (i) the End User or an Operator;
 - (ii) another Railway Operator (other than QR Network);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of (including Enhancements to) the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) any action taken by QR Network, acting reasonably, in response to an emergency or a genuine safety risk; and
- (d) either:
 - (i) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5 and the total number of Train Services cancelled in a Billing Period as a result of a failure by QR Network to make the Infrastructure available exceeds the Allowable Threshold; or
 - (ii) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5, but the non-provision of access or cancellation of Train Services is of a magnitude which is beyond the scope of that performance and adjustment regime.

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9.4 Claims in respect of delays to Train Movements

Neither Party (the “Affected Party”) shall have or make any Claim against the other Party (the “Defaulting Party”) in respect of delays to Train Movements unless, and shall only have a Claim to the extent that:

- (a) the delay was a result of a breach of this Agreement by the Defaulting Party, or negligence on the part of the Defaulting Party; and
- (b) the delay is not attributable to:
 - (i) the Affected Party (or Operator where the End User is the Affected Party);
 - (ii) another Railway Operator (other than QR Network or the Defaulting Party or an Operator where the End User is the Defaulting Party);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of (including Enhancements to) the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) any action taken by QR Network, acting reasonably, in response to an emergency or a genuine safety risk; and
- (c) either:
 - (i) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5; or
 - (ii) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5, but the non-provision of access or cancellation of Train Services is of a magnitude which is beyond the scope of that performance and adjustment regime.

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9.5 Exclusion of Claims in certain other circumstances

- (a) Except to the extent that an Operational Constraint results from a breach by QR Network of this Agreement, any delays or cancellations of Train Services caused by or resulting from Operational Constraints shall not constitute a default by QR Network of its obligations under this Agreement and QR Network will not be liable for any Claims suffered or incurred by or made or brought by or against the End User as a result of or arising from the imposition of such an Operational Constraint.
- (b) Except as otherwise provided in this Agreement, QR Network will not be liable for any delays, cancellation of Train Services or Claims suffered or incurred by or made or brought by or against the End User as a result of an Operator complying with a request by QR Network pursuant to Clause 8.4(e) of the General Conditions of Contract of a Train Operations Agreement.
- (c) If QR Network takes action under Clause 8.4(d)(i) of the General Conditions of Contract of a Train Operations Agreement, then QR Network shall have no liability for any damage to or loss of freight caused by such actions.
- (d) If QR Network conducts an inspection or audit under Clause 13 of the General Conditions of Contract of a Train Operations Agreement, QR Network will not be liable for any delays or cancellation of Train Services or Claims suffered or

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incurred by or made or brought by or against the End User as a result of the exercise by QR Network of its rights under Clause 13 of the General Conditions of Contract of the Train Operations Agreement provided QR Network complies with Clause 13.4(c) of the General Conditions of Contract of the Train Operations Agreement.

10 Material Change

10.1 Meaning of Material Change

In this Clause 10:

- (a) "Material Change" means a:
- (i) Change in Relevant Taxes;
 - (ii) Change in Law;
 - (iii) change in the funding from governments in respect of that part of the Nominated Network specified in Part 4 of **Schedule 2**; or
 - (iv) matter deemed to be a Material Change under Clause 17.18(d); and
- (b) "**Net Financial Effect**" means the net effect in financial terms of a Material Change on QR Network in relation to performing its obligations or exercising its rights under this Agreement and/or a Train Operations Agreement including any offsetting benefits or adverse effects directly or indirectly connected to the Material Change. Any change in the funding from governments in respect of the Nominated Network which is adverse to QR Network shall, to the extent that change affects the financial position of QR Network, be deemed to be an additional cost to QR Network of performing its obligations under this Agreement and/or a Train Operations Agreement.

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10.2 Adjustment for a Material Change

- (a) If there is no Reference Tariff applicable to the relevant Train Service under this Agreement then:
- (i) if at any time after the date of this Agreement a Material Change occurs which affects the financial position of QR Network or the cost to QR Network of performing its obligations under this Agreement and/or a Train Operations Agreement, QR Network may notify the End User giving details of the Net Financial Effect of the Material Change;
 - (ii) within fourteen (14) days after receipt of a notice under Clause 10.2(a)(i), the Parties shall meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement in order to remove as far as practicable the Net Financial Effect of the Material Change and return QR Network to the position it would have been in had it not been for the Material Change. If the Parties do not reach agreement within twenty (20) days of QR Network's notice, the matter will be referred to an expert for determination in accordance with Clause 11.3.
- (b) If a Reference Tariff is applicable to the relevant Train Service under this Agreement then the relevant Reference Tariff Schedule will provide for the consequences of Material Change.

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10.3 Parties Obligations

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

11 Disputes

11.1 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 shall be resolved in accordance with this Clause 11 and either Party may give to the other Party to the Dispute a notice in writing ("**Dispute Notice**") specifying the Dispute and requiring that it be dealt with in the manner set out in this Clause 11.

11.2 Chief Executive Resolution

(a) Except as otherwise provided in this Agreement, the Parties hereby agree that any Dispute shall be referred in the first instance and in any event within five (5) Business Days of the Dispute Notice to the chief executive officer of QR Network (or his nominee) and the chief executive officer of the End User (or his nominee) for the purposes of this Clause 11.2 for resolution.

(b) If the Dispute is not resolved within ten (10) Business Days, the relevant Dispute may by agreement between QR Network and the End User be referred for resolution by an expert in accordance with Clause 11.3 or by arbitration in accordance with Clause 11.4.

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11.3 Expert

Subject to Clause 16.1, where any matter may be referred to an expert pursuant to Clause 11.2 or is required by this Agreement to be referred to an expert then except as otherwise provided for in this Agreement, the matter must be referred for determination by a person:

(a) who is appointed by the Parties, or in default of such appointment within ten (10) Business Days after either Party giving notice in writing to the other Party requiring the appointment of an expert then that person is to be nominated at either Party's request by:

(i) if the Parties agree that the Dispute is of a financial nature, the President for the time being of CPA Australia;

(ii) if the Parties agree that the Dispute is of a non-financial nature, the President for the time being of the Engineers Australia – Queensland Division; and

(iii) in any other case, by the President for the time being of the Queensland Law Society Incorporated;

(b) who has appropriate qualifications and practical experience having regard to the nature of the Dispute;

(c) who has no interest or duty which conflicts or may conflict with his function as expert, he being required to fully disclose any such interest or duty by written notice to the Parties before his appointment;

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- (d) who is not an employee of the End User, any Operator or QR Network or of a Related Body Corporate of any of them;
- (e) who shall not be permitted to act until he has given written notice to both Parties that he is willing and able to accept the appointment;
- (f) who shall 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 submitted by the Parties or submitted by the Parties as soon as reasonably practicable at his request and who must provide both Parties with a copy of his determination in the form of a report within a reasonable time after his appointment;
- (g) who shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (h) who shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration (including, without limitation, the *Commercial Arbitration Act 1990* (Qld)) shall not apply to him or his determination or the procedures by which he may reach his determination;
- (i) whose decision, in the absence of manifest error, shall be final and binding upon the Parties; and
- (j) whose costs (and the costs of any advisers to the expert) shall be borne 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).

Any determination made by an expert must be consistent with the provisions of this Agreement.

11.4 Arbitration

Subject to Clause 16.1, the Parties may agree to refer any Dispute to arbitration by a single arbitrator sitting in Brisbane agreed upon between the End User and QR Network and failing agreement upon such arbitrator within fourteen (14) days after the date of written notice from one Party to the other requiring the appointment of an arbitrator then to an arbitrator appointed by the President of the Institute of Arbitrators. Every such reference shall be an arbitration within the meaning of the *Commercial Arbitration Act 1990* (Qld) and subject to the provisions relating to arbitration contained in that Act.

11.5 Determination by Court

If any Dispute is not resolved in accordance with Clause 11.2 nor referred to an expert in accordance with Clause 11.3, nor referred to arbitration by agreement of the Parties in accordance with Clause 11.4, nor referred to the QCA in accordance with Clause 11.6, then the Dispute shall be referred to the courts of the State.

11.6 Queensland Competition Authority (QCA)

Subject to Clause 16.1, the Parties may agree to refer and where required by this Agreement shall refer any Dispute to the QCA.

12 Force majeure

12.1 Claim of Force Majeure

If by reason of a Force Majeure Event occurring either Party is wholly or partially unable to carry out its obligations under this Agreement (other than an obligation to pay monies), that Party must, as soon as it becomes aware of the Force Majeure Event, give to the other Party prompt written notice of the Force Majeure Event together with full particulars of all relevant matters including:

- (a) details of the Force Majeure Event and that part of the Nominated Network affected;
- (b) details of the obligations affected;
- (c) details of the action that the Party has taken to remedy the situation and details of the action that the Party proposes to remedy the situation; and
- (d) an estimate of the time during which the Party will be unable to carry out its obligations due to the Force Majeure Event.

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No Party will be obliged to settle any strike, lockout or other labour dispute on terms not acceptable to it.

12.2 Suspension of obligations

If by reason of a Force Majeure Event affecting all or any part of the Nominated Network either Party is delayed or prevented from carrying out, whether wholly or in part, its obligations under this Agreement (other than an obligation to pay monies) then the obligations of that Party will be suspended during that time and to the extent that the performance of such obligations is prevented or hindered by the Force Majeure Event.

12.3 Duty to Mitigate

Each Party will use all reasonable diligence to remedy or overcome the effect of the Force Majeure Event as soon as possible and will attempt to identify alternative viable means of providing the Access Rights affected and to mitigate the effect of the Force Majeure Event.

12.4 End of period of Force Majeure

Subject to Clauses 12.5 and 12.6, the suspension of the obligations of the Parties due to a Force Majeure Event ends when the Party that issued the notice of the Force Majeure Event is able to resume full performance of its obligations under this Agreement at which time it must issue a notice to the other Party advising that it intends to recommence the performance of its obligations and must thereafter recommence the performance of its obligations.

12.5 Termination for Loss or Damage to Nominated Network

- (a) In the event that any part of the Nominated Network specified in Part 2 of **Schedule 2** is damaged or destroyed by a Force Majeure Event and in QR Network's reasonable opinion the cost of repairing such damage 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, QR Network may by written notice advise the End User of:

- (i) the estimated cost of effecting the necessary repairs or replacement; and
 - (ii) QR Network's intention to not repair or replace the relevant part of the Nominated Network unless the End User and any other Railway Operator using that part of the Nominated Network pay the amounts specified by QR Network towards the cost of effecting the necessary repairs or replacement.
- (b) If the End User gives notice to QR Network advising that it will bear the whole, or that part requested by QR Network, of the cost of necessary repairs or replacement, then QR Network will proceed with the repairs or replacement within a reasonable time after receipt by QR Network from the End User of payment of the relevant amount subject to reaching agreement with any other Railway Operator using the affected part of the Nominated Network. Where the End User pays to QR Network the whole of the estimated cost, QR Network must, upon completion of the necessary repairs or replacement, refund to the End User any amount by which the amount paid by the End User exceeds the actual cost and the End User shall pay to QR Network the amount by which the actual cost exceeds the amount paid by the End User.
- (c) If within sixty (60) days after receipt of a notice from QR Network under Clause 12.5(a) the End User has not given notice to QR Network pursuant to Clause 12.5(b) indicating that it will pay the whole, or that part requested by QR Network, of the cost of the necessary repairs or replacement, QR Network shall have the right to terminate this Agreement by giving not less than thirty (30) days notice in writing to the End User, without prejudice to any of the rights of the Parties accrued prior to the date of such termination.

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12.6 Termination after extended Force Majeure Event

If by reason of a Force Majeure Event a Party ("affected Party") is rendered unable to perform its obligations under this Agreement for a period of more than three (3) consecutive Months, the Parties must meet in an endeavour to identify any alternative viable means to provide the suspended Access Rights and failing an alternative means being agreed upon within one (1) Month of the end of the three (3) Month period the other Party may terminate this Agreement by thirty (30) days written notice to the affected Party and the provisions of this Agreement relating to termination set out in Clause 14.4 apply without prejudice to any of the rights of the Parties accrued prior to the date of such termination.

13 Suspension

- (a) The End User acknowledges that, under a Train Operations Agreement, QR Network has a right to suspend the right of an Operator to operate some or all of the Operator's Train Services upon the occurrence of one or more specific events or circumstances including, for example, if the End User fails to pay when due any amount payable under this Agreement and such default continues for seven (7) days after notice from QR Network to the End User of the default.
- (b) The suspension of any rights under a Train Operations Agreement does not affect or suspend any other obligation of the End User, including the obligation to pay TOP Charges under this Agreement.

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14 Termination

14.1 Termination by QR Network

Without limiting any rights of termination contained elsewhere in this Agreement or otherwise existing at Law, QR Network may, by notice in writing to the End User, immediately terminate this Agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) the End User fails to pay when due any amount payable under this Agreement and such default continues for thirty (30) days after notice from QR Network to the End User of the default;
- (b) the End User fails to comply in any material respect with its obligations under Clause 6 and such default continues for, or the End User has failed to take reasonable action to prevent recurrence of the default within, thirty (30) days after notice from QR Network to the End User of the default;
- (c) an Insolvency Event occurs in relation to the End User and such default continues for a period of sixty (60) days;
- (d) the End User fails to effect or maintain the insurances required under Clause 7.2 and such default continues for thirty (30) days after notice from QR Network to the End User of the default;
- (e) the End User fails to establish, maintain or replace the Security as required under this Agreement and such default continues for thirty (30) days after notice from QR Network to the End User of the default;
- (f) the End User purports to Assign any of its rights or interests in this Agreement other than as permitted by this Agreement;
- (g) the End User is in default of the due performance of any other obligation under this Agreement, and such default continues for sixty (60) days after notice from QR Network to the End User of the default.

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14.2 Termination by the End User

Without limiting any rights of termination contained elsewhere in this Agreement or otherwise existing at Law, the End User may, by notice in writing to QR Network, immediately terminate this Agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) an Insolvency Event in relation to QR Network occurs and such default continues for a period of sixty (60) days;
- (b) QR Network's Accreditation is cancelled such that it cannot perform its obligations generally under this Agreement, and such default continues for thirty (30) days after notice from the End User to QR Network of the default;
- (c) QR Network fails to pay when due any amount payable under this Agreement and such default continues for thirty (30) days after notice from the End User to QR Network of the default;
- (d) QR Network is in default of the due performance of any other obligation under this Agreement and such default continues for sixty (60) days after notice from the End User to QR Network of the default.

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14.3 Grounds for Termination to be specified

A notice of termination given under Clauses 14.1 or 14.2 must set out the grounds for the termination.

14.4 Obligations and other rights upon termination or expiration

- (a) Neither termination of this Agreement by a Party pursuant to this Clause 14 nor expiration of this Agreement prejudices:
- (i) a Party's right to make a Claim or recover damages or avail itself of other remedies under this Agreement or at Law; or
 - (ii) either Party's rights to recover monies due to it under this Agreement.
- (b) Upon termination of this Agreement QR Network and the End User shall be released from all further obligations or liabilities under this Agreement except in respect of any antecedent breach of this Agreement on their respective parts. Any liability in respect of such antecedent breach shall be limited in the manner provided in this Agreement.

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15 Assignment

15.1 Assignment by QR Network

QR Network may Assign the whole or any part of its rights or obligations under this Agreement without the prior consent of the End User provided that QR Network procures the Assignee to covenant with the End User by deed to be bound by and to perform the obligations of QR Network under this Agreement to the extent of the rights and obligations Assigned to the Assignee. Upon the Assignee entering into that deed QR Network will be 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.

15.2 Assignment by the End User

- (a) Subject to the following provisions of this Clause 15.2, the End User shall not Assign its rights or obligations, or any part thereof, under this Agreement without the prior written consent of QR Network, which consent may not be unreasonably withheld.
- (b) The End User may, provided it is not in default in the performance or observance of any of its obligations under this Agreement, Assign the whole of its rights and obligations under this Agreement to:
- (i) a Related Body Corporate of the End User which is capable of performing the obligations of the End User under this Agreement provided that the End User shall remain liable for the performance of the duties, responsibilities and obligations assumed by the Assignee and provided however that performance by the Assignee will pro tanto discharge the End User from liability for performance of those duties, responsibilities and obligations that are Assigned; or
 - (ii) a person other than a Related Body Corporate of the End User with the prior written consent of QR Network, provided that such consent will not be unreasonably withheld if QR Network is satisfied that such person:
 - (A) is financially sound; and

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(B) is otherwise capable of performing the obligations of the End User under this Agreement.

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(c) Any Assignment by the End User of its rights or obligations under this Agreement will be conditional upon and will not take effect until the Assignee covenants with QR Network by deed, in such terms as QR Network may reasonably require, to be bound by and to perform the obligations of the End User under this Agreement.

(d) Except where the End User is a company the shares in which are quoted by the Australian Stock Exchange Limited, any change in shareholding of the End User altering the effective control of the End User will be deemed to be an Assignment of this Agreement.

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(e) The End User shall not:

(i) register, record or enter in its books any transfer of any share or shares in the capital of the End User;

(ii) deal with any beneficial interest in any such share or shares;

(iii) issue any new share or shares; or

(iv) take or attempt to take any action having the effect:

(A) of altering the control of the End User; or

(B) that the shareholders of the End User at the date of this Agreement together beneficially hold or control less than 51% of the voting rights of capital in the End User,

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until the requirements of this Clause 15.2 have been complied with.

15.3 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 shall 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 15 as if it were originally a party hereto, and will not exercise any power of sale of the rights and/or obligations of the Chargor under the Agreement except in accordance with this Clause 15.

16 Relationship with Train Operations Agreement

16.1 Disputes

(a) Prior to any referral of a matter to a loss adjuster, expert, arbitrator or the QCA ("**Adjudicator**") in accordance with Clause 8.7 or 11, 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 relevant Operator must be:

(i) notified of the matter to be referred to the Adjudicator; and

- (ii) provided 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 16.1(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 that loss adjuster or expert unless the Operator has also agreed to the appointment of that loss adjuster, expert or arbitrator;
- (ii) the Parties must comply with the Dispute Provisions in respect of the Operator as though the Operator was a Party to this Agreement for the purposes of the matter referred to the Adjudicator; and
- (iii) the Adjudicator in addition to determining the matter between the Parties must also determine any claim, dispute, question or liability involving the Operator and the relevant Train Operations Agreement arising in connection with the matter referred to the Adjudicator (unless that claim, dispute, question or liability has already been agreed by QR Network and the Operator or otherwise determined).
- (c) If the End User is notified of a matter to be referred to an Adjudicator in accordance with a Train Operations Agreement, then the End User:
- (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) agrees that the Dispute Provisions do not apply to any claim, dispute, question or liability involving the End User and this Agreement in connection with the matter referred to the Adjudicator; and
- (iii) agrees that, for the avoidance of doubt, the decision of that Adjudicator, in the absence of manifest error, shall be final and binding upon the End User.

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16.2 Amendments due to changes to Train Operations Agreement

If:

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

then:

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(g) the Parties must amend this Agreement (including, but not limited to, by QR Network varying the Base Access Charges, Train Service Levels or Train Service Description) as reasonably necessary to reflect the change or variation to the Train Operations Agreement and otherwise comply with this Agreement (including, for example, the End User varying its nomination of the Operator (if necessary));

(h) QR Network must advise the End User of any variations to the Base Access Charges payable by the End User as a result of that change or variation; and

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(i) where QR Network and the End User cannot agree on the amendments to this Agreement, to the extent that those amendments:

(i) are not variations to the Base Access Charges, the matter will be referred to an expert in accordance with Clause 11.3; and

(ii) are variations to the Base Access Charges (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 11.6,

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

17 General

17.1 Variation/Amendment

Except as otherwise provided in this Agreement any variation or amendment to this Agreement must be in writing signed by both Parties.

17.2 Confidentiality

(a) Subject to Clause 17.2(b), the Parties shall comply with the provisions of the confidentiality deed set out in **Schedule 5**.

(b) Either Party may disclose to an Operator information and notices arising from or in connection with this Agreement or the Access Rights but only to the extent that such a disclosure is:

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(i) reasonably necessary for the performance of obligations or the exercise rights under this Agreement or the Operator's Train Operations Agreement;

(ii) in connection with the safe operation of the Nominated Network; or

(iii) would otherwise be permitted by the provisions of the confidentiality deed set out in **Schedule 5**.

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17.3 Intellectual Property

All material supplied or made available by one Party ("the Supplier") to the other Party remains the intellectual property of the Supplier and cannot be reproduced nor used for any purpose other than the purpose for which it was supplied without the approval of the Supplier.

17.4 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 Party will be 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 Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

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17.5 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.

17.6 Authority to enter into Agreement

- (a) The Parties represent and warrant to and covenant with each other that they have full power to enter into and perform their obligations under this Agreement and that this Agreement constitutes valid and binding obligations on the Parties respectively 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.

17.7 Interpretation not to disadvantage a Party

In the interpretation of this Agreement no rules of construction shall apply to the disadvantage of one Party on the basis that that Party put forward this Agreement or any part thereof.

17.8 Relationship

- (a) The relationship between the Parties is entirely contractual and 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.
- (b) This Agreement is for the exclusive benefit of the Parties and does not create any rights in any Third Parties.

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17.9 Notices

(a) 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 ("**Notice**") must be in writing and signed by an authorised officer of that Party and may, if so agreed by QR Network, be in electronic form.

(b) Method of Service

A Notice may be given by:

- (i) being personally delivered on a Party;
- (ii) being left at the Party's current address for service;
- (iii) being sent to the Party's current address for service by pre-paid ordinary mail; or
- (iv) being sent by facsimile transmission to the Party's current facsimile number for service provided that a copy of the notice is then delivered by one of the means described above.

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(c) Deemed Notice

A Notice is deemed given if:

- (i) personally delivered, upon delivery;
- (ii) posted to an address in Australia, three (3) days after posting;
- (iii) sent by facsimile, on the next 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.

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(d) Addresses for Service

- (i) Each Party's address for service is:

QR Network:

Address: Floor 5, 192 Ann Street, BRISBANE QLD 4000

Facsimile: 07 – 3235 3439

Attention: Chief Executive Officer, QR Network Pty Ltd

End User:

Address: [***]

Facsimile: [***]

Attention: [***]

- (ii) A Party may from time to time change its particulars of service by giving written notice of that change to the other Party.

17.10 Certificate

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

17.11 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.

17.12 Stamp Duty

- (a) The End User 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 QR 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 must reimburse QR Network the amount paid upon demand.

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17.13 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 succeeding 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.

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17.14 Computation of Time

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

17.15 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 whatsoever, then:
- (i) that term or its application to such Party, person or circumstance is severable 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 as to a replacement term. If the Parties cannot agree upon a replacement term, this Agreement is continued in accordance with Clause 17.15(a)(i) and (ii).

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17.16 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.

17.17 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.

17.18 Ownership of Land

The End User acknowledges that the land identified in Part 5 of **Schedule 2**:

- (a) is not owned or controlled by QR Network; and
- (b) is not land the entry to which is included within the definition of "Access" in QR Network's Access Undertaking (as those provisions are amended, varied or replaced from time to time),

and agrees that in respect of that land owned or controlled by another person ("**Landowner**") then:

- (c) the End User will comply with the requirements of the Landowner in relation to that land as notified to the End User by QR Network from time to time;
- (d) if, after the date of this Agreement, there is a change in the costs incurred by QR Network due to the requirements of the Landowner in respect of that land, then that change shall be deemed to be a Material Change; and
- (e) if QR Network's rights in respect of that land are terminated for any reason other than the default of QR Network of any agreement that affects QR Network's use of that land or other than by agreement with the Landowner, then QR Network may by notice to the End User suspend and/or terminate the Access Rights insofar as they relate to that part of the Nominated Network which is situated on that land.

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17.19 Implementation of Agreement

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

17.20 Schedules

In the event that the content of a Schedule requires variation or replacement in accordance with this Agreement, QR Network shall issue to the End User a replacement Schedule which shall upon issue be substituted for and replace the relevant Schedule in this Agreement. Nothing in a Schedule shall be varied in any way except by the issue of a replacement Schedule by QR Network in accordance with this Clause.

17.21 Governing Law and Jurisdiction

This Agreement shall be interpreted according to the Laws for the time being in force in the State and each of the Parties submits to the jurisdiction of the courts of

the State and the jurisdiction of all courts competent to hear appeals therefrom and waives any right to object to any proceedings being brought in those courts.

17.22 Compliance with official requirements

To the extent relevant to the performance of its obligations under this Agreement, a 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 QR Network's Access Undertaking (including the ringfencing obligations) in effect from time to time.

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EXECUTION

Executed in Queensland

SIGNED for and on behalf of)
QR NETWORK PTY LTD)
in the presence of:)

Witness

Signature

Print Name

Print Name

[the End User])
in the presence of:)

Witness

Witness

Print Name

Print Name

Note: QR Network will require the End User to execute this Agreement either:

- (a) under seal; or
- (b) under s127(i) of the Corporations Act; or
- (c) under a duly executed Power of Attorney.

Reference Schedule

- Item 1 End User:** Name
ACN
Address
- Item 2 Commencement Date:**
- Item 3 Termination Date:**
- Item 4 Commitment Date:**
- Item 5 Security Amount:** (Clause 3.4(a))
- Subject to QR Network's reasonable assessment of the creditworthiness of the End User, the Security Amount (if applicable) will be an amount equivalent to the greater of:
- (a) twelve (12) weeks Access Charges under a Train Operations Agreement determined as if:
 - (i) the End User had nominated an Operator and allocated all of the Access Rights to that Operator; and
 - (ii) that Operator made maximum use of those Access Rights; or
 - (b) the deductible for any one loss as specified in **Schedule 4**.

Schedule 1

End User's Train Service Entitlements

PART 1 TRAIN SERVICE DESCRIPTION

1.1 Train Service Characteristics

The following tables define the characteristics of Train Services which characteristics shall form part of the Train Service Description.

Commodity: Coal

Sectional Run Times: See Clause 1.2

Special Operating Restrictions: See Clause 1.5

System:

Origin	Destination	Distance (km)	Time at Origin Loading Facility (hrs)
---------------	--------------------	--------------------------	--

Notes: Origin is denoted as the mine and/or QR Network terms for the location at which the mine loads Trains

Train Services run loaded between Origin and Destination and empty between Destination and Origin.

For Train Services with the above characteristics, the time at the Destination unloading facility is as per the following table.

Destination Unloading Facility	Time at Destination Unloading Facility (hrs)

For Train Services with the above characteristics, the average Time at Depot and the Other Dwell Time are as per the following table:

System	Time at Depot (hrs)	Other Dwell Time (hrs)

1.2 Sectional Running Times

The Sectional Running Times to be achieved by coal system Trains are set out in Table 1.2 below:

Table 1.2 -Sectional Running Times:

From	To	Sectional Running Time	
		Direction Empty (minutes)	Direction Loaded (minutes)

Note: A Diagram illustrating the location of each Section can be found in **Schedule 2**.

[End User to provide details of Sectional Running Times]

1.3 Train Service Levels

The number of Nominated Weekly Train Services for the relevant coal system Train that QR Network will provide to the End User from the Commitment Date are set out in Table 1.3 below;

Table 1.3: Train Service Levels

Service Levels	No. of Train Services
Nominated Weekly Train Services ¹	
Nominated Monthly Train Services ¹ (31 days)	
Nominated Monthly Train Services ¹ (30 days)	
Nominated Monthly Train Services ¹ (29 days)	
Nominated Monthly Train Services ¹ (28 days)	
Nominated Annual Train Services ¹	

¹ NB: A Train Service is a One Way Train Service

The above Train Service Levels will be converted into timetables using the process referred to in Clause 2.2(i) of the Scheduling Principles set out in Schedule 10 of the relevant Train Operations Agreement.

¹ This formula for ATP assumes that, for a Train Service operating in the Central Queensland Coal Region, the Train Service operates within an single Individual Coal System. If a Train Service operates in the Central Queensland Coal Region and requires access to more than one Individual Coal System ("Cross System Train Service"), the calculation of ATP will involve calculating a separate ATP for that Train Service for each Individual Coal System and then aggregating those separate amounts. If the Train Service is a Cross System Train Service, QR Network may vary the formula of ATP to reflect this.

1.4 Transit Times

The target Average Below Rail Transit Time Factor is set out below:

Goal	Target Average Below Rail Transit Time Factor (%)

1.5 Special Operating Restrictions

In scheduling Train Services in accordance with the Network Management Principles, QR Network will comply with the following special operating restrictions:

[Specific operating restrictions to be agreed]

1.6 Cycle Description

With the following exceptions, the Train Services Cycle description is the most direct route over the Nominated Network between the Origins and Destinations and Destinations and Origins (as described in Paragraph 1.1).

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

Exceptions

[To be agreed]

1.7 Stowage

[To identify any agreed short term Stowage requirements additional to that provided in the relevant Reference Tariff Schedule]

1.8 Permitted Movements on the Nominated Network

[To detail 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]

Schedule 2

Nominated Network

PART 1 EXTENT OF NOMINATED NETWORK

- 1.1 For the purposes of this Agreement the Nominated Network on which Train Services will be entitled to operate for the End User will be described by a combination of diagram and/or table but does not include freight terminals, railway stations, passenger facilities, workshops or maintenance depots (including provisioning facilities).

[Diagram/table to be inserted as applicable]

PART 2 PARTS OF NOMINATED NETWORK SUBJECT TO CLAUSE 12.5

- 2.1 The following line sections to the extent they form part of the Nominated Network as specified in Part 1 of this **Schedule 2** will be subject to the provisions of Clause 12.5 of the Agreement:

[To be inserted if applicable]

PART 3 TRAIN CONTROL CENTRES AND SIGNAL CABINS

The movement of the End User's Trains while on the Nominated Network will be controlled by the Train Control centres and signal cabins as follows:

[Diagram to be inserted]

PART 4 PARTS OF THE NOMINATED NETWORK SUBJECT TO CLAUSE 10.1(a)(iii)

[To be inserted if applicable]

PART 5 LAND IN WHICH OTHER PARTIES HAVE AN INTEREST (Clause 17.18)

[To be inserted if applicable]

Schedule 3

Calculation of TOP Charges

PART 1 BASE ACCESS CHARGES

- 1.1 Table 1.1 below defines the three elements of the Base Access Charges that are used to calculate the TOP Charge payable by the End User to QR Network:

Table 1.1: Base Access Charge

			Base Access Charge
Train Service			
Origin			
Destination			
Incremental Capacity Tariff	(\$/ One Way Train Service)	AT ₂	
Allocated Tariff 1	(\$/000 Ntk)	AT ₃	
Allocated Tariff 2	(\$/net tonne)	AT ₄	

- 1.2 The elements of the Base Access Charge will be escalated on the Escalation Date.

The First Escalation Date is the first date that is twelve (12) Months after the most recent Review Date and each subsequent Escalation Date shall be twelve (12) Months after the previous Escalation Date where no Review Date has occurred in the twelve (12) Month period.

PART 2 REVIEW DATE

2.1 Review Date

- 2.1.1 The Parties acknowledge that the Base Access Charge elements have been agreed by reference to the relevant Reference Tariffs in place at the time and that the methodology for calculating TOP Charges shall be in accordance with QR Network's Access Undertaking applicable at that time.

- 2.1.2 For the purposes of this **Schedule 3** the Review Dates shall be the first day of the Month in which the renewed or varied Reference Tariff Schedule and/or renewed or varied Take or Pay methodology relevant to the Train Services is intended to apply from in accordance with QR Network's Access Undertaking. Where such date is prior to the date when the renewed or varied Reference Tariff Schedule and/or renewed or varied Take or Pay methodology relevant to the Train Services are published or otherwise advised ("**Advice Date**"), then the

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Parties will account to one another accordingly for the period between the Review Date and the Advice Date.

2.2 Review of charges

2.2.1 For each Train Service type the Base Access Charge elements, the TOP Charges methodology and, where necessary, any other elements of this **Schedule 3** will be reviewed on each Review Date.

2.2.2 For each Train Service type QR Network will advise the End User in writing of the Base Access Charge elements, the TOP Charges methodology and any other changes to this **Schedule 3** to apply from each Review Date within 14 days of the latter of the Review Date or the date on which the QCA endorses the relevant renewal or variation. In determining any variations, QR Network will have regard to:

- (a) the new or varied relevant Reference Tariffs and/or Take or Pay methodology;
- (b) the differences between the relevant Train Service and the Reference Train Service defined in the relevant Reference Tariff Schedule;
- (c) other related factors in the relevant Reference Tariff Schedule and/or Take or Pay methodology; and
- (d) QR Network's Access Undertaking.

2.2.3 If the End User does not accept some or all of the variations advised pursuant to Clause 2.2.2 of this Schedule, the End User must give QR Network notice within 14 days of receipt of notice of the variations.

2.2.4 The Parties will negotiate in good faith to attempt to agree any new Base Access Charge elements, TOP Charges methodology and/or other changes to this Schedule for which the End User has given notice pursuant to Clause 2.2.3 of this Schedule.

2.2.5 If the Parties have not agreed the new Base Access Charge elements, TOP Charges methodology and/or other changes to this Schedule within thirty (30) days of the relevant Review Date, either Party may refer the determination of the new Base Access Charge elements, TOP Charges methodology and/or other changes to this Schedule to an expert in accordance with Clause 2.3 of this Schedule.

2.2.6 Unless and until agreement is reached or a determination is made pursuant to Clause 2.3 of this Schedule, the Base Access Charge elements, TOP Charges methodology and/or any other relevant provision of this Schedule prevailing as at the Review Date shall continue to be utilised to determine the amount of TOP Charges payable by the End User. If any change in the Base Access Charge elements, TOP Charges methodology or any relevant provision of this Schedule is subsequently agreed or determined then the revised Base Access Charges, TOP Charges methodology or any relevant provision of this Schedule will apply from the relevant Review Date and the Parties will account to one another accordingly.

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2.3 Expert Review

2.3.1 This Clause 2.3 only applies where the Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule are referred to an expert for review pursuant to Clause 2.2 of this **Schedule 3**.

2.3.2 Where a matter is to be referred to an expert pursuant to Clause 2.2 of this Schedule, the matter must be referred for determination by a person:

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- (a) who is appointed by the Parties, or in default of such appointment within fourteen (14) days after either Party giving notice in writing to the other Party requiring the appointment of an expert then that person is to be nominated at either Party's request by the President for the time being of the Australian Society of Certified Practising Accountants;
- (b) who has appropriate qualifications and practical experience having regard to the nature of the matter in dispute;
- (c) who has no interest or duty which conflicts or may conflict with his function as expert, he being required to fully disclose any such interest or duty by written notice to the Parties before his appointment;
- (d) who is not an employee of the End User, Operator or QR Network or of a Related Body Corporate of any of them;
- (e) who shall not be permitted to act until he has given written notice to both Parties that he is willing and able to accept the appointment; and
- (f) who shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the *Commercial Arbitration Act 1990* (Qld) shall not apply to him or his determination or the procedures by which he may reach his determination.

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2.3.3 QR Network will provide the expert with documentation to support the QR Network determination of the Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule. The expert may request any other documentation from either Party or any other party as it sees fit in order to determine the outcome of the dispute.

2.3.4 The expert shall be required to 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. The expert shall not include such information in its reasons for reaching the determination.

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2.3.5 The expert shall review the QR Network documentation and either:

- (a) uphold the QR Network Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule proposed by QR Network; or
- (b) where the expert believes the QR Network provided Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule have not been determined consistent with QR Network's Access Undertaking and the relevant Reference Tariff Schedule, the expert shall seek to reach agreement with QR

Network as to, and failing agreement shall determine, appropriate Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule, having regard to:

- (i) the new relevant Reference Tariffs and/or Take or Pay methodology;
- (ii) the differences between the relevant Train Service and the Reference Train Service defined in the relevant Reference Tariff Schedule;
- (iii) other related factors in the relevant Reference Tariff Schedule and/or Take or Pay methodology; and
- (iv) QR Network's Access Undertaking.

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2.3.6 The expert will report its findings to QR Network and the End User and the reasons for such assessment.

2.3.7 In the absence of manifest error, the decision of the expert shall be final and binding upon the Parties.

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2.3.8 The costs of the expert and any advisers to the expert shall be borne by:

- (a) the End User in the event that the expert does not adjust the Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule most recently proposed by QR Network prior to referral to the expert;
- (b) QR Network in the event that the Base Access Charge elements, TOP Charges methodology and/or any other changes to this Schedule are varied from those most recently proposed by QR Network prior to referral to the expert; or
- (c) in such other proportion as the expert considers appropriate.

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PART 3 ESCALATION FORMULA

3.1 Unless otherwise agreed between the Parties, the Base Access Charge elements will escalate on each Escalation Date from and including the First Escalation Date, in accordance with the following formula:

$$BAC_n = BAC_{n-1} * CPI_n / CPI_{n-1}$$

Where:

- BAC_n means the escalated value of the relevant Base Access Charge element for the purpose of calculating TOP Charges;
- BAC_{n-1} means the escalated value of the relevant Base Access Charge element applied prior to the relevant Escalation Date or in the case of TOP Charges at the First Escalation Date means the relevant Base Access Charge element shown in Table 1.1;
- CPI_n 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 6 months prior to the midpoint of the Quarter commencing on the Escalation Date for which the variable BAC_n is being determined;

CPI_{n-1} 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 Escalation Date for which the variable BAC_n is being determined.

3.2 Review of Consumer Price Index

3.2.1 If in the reasonable opinion of QR Network or the End User the Consumer Price Index used for the purposes of the escalation formula specified in Clause 3.1 of this Schedule:

- (a) is altered in a material way;
- (b) ceases to be published; or
- (c) 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 Clause 3.1 of this Schedule,

then QR Network or the End User (as the case may be) shall notify the other Party in writing of such opinion.

3.2.2 Upon such notice being given, the Parties will negotiate with a view to agreeing to vary the application of the Consumer Price Index or to adopting an alternative or alternatives to the Consumer Price Index and failing agreement within forty five (45) days of such notice being given then the matter shall be referred to an expert in accordance with Clause 11.3 of the Agreement.

3.2.3 If the dispute is resolved after the next Escalation Date, the Parties agree to retrospectively adjust any TOP Charges invoiced since that date to be consistent with the outcome of the dispute resolution.

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PART 4 CALCULATION OF INVOICE

4.1 The amount of the invoice for TOP Charges payable by the End User under this Agreement for:

- (a) for that part of the first year following the Commitment Date until 30 June, the period from the Commitment Date up to and including the Month commencing 1 June;
- (b) the twelve (12) Months during a full year commencing 1 July; or
- (c) for a year commencing on 1 July and ending on the date of expiry or termination of this Agreement, the twelve (12) Months commencing when that year commences,

but applied only in the last Month of the period identified in (a), (b) or (c) above, shall be calculated in accordance with the following formula:

$$TC = ATP * (1 + GST) + G$$

Where

TC is the total amount of charges payable by the End User in respect of the relevant Year;

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ATP² is the annual TOP Charge for the relevant Train Service type, calculated for the relevant period in paragraph (a), (b) or (c) above, shall be, subject to ATP not being less than zero:

- (1) if $SGtkY \geq (FGtkY - QR\ NetworkGtKY)$, zero;
- (2) if $TR \geq SAR$, zero;
- (3) if $TR < SAR$ and $TATP > MTPA, TPA$; or
- (4) otherwise, $ATPY$,

Where:

SGtkY is the System GtK for the period identified in paragraph (b) or (c) above;

FGtkY is the Forecast GtK for the period identified in paragraph (b) or (c) above;

QR NetworkGtKY is the System GtK that would have been achieved solely due to coal carrying Train Services that were unable to operate in the period identified in (b) or (c) above directly as a result of a QR Network Cause; and

TR subject to Clause 4.2 of this **Schedule 3**, is the Total Actual Revenue for AT_{2-4} for the Individual Coal System to which this Agreement relates for the relevant Year less the aggregate amount of Take or Pay for the relevant Year that QR Network would be entitled to earn from all Access Agreements in relation to that Individual Coal System executed or renewed on or after the Commencing Date (other than New Access Agreements entered as part of transferring Access Rights from Access Agreements entered as part of transferring Access Rights from Access Agreements in place on the day immediately prior to the Commencing Date pursuant to Paragraph 7.3.7(a) of QR Network's Access Undertaking);

SAR subject to Clause 4.2 of this **Schedule 3**, is the System Allowable Revenue for AT_{2-4} for the Individual Coal System to which this Agreement relates for the relevant Year;

MTPA is the amount by which SAR exceeds TR;

TATP subject to Clause 4.2 of this **Schedule 3**, is the aggregate amount of Take or Pay that QR Network would be entitled to earn from all Access Agreements executed or renewed on or after the Commencing Date (other than New Access Agreements entered as part of transferring Access Rights

¹ For example, Timetabled Traffics may be defined in terms of a path between certain locations, on particular days, and at particular times. Cyclic Traffics may be defined in terms of a number of Train Services per specified period of time.

² See Footnote 2 below

from Access Agreements in place of the day immediately prior to the Commencing Date pursuant to Paragraph 7.3.7(a) of QR Network's Access Undertaking) in relation to the Individual Coal System to which this Agreement relates for the relevant Year;

TPA is calculated by the formula:

$$\text{MTPA} * (\text{ATPY} / \text{TATP})$$

ATPY is calculated by the formula:

$$\text{AT}_2 * (\text{CNTSY} - \text{QR NetworkNTSY} - \text{NTSY}) + \text{AT}_3 * (\text{CNTKY} - \text{QR NetworkNTKY} - \text{NTKY}) + \text{AT}_4 * (\text{CNTY} - \text{QR NetworkNTY} - \text{NTY})$$

Where:

AT₂ is the amount specified as AT₂ in Table 1.1 of this Schedule for the relevant Train Service type as escalated for the relevant Billing Period;

CNTSY is the number of individual Train Services that were entitled to be operated for the End User under **Schedule 1** for the relevant period identified in (a), (b) or (c) above;

QR NetworkNTSY is the number of the relevant individual Train Services for which an Operator has been allocated Access Rights by the End User and that would have been operated by that Operator for the relevant period identified in (a), (b) or (c) above, but were unable to operate directly as a result of a QR Network Cause;

NTSY is the number of the relevant individual Train Services operated for the relevant period identified in (a), (b) or (c) above;

AT₃ is the amount specified as AT₃ in Table 1.1 of this Schedule for the relevant Train Service type as escalated for the relevant Billing Period (including any applicable System Premium or System Discount);

CNTKY is the sum of the Ntk that would have been determined for the relevant period identified in (a), (b) or (c) above, had all the relevant Train Services (loaded and empty) that were entitled to be operated for the End User in the relevant period under **Schedule 1** been operated and where Ntk is determined by identifying CNTSY for loaded Train Services (as defined above) multiplied by a nominal net tonnes per loaded Train Service as reasonably determined by QR Network multiplied by the distance specified in

Table 1.1 of **Schedule 1** for the relevant Train Service;

QR NetworkNTKY is the sum of the Ntk that would have been determined for the relevant period identified in (a), (b) or (c) above, solely due to those relevant Train Services that were unable to operate directly as a result of a QR Network Cause where Ntk is determined by identifying QR NetworkNTSY for loaded Train Services (as defined above) multiplied by a nominal net tonnes per loaded Train Service as reasonably determined by QR Network multiplied by the distance specified in Table 1.1 of **Schedule 1** for the relevant Train Service;

NTKY is the sum of the Ntk of all relevant Train Services (loaded and empty) operated for the relevant period identified in (a), (b) or (c) above on the basis of the Ntk for each individual Train Service operated being determined in accordance with the relevant Train Operations Agreement;

AT₄ is the amount specified as AT₄ in Table 1.1 of this Schedule for the relevant Train Service type as escalated for the relevant Billing Period;

CNTY is the sum of the Nt that would have been determined for the period identified in (a), (b) or (c) above, had all the relevant Train Services (loaded and empty) that were entitled to be operated for the End User in the relevant period under **Schedule 1** been operated and where Nt is determined by identifying CNTSY for loaded Train Services (as defined above) multiplied by a nominal net tonnes per loaded Train Service as reasonably determined by QR Network for the relevant Train Service;

QR NetworkNTY is the sum of the Nt that would have been determined for the period identified in (a), (b) or (c) above, solely due to those relevant Train Services that were unable to operate directly as a result of a QR Network Cause where Nt is determined by identifying QR NetworkNTSY for loaded Train Services (as defined above) multiplied by a nominal net tonnes per loaded Train Service as reasonably determined by QR Network for the relevant Train Service; and

NTY is the sum of the net tonnes of all relevant Train Services (loaded and empty) operated for the relevant period identified in (a), (b) or (c) above

on the basis of the net tonnes for each individual Train Service operated being determined in accordance with the relevant Train Operations Agreement.

GST is the rate of GST (expressed as a decimal) applicable at the time the supply is made; and

G is the sum of any other amount due and payable under this Agreement including charges for GST not already factored in by the formula for ATP including, but not limited to, payment for interest, Adjustment Charges and any adjustments (positive or negative).

4.2 For the purposes of the definitions of TR, SAR and TATP, each of the following terms has the meaning given to that term in QR Network's Access Undertaking as at the date of this Agreement (including, for the avoidance of doubt, where that term is defined in Schedule F of QR Network's Access Undertaking):

- (a) Access Agreement;
- (b) Access Rights;
- (c) AT₂₋₄;
- (d) Commencing Date;
- (e) Individual Coal System;
- (f) New Access Agreement;
- (g) Take or Pay;
- (h) Total Actual Revenue;
- (i) Train Service;
- (j) System Allowable Revenue;
- (k) System Premium;
- (l) System Discount; and
- (m) Year.

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For the purposes of the definitions of TR and TATP, the amount of Take or Pay that QR Network is entitled to earn will be calculated in accordance with Subclause 2.2.6, Part B, Schedule F of QR Network's Access Undertaking as at the date of this Agreement.

4.3 For the purposes of this **Schedule 3** a Train Service is a One Way Train Service.

4.4 A Train Service shall be deemed to commence at that time nominated by QR Network in accordance with its information systems in use at the time.

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PART 5 ADJUSTMENT CHARGES

Adjustment Charges will be applied as approved by the QCA, from time to time, and as determined, in accordance with QR Network's Access Undertaking.

Schedule 4

Insurance

Required Insurances

(a) **Public liability insurance**

(i) to cover the legal liability of the insured arising out of or in connection with the performance of this Agreement by the End User whether in respect of injury to or death of any person other than the insured or an employee of the insured or loss of or damage to any property other than property owned by the insured in a sum insured of not less than THREE HUNDRED AND FIFTY MILLION DOLLARS (\$350,000,000) and with a self-insured retention not to exceed *[to be inserted]* for any one loss or an aggregate deductible of not more than *[to be inserted]*;

(ii) to include cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs on a definitely identifiable date; and

(iii) to cover the End User's rail operations and associated activities on the Nominated Network.

(b) **Employees** - Insurance covering such liability as may arise at common law or by virtue of any relevant Workers Compensation legislation in respect of any End User's Staff.

(c) **Carrier liability insurance** in relation to the legal liability of the insured arising out of the transport of goods by Train Services on behalf of the End User in accordance with this Agreement to a sum insured of not less than TEN MILLION DOLLARS (\$10,000,000) and with a deductible not to exceed *[to be inserted]* for any one loss.

(d) **Motor Vehicle (non-Act) insurance** to cover the legal liability of the insured arising out of or in connection with the use of all vehicles in the performance of this Agreement by the End User or End User's Staff and must include:

(i) third party liability to a sum insured of not less than TWENTY MILLION DOLLARS (\$20,000,000); and

(ii) a Dangerous Goods extension with a maximum sum insured as required by statute.

(e) **Motor Vehicle insurance** to cover the statutory liability in respect of personal injury arising out of or in connection with the use by the End

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User or the End User's Staff of all vehicles in the performance of their obligations under this Agreement.

(f) Insurances effected pursuant to (a) and (d) of this Schedule must:

(i) include a principal's indemnity endorsement specifically noting QR Network as an insured party in respect of its interest arising out of or under this Agreement;

(ii) include a cross liability clause;

(iii) provide that a notice of claim given to the insurer by one insured party will be accepted by the insurer as a notice of claim given by each of the insured parties; and

(iv) provide that a breach of or failure to observe and fulfil the terms of the policy by any party comprising the insured must not prejudice the rights of the remaining parties comprising the insured.

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Schedule 5

Confidentiality Deed

[Unless otherwise agreed, this deed shall be the confidentiality deed set out in Schedule B of QR Network's Access Undertaking]

Schedule 6

Pro Forma Train Operations Agreement

[insert]