

QCA submission draft
18 December 2012

[NewCo Pty Ltd] as trustee for the [Name of Trust]

Aurizon Network Pty Ltd

User Funding – Project Management Agreement

*[insert Extension
name]*

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Date

Parties

[NewCo Pty Ltd] **[ACN]** as trustee for the **[Name of Trust]** of Level 14, Railcentre 1, 305 Edward Street, Brisbane, Queensland (**Trustee**)

Aurizon Network Pty Ltd ABN 78 132 181 116 of Level 14, Railcentre 1, 305 Edward Street, Brisbane, Queensland (**Project Manager**)

Background

- A The Trustee wishes to procure the design, supply, procurement, construction, commissioning and completion of the Extension.
 - B The Project Manager has expertise in the design, supply, procurement, construction, testing and commissioning of railway infrastructure.
 - C The Project Manager agrees to project manage the design, supply, procurement, construction, testing commissioning and completion of the Extension for the Trustee in accordance with the terms of this Agreement.
-

Agreed terms

1 Interpretation

1.1 Definitions

In this Agreement:

Acceleration has the meaning given in **clause 10.2(a)**.

Acceleration Variation Notice has the meaning given in **clause 10.2(a)**.

Access Regulator has the meaning given in the Unit Holders Deed.

Access Undertaking has the meaning given in the Unit Holders Deed.

Additional Costs has the meaning given in **schedule 10**.

Additional Statement has the meaning given in **clause 13.3**.

Adjustment Event means, in respect of a Segment:

- (a) the occurrence of any event, circumstance or change:
 - (i) which is beyond the reasonable control of the Project Manager, including:

- (A) the occurrence of a Force Majeure Event which prevents or hinders the Project Manager from fully or partly performing its obligations under this Agreement in respect of that Segment;
 - (B) damage to, or destruction of, that Segment caused, or contributed to, by the occurrence of a Force Majeure Event;
 - (C) a Latent Condition encountered while carrying out the Works for that Segment; or
 - (D) the existence of a Dispute which delays the carrying out of the Works for that Segment; and
- (ii) the effects of which could not, by the exercise of reasonable diligence by the Project Manager, have been avoided;
- (b) a change to the Project Manager's or a Works Contractor's usual operating practices which the Project Manager or Works Contractor (as applicable) considers is reasonably required to achieve consistency with Good Operating Practice due to a change in Good Operating Practice;
 - (c) the exercise of any rights by a Works Contractor in respect of a Payment Claim made by that Works Contractor to the extent that any certification given by the Independent Engineer under **clause 6.6(a)** in respect of that Payment Claim is incorrect; or
 - (d) a direction to the Project Manager by the Trustee to suspend, permanently cease and/or recommence all or any part of the Works for the Extension under **clause 19**,

which will, or will likely, result in:

- (e) the Project Costs for that Segment being greater than they otherwise would have been if the event, circumstance or change had not occurred; and/or
- (f) the time required to carry out the Works for that Segment being greater than it otherwise would have been if the event, circumstance or change had not occurred.

[Drafting note: The definition of "Adjustment Event" will be considered on a transaction-by-transaction basis having regard to, amongst other matters, the Extension, market conditions and the nature and scope of the Works for the Extension.]

Agreement means this document, including the **schedules**.

Allocation Principles means the principles specified in **schedule 11**.

Amended Tender Panel for a proposed Major Works Contract means an amended list of entities which are recommended to be invited to submit tenders for that proposed Major Works Contract in the Amended Tender Panel Recommendation Report for that proposed Major Works Contract.

Amended Tender Panel Recommendation Report for a proposed Major Works Contract means a report which:

- (a) specifies an entity in the Tender Panel for that proposed Major Works Contract which:
 - (i) notified the Project Manager that it did not propose to tender for that proposed Major Works Contract; or
 - (ii) the Project Manager considers should no longer be invited to tender for that proposed Major Works Contract in accordance with **clause 7.3(a)**, together with details as to why that entity should no longer be invited to tender;
- (b) contains an evaluation of any new entities proposed by the Project Manager who were not previously included in the Tender Panel for that proposed Major Works Contract, to be invited to submit tenders for that proposed Major Works Contract; and
- (c) based on the evaluation under **paragraph (b)** of this definition and the evaluation undertaken in respect of the Tender Panel for the proposed Major Works Contract under **paragraph (a)** of the definition of Tender Panel Recommendation Report, specifies the new list of entities which are recommended to be invited to submit tenders for that proposed Major Works Contract.

Approved Designs and Specifications means, in respect of any Construction Works, the designs and specifications, and any variations to them, in respect of those Construction Works approved by, or deemed to be approved by, the Landholder under clause **7.1** of the Rail Corridor Agreement.

Auditor has the meaning given in **clause 15.4(a)**.

Audits has the meaning given in **clause 15.4(a)**.

Authority means any government or any governmental, semi-governmental, regulatory, statutory or similar entity or authority that exercises jurisdiction or control in relation to the Extension.

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

Available means, in respect of a Segment, that the Segment has been materially completed in accordance with the Scope of Works for the Segment and, as a result, the Segment is capable of being lawfully used as a railway to allow the operation of train services.

Available Date means, in respect of a Segment:

- (a) the date which the Project Manager specifies in a notice given under **clause 4.4(b)** as the date on which the Segment became Available; or
- (b) if the Trustee gives the Project Manager a Dispute Notice referred to in **clause 4.4(d)** in respect of the Segment, the date on which the Segment is agreed or determined to have become Available under the Dispute Resolution Process.

Aurizon Network Land Acquisition Costs means costs incurred by the Project Manager, in its own capacity, in acquiring land or an interest in land for the purposes of the Extension (whether before or after the date of this Agreement).

Aurizon Works Contractor has the meaning given in **clause 4.5(b)**.

BCIP Act means the *Building and Construction Industry Payments Act 2004* (Qld).

BCIP Payment Claim means a Payment Claim made under a “construction contract” (as defined under the BCIP Act).

Breach Claim means any Claim by the Trustee that the Project Manager has breached any obligation imposed on the Project Manager under this Agreement, other than a Wilful Default Claim.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday in Brisbane, Queensland.

Change in Law means the occurrence of any of the following after the Commencement Date:

- (a) the introduction or commencement of, repeal of, or a change in, applicable Legislation or a change in the common law or law of equity;
- (b) a change in the terms and conditions imposed under an Authority Approval after it has been given or the imposition of any new terms or conditions under that Authority Approval, in each case, other than if caused by the default of a party under that Authority Approval;
- (c) the revocation or cancellation of an Authority Approval, other than if caused by the default of a party under that Authority Approval; or
- (d) the non-renewal or failure of an Authority to re-issue an Authority Approval or its renewal or re-issue on new terms that are materially different from the terms of that Authority Approval as at the Commencement Date, in each case, other than if caused by the default of a party under that Authority Approval.

Charge has the meaning given in **clause 25.4**.

Chargee has the meaning given in **clause 25.4**.

Claim includes any claim, demand, liability, cost, expense, damage, loss, proceeding, suit, litigation, investigation, audit, action or cause of action, whether judicial, administrative, investigative or otherwise and whether arising in contract, tort (including negligence), under statute or otherwise, of whatever nature, known or unknown, liquidated or unliquidated.

Commencement Date means the date of this Agreement.

Confidential Information of a Disclosing Party means:

- (a) the terms of this Agreement;
- (b) Price Sensitive Information; and

- (c) information disclosed by, or on behalf of, the Disclosing Party to the Recipient under or in connection with this Agreement which:
 - (i) is by its nature confidential or commercially sensitive;
 - (ii) is identified by the Disclosing Party as confidential or commercially sensitive;
 - (iii) the Recipient knows, or ought to know, is confidential or commercially sensitive; or
 - (iv) relates to the business, operations or financial affairs of the Disclosing Party or a Related Body Corporate of it (and where the Disclosing Party is the Trustee, any Unit Holder or a Related Body Corporate of a Unit Holder),

but does not include those terms of this Agreement, or any other information, which:

- (d) are or become public knowledge other than by:
 - (i) breach of this Agreement or by a breach of confidentiality by the Recipient or any third party to whom the Recipient has disclosed the information; or
 - (ii) breach of confidentiality by a Preference Unit Holder, the Independent Engineer, the PUH Engineer or an "Auditor" or "Expert" (as defined in each Transaction Document);
- (e) are in the possession of the Recipient or a Related Body Corporate of it without restriction in relation to disclosure before the date of receipt; or
- (f) have been independently developed or acquired by the Recipient or a Related Body Corporate of it.

Consequential Loss means, subject to **paragraphs (e), (f) or (g)** of this definition:

- (a) any special, indirect or consequential loss;
- (b) any economic loss in respect of any Claim in tort (including negligence);
- (c) any loss of profits, loss of production, loss of revenue, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill or wasted overheads whatsoever; and
- (d) any loss arising out of any Claim by a third party,

but 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; or
- (g) in respect of the Trustee, any loss suffered or incurred by the Trustee arising out of any Claim against the Trustee by a Works Contractor under or in connection with a Works Contract which is caused, or contributed to (to the extent of the contribution), by any:
 - (i) breach by the Project Manager of any of its obligations under this Agreement; or
 - (ii) negligence or fraud committed by the Project Manager in connection with this Agreement.

Construction Period means the period commencing on the Commencement Date and ending on the last day of the Month during which the Available Date for the last of the Segments to become Available occurs.

Construction Works means any construction, commissioning, defects rectification and ancillary physical works and services associated with the construction and completion of the Extension.

Consultation Meeting means a meeting referred to in **clauses 7.2(b), 7.3(c), 7.4(b), 7.5(c) or 7.6(b)**.

Contract Price means:

- (a) for a proposed Major Works Contract, an estimate of the aggregate of the amounts which, if executed, the Trustee would reasonably be expected to be required to pay to the Works Contractor under that proposed Major Works Contract; and
- (b) for an executed Major Works Contract, an estimate of the aggregate of the amounts which, at the time of execution of that Major Works Contract, the Trustee would reasonably be expected to be required to pay to the Works Contractor under that Major Works Contract.

Defect means any:

- (a) defect, shrinkage, movement, error, omission, deficiency or other imperfection in the Extension Infrastructure in respect of, or arising from, any cause including design, materials or workmanship;
- (b) aspect of the Works for the Extension which is not in accordance with any Works Contract;
- (c) physical damage to the Extension Infrastructure resulting from any of the matters referred to in **paragraphs (a) and (b)** of this definition; or
- (d) impact on the physical condition of, or ability to safely and efficiently use, the Railway Network (other than the Extension Infrastructure) resulting from any of the matters referred to in **paragraphs (a), (b) and (c)** of this definition.

Defects Rectification Period means the period commencing on the Commencement Date and ending on the day which is 13 months after the end of the Construction Period.

Defects Register has the meaning given in **clause 4.6(a)**.

Disclosee has the meaning given in **clause 23.3**.

Disclosing Party has the meaning given in **clause 23.1(a)**.

Dispute has the meaning given in **clause 21.1(a)** and includes:

- (a) a matter referred to an Expert for determination under this Agreement; and
- (b) a “Dispute” (as defined in the Unit Holders Deed) if the Trustee joins the Project Manager to the dispute resolution process under the Unit Holders Deed in accordance with **clause 21.10**.

Dispute Notice has the meaning given in **clause 21.1(a)**.

Dispute Resolution Process means:

- (a) the dispute resolution process under **clause 21**; and
- (b) if the Trustee joins the Project Manager to the dispute resolution process under the Unit Holders Deed in accordance with **clause 21.10**, the dispute resolution process under the Unit Holders Deed.

Early Termination Project Management Fee for a Segment means the amount calculated in accordance with **item 3** of **schedule 6** for the Segment.

Early Termination Statement has the meaning given in **clause 20.4(b)**.

Estimated Available Date for a Segment means:

- (a) the date which the Project Manager reasonably estimates to be the date on which that Segment will become Available, as reported by the Project Manager to the Trustee from time to time under **clause 12.2**; or
- (b) if the Trustee gives the Project Manager a Dispute Notice referred to in **clause 12.2(c)** in respect of the Segment, the date which is agreed or determined under the Dispute Resolution Process to be a reasonable estimate of the date on which that Segment will become Available.

Estimated Project Costs for a Segment means:

- (a) the amount which the Project Manager reasonably estimates will be the total Project Costs to be Incurred by the Trustee for that Segment, as reported by the Project Manager to the Trustee from time to time under **clause 12.2**; or
- (b) if the Trustee gives the Project Manager a Dispute Notice referred to in **clause 12.2(c)** in respect of a Segment, the amount which is agreed or determined under the Dispute Resolution Process to be a reasonable estimate of the total Project Costs to be Incurred by the Trustee for that Segment.

Estimated Terminal Available Date means:

- (a) the date which the developer of the Terminal reasonably estimates will be the date on which the Terminal will be complete (except for minor defects) and will be capable of Handling coal (up to its full design

- capacity) if it were transported by rail to the Terminal, as reported by the Trustee to the Project Manager from time to time under **clause 12.3**; or
- (b) if the Project Manager gives the Trustee a Dispute Notice referred to in **clause 12.3(e)**, the amount which is agreed or determined under the Dispute Resolution Process to be a reasonable estimate of the date on which the Terminal will be complete (except for minor defects) and will be capable of Handling coal (up to its full design capacity) if it were transported by rail to the Terminal.

[Drafting note: This Agreement has been drafted on the assumption that a 'single stage' port development or upgrade will be required in parallel with the Extension. If no port development or upgrade is required, then it will be necessary to amend this Agreement. Amendment to the Agreement will also be required if there is a staged port development and one or more port stages correspond to different parts of the Extension. In this situation the Scope of Works and Target Available Date for each part of the Extension would correspond to a separate 'Estimated Terminal Available Date' for the relevant port stage.]

Expert has the meaning given in **clause 21.2(b)**.

Extension has the meaning given in the Unit Holders Deed.

Extension Committee has the meaning given in **clause 12.1(a)**.

Extension Infrastructure means the "Total Extension Infrastructure" (as defined under the Extension Infrastructure Lease).

Extension Infrastructure Agreement has the meaning given in the Unit Holders Deed.

Extension Infrastructure Lease has the meaning given in the Unit Holders Deed.

Extension Investigation Reports means the reports described in **item 2 of schedule 1**.

Extension Land means any land or site required to design, supply, procure, construct, test and/or commission the Extension.

Extension Target Available Date means the later of:

- (a) the Latest Target Available Date; and
- (b) the Terminal Available Date.

Final Certificate means a notice given under **clause 4.7(a)**.

Final PMF Percentage for a Segment means the percentage calculated in accordance with **item 2.2 of schedule 6** for that Segment.

Final Project Management Fee for a Segment means the amount calculated in accordance with **item 2.1 of schedule 6** for that Segment.

Final Reconciliation Statement has the meaning given in **clause 13.4**.

Final Reconciliation Statement Date means the later of:

- (a) 20 Business Days after the date the Project Manager gives the Final Certificate to the Trustee;

- (b) the RAB Decision Date; and
- (c) the date that any Dispute which is (or includes) a Claim that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement is resolved in accordance with the Dispute Resolution Process.

Force Majeure Event in respect of the Project Manager means any event or circumstance:

- (a) which is beyond the reasonable control of the Project Manager; and
- (b) the effects of which could not, by the exercise of reasonable diligence by the Project Manager, have been avoided;

and (to the extent it meets the above criteria) includes any of the following:

- (c) act of God;
- (d) law, rule, regulation or order of any government or governmental authority;
- (e) executive or administrative orders or acts of either general or particular application of any Authority or of any official acting under the authority of such Authority;
- (f) act of war (declared or undeclared);
- (g) public disorder;
- (h) riot, insurrection, rebellion, sabotage or act of terrorists;
- (i) fire, earthquake, tidal wave or other natural calamity;
- (j) drought, flood, storm, hail, lightning, inclement weather or other severe weather conditions;
- (k) explosion, breakdown or injury to or expropriation, confiscation or requisitioning of production, manufacturing, selling, transportation or delivery facilities;
- (l) quarantine or customs restrictions;
- (m) strike, boycott, lockout or other labour disturbance (whether national, state-wide or otherwise);
- (n) act (including a delay in performing an act) or omission of any Authority;
- (o) failure to obtain, or delay in obtaining, any environmental or other Authority Approval relating to, or necessary for, the design, supply, procurement, construction, testing and/or commissioning of the Extension;
- (p) failure to obtain, or delay in obtaining, access to, use of, or tenure to any Extension Land;
- (q) all or part of any Extension Land, or any object or evidence of occupation on, under or within the vicinity of any Extension Land, being,

- appearing to be, or being alleged to be, Aboriginal Cultural Heritage (as defined in the *Aboriginal Cultural Heritage Act 2003* (Qld));
- (r) all or part of any Extension Land being, appearing to be, or being alleged to be, land which may be subject to native title or land which is the subject of a native title Claim, determination or agreement;
 - (s) compliance with an obligation contained in any relevant cultural heritage management plan, indigenous land use agreement, right to negotiate agreement or other agreement with indigenous parties;
 - (t) all or part of any Extension Land being affected by any Latent Condition or other adverse physical characteristic;
 - (u) permanent or temporary shortage or unavailability of, or inability to procure:
 - (i) appropriately qualified and experienced labour acceptable to the Project Manager, acting reasonably;
 - (ii) materials;
 - (iii) water, fuel, electricity or other essential goods or services; or
 - (iv) any other necessary goods or services;
 - (v) a Change in Law;
 - (w) act or omission of the Trustee or any of the Trustee's officers, employees, agents (other than the Project Manager acting as disclosed agent of the Trustee under this Agreement) or contractors;
 - (x) any of the above events (or any other event which constitutes an excusal from performance of a supplier's or contractor's obligations under its arrangements with the Project Manager or the Trustee) delaying a supplier or contractor to the Project Manager or Trustee (including a Works Contractor) in performing its obligations; and
 - (y) failure by a third party (including a Works Contractor) to perform its obligations, or a delay by a third party (including a Works Contractor) in performing its obligations.

Fraud Claim means any Claim by the Trustee that the Project Manager has committed fraud in connection with this Agreement.

Good Industry Practice means the engineering, technical, operational, commercial, contractual and risk management practices and other business practices that would reasonably be expected from a prudent, efficient and experienced developer of brownfields rail infrastructure in Australia under comparable conditions.

Good Operating Practice means the exercise of the standard of skill, diligence, prudence, foresight, safety and operating practice that would reasonably and ordinarily be expected from a skilled operator engaged in the same type of undertaking as that of the relevant person under the same or similar circumstances.

Governmental Agency means any government, whether Federal, State or Territory, municipal or local, and any agency, authority, commission, department, instrumentality, regulator or tribunal thereof, including the Commissioner of Taxation and Australian Taxation Office.

Gross Negligence Claim means any Claim by the Trustee that the Project Manager has committed negligence in connection with this Agreement involving such wanton and reckless conduct as constitutes an utter disregard for the harmful, foreseeable and avoidable consequences which result from such conduct.

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

Handle in relation to coal at the Terminal means the receiving by rail, unloading, stockpiling, storing and reclaiming of coal and loading of vessels with coal at the Terminal (and, for the avoidance of doubt, does not include any of those things undertaken for the purposes of commissioning and completing the Terminal following construction).

Incurred:

- (a) in respect of Reimbursable Expenses, has the meaning given in **clause 15.1**; and
- (b) in respect of Project Costs, has the meaning given in the Unit Holders Deed.

Independent Engineer means the independent engineer jointly appointed by the Parties in accordance with the Independent Engineer Appointment Deed.

Independent Engineer Appointment Deed means a deed to be entered into by the Parties and an independent engineer under which an independent engineer is jointly appointed for the purpose of performing the responsibilities and functions of the Independent Engineer under this Agreement and in accordance with **clause 5.1**.

Insurance Policy means a Project Insurance Policy or the Professional Indemnity Insurance Policy.

Intellectual Property Rights includes both in Australia and throughout the world and for the duration of the rights:

- (a) any patents, utility models, copyrights, eligible layout rights, designs and other like rights;
- (b) any invention, discovery, trade secret, know-how, computer software and confidential information; and
- (c) any business, scientific, technical and product information, including proprietary information relating to the development of new products,

whether registered, registrable or unregistered.

Interest Rate means, for any day in a Month, the annual interest rate that is the sum of:

- (a) 2%; and
- (b) the Commonwealth Bank of Australia's "Corporate Overdraft Reference Rate" (monthly charging cycle) quoted by the Commonwealth Bank of Australia on its public website for the last trading day of the previous Month (or in the event that such a rate is not so quoted at or in respect of any relevant date, such other similar rate as is quoted by a major commercial bank as agreed by the Parties or, failing agreement, as determined by an Expert under **clause 21.3**).

Internal Costs has the meaning given in **schedule 10**.

Landholder means the party that is the 'Landholder' under the Rail Corridor Agreement.

Latent Conditions means physical conditions on the Extension Land and its near surrounds (including artificial things but excluding weather conditions) which differ materially from the physical conditions which could have been reasonably anticipated by the Project Manager as at the date of this Agreement based on the information set out in the Extension Investigation Reports.

Latest Target Available Date means the latest of the Target Available Dates for the Segments.

Legislation means statutes, ordinances, regulations, by-laws, proclamations and subordinate legislation of the Commonwealth, the State or an Authority.

Loss has the meaning given in the Unit Holders Deed.

Major Works Contract means a proposed or executed Works Contract for which the Project Manager (acting reasonably) determines the Contract Price exceeds the greater of:

- (a) 2% of the Target Costs for the Extension as at the Commencement Date; and
- (b) \$20 million.

Major Works Contract Dispute means a Type 1 Major Works Contract Dispute and a Type 2 Major Works Contract Dispute.

Major Works Contract Notice has the meaning given in **clauses 7.2(a)(i), 7.3(b)(i), 7.4(a)(i), 7.5(b)(i) and 7.6(a)(i)**.

Major Works Contract Response Notice has the meaning given in **clause 7.7(a)**.

Material Addendum for a Major Works Contract means a material modification to the Tender Documentation for the Major Works Contract at any time after the Tender Documentation has been provided to tenderers but before a Major Works Contract for that tender is executed.

Material Variation for a Major Works Contract means any variation arising from a Variation Direction under that Major Works Contract:

- (a) which would materially reduce the MWC Scope of that Major Works Contract;
- (b) where the Variation Direction Cost for the Variation Direction is reasonably expected to be 2.5% or more of the Contract Price for that Major Works Contract;
- (c) where the Variation Direction Cost for the Variation Direction, together with the aggregate of the Variation Direction Costs for all previous Variation Directions for that Major Works Contract which:
 - (i) have not individually satisfied **paragraph (b)** of this definition; and
 - (ii) the Trustee has not consented to (or been deemed to have consented to) as part of a previous Proposed Action under **clause 7**,

is reasonably expected to be 5% or more of the Contract Price for that Major Works Contract;
- (d) which would, of itself, reasonably be expected to result in the date for completion of the works under that Major Works Contract being delayed by a period of four weeks or more; or
- (e) which would, of itself, reasonably be expected to result in any Segment not becoming Available by the Estimated Available Date for that Segment,

but excludes variations arising from a any Variation Direction under that Major Works Contract which the Project Manager, acting reasonably, considers is:

- (f) required to prevent, minimise or mitigate any threat or danger to any person, property or the environment;
- (g) required to ensure compliance with applicable Legislation and Authority Approvals; and/or
- (h) urgently required in response to an event or circumstance which is beyond the reasonable control of the Project Manager.

Month means a calendar month, except that:

- (a) the first Month starts on the Commencement Date and ends on the last day of the calendar month in which the Commencement Date occurs; and
- (b) the last Month ends on:
 - (i) the last day of the term of this Agreement; or
 - (ii) if this Agreement is earlier terminated in accordance with its terms, the date of termination.

Monthly Report has the meaning given in **clause 12.2(a)**.

Monthly Statement has the meaning given in **clause 13.1**.

Moral Rights means the moral rights granted under the *Copyright Act 1968* (Cth), and any similar rights existing under foreign laws.

Moral Rights Consent means a waiver of Moral Rights to the extent permitted by law and an unconditional consent to any act or omission in relation to any works by or on behalf of the Project Manager, any person authorised by the Project Manager or any licensee of copyright in the works.

MWC Scope for a Major Works Contract means the scope of the works which is specified for that Major Works Contract.

Negligence Claim means any Claim by the Trustee that the Project Manager has committed negligence in connection with this Agreement, other than a Gross Negligence Claim.

Nominated Type 1 Major Works Contract Dispute means a Type 1 Major Works Contract Dispute notified by the Trustee to the Project Manager in accordance with **clause 8.1(b)**.

Nominated Type 2 Major Works Contract Dispute means a Type 2 Major Works Contract Dispute notified by the Trustee to the Project Manager in accordance with **clause 8.2(b)**.

Notice has the meaning given in **clause 26.1**.

Optimisation Date for a Segment means the date which is ten Business Days after the date that the Access Regulator makes a decision having the effect that part or all of the Project Costs for that Segment are not accepted into the Regulatory Asset Base.

Optimisation Event for a Segment has the meaning given in **clause 14.1**.

Optimisation Fee for a Segment means the amount calculated in accordance with **item 1.2 of schedule 7** for that Segment.

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

Payee has the meaning given in **clause 13.8(c)**.

Payment Claim means a claim for payment made by a Works Contractor under a Works Contract.

Payor has the meaning given in **clause 13.8(c)**.

Payment Schedule has the meaning given in the BCIP Act.

Preference Unit Holder has the meaning given in the Unit Holders Deed.

Price Sensitive Information means any information in relation to:

- (a) the calculation of Internal Costs; or
- (b) a Works Contract (including any terms of a Works Contract) which is:
 - (i) specified in, or determined under, the Procurement Methodology to be 'Price Sensitive Information' for the purpose of this definition; or
 - (ii) specified in the Works Contract to be 'Price Sensitive Information' for the purpose of this definition but only where the specification of

that information as 'Price Sensitive Information' has been approved by the Trustee under **clause 6.2(c)**.

Proceedings has the meaning given in **clause 21.8(b)**.

Procurement Methodology means the procurement methodology set out in **schedule 4**.

Professional Indemnity Insurance Policy means the professional indemnity insurance policy referred to in **clause 16.2**.

Project Contract Works Insurance Policy means the 'Contract Works Material Damage' insurance referred to in **clause 16.1(b)(i)**.

Project Costs means:

(a) for the Extension:

(i) each of the following:

- (A) any Reimbursable Expenses for the Extension;
- (B) any costs, expenses and liabilities Incurred by the Trustee under, or in connection with, a Works Contract or the Independent Engineer Appointment Deed (including in respect of any dispute under, or in connection with, a Works Contract or the Independent Engineer Appointment Deed); and
- (C) any premiums payable by the Trustee under a Project Insurance Policy and any costs, expenses and liabilities Incurred by the Trustee in respect of any dispute under a Project Insurance Policy; and
- (D) any amounts payable by the Trustee to Aurizon Network Pty Ltd (as 'Landholder') under the Rail Corridor Agreement;
- (E) any costs and expenses Incurred by the Trustee in connection with any Authority Approvals required in relation to the Works for the Extension or the Extension,

but does not include the GST component of any costs, expenses or liabilities Incurred by the Trustee which would otherwise be Project Costs for the Extension under this **paragraph (a)(i)** of this definition to the extent that the Trustee (or the representative member of the GST group of which the Trustee is part) is entitled to claim an input tax credit in respect of such costs, expenses or liabilities;

less:

(ii) each of the following:

- (F) any amounts recovered under, or in connection with, a Works Contract or the Independent Engineer Appointment Deed (including in respect of any dispute under, or in

connection with, a Works Contract or the Independent Engineer Appointment Deed); and

- (G) any amounts recovered by the Trustee or any other insured from an insurer under the Project Contract Works Insurance Policy;
- (b) for a Segment, Project Costs for the Extension (as defined in **paragraph (a)** of this definition) that are:
 - (i) directly attributable to that Segment; or
 - (ii) otherwise, allocated to that Segment by the Project Manager applying the Allocation Principles.

Project Insurance Policy means the 'Contract Works Material Damage' insurance and 'Broadform Public and Products Liability' insurance referred to in **clause 16.1**.

Proposed Action means, for a proposed Major Works Contract or an executed Major Works Contract, as applicable:

- (a) identifying the Tender Panel for that proposed Major Works Contract specified in a Major Works Contract Notice given under **clause 7.2(a)**;
- (b) inviting tenders for that proposed Major Works Contract from the Tender Panel or the Amended Tender Panel (if any), and in the form of the Tender Documentation, each as specified in a Major Works Contract Notice given under **clause 7.2(a)** and **clause 7.3(b)** (as applicable) in respect of that proposed Major Works Contract;
- (c) issuing a Material Addendum to the Tender Documentation for that proposed Major Works Contract in the form specified in a Major Works Contract Notice given under **clause 7.4(a)** in respect of that proposed Major Works Contract;
- (d) entering into (or otherwise reaching an agreement, understanding or arrangement to award or enter into) that Major Works Contract with the preferred tenderer, and in the form of that proposed Major Works Contract, specified in a Major Works Contract Notice given under **clause 7.5(b)** in respect of that proposed Major Works Contract; or
- (e) giving a Variation Direction under that Major Works Contract which would give rise to a Material Variation as specified in a Major Works Contract Notice given under **clause 7.6(a)** in respect of that Major Works Contract.

Provisional Damages has the meaning given in **clause 21.4(b)(i)**.

Provisional PMF Percentage for a Segment means the percentage calculated in accordance with **item 1.2** of **schedule 6** for the Segment.

Provisional Project Management Fee for a Segment means the amount calculated in accordance with **item 1.1** of **schedule 6** for the Segment.

Provisional Reconciliation Statement has the meaning given in **clause 13.2**.

PUH Engineer means an engineer (if any) appointed by the applicable Preference Unit Holders as contemplated under the Unit Holders Deed and notified to the Project Manager by the Trustee under **clause 3.7(b)**.

Quantum of Dispute for a Works Contract Dispute means the amount which the Works Contractor alleges, in the Works Contract Dispute, is payable to it under, or in connection with, the Works Contract which is the subject of that Works Contract Dispute.

RAB Decision Date means the date on which the Access Regulator makes a decision as to whether or not to accept all of the Project Costs for the Extension into the Regulatory Asset Base:

- (a) in the case of one decision by the Access Regulator in relation to all of the Project Costs for the Extension, on the date of that decision; and
- (b) in the case of a series of separate decisions by the Access Regulator in relation to separate parts of the Project Costs for the Extension, the date on which the last decision is made.

Rail Corridor Agreement has the meaning given in the Unit Holders Deed.

Railway Network has the meaning given in the Unit Holders Deed.

RCTI has the meaning given in **clause 24.4(a)(i)**.

Recipient has the meaning given in **clause 23.1**.

Record means any document (in hard copy or electronic form) in the possession or control of the Project Manager.

Reference Program means the program in respect of the Works for the Extension set out in **item 4** of **schedule 3**, as revised by the Project Manager under **clause 10.8(b)**.

Referral Date in relation to a Works Contract Dispute arising under a Major Works Contract means the date on which:

- (a) the Works Contract Dispute is validly referred, in whole or in part, to binding expert determination or arbitration; or
- (b) a party to the Major Works Contract validly commences proceedings in a court or tribunal in relation to the whole or part of the subject matter of the Works Contract Dispute.

Regulatory Asset Base has the meaning given under the Access Undertaking.

Reimbursable Expenses means:

- (a) for the Extension:
 - (i) Internal Costs; and
 - (ii) Additional Costs; and
- (b) for a Segment, Reimbursable Expenses for the Extension (as defined in **paragraph (a)** of this definition) that are:

- (i) directly attributable to that Segment; or
- (ii) otherwise, allocated to that Segment by the Project Manager applying the Allocation Principles.

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Relevant Information has the meaning given in **clause 12.4(a)**.

Replacement Breach means the Project Manager:

- (a) fails to provide any information to the Trustee which it is required to provide to the Trustee under this Agreement; or
- (b) fails to comply with its obligations under **clauses 6.5** and **15.4(d)**.

Replacement Breach Notice has the meaning given in **clause 22.1(a)**.

Replacement Date has the meaning given in **clause 22.5(b)**.

Replacement Election Notice has the meaning given in **clause 22.4**.

Replacement Event means:

- (a) the occurrence of an Unnecessary Delay;
- (b) the Project Manager abandons or substantially abandons the performance of the Services; or
- (c) the Project Manager commits a Replacement Breach and does not remedy the Replacement Breach within 20 Business Days after:
 - (i) the Trustee gives the Project Manager a Replacement Breach Notice in respect of the Replacement Breach; or
 - (ii) if the Project Manager gives a Dispute Notice referred to in **clause 22.1(b)(i)** in respect of the Replacement Breach, it is agreed or determined through the Dispute Resolution Process that the Project Manager committed the Replacement Breach.

Replacement Event Notice has the meaning given in **clause 22.3(a)**.

Replacement Period has the meaning given in **clause 22.5(b)**.

Replacement Project Manager has the meaning given in **clause 22.5(b)**.

Replacement Services means the project management of the completion of the Works for the Extension which are not yet complete as at the Replacement Date, including the control, coordination, administration and direction of all activities necessary for the completion of the implementation, planning, detailing, design, documentation, supply, procurement, construction, testing, commissioning, completion, Defects rectification and delivery of the Works for the Extension in accordance with **clause 22.5**.

Scheduled Amount has the meaning given in the BCIP Act.

Scope Change Event means each of the following:

- (a) a Change in Law; and

(b) a Latent Condition encountered while carrying out the Works.

Scope of Works means:

- (a) for the Extension, the scope of works for all Segments comprising the Extension (as defined in **paragraph (b)** of this definition); and
- (b) for a Segment, the scope of works set out in **item 1** of **schedule 2** to the extent that it relates to that Segment, as varied in accordance with this Agreement.

Segment has the meaning given in the Unit Holders Deed.

Services means:

- (a) if a Replacement Project Manager has not been appointed, the project management of the delivery of the Works for the Extension, including the control, coordination, administration and direction of all activities necessary for the implementation, planning, detailing, design, documentation, supply, procurement, construction, commissioning, testing, completion, Defects rectification and delivery of the Works for the Extension; or
- (b) if a Replacement Project Manager is appointed, anything required to be undertaken by the Project Manager under **clause 22**.

Standing Expert means an Expert appointed by the Project Manager and the Trustee under **clause 7.10(c)**.

State means the State of Queensland.

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

Target Available Date for a Segment means the date specified for that Segment in **item 2** of **schedule 3**, as varied in accordance with this Agreement.

Target Available Date Adjustment Trigger has the meaning given in **clause 11**.

Target Cost means:

- (a) for a Segment, the amount specified for that Segment in **item 1** of **schedule 3**, as varied in accordance with this Agreement; and
- (b) for the Extension, the sum of the Target Costs (as defined in **paragraph (a)** of this definition) for all Segments comprising the Extension.

Tender Documentation for a proposed Major Works Contract means the documentation (including all technical and commercial documentation) to be provided to tenderers as part of the invitation to tender for that proposed Major Works Contract.

Tender Evaluation Documentation for a proposed Major Works Contract means the methodology (including the evaluation criteria) for:

- (a) evaluating tenders submitted in response to an invitation to tender for that proposed Major Works Contract; and

- (b) selecting the preferred tenderer for that proposed Major Works Contract.

Tender Panel for a proposed Major Works Contract means the entities which are recommended to be invited to submit tenders for that proposed Major Works Contract in the Tender Panel Recommendation Report for that proposed Major Works Contract.

Tender Panel Recommendation Report for a proposed Major Works Contract means a report which:

- (a) contains an evaluation of the entities proposed by the Project Manager to be invited to submit tenders for that proposed Major Works Contract; and
- (b) based on such evaluation, specifies the entities which are recommended to be invited to submit tenders for that proposed Major Works Contract.

Terminal means [insert].

[Drafting note: The definition of "Terminal" to be completed on a transaction-by-transaction basis. If necessary, the definition of "Terminal" will reflect the stage of the development of the Terminal. In cases where an Extension is to an unloading facility other than a coal terminal, "Terminal" will be replaced with an appropriate definition.]

Terminal Available Date means:

- (a) the date on which the Terminal is complete (except for minor defects) and is capable of Handling coal (up to its full design capacity), as reported by the Trustee to the Project Manager under **clause 12.3**; or
- (b) if the Project Manager gives the Trustee a Dispute Notice referred to in **clause 12.3(e)**, the date which is agreed or determined under the Dispute Resolution Process to be date on which the Terminal is complete (except for minor defects) and is capable of Handling coal (up to its full design capacity).

Transaction Documents has the meaning given in the Unit Holders Deed.

Transition Services has the meaning given in **clause 22.6(b)**.

Trust has the meaning given in the Trust Deed.

Trust Costs has the meaning given in the Unit Holders Deed.

Trust Deed means the trust deed made by the Trustee entitled "User Funding – Trust Deed of [Name of Trust]".

Trustee Acceleration Proposal Notice has the meaning given in **clause 10.2(c)**.

Trustee Supplies has the meaning given in **clause 24.4(a)(i)**.

Type 1 Major Works Contract Dispute means a Works Contract Dispute arising under a Major Works Contract:

- (a) where the Quantum of Dispute for that Works Contract Dispute is 2.5% or more of the Contract Price for that Major Works Contract;

- (b) which would, of itself, reasonably be expected to result in the date for completion of the Works under that Major Works Contract being delayed by a period of four weeks or more; or
- (c) which would, of itself, reasonably be expected to result in a Segment not becoming Available by the Estimated Available Date for that Segment.

Type 2 Major Works Contract Dispute means a Works Contract Dispute arising under a Major Works Contract which is not a Type 1 Major Works Contract Dispute.

Unit Holder has the meaning given in the Trust Deed.

Unit Holders Deed has the meaning given in the Trust Deed.

Unnecessary Delay means, at a point in time, the Estimated Available Date for any Segment is:

- (a) subject to **clause 22.2**, more than six months later than the Latest Target Available Date at that time; and
- (b) later than the Estimated Terminal Available Date at that time.

Variation Direction for a Works Contract means a variation direction which the Works Contractor would be obliged to comply with under the Works Contract.

Variation Direction Cost for a Variation Direction under a Major Works Contract means the additional amounts which would reasonably be expected to be required to be paid by the Trustee to the Works Contractor under that Major Works Contract as a consequence of that Variation Direction.

Variation Notice has the meaning given in **clauses 9.1(a)** and **9.2(a)**.

Weather Adjustment Event means an Adjustment Event arising out of a Force Majeure Event referred to in **paragraph (j)** of the definition of Force Majeure Event.

Weather Delay Period for a Segment means the period specified in **item 3 of schedule 3** for the Segment.

Wilful Default Claim means any Claim by the Trustee that the Project Manager has intentionally breached any obligation imposed on the Project Manager under this Agreement.

Works means:

- (a) for the Extension, all design, supply, procurement, construction, testing, commissioning, Defects rectification and ancillary works and services associated with the construction and completion of the Extension; and
- (b) for a Segment, all design, supply, procurement, construction, testing, commissioning, Defects rectification and ancillary works and services associated with the construction and completion of the part of the Extension on, under or over that Segment,

but excluding the Services.

Works Contract means a contract between the Trustee (entered into by the Project Manager or a Replacement Project Manager (if any) as disclosed agent for the Trustee) and a third party:

- (a) under which the third party is engaged to carry out all or any part of the Works for the Extension; or
- (b) relating to the delivery of all or any part of the Works for the Extension or the Extension.

Works Contract Dispute means any dispute, question or Claim between the parties to a Works Contract arising under, or in connection with, that Works Contract.

Works Contractor means a contractor engaged under a Works Contract.

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) where the day on or by which any thing is to be done is not a Business Day, it must be done on or by the preceding Business Day;
- (c) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (e) "includes" means includes without limitation;
- (f) no rule of construction will apply to the disadvantage of one Party on the basis that that Party put forward the documents comprising this Agreement;
- (g) if the documents comprising this Agreement contain any ambiguity, discrepancy or inconsistency, then the following order of precedence will apply to resolve that ambiguity, discrepancy or inconsistency:
 - (i) this Agreement excluding the schedules; and
 - (ii) the schedules;
- (h) words in the singular include the plural and vice versa;
- (i) words importing one gender will include every gender;
- (j) references to clauses and schedules are references to clauses of, and schedules to, this Agreement;
- (k) a requirement for a Party to obtain the consent or approval of the other Party requires the first Party to obtain the consent or approval in writing; and
- (l) a reference to:

- (i) a person includes any company, partnership, joint venture, unincorporated association, corporation or other body corporate and a government or statutory body or authority;
- (ii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified, consolidated, re-enacted or replaced;
- (iii) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
- (iv) a right includes a benefit, remedy, discretion and power;
- (v) time is to local time in Brisbane, Queensland;
- (vi) \$ or dollars is a reference to Australian currency;
- (vii) this Agreement or any other document includes this Agreement or the document as novated, varied or replaced and despite any change in the identity of the parties;
- (viii) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmission; and
- (ix) a Party includes that Party's successors according to law and permitted assigns and any person to whom it novates its rights and obligations.

2 Term

This Agreement commences on the Commencement Date and, unless earlier terminated in accordance with this Agreement, continues until the date that the Project Manager gives the Final Reconciliation Statement to the Trustee.

3 Appointment

3.1 Appointment

The Trustee appoints the Project Manager to perform the Services in accordance with the terms of this Agreement.

3.2 Project Manager as agent

- (a) During the term of this Agreement, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of performing the Services in accordance with the terms of this Agreement.
- (b) Without limiting the generality of **clause 3.2(a)**, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of:
 - (i) procuring, negotiating, entering into, varying and administering Works Contracts;

- (ii) liaising with Authorities in relation to the Works for the Extension or the Extension; and
- (iii) applying for and obtaining any Authority Approvals or variation to any Authority Approvals, and administering any Authority Approvals, required in relation to the Works for the Extension or the Extension (and procuring third parties to do any of those things),

subject to and in accordance with the terms of this Agreement.

3.3 Rail Corridor Agreement

- (a) During the term of this Agreement, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of performing the Trustee's obligations, and exercising the Trustee's rights (other than the Trustee's rights under clauses [3.1 and 3.2] of the Rail Corridor Agreement and its rights in respect of "Disputes" (as defined in the Rail Corridor Agreement) under clause [19] of the Rail Corridor Agreement), under the Rail Corridor Agreement, other than to the extent such obligations and rights must, by operation of law, be personally performed or exercised by the Trustee.
- (b) The Project Manager must, when requested by the Trustee, provide the Trustee with any information of which the Project Manager is aware in connection with the Extension or the Works for the Extension which the Trustee reasonably requires for the purpose of complying with its obligations under the Rail Corridor Agreement.

3.4 Trustee not to act itself

During the term of this Agreement, the Trustee must not, other than through the Project Manager acting as the Trustee's disclosed agent under this Agreement, do anything for which the Project Manager is appointed, and which is the responsibility of the Project Manager, under this Agreement, including:

- (a) procuring, negotiating, entering into, varying and administering Works Contracts;
- (b) liaising with Authorities in relation to the Works for the Extension or the Extension;
- (c) applying for or obtaining, applying for or obtaining a variation to, or administering any Authority Approvals in relation to the Works for the Extension or the Extension (or procuring third parties to do any of those things); and
- (d) performing the Trustee's obligations, and exercising the Trustee's rights (other than the Trustee's rights under clauses [3.1 and 3.2] of the Rail Corridor Agreement and its rights in respect of "Disputes" (as defined in the Rail Corridor Agreement) under clause [19] of the Rail Corridor Agreement), under the Rail Corridor Agreement,

unless:

- (e) such things must, by operation of law, be personally performed or exercised by the Trustee;
- (f) requested to do so in writing by the Project Manager; or
- (g) expressly required or permitted to do so under this Agreement.

3.5 No breach of Trust Deed and Unit Holders Deed

When acting as the disclosed agent for the Trustee under this Agreement, the Project Manager must not do or omit to do anything which would cause the Trustee to breach the Trust Deed or Unit Holders Deed.

3.6 Acting for benefit of Aurizon Network Pty Ltd

- (a) Despite any fiduciary obligations which would, but for the operation of this Agreement, arise as a consequence of the Project Manager acting as disclosed agent for the Trustee under this Agreement and the Rail Corridor Agreement, the Trustee:
 - (i) irrevocably consents to the Project Manager, when acting as disclosed agent for the Trustee under this Agreement and the Rail Corridor Agreement, doing acts and making omissions which may:
 - (A) be in the interest of, or advantage, the Project Manager or any Related Body Corporate of it; and
 - (B) not be in the interest of, or disadvantage, the Trustee; and
 - (ii) agrees the Project Manager will have no obligation to fully disclose to it the interest, advantage or disadvantage prior to the relevant act or omission,

provided that:

- (iii) the Project Manager is not expressly prohibited from doing the relevant act or making the relevant omission under this Agreement; or
- (iv) the relevant act is done or relevant omission is made by the Project Manager acting in good faith having regard to the Project Manager's (or any Related Body Corporate of its):
 - (A) legitimate interests as:
 - (1) 'Project Manager' under this Agreement;
 - (2) 'Aurizon' under the Extension Infrastructure Lease;
 - (3) 'Sublessee' under the Extension Infrastructure Agreement;
 - (4) 'Landholder' under the Rail Corridor Agreement;
 - (5) lessee or sublessee under a land or infrastructure lease or sublease in respect of the Railway Network (or any part of it);
 - (6) operator and manager of the Railway Network;

- (7) access provider under access agreements in respect of the Railway Network; and
 - (8) the accredited rail infrastructure manager of the Railway Network; and
 - (B) rights and obligations under Legislation (including the *Transport (Rail Safety) Act 2010* (Qld) and *Work Health and Safety Act 2011* (Qld)).
- (b) For the avoidance of doubt, **clause 3.6(a)** permits the Project Manager, acting as the disclosed agent for the Trustee under this Agreement, to enter into a Works Contract with a Works Contractor which contains terms which are:
- (i) in the interest of, or advantage, the Project Manager or any Related Body Corporate of it; and/or
 - (ii) not in the interest of, or disadvantage, the Trustee (for example, by increasing the amount payable by the Trustee under the relevant Works Contract),
- provided that the requirements under **clause 3.6(a)** are satisfied.

3.7 Details of Preference Unit Holders and PUH Engineer

- (a) Promptly after:
- (i) the Commencement Date;
 - (ii) any change to the identity of the Preference Unit Holders previously notified to the Project Manager under this **clause 3.7(a)**; and
 - (iii) any change to the particulars for notices for a Preference Unit Holder previously notified to the Project Manager under this **clause 3.7(a)**,
- the Trustee must notify the Project Manager of the identify of each Preference Unit Holder and each Preference Unit Holder's then current particulars for notices (including the business address, postal address, facsimile and relevant contact party for each Preference Unit Holder).
- (b) Promptly after:
- (i) the Commencement Date;
 - (ii) the appointment of a PUH Engineer;
 - (iii) any change to the identity of the PUH Engineer previously notified to the Project Manager under this **clause 3.7(b)**; and
 - (iv) any change to the particulars for notices for the PUH Engineer previously notified to the Project Manager under this **clause 3.7(b)**,
- the Trustee must notify the Project Manager of the identify of the PUH Engineer and its then current particulars for notices (including the

business address, postal address, facsimile and relevant contact party for the PUH Engineer).

- (c) The Project Manager:
 - (i) is permitted to rely upon the information notified to the Project Manager under this **clause 3.7** for the purposes of giving any notice or other information that it is required to give to a Preference Unit Holder or the PUH Engineer under this Agreement; and
 - (ii) will not be in breach of any such obligation to the extent that the Trustee has not complied with this **clause 3.7** or any information notified to the Project Manager under this **clause 3.7** is incorrect.

4 Execution of the Works

4.1 Scope of Works

The Project Manager must, acting as the disclosed agent of the Trustee under this Agreement, procure through Works Contractors the carrying out of the Works for the Extension in accordance with the Scope of Works for the Extension.

4.2 Procurement

- (a) The Project Manager must, to the extent applicable, comply with the Procurement Methodology in procuring any Works Contract.
- (b) Except as expressly provided in the Procurement Methodology, the Project Manager must not, acting as disclosed agent for the Trustee under this Agreement, engage itself or any Related Body Corporate of it as a Works Contractor under a Works Contract to carry out any Works for the Extension unless the Project Manager has obtained the prior consent of the Trustee to such engagement.

4.3 Cost

The Project Manager must use its reasonable endeavours to ensure that the Project Costs for each Segment do not exceed the Target Cost for the Segment.

4.4 Availability

- (a) The Project Manager must use its reasonable endeavours to ensure that each Segment becomes Available by the Target Available Date for the Segment.
- (b) Within three Business Days after the date that the Project Manager considers that a Segment becomes Available, the Project Manager must give the Trustee, the Independent Engineer and the PUH Engineer a notice specifying the date on which that Segment became Available.
- (c) Promptly after the Project Manager gives the Independent Engineer a notice under **clause 4.4(b)**, the Independent Engineer must give the

Parties and the PUH Engineer a written report specifying whether or not, in its reasonable opinion, the relevant Segment has become Available and, if so, the date on which, in its reasonable opinion, the relevant Segment became Available.

- (d) If the report given by the Independent Engineer under **clause 4.4(c)** specifies that, in the Independent Engineer's reasonable opinion, the relevant Segment:
 - (i) has not become Available; or
 - (ii) became Available on a date which is later than the date specified in the notice given by the Project Manager under **clause 4.4(b)**,then:
 - (iii) the Trustee may, within 20 Business Days after the Independent Engineer gives the Trustee the report under **clause 4.4(c)**, give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes the date specified in the notice given by the Project Manager under **clause 4.4(b)**; and
 - (iv) if the Dispute referred to in **clause 4.4(d)(iii)** is not resolved in accordance with **clause 21.2**, the Dispute must be referred to an Expert to determine whether or not the relevant Segment has become Available and, if so, the date on which the relevant Segment became Available.
- (e) If:
 - (i) the report given by the Independent Engineer under **clause 4.4(c)** specifies that, in the Independent Engineer's reasonable opinion, the relevant Segment became Available on a date which is the same or earlier than the date specified in the notice given by Project Manager under **clause 4.4(b)**; or
 - (ii) **clause 4.4(d)** applies and the Trustee does not give the Project Manager a Dispute Notice referred to in **clause 4.4(d)(iii)** within the time referred to in **clause 4.4(d)(iii)**,then:
 - (iii) the Trustee must not give the Project Manager a Dispute Notice under **clause 21.1(a)** Disputing the date specified in the notice given by the Project Manager under **clause 4.4(b)**; and
 - (iv) any such Dispute Notice which is given by the Trustee will be taken to be of no effect.

4.5 Legislation and Authority Approvals

- (a) The Project Manager must (in its own capacity and when acting as disclosed agent for the Trustee under this Agreement, as applicable) comply (and use reasonable endeavours to procure the compliance of a third party) with all:
 - (i) Legislation;

- (ii) Authority Approvals; and
 - (iii) directions of any Authorities,
relating to the Works for the Extension.
- (b) If the Project Manager or a Related Body Corporate of the Project Manager is appointed as a Works Contractor under, and in accordance with, this Agreement (**Aurizon Works Contractor**), **clause 4.5(a)** will not relieve the Aurizon Works Contractor from complying with any obligation imposed on the Aurizon Works Contractor under the applicable Works Contract to comply with any Legislation, Authority Approvals and directions of any Authorities.

4.6 Rectification of Defects

- (a) The Project Manager must prepare and maintain a written register (**Defects Register**) which records:
- (i) each Defect which the Project Manager becomes aware of during the Defects Rectification Period; and
 - (ii) in respect of each Defect referred to in **clause 4.6(a)(i)**:
 - (A) the date on which the Project Manager became aware of the Defect;
 - (B) reasonable details of all steps taken by the Project Manager to procure the rectification of the Defect in accordance with the Project Manager's obligation under **clause 4.6(c)**; and
 - (C) if applicable, the date on which the Defect was rectified.
- (b) Within 15 Business Days after the end of:
- (i) each Month during the Defects Rectification Period; and
 - (ii) the Defects Rectification Period,
- the Project Manager must give a copy of the Defects Register (current as at the end of the relevant Month or the Defects Rectification Period, as applicable) to the Trustee, the Independent Engineer and the PUH Engineer.
- (c) The Project Manager must, as disclosed agent for the Trustee, procure through the relevant Works Contractors the rectification of each Defect which the Trustee is required to procure the rectification of under **clause 6.1** of the Extension Infrastructure Lease.
- (d) Despite any other provision of this Agreement, the Project Manager's obligations under this Agreement in respect of the rectification of Defects are limited to its obligations under **clause 4.6(c)**.
- (e) For the avoidance of doubt, any costs and expenses Incurred by the Project Manager in procuring the rectification of Defects under **clause 4.6(c)** will be Reimbursable Expenses.

4.7 Final Certificate

(a) Within ten Business Days after the date on which the Project Manager forms the opinion, acting reasonably, that:

- (i) no further Project Costs will be Incurred or recovered by the Trustee, other than Reimbursable Expenses;
- (ii) all Works for the Extension have been completed in accordance with the Scope of Works for the Extension; and
- (iii) the Project Manager has fully discharged its obligations under **clause 4.6(c)**,

the Project Manager must give the Trustee a notice (**Final Certificate**) which states that it is the Final Certificate given under this **clause 4.7(a)**.

(b) If the Project Manager gives the Trustee a Final Certificate under **clause 4.7(a)**:

(i) the Trustee may, within ten Business Days after the Project Manager gives the Final Certificate to the Trustee, give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes that the Project Manager was entitled to give the Final Certificate under **clause 4.7(a)**;

(ii) if the Dispute referred to in **clause 4.7(b)(i)** is not resolved in accordance with **clause 21.2**, the Trustee may refer the Dispute to an Expert to determine whether or not:

(A) any further Project Costs will be Incurred or recovered by the Trustee, other than the Reimbursable Expenses required to implement the winding up of this Agreement;

(B) all Works for the Extension have been completed in accordance with the Scope of Works for the Extension; and/or

(C) the Project Manager has fully discharged its obligations under **clause 4.6(c)**; and

(iii) if the Dispute is referred to an Expert and the Expert determines that:

(A) some further Project Costs will be Incurred or recovered by the Trustee, other than the Reimbursable Expenses required to implement the winding up of this Agreement;

(B) some of the Works for the Extension have not been completed in accordance with the Scope of Works for the Extension; and/or

(C) the Project Manager has not fully discharged its obligations under **clause 4.6(c)**,

then the Final Certificate given under **clause 4.7(a)** will be taken to have not been given under **clause 4.7(a)** and will be of no effect.

- (c) If the Project Manager gives the Trustee a Final Certificate under **clause 4.7(a)** and the Trustee does not give the Project Manager a Dispute Notice referred to in **clause 4.7(b)(i)** within the time referred to in **clause 4.7(b)(i)**, then:
 - (i) the Trustee must not give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes that the Project Manager was entitled to give the Final Certificate under **clause 4.7(a)**; and
 - (ii) any such Dispute Notice which is given by the Trustee will be taken to be of no effect.

5 Independent Engineer and PUH Engineer

5.1 Independent Engineer

- (a) The Parties agree to jointly appoint the Independent Engineer by signing the Independent Engineer Appointment Deed.
- (b) Where this Agreement or the Unit Holders Deed places an obligation on the Independent Engineer, the Parties must ensure that the Independent Engineer Appointment Deed requires the Independent Engineer to comply with that obligation in the manner and within the timeframe contemplated by this Agreement or the Unit Holders Deed (as applicable).
- (c) The Parties must negotiate the terms and conditions of the Independent Engineer Appointment Deed consistent with the following principles:
 - (i) the Independent Engineer is required to discharge the functions and obligations of an Independent Engineer specified in this Agreement, the Unit Holders Deed and the Independent Engineer Appointment Deed;
 - (ii) the Independent Engineer is required to act independently of the Parties and with the requisite degree of professional care, knowledge, skill, expertise, experience and diligence;
 - (iii) at the time of appointment, the Independent Engineer must not have an interest or duty which conflicts or may conflict with its role as Independent Engineer;
 - (iv) if during the term of its appointment, the Independent Engineer wishes to accept an engagement with a person which may result in it having an interest or duty which conflicts or may conflict with its role as Independent Engineer, prior to accepting that engagement, the Independent Engineer must fully disclose any such interest or duty and the nature of the conflict to the Parties and obtain the consent of each Party to such engagement;
 - (v) the Independent Engineer acknowledges that it is jointly appointed by the Project Manager and the Trustee and that it owes equal duties to each of them;

- (vi) the Independent Engineer agrees to perform its services in a timely manner and, where a time limit is prescribed in this Agreement, the Unit Holders Deed or the Independent Engineer Appointment Deed, within that time limit;
 - (vii) the Trustee appoints the Independent Engineer as the Trustee's disclosed agent for the purpose of the Independent Engineer giving Payment Schedules to a Works Contractor under **clause 6.6(a)(ii)**;
 - (viii) the Independent Engineer agrees to keep confidential any confidential information which is provided to the Independent Engineer, or of which the Independent Engineer otherwise becomes aware, in connection with the services provided by the Independent Engineer under the Independent Engineer Appointment Deed, on terms satisfactory to the Trustee and the Project Manager (each acting reasonably); and
 - (ix) the Independent Engineer agrees to keep confidential, and not disclose to any person (including the Trustee, a Preference Unit Holder or the PUH Engineer), any Price Sensitive Information which is provided to the Independent Engineer by the Project Manager, or of which the Independent Engineer otherwise becomes aware, in connection with the services provided by the Independent Engineer under the Independent Engineer Appointment Deed, on terms satisfactory to the Project Manager.
- (d) Subject to **clause 5.1(e)**, each Party must provide all relevant documents, information and other written material (including any Works Contracts and information arising out of any Works Contracts or received from any Works Contractors) under the control of that Party to enable the Independent Engineer to perform its role under this Agreement and the Independent Engineer Appointment Deed.
 - (e) Neither the Project Manager nor the Trustee is required to provide the Independent Engineer with any Confidential Information unless the Independent Engineer Appointment Deed includes a provision contemplated under **clause 5.1(c)(viii)** and **5.1(c)(ix)**.
 - (f) The Parties agree that the Independent Engineer will have no authority to act for or on behalf of the Parties except to the extent expressly provided for in the Independent Engineer Appointment Deed.
 - (g) The Parties agree that the Trustee must pay to the Independent Engineer all fees, charges and other amounts payable to the Independent Engineer under the Independent Engineer Appointment Deed in accordance with the Independent Engineer Appointment Deed.
 - (h) If:
 - (i) the Trustee fails to comply with **clause 5.1(g)**; and

- (ii) the Project Manager pays to the Independent Engineer any amount which is due for payment to the Independent Engineer under the Independent Engineer Appointment Deed,

that amount will be taken to be a Reimbursable Expense.

5.2 PUH Engineer

- (a) For the avoidance of doubt, the costs and expenses of the PUH Engineer will be borne by the applicable Preference Unit Holders as contemplated under the Unit Holders Deed.
- (b) Prior to the provision of any information to the PUH Engineer in connection with this Agreement or another Transaction Document, a Works Contract, the Extension or the Works for the Extension, the Trustee must procure the PUH Engineer to enter into a confidentiality agreement in favour of the Project Manager in accordance with the Unit Holders Deed.
- (c) For the avoidance of doubt, the PUH Engineer is permitted to disclose to the Trustee and the Preference Unit Holders any information which is disclosed to the PUH Engineer by the Project Manager under this Agreement.

5.3 Attendance at meetings and access to sites

- (a) Subject to the Independent Engineer and PUH Engineer complying with **clause 5.3(b)**, the Project Manager must permit the Independent Engineer and the PUH Engineer (as observers) to attend any meetings between a Works Contractor and the Project Manager (acting as the Trustee's disclosed agent) which the Works Contractor and Project Manager (acting as the Trustee's disclosed agent) are required to attend under the Works Contract.
- (b) The Independent Engineer and PUH Engineer must comply with all site access protocols, safety induction and other safety requirements of the Project Manager and any applicable Works Contractor (in relation to a site controlled by a Works Contractor) in relation to the Independent Engineer or PUH Engineer's attendance at a meeting referred to in **clause 5.3(a)**.

6 Works Contracts

6.1 Project Manager is Trustee's representative

Without limiting **clause 3.2**, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of:

- (a) entering into Works Contracts;
- (b) acting as the Trustee's representative under the Works Contracts;
- (c) supervising and managing the performance of the Works Contractors under the Works Contracts;

- (d) giving any directions which may be given by the Trustee under the Works Contracts;
- (e) giving any notices which may be given by the Trustee under the Works Contracts;
- (f) giving any consents or approvals which may be given by the Trustee under the Works Contracts;
- (g) enforcing or waiving any rights which may be enforced or waived by the Trustee under the Works Contracts;
- (h) varying the terms of the Works Contracts;
- (i) conducting, settling or compromising any Works Contract Disputes; and
- (j) terminating the Works Contracts,

in each case, subject to and in accordance with the terms of this Agreement.

6.2 Terms of Works Contracts

- (a) Except with the Trustee's prior written consent, the Project Manager must ensure that each Works Contract entered into by the Project Manager as disclosed agent for the Trustee contains the provisions specified in **item 1 of schedule 9**.
- (b) The Trustee agrees that a Works Contract entered into by the Project Manager as disclosed agent for the Trustee may contain any of the provisions specified in **item 2 of schedule 9**.
- (c) The Project Manager must not include a provision in a Works Contract that provides that any information in relation to the Works Contract is 'Price Sensitive Information' for the purpose of the definition of Price Sensitive Information in **clause 1.1** unless:
 - (i) the Project Manager gives a notice to the Trustee requesting the Trustee's consent to the inclusion of that provision in the Works Contract; and
 - (ii) the Trustee notifies the Project Manager in writing that it consents to the inclusion of that provision in the Works Contract.

6.3 Copy of Works Contracts

- (a) Within ten Business Days after the Project Manager, as disclosed agent for the Trustee, enters into a Works Contract, or any agreement varying the terms of a Works Contract, the Project Manager must provide a copy of the Works Contract or variation agreement (as applicable) to the Trustee, the Independent Engineer and the PUH Engineer.
- (b) If a Works Contract or variation agreement referred to in **clause 6.3(a)** contains Price Sensitive Information, the Project Manager must redact the Price Sensitive Information from the copy of the document which the Project Manager is required to provide to the Trustee and PUH Engineer under **clause 6.3(a)**.

6.4 Compliance with Works Contracts

Subject to **clause 6.6**, the Project Manager must, acting as disclosed agent for the Trustee, act in a manner so as to enable the Trustee to comply with its obligations under the Works Contracts.

6.5 Payment Claims – Project Manager

After a Payment Claim is served on the Project Manager:

- (a) the Project Manager must promptly analyse and evaluate that Payment Claim to determine whether the amount claimed under the Payment Claim is due for payment under the applicable Works Contract;
- (b) the Project Manager must, within seven Business Days after the Payment Claim is served on the Project Manager, give each of the Trustee, the Independent Engineer and the PUH Engineer:
 - (i) a notice specifying:
 - (A) the date on which the Payment Claim is served on the Project Manager;
 - (B) the amount (if any) claimed under that Payment Claim which the Project Manager considers, acting reasonably, is due for payment under the applicable Works Contract;
 - (C) the amount (if any) claimed under that Payment Claim which the Project Manager considers, acting reasonably, is not due for payment under the applicable Works Contract (and reasonable details of the Project Manager's reasons as to why that amount is not due for payment); and
 - (D) the due date for payment of the amount which is due for payment under the applicable Works Contract; and
 - (ii) if the Payment Claim is a BCIP Payment Claim, a draft form of Payment Schedule in accordance with the requirements of the BCIP Act which:
 - (A) identifies the Payment Claim to which it relates; and
 - (B) states the Scheduled Amount for the Payment Claim (being the amount referred to in **clause 6.5(b)(i)(B)**).

6.6 Payment Claims – Independent Engineer

- (a) If the Project Manager gives the Independent Engineer a notice under **clause 6.5** in respect of a Payment Claim, then on or before the date which is ten Business Days after the Payment Claim is served on the Project Manager, the Independent Engineer must:
 - (i) give a certificate to the Trustee which:
 - (A) certifies to the Trustee:
 - (1) the amount (if any) claimed under the Payment Claim which the Independent Engineer considers, acting

- reasonably, is due for payment under the applicable Works Contract;
- (2) the amount (if any) claimed under the Payment Claim which the Independent Engineer considers, acting reasonably, is not due for payment under the applicable Works Contract (and reasonable details of the Independent Engineer's reasons as to why that amount is not due for payment); and
- (3) the due date for payment of that amount under the applicable Works Contract; and
- (B) is accompanied by a copy of the applicable Payment Claim; and
- (ii) if the Payment Claim is a BCIP Payment Claim – serve a Payment Schedule on the Works Contractor (as disclosed agent for the Trustee) in accordance with the requirements of the BCIP Act which:
 - (A) identifies the Payment Claim to which it relates; and
 - (B) states the Scheduled Amount for the Payment Claim (being the amount referred to in **clause 6.6(a)(i)(A)(1)**).
- (b) The Independent Engineer must give a copy of:
 - (i) the certificate referred to in **clause 6.6(a)** to the Project Manager and PUH Engineer on the same day it gives it to the Trustee; and
 - (ii) the Payment Schedule referred to in **clause 6.6(a)** to the Trustee, Project Manager and PUH Engineer on the same day it serves it on the Works Contractor.

6.7 Responsibility for payment

- (a) The Trustee (and not the Project Manager in its own capacity or as agent for the Trustee) is responsible for:
 - (i) paying any money that is due and payable to any Works Contractor under any Works Contract; and
 - (ii) paying any damages arising out of a breach or another claim whether arising out of tort (including negligence), common law, equity, under statute or otherwise, by the Trustee of any obligations (financial or otherwise) under any Works Contract.
- (b) Upon receipt of a certificate from the Independent Engineer under **clause 6.6**, the Trustee must pay to the applicable Works Contractor the amount which the Independent Engineer certifies is due for payment under the applicable Works Contract by the date which the Independent Engineer certifies is the due date for the payment of that amount.
- (c) If the Independent Engineer does not give the Trustee a certificate under **clause 6.6** in respect of a Payment Claim by the due date for payment specified in the Payment Claim, the Trustee must pay to the applicable

Works Contractor the amount claimed in the Payment Claim on or before the date which is ten Business Days after the Payment Claim is served on the Project Manager.

7 Major Works Contracts

7.1 Competitive tender process

Except as otherwise:

- (a) provided in the Procurement Methodology; or
- (b) agreed between the Project Manager and the Trustee,

the Project Manager must procure all Major Works Contracts through a competitive tender process.

7.2 Tender Panels for Major Works Contracts

- (a) If the Project Manager proposes to invite tenders for a proposed Major Works Contract, the Project Manager must give the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer:
 - (i) a notice of the proposed Tender Panel for such Major Works Contracts (**Major Works Contract Notice**); and
 - (ii) a copy of the Tender Panel Recommendation Report for that proposed Major Works Contract.
- (b) A Major Works Contract Notice given under **clause 7.2(a)** must invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting (**Consultation Meeting**) with the Project Manager to:
 - (i) be held:
 - (A) at a time and on a date specified in such Major Works Contract Notice (which date must, at the Project Manager's election, be either the fifth or sixth Business Day after the date on which the Project Manager gives such Major Works Contract Notice);
 - (B) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day; and
 - (C) whether or not the Independent Engineer has provided a report under **clause 7.2(c)**; and
 - (ii) discuss:
 - (A) the information provided in such Major Works Contract Notice; and

- (B) the report (if any) to be given by the Independent Engineer under **clause 7.2(c)** in respect of such Major Works Contract Notice.
- (c) At least two Business Days prior to the date of a Consultation Meeting, the Independent Engineer must prepare, and give to the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Project Manager and the PUH Engineer, a report:
 - (i) specifying whether or not in the Independent Engineer's opinion (acting reasonably) the proposed Tender Panel for that proposed Major Works Contract is consistent with Good Industry Practice; and
 - (ii) providing reasonable details of the reasons for the Independent Engineer's opinion in relation to that matter.
- (d) The Project Manager:
 - (i) may only invite tenders for a proposed Major Works Contract if the Project Manager has first complied with this **clause 7.2** in respect of such proposed Major Works Contract; and
 - (ii) subject to **clause 7.3(a)**, must only invite tenders for such proposed Major Works Contract from entities listed on such Tender Panel for that proposed Major Works Contract consented to, or deemed to be consented to, in accordance with **clause 7.7**.

7.3 Calling for tenders for Major Works Contracts

- (a) If:
 - (i) between the date the Tender Panel for a proposed Major Works Contract is consented to, or is deemed to be consented to, in accordance with **clause 7.7**; and
 - (ii) ten Business Days prior to the date on which the Project Manager intends to issue a Major Works Contract Notice under **clause 7.3(b)**,

an entity included in the Tender Panel has notified the Project Manager that it does not propose to tender for that proposed Major Works Contract or the Project Manager considers (acting reasonably) that an entity included in that Tender Panel should no longer be invited to tender for that proposed Major Works Contract, then the Project Manager must prepare:

 - (iii) an Amended Tender Panel for that proposed Major Works Contract; and
 - (iv) prepare an Amended Tender Panel Recommendation Report for that Amended Tender Panel.
- (b) At least ten Business Days prior to the date on which the Project Manager proposes to invite tenders for a proposed Major Works Contract, the Project Manager must give the Trustee, the Preference

Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer:

- (i) a notice of the proposed invitation to tender (also a **Major Works Contract Notice**); and
- (ii) copies of:
 - (A) the Amended Tender Panel Recommendation Report (if any);
 - (B) the proposed Tender Documentation; and
 - (C) the proposed Tender Evaluation Documentation,for that proposed Major Works Contract.
- (c) A Major Works Contract Notice given under **clause 7.3(b)** must invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting (also a **Consultation Meeting**) with the Project Manager to:
 - (i) be held:
 - (A) at a time and on a date specified in such Major Works Contract Notice (which date must, at the Project Manager's election, be either the fifth or sixth Business Day after the date on which the Project Manager gives such Major Works Contract Notice);
 - (B) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day;
 - (C) whether or not the Independent Engineer has provided a report under **clause 7.3(d)**; and
 - (ii) discuss:
 - (A) the information provided in such Major Works Contract Notice; and
 - (B) the report (if any) to be given by the Independent Engineer under **clause 7.3(d)** in respect of such Major Works Contract Notice.
- (d) At least two Business Days prior to the date of a Consultation Meeting, the Independent Engineer must prepare, and give to the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Project Manager and the PUH Engineer, a report:
 - (i) specifying whether or not in the Independent Engineer's opinion (acting reasonably) the proposed Amended Tender Panel (if any), Tender Documentation and Tender Evaluation Documentation for that proposed Major Works Contract are consistent with Good Industry Practice; and

- (ii) providing reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters.
- (e) The Project Manager:
 - (i) may only invite tenders for a proposed Major Works Contract, if the Project Manager has first complied with this **clause 7.3** in respect of such proposed Major Works Contract;
 - (ii) must only invite tenders for such proposed Major Works Contract from entities listed on the Tender Panel or Amended Tender Panel (as the case may be) consented to, or deemed to be consented to, in accordance with **clause 7.7**; and
 - (iii) must only issue such entities the Tender Documentation consented to, or deemed to be consented to, in accordance with **clause 7.7**.

7.4 Material Addenda

- (a) At least ten Business Days prior to the date on which the Project Manager proposes to issue a Material Addendum for the Tender Documentation for a proposed Major Works Contract, the Project Manager must give the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer:
 - (i) a notice (also a **Major Works Contract Notice**) in respect of the proposed issue of a Material Addendum; and
 - (ii) a copy of the proposed Material Addendum.
- (b) A Major Works Contract Notice given under **clause 7.4(a)** must invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting (also a **Consultation Meeting**) with the Project Manager to:
 - (i) be held:
 - (A) at a time and on a date specified in such Major Works Contract Notice (which date must, at the Project Manager's election, be either the fifth or sixth Business Day after the date on which the Project Manager gives such Major Works Contract Notice);
 - (B) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day;
 - (C) whether or not the Independent Engineer has provided a report under **clause 7.4(c)**; and
 - (ii) discuss:
 - (A) the information provided in such Major Works Contract Notice; and

- (B) the report (if any) to be given by the Independent Engineer under **clause 7.4(c)** in respect of such Major Works Contract Notice.
- (c) At least two Business Days prior to the date of a Consultation Meeting, the Independent Engineer must prepare, and give to the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Project Manager and the PUH Engineer, a report:
 - (i) specifying whether or not in the Independent Engineer's opinion (acting reasonably) the proposed Material Addendum is consistent with Good Industry Practice; and
 - (ii) providing reasonable details of the reasons for the Independent Engineer's opinion in relation to that matter.
- (d) The Project Manager:
 - (i) may only issue a Material Addendum for the Tender Documentation for a proposed Major Works Contract if the Project Manager has first complied with this **clause 7.4** in respect of such Material Addendum; and
 - (ii) must issue the Material Addendum in the form consented to, or deemed to be consented to, under **clause 7.7**.

7.5 Evaluating tenders for Major Works Contracts

- (a) The Project Manager must:
 - (i) evaluate all tenders received (including as varied by the tenderers during pre-selection negotiations) in response to an invitation to tender for a proposed Major Works Contract in accordance with the Tender Evaluation Documentation; and
 - (ii) prepare a tender assessment report which:
 - (A) contains an evaluation of such tenders (including negotiations over qualifications or other changes to the Tender Documentation proposed by the tenderers) in accordance with the Tender Evaluation Documentation; and
 - (B) recommends a preferred tenderer on the basis of such evaluation.
- (b) At least ten Business Days prior to the date that the Project Manager proposes to enter into a proposed Major Works Contract, the Project Manager must give the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer:
 - (i) a notice (also a **Major Works Contract Notice**) of the evaluation of the proposed tender; and
 - (ii) a copy of:
 - (A) the tender assessment report; and

- (B) the form of the proposed Major Works Contract (including all commercial and technical documentation forming part of the proposed Major Works Contract) which is proposed to be executed with the preferred tenderer.
- (c) A Major Works Contract Notice given under **clause 7.5(b)** must invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting (also a **Consultation Meeting**) with the Project Manager to:
 - (i) be held:
 - (A) at a time and on a date specified in such Major Works Contract Notice (which date must, at the Project Manager's election, be either the fifth or sixth Business Day after the date on which the Project Manager gives such Major Works Contract Notice);
 - (B) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day; and
 - (C) whether or not the Independent Engineer has provided a report under **clause 7.5(d)**; and
 - (ii) discuss:
 - (A) the information provided in such Major Works Contract Notice; and
 - (B) the report (if any) to be given by the Independent Engineer under **clause 7.5(d)** in respect of such Major Works Contract Notice.
- (d) At least two Business Days prior to the date of a Consultation Meeting, the Independent Engineer must prepare, and give to the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Project Manager and the PUH Engineer, a report:
 - (i) specifying whether or not in the Independent Engineer's opinion (acting reasonably):
 - (A) the selection of the preferred tenderer; and
 - (B) the form of the proposed Major Works Contract (including the technical specifications) to be executed with the preferred tenderer,

are consistent with Good Industry Practice; and
 - (ii) providing reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters.
- (e) The Project Manager:

- (i) may only enter into (or otherwise reach an agreement, understanding or arrangement to award or enter into) a Major Works Contract with a person if the Project Manager has first complied with this **clause 7.5** in respect of such Major Works Contract; and
- (ii) must only execute a proposed Major Works Contract:
 - (A) with the preferred tenderer consented to, or deemed to be consented to, in accordance with **clause 7.7**;
 - (B) in the form of the proposed Major Works Contract consented to, or deemed to be consented to, in accordance with **clause 7.7**; and
 - (C) as disclosed agent of the Trustee.

7.6 Material Variations of Major Works Contract

- (a) At least ten Business Days prior to the date on which the Project Manager proposes to issue a Variation Direction under a Major Works Contract which would give rise to a Material Variation, the Project Manager must give the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer:
 - (i) a notice (also a **Major Works Contract Notice**) specifying the proposed Variation Direction; and
 - (ii) reasonable details of the proposed Variation Direction.
- (b) A Major Works Contract Notice given under **clause 7.6(a)** must invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting (also a **Consultation Meeting**) with the Project Manager to:
 - (i) be held:
 - (A) at a time and on a date specified in such Major Works Contract Notice (which date must, at the Project Manager's election, be either the fifth or sixth Business Day after the date on which the Project Manager gives such Major Works Contract Notice);
 - (B) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably); and
 - (C) whether or not the Independent Engineer has provided a report under **clause 7.6(c)**; and
 - (ii) discuss:
 - (A) the information provided in such Major Works Contract Notice; and

- (B) the report (if any) to be given by the Independent Engineer under **clause 7.6(c)** in respect of such Major Works Contract Notice.
- (c) At least two Business Days prior to the date of a Consultation Meeting, the Independent Engineer must prepare, and give to the Trustee, the Preference Unit Holders (as notified by the Trustee to the Project Manager), the Project Manager and the PUH Engineer, a report:
 - (i) specifying whether or not in the Independent Engineer's opinion (acting reasonably) the proposed Variation Direction is consistent with Good Industry Practice; and
 - (ii) providing reasonable details of the reasons for the Independent Engineer's opinion in relation to that matter.
- (d) The Project Manager:
 - (i) may only issue a Variation Direction under a Major Works Contract which would give rise to a Material Variation if the Project Manager has first complied with this **clause 7.6** in respect of such Variation Direction; and
 - (ii) must only issue a Variation Direction in the form of the direction consented to, deemed to be consented to, in accordance with **clause 7.7**.

7.7 Major Works Contract Response Notice

- (a) Within ten Business Days after the Project Manager gives the Trustee a Major Works Contract Notice, the Trustee must give the Project Manager a notice (**Major Works Contract Response Notice**) specifying whether, in accordance with this **clause 7**, the Trustee:
 - (i) consents to the Proposed Action; or
 - (ii) does not consent to the Proposed Action,
 specified in the Major Works Contract Notice.
- (b) If the Trustee specifies in a Major Works Contract Response Notice that it does not consent to a Proposed Action specified in a Major Works Contract Notice, the Trustee must provide the Project Manager with:
 - (i) reasonable details as to why the Trustee considers it is permitted to refuse its consent to such Proposed Action under **clause 7.9**; and
 - (ii) particulars of the changes that, if adopted by the Project Manager, would address the Trustee's reasons for refusing its consent to such Proposed Action, and reasonable details for the Trustee's reasons for those changes.
- (c) If the Trustee does not provide the Project Manager with a Major Works Contract Response Notice within the period specified in **clause 7.7(a)**, the Trustee will be deemed to have consented to the Proposed Action specified in the Major Works Contract Notice.

7.8 Invalid grounds for not consenting to Proposed Action

- (a) The Trustee must not refuse to consent to a Proposed Action specified in a Major Contract Works Notice given under **clause 7.2(a), 7.3(b), 7.4(a) or 7.5(b)** for the reason that:
 - (i) the proposed MWC Scope for the proposed Major Works Contract does not contain scope which is not specifically required to be carried out in accordance with the Scope of Works for the Extension; or
 - (ii) the proposed MWC Scope for the proposed Major Works Contract includes scope that is specifically required to be carried out in accordance with the Scope of Works for the Extension.
- (b) The Trustee must not refuse to consent to a Proposed Action specified in a Major Contract Works Notice given under **clause 7.6(a)** for the reason that:
 - (i) the Variation Direction would result in the MWC Scope for the Major Works Contract being omitted which is not specifically required to be carried out in accordance with the Scope of Works for the Extension; or
 - (ii) the Variation Direction would result in the MWC Scope for the Major Works Contract including scope which is specifically required to be carried out in accordance with the Scope of Works for the Extension.
- (c) The Trustee must not refuse its consent to a Proposed Action specified in a Major Contract Works Notice to the extent that the Proposed Action is specifically required to comply with the Procurement Methodology.
- (d) The Trustee must not refuse its consent to a Proposed Action specified in a Major Works Contract Notice to the extent that the Proposed Action is consistent with a previous Proposed Action which:
 - (i) the Trustee has consented to under **clause 7.7(a)(i)** (or was deemed to have consented to in accordance with **clause 7.7(c)**); or
 - (ii) an Expert determined the Trustee invalidly refused its consent to in accordance with **clause 7.10**.
- (e) For the avoidance of doubt, the Trustee must not refuse its consent to a Proposed Action in respect of an Amended Tender Panel for a Major Works Contract to the extent entities included in that Amended Tender Panel were the subject of a Tender Panel for that Major Works Contract which the Trustee has previously consented to under **clause 7.7(a)(i)** (or was deemed to have consented to in accordance with **clause 7.7(c)**).

7.9 Valid grounds for not consenting to Proposed Action

Without limiting **clause 7.8**, the Trustee may refuse to consent to a Proposed Action if (and only if) the Proposed Action specified in a Major Contract Works Notice would be inconsistent with:

- (a) Good Industry Practice;
- (b) the Scope of Works for the Extension; and/or
- (c) the Procurement Methodology.

7.10 Dispute of a Major Works Contract Response Notice

- (a) If the Trustee specifies in a Major Works Contract Response Notice that it does not consent to a Proposed Action specified in a Major Works Contract Notice, the Project Manager may, within ten Business Days after the Trustee gives the Project Manager the Major Works Contract Response Notice, give the Trustee a Dispute Notice under **clause 21.1(a)** which Disputes the validity of the Trustee refusing its consent to the Proposed Action.
- (b) If the Project Manager does not give the Trustee a Dispute Notice referred to in **clause 7.10(a)** within the time required in **clause 7.10(a)**, the Project Manager must not give the Trustee a Dispute Notice in respect of such Dispute.
- (c) The Parties may appoint a Standing Expert to act as the Expert for all Disputes referred to in this **clause 7.10**.
- (d) The Dispute referred to in **clause 7.10(a)** must be referred to an Expert (which, if a Standing Expert has been appointed, will be the Standing Expert) for the purposes of **clause 21.3** to determine whether or not the Trustee validly refused its consent to the Proposed Action in accordance with this **clause 7.10**.
- (e) If:
 - (i) the Expert determines that the Trustee invalidly refused its consent to the Proposed Action in accordance with this **clause 7.10**; and
 - (ii) the Trustee's invalid refusal of its consent to a Proposed Action has resulted, or may result, in:
 - (A) the Project Costs for carrying out the Works for one or more Segments being greater than they would otherwise have been; and/or
 - (B) the time required to carry out any Works for one or more Segments being greater than it would otherwise have been,then the Expert must also determine a variation to the Target Cost and/or Target Available Date for those Segments which is or are reasonable having regard to the additional Project Costs and/or delay for such Segments.

- (f) If the Expert determines to vary the Target Cost and/or Target Available Date for a Segment under **clause 7.10(e)**, then the Target Cost and/or Target Available Date for the Segment will be taken to be varied as determined by the Expert on the date the Expert notifies the Parties of his or her determination.

7.11 Giving effect to Proposed Actions

- (a) The Project Manager must not implement a Proposed Action specified in a Major Works Contract Notice if the Trustee has given the Project Manager a Major Works Contract Response Notice specifying that it does not consent to such Proposed Action (unless an Expert determines that the Trustee invalidly refused its consent to such Proposed Action).
- (b) The Project Manager may implement a Proposed Action specified in a Major Works Contract Notice if:
 - (i) the Trustee has given the Project Manager a Major Works Contract Response Notice specifying that it consents to such Proposed Action;
 - (ii) the Trustee is deemed to have consented to such Proposed Action in accordance with **clause 7.7(c)**; or
 - (iii) the Trustee has given the Project Manager a Major Works Contract Response Notice specifying that it does not consent to such Proposed Action but an Expert determines that the Trustee invalidly refused its consent to such Proposed Action.

8 Major Works Contracts Disputes

8.1 Type 1 Major Works Contract Dispute

- (a) Without limiting **clause 6** and subject to **clause 8.1(b)**, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of conducting, settling and/or compromising any and all Type 1 Major Works Contract Disputes.
- (b) If the Trustee gives the Project Manager a notice specifying that it elects to assume responsibility for the conduct of a Type 1 Major Works Contract Dispute nominated in that notice (**Nominated Type 1 Major Works Contract Dispute**), then on and from the date of that notice:
 - (i) the Project Manager will cease being the Trustee's disclosed agent for the purpose of conducting, settling and/or compromising the Nominated Type 1 Major Works Contract Dispute; and
 - (ii) the Trustee assumes, at its cost and risk, full responsibility for conducting, settling and/or compromising the Nominated Type 1 Major Works Contract Dispute.

8.2 Type 2 Major Works Contract Dispute

- (a) Without limiting **clause 6** and subject to **clause 8.2(b)**, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of conducting, settling and/or compromising any and all Type 2 Major Works Contract Disputes.
- (b) On or after the Referral Date for a Type 2 Major Works Contract Dispute, if the Trustee gives the Project Manager a notice specifying that it elects to assume responsibility for the conduct of that Type 2 Major Works Contract Dispute (**Nominated Type 2 Major Works Contract Dispute**), then on and from the date of that notice:
 - (i) the Project Manager will cease being the Trustee's disclosed agent for the purpose of conducting, settling and/or compromising the Nominated Type 2 Major Works Contract Dispute; and
 - (ii) the Trustee assumes, at its cost and risk, full responsibility for conducting, settling and/or compromising the Nominated Type 2 Major Works Contract Dispute.

8.3 Conduct of Major Works Contract Dispute by Project Manager

- (a) Subject to **clause 8.3(b)**, during the period the Project Manager is appointed as the disclosed agent of the Trustee for the purpose of conducting, settling and/or compromising a Major Works Contract Dispute, the Project Manager must:
 - (i) provide the Trustee with information or documentation which is material to that Major Works Contract Dispute and which has not otherwise been provided to the Trustee by the Project Manager in the Monthly Report in relation to that Major Works Contract Dispute;
 - (ii) consult with the Trustee in relation to the conduct, and/or any proposed settlement or compromise (in whole or in part), of a Major Works Contract Dispute, where the conduct and/or proposed settlement or compromise is a material matter in relation to that Major Works Contract Dispute; and
 - (iii) have regard to the Trustee's opinion in relation to the manner of the conduct, and/or any proposed settlement or compromise (in whole or in part) of a Major Works Contract Dispute, where that conduct or proposed settlement or compromise is material to that Major Works Contract Dispute.
- (b) In determining whether a matter is material in relation to a Major Works Contract Dispute for the purposes of **clause 8.3(a)**, the Project Manager may have regard to:
 - (i) the Quantum of Dispute of that Major Works Contract Dispute;
 - (ii) the potential adverse effect on the Estimated Project Costs for the Segments affected by that Major Works Contract Dispute;

- (iii) the potential delay to the completion date for the works under the Major Works Contract which is the subject of that Major Works Contract Dispute; and/or
- (iv) the extent to which there may be a delay to the Available Date of any Segment as a result of a potential delay under **clause 8.3(b)(iii)**.

8.4 Conduct of Major Works Contract Dispute by Trustee

If the Trustee elects to assume responsibility for conducting, settling and/or compromising a Major Works Contract Dispute, then the Trustee must:

- (a) regularly (and, in any event, promptly following a request by the Project Manager) provide the Project Manager with any information or documentation (including notices and correspondence) in relation to the conduct, and/or any proposed settlement or compromise (in whole or in part) of that Major Works Contract Dispute;
- (b) regularly (and, in any event, promptly following a request by the Project Manager) liaise, cooperate and consult with the Project Manager in relation to the conduct, and/or any proposed settlement or compromise (in whole or in part), of that Major Works Contract Dispute;
- (c) without limiting **clause 8.4(a)** and **8.4(b)**, provide the Project Manager with full details of any proposed settlement or compromise (in whole or in part) of that Major Works Contract Dispute;
- (d) have regard to the Project Manager's opinion in relation to the manner of the conduct, and/or any proposed settlement or compromise (in whole or in part), of that Major Works Contract Dispute;
- (e) consult with the Project Manager in relation to the conduct of, and/or proposed settlement or compromise (in whole or in part), of that Major Works Contract Dispute, to the extent that the conduct or proposed settlement or compromise may be reasonably expected to:
 - (i) damage the Project Manager's business reputation; or
 - (ii) threaten or endanger persons, property or the environment; or
 - (iii) have an adverse impact on the operational characteristics (including, functionality, quality, performance, reliability and maintainability) of the works once completed under the Major Works Contract;
- (f) not conduct, or settle and/or compromise (in whole or in part), that Major Works Contract Dispute in a manner which, in the Project Manager's absolute discretion and which the Project Manager notifies to the Trustee, may reasonably be expected to threaten or endanger persons, property or the environment; and
- (g) not conduct, or settle and/or compromise (in whole or in part), that Major Works Contract Dispute in a manner which, in the Project Manager's opinion (acting reasonably) and which the Project Manager notifies the

Trustee, may reasonably be expected to have an adverse impact on the operational characteristics (including, functionality, quality, performance, reliability and maintainability) of the works once completed under the relevant Major Works Contract.

9 Variations to Scope of Works

9.1 Variation to Scope of Works initiated by Project Manager

If the Project Manager proposes to vary the Scope of Works for a Segment, then the Project Manager:

- (a) may, by notice to the Trustee, the Independent Engineer and the PUH Engineer (**Variation Notice**), request the consent of the Trustee to vary the Scope of Works for the Segment as proposed in the Variation Notice; and
- (b) must, if the Project Manager gives a Variation Notice under **clause 9.1(a)**, provide in that Variation Notice reasonable details of the proposed variations to the Scope of Works for the Segment.

9.2 Variation to Scope of Works due to Scope Change Event

If the Project Manager considers, acting reasonably, that it is necessary to vary the Scope of Works for a Segment as a result of a Scope Change Event, then the Project Manager:

- (a) may, by notice to the Trustee, the Independent Engineer and the PUH Engineer (also a **Variation Notice**), request the consent of the Trustee to vary the Scope of Works for the Segment as a result of the Scope Change Event as proposed in the Variation Notice; and
- (b) must, if the Project Manager gives a Variation Notice under **clause 9.2(a)**, provide in that Variation Notice reasonable details of:
 - (i) the Scope Change Event and the effect of the Scope Change Event on the Scope of Works for the Segment; and
 - (ii) why the Project Manager considers the proposed variation of the Scope of Works for the Segment is the preferred manner of addressing the Scope Change Event.

9.3 Consequential variations to Target Available Date and Target Cost

If the Project Manager considers that a proposed variation to the Scope of Works for a Segment under **clauses 9.1** or **9.2** requires a consequential variation to the Target Available Date and/or the Target Cost for the Segment, the Variation Notice may also request the consent of the Trustee to vary the Target Available Date and/or the Target Cost (as applicable) for that Segment as proposed in the Variation Notice.

9.4 Independent Engineer to provide report

If the Project Manager gives a Variation Notice, the Independent Engineer must promptly (and, in any event, at least one Business Day prior to the date on which the meeting referred to in **clause 9.5(a)** is to be held) give the Parties and the PUH Engineer a written report specifying:

- (a) if the Variation Notice is given under **clause 9.2**, whether or not, in the Independent Engineer's reasonable opinion:
 - (i) the Scope Change Event specified in the Variation Notice has occurred; and
 - (ii) the proposed variation to the Scope of Works for the Segment is reasonable as a result of the Scope Change Event and whether any alternatives to the variation have been considered and the reasonableness or otherwise of those alternatives,including reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters;
- (b) if the Project Manager requests the consent of the Trustee to vary the Target Cost and/or Target Available Date for the Segment under a Variation Notice given under **clause 9.1** or **9.2**:
 - (i) whether or not, in the Independent Engineer's reasonable opinion, the variation to the Target Cost and/or Target Available Date (as applicable) for the Segment proposed in the Variation Notice is or are reasonable as a result of the variation to the Scope of Works for the Segment proposed in the Variation Notice; and/or
 - (ii) if not, the variation(s) to the Target Cost and/or Target Available Date (as applicable) for the Segment which, in the Independent Engineer's reasonable opinion, is or are reasonable as a result of the variation to the Scope of Works for the Segment proposed in the Variation Notice,including reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters;
- (c) a recommendation by the Independent Engineer as to whether the variation(s) proposed in the Variation Notice should be accepted, rejected or accepted with amendment, including reasonable details of the reasons for the Independent Engineer's recommendation; and
- (d) any other matter the Independent Engineer considers relevant in respect of the variation(s) proposed in the Variation Notice.

9.5 Consultation

- (a) If the Project Manager gives a Variation Notice, the Project Manager must, on the same day that the Project Manager gives the Variation Notice, invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting with the Project Manager to discuss:

- (i) the variation(s) proposed in the Variation Notice; and
 - (ii) the report (if any) given by the Independent Engineer under **clause 9.4**.
- (b) A meeting referred to in **clause 9.5(a)** must be held:
- (i) not less than five Business Days, and not more than ten Business Days, after the date that the Project Manager gives the Variation Notice;
 - (ii) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day; and
 - (iii) whether or not the Independent Engineer has provided a report under **clause 9.4**.

9.6 Consent of Trustee

- (a) Within five Business Days after the date of the meeting referred to in **clause 9.5**, the Trustee must notify the Project Manager whether or not it consents to the variation(s) proposed in the Variation Notice.
- (b) If the Trustee does not notify the Project Manager under, and within the time required by, **clause 9.6(a)**, and the report (if any) given by the Independent Engineer under **clause 9.4**:
 - (i) recommends a variation proposed in the Variation Notice, the Trustee will be deemed to have consented to the relevant variation proposed in the Variation Notice; or
 - (ii) does not recommend or conditionally recommends a variation proposed in the Variation Notice or contains no recommendation in respect of the variation, the Trustee will be deemed not to have consented to the relevant variation proposed in the Variation Notice.
- (c) If the Trustee consents (or is deemed to have consented) to a variation to the Scope of Works for a Segment proposed in a Variation Notice, the Scope of Works for the Segment will be taken to be varied as proposed in that Variation Notice on the date on which such consent is obtained or deemed to be obtained.
- (d) If **clause 9.6(c)** applies and the Trustee also consents (or is deemed to have consented) to a variation to the Target Available Date and/or Target Cost (as applicable) for the Segment proposed in the Variation Notice, the Target Available Date and/or Target Cost (as applicable) for the Segment will be taken to be varied as proposed in the Variation Notice on the date on which such consent is obtained or deemed to be obtained.
- (e) If the Trustee does not consent (or is deemed to have not consented) to a variation to the Scope of Works for a Segment proposed in a Variation

Notice given under **clause 9.1**, the Scope of Works, Target Cost and Target Available Date for the Segment will not be varied.

9.7 Expert determination

- (a) If the Trustee does not consent (or is deemed to have not consented) under **clause 9.6** to a variation to the Scope of Works for a Segment proposed in a Variation Notice given under **clause 9.2**:
 - (i) the Project Manager may, within 20 Business Days after the Trustee did not consent (or is deemed to have not consented) to a variation to the Scope of Works for the Segment, refer the matter to an Expert to determine whether:
 - (A) the Scope Change Event specified in the Variation Notice has occurred; and
 - (B) the Project Manager's proposed variation to the Scope of Works for the Segment is reasonable as a result of the Scope Change Event;
 - (ii) if the Expert determines that the Scope Change Event specified in the Variation Notice has not occurred:
 - (A) the Scope of Works for the Segment will not be varied; and
 - (B) the Expert's determination must specify the reasons why the Expert considers that the Scope Change Event has not occurred; and
 - (iii) if the Expert determines that the Scope Change Event specified in the Variation Notice has occurred and that the variation to the Scope of Works for the Segment:
 - (A) is reasonable as a result of the Scope Change Event:
 - (1) the Scope of Works for the Segment will be taken to be varied as proposed in the Variation Notice on the date the Expert notifies the Parties of his or her determination; and
 - (2) the Expert's determination must specify the reasons why the Expert considers that the proposed variation is reasonable as a result of the Scope Change Event; or
 - (B) is not reasonable as a result of the Scope Change Event:
 - (1) the Scope of Works for the Segment will not be varied; and
 - (2) the Expert's determination must specify the reasons why the Expert considers that the proposed variation is not reasonable as a result of the Scope Change Event.

- (b) If the Scope of Works for a Segment is varied under **clauses 9.6(c)** or **9.7(a)(iii)(A)** but the Trustee does not consent (or is deemed to have not consented) under **clause 9.6** to a variation to the Target Available Date and/or Target Cost (as applicable) for a Segment proposed in the Variation Notice:
 - (i) the Project Manager may, within 20 Business Days after the Trustee does not consent (or is deemed to have not consented) to a variation to the Target Available Date and/or Target Cost (as applicable) for the Segment, refer the matter to an Expert to determine whether the Project Manager's proposed variation to the Target Available Date and/or Target Cost (as applicable) for the Segment proposed in the Variation Notice is reasonable as a result of the variation to the Scope of Works for the Segment; and
 - (ii) if the Expert determines that the variation to the Target Available Date and/or Target Cost (as applicable) for a Segment proposed in the Variation Notice:
 - (A) is reasonable as a result of the variation to the Scope of Works for the Segment, the Target Available Date and/or Target Cost (as applicable) for the Segment will be taken to be varied as proposed in the Variation Notice on the date the Expert notifies the Parties of his or her determination; or
 - (B) is not reasonable as a result of the variation to the Scope of Works for the Segment:
 - (1) the Expert must determine the variation to the Target Available Date and/or Target Cost (as applicable) for the Segment which is reasonable as a result of the variation to the Scope of Works for the Segment; and
 - (2) the Target Available Date and/or Target Cost (as applicable) for the Segment will be taken to be varied as determined by the Expert on the date the Expert notifies the Parties of his or her determination.

9.8 Variations to Scope of Works requested by Trustee

- (a) The Trustee may, by notice to the Project Manager, request the Project Manager to propose variations to the Scope of Works for a Segment under **clause 9.1**.
- (b) The Project Manager must consult with the Trustee in respect of such a request and must act reasonably in considering whether or not the Project Manager should propose to vary the Scope of Works for the Segment under **clause 9.1** as requested.
- (c) For the purposes of **clause 9.8(b)**, it will be reasonable for the Project Manager to consider, amongst other matters, the impact of the proposed variation on the Project Manager's other existing or proposed customers and its own commercial interests.

10 Variations to Target Available Date and Target Cost

10.1 Variation to Target Available Date and Target Cost initiated by Project Manager

Subject to **clause 7**, **clause 9** and this **clause 10**, the Project Manager cannot vary the Target Available Date or Target Cost for a Segment without the consent of the Trustee.

10.2 Variation to Target Available Date for Acceleration

- (a) If the Project Manager proposes to accelerate the progress of the carrying out of the Works for a Segment (**Acceleration**), the Project Manager may, by notice to the Trustee, the Independent Engineer and the PUH Engineer (**Acceleration Variation Notice**), request the consent of the Trustee to vary (bring forward) the Target Available Date for the Segment as proposed in the Acceleration Variation Notice.
- (b) An Acceleration Variation Notice given under **clause 10.2(a)** must specify reasonable details of:
 - (i) the Project Manager's reasons for the proposed Acceleration for the Segment; and
 - (ii) the actions which are proposed to be undertaken to give effect to the proposed Acceleration for the Segment.
- (c) The Trustee may, by notice to the Project Manager, request that the Project Manager propose an Acceleration for a Segment (**Trustee Acceleration Proposal Notice**).
- (d) The Project Manager must consult with the Trustee in respect of the Trustee Acceleration Proposal Notice and act reasonably in considering whether or not to propose to vary the Target Available Date for a Segment under **clause 10.2(a)** to give effect to the Trustee Acceleration Proposal Notice (including by considering the impact of the proposed variation on the Project Manager's other existing or proposed customers and its own commercial interests).

10.3 Consequential variations to Target Cost for Acceleration

If the Project Manager considers that a proposed variation to the Target Available Date for a Segment as a result of a proposed Acceleration under **clause 10.2** requires a consequential increase to the Target Cost for the Segment to carry out the Works for that Segment by the proposed varied Target Available Date, the Acceleration Variation Notice may also request the consent of the Trustee to vary the Target Cost for the Segment by increasing it as proposed in the Acceleration Variation Notice.

10.4 Independent Engineer to provide report

If the Project Manager gives an Acceleration Variation Notice, the Independent Engineer must promptly (and, in any event, at least one Business Day prior to the date on which the meeting referred to in **clause 10.5(a)** is to be held) give the Parties and the PUH Engineer a written report specifying:

- (a) whether or not, in the Independent Engineer's reasonable opinion, the actions which are proposed to be undertaken to give effect to the proposed Acceleration by the proposed varied Target Available Date are reasonable;
- (b) if the Acceleration Variation Notice requests the consent of the Trustee to vary the Target Cost for the Segment as proposed in the Acceleration Variation Notice, whether or not, in the Independent Engineer's reasonable opinion, the proposed variation to the Target Cost for the Segment is reasonable as a result of the additional Project Costs reasonably likely to be Incurred to carry out the Works for the Segment by the proposed varied Target Available Date;
- (c) a recommendation by the Independent Engineer as to whether the variation(s) proposed in the Acceleration Variation Notice should be accepted, rejected or accepted with amendment; and
- (d) any other matter the Independent Engineer considers relevant in respect of the variation(s) proposed in the Acceleration Variation Notice.

10.5 Consultation

- (a) If the Project Manager gives an Acceleration Variation Notice under **clause 10.2**, the Project Manager must, on the same day that the Project Manager gives the Acceleration Variation Notice, invite the Trustee, all Preference Unit Holders (as notified by the Trustee to the Project Manager), the Independent Engineer and the PUH Engineer to attend a meeting with the Project Manager to discuss:
 - (i) the variation(s) proposed in the Acceleration Variation Notice; and
 - (ii) the report (if any) given by the Independent Engineer under **clause 10.4**.
- (b) A meeting referred to in **clause 10.5(a)** must be held:
 - (i) not less than five Business Days, and not more than ten Business Days, after the date that the Project Manager gives the Acceleration Variation Notice;
 - (ii) at a place in Brisbane or by telephone conference (as determined by the Project Manager, acting reasonably) on a Business Day; and
 - (iii) whether or not the Independent Engineer has provided a report under **clause 10.4**.

10.6 Consent of Trustee

- (a) Within five Business Days after the date of the meeting referred to in **clause 10.5(a)**, the Trustee must notify the Project Manager whether or not it consents to the variation(s) proposed in the Acceleration Variation Notice.

- (b) If the Trustee does not notify the Project Manager under, and within the time required by, **clause 10.6(a)**, and the report (if any) given by the Independent Engineer under **clause 10.4**:
 - (i) recommends a variation proposed in the Acceleration Variation Notice, the Trustee will be deemed to have consented to the relevant variation proposed in the Acceleration Variation Notice; or
 - (ii) does not recommend or conditionally recommends a variation proposed in the Acceleration Variation Notice or contains no recommendation in respect of the variation, the Trustee will be deemed not to have consented to the relevant variation proposed in the Acceleration Variation Notice.
- (c) If the Trustee consents (or is deemed to have consented) to a variation to the Target Available Date and, if applicable, the Target Cost for a Segment proposed in an Acceleration Variation Notice given under **clause 10.2**, the Target Available Date and, if applicable, the Target Cost for the Segment will be taken to be varied as proposed in the Acceleration Variation Notice on the date on which such consent is obtained or deemed to be obtained.
- (d) If the Trustee does not consent (or is deemed to have not consented) to a variation to the Target Available Date and, if applicable, the Target Cost for the Segment proposed in the Acceleration Variation Notice given under **clause 10.2**, the Target Available Date and, if applicable, the Target Cost for the Segment will not be varied and the Project Manager will not give effect to the proposed Acceleration.

10.7 Variations resulting from Adjustment Events

- (a) If an Adjustment Event occurs in respect of a Segment, then the Project Manager:
 - (i) must notify the Trustee, the Independent Engineer and the PUH Engineer of the Adjustment Event as soon as reasonably practicable after the Project Manager becomes aware of the occurrence of the Adjustment Event, such notice to include details of the Adjustment Event as are known by the Project Manager at the time of the notice; and
 - (ii) may, by notice to the Trustee, the Independent Engineer and the PUH Engineer given as soon as reasonably practicable after the full effects of the Adjustment Event have been determined by the Project Manager, acting reasonably:
 - (A) vary the Target Cost for the Segment by increasing it by the amount that the Project Manager considers is reasonable as a result of the Adjustment Event; and/or
 - (B) subject to **clause 10.7(b)(ii)**, vary the Target Available Date for the Segment by extending it by the period that the Project Manager considers is reasonable as a result of the Adjustment Event,

such notice to include reasonable details of:

- (C) the Adjustment Event; and
 - (D) why the Project Manager considers that the proposed variation(s) is or are (as applicable) reasonable as a result of the Adjustment Event.
- (b) If an Adjustment Event is a Weather Adjustment Event:
- (i) as soon as reasonably practicable after the full effects of the Weather Adjustment Event have been determined by the Project Manager, acting reasonably, the Project Manager must notify the Trustee, the Independent Engineer and the PUH Engineer of the period of the delay to the carrying out of the Works for the Segment as a result of the Weather Adjustment Event; and
 - (ii) the Project Manager may only vary the Target Available Date for a Segment under **clause 10.7(a)(ii)(B)** if, and to the extent that, the total period of the delay in carrying out the Works for the Segment as a result of the Weather Adjustment Event and all previous Weather Adjustment Events in respect of the Segment exceeds the Weather Delay Period for that Segment.
- (c) If the Project Manager gives a notice under **clause 10.7(a)(ii)**, the Independent Engineer must promptly give the Parties and the PUH Engineer a written report specifying:
- (i) whether or not, in the Independent Engineer's reasonable opinion, the relevant Adjustment Event has occurred, including reasonable details of the reasons for the Independent Engineer's opinion;
 - (ii) whether or not, in the Independent Engineer's reasonable opinion, the variation(s) to the Target Cost and/or the Target Available Date (as applicable) for the Segment is or are reasonable as a result of the Adjustment Event, including reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters;
 - (iii) if, in the Independent Engineer's reasonable opinion, the variation(s) to the Target Cost and/or the Target Available Date (as applicable) for the Segment is or are not reasonable as a result of the Adjustment Event, the variation(s) to the Target Cost and/or Target Available Date (as applicable) for the Segment which, in the Independent Engineer's reasonable opinion, is or are reasonable as a result of the Adjustment Event, including reasonable details of the reasons for the Independent Engineer's opinion in relation to those matters; and
 - (iv) any other matter the Independent Engineer considers relevant in respect of the Adjustment Event and the variation(s) to the Target Cost and/or the Target Available Date (as applicable) for the Segment as a result of the Adjustment Event.

- (d) If the Project Manager gives a notice under **clause 10.7(a)(ii)**, the Trustee may, within 20 Business Days after the Independent Engineer gives the Trustee the report under **clause 10.7(c)**, give the Project Manager a Dispute Notice which Disputes a variation to the Target Cost and/or Target Available Date (as applicable) for a Segment specified in the notice given by the Project Manager under **clause 10.7(a)(ii)**.
- (e) If a Dispute referred to in **clause 10.7(d)** is not resolved in accordance with **clause 21.2**:
 - (i) the Trustee may refer the Dispute to an Expert to determine whether the variation to the Target Cost and/or Target Available Date (as applicable) for the Segment is reasonable as a result of the Adjustment Event; and
 - (ii) if the Dispute is referred to an Expert and the Expert determines that the variation to the Target Cost and/or Target Available Date (as applicable) for the Segment:
 - (A) is reasonable as a result of the Adjustment Event, then the Target Cost and/or Target Available Date (as applicable) for the Segment will be taken to be varied as specified in the notice given under **clause 10.7(a)(ii)** on the date the notice is given; or
 - (B) is not reasonable as a result of the Adjustment Event then:
 - (1) the Expert must determine the variation (extension) to the Target Available Date and/or variation (increase) to the Target Cost (as applicable) which is reasonable as a result of the Adjustment Event; and
 - (2) the Target Available Date and/or Target Cost (as applicable) will be taken to be varied as determined by the Expert on the date that the Expert notified the Parties of his or her determination.
- (f) If the Trustee does not give the Project Manager a Dispute Notice referred to in **clause 10.7(d)** within the time referred to in **clause 10.7(d)**, then:
 - (i) the Trustee must not give the Project Manager a Dispute Notice Disputing the variation to the Target Cost and/or Target Available Date for a Segment specified in the notice given by the Project Manager under **clause 10.7(a)(ii)**; and
 - (ii) any such Dispute Notice which is given by the Trustee will be taken to be of no effect.

10.8 Reference Program

- (a) The Trustee acknowledges that:

- (i) the Reference Program will be used for reporting purposes to monitor the progress of the carrying out of the Works for the Extension; and
 - (ii) the Reference Program does not bind the Project Manager and meeting any timeframes or milestones specified in the Reference Program is not (in itself) an obligation under this Agreement.
- (b) Within ten Business Days after the date of a variation to the Scope of Works and/or the Target Available Date for a Segment under **clause 7**, **clause 9** or this **clause 10**, the Project Manager must:
- (i) revise the Reference Program to the extent necessary as a result of the variation to the Scope of Works and/or the Target Available Date (as applicable) for the Segment; and
 - (ii) provide the revised Reference Program to the Trustee, the Independent Engineer and the PUH Engineer.
- (c) If the Project Manager revises the Reference Program under **clause 10.8(b)**, the revised Reference Program will take effect on the date it is provided to the Trustee.

11 Time event

For the avoidance of doubt, where under this Agreement:

- (a) the Project Manager is permitted or required to propose;
 - (b) the Independent Engineer is required to form an opinion in relation to; and/or
 - (c) an Expert is required to determine,
- a variation to the Target Available Date for a Segment (in the case of the Independent Engineer which is a variation proposed by the Project Manager) which is reasonable as a result of an event or circumstance (**Target Available Date Adjustment Trigger**), for the purpose of such proposal, opinion or determination (as applicable), the Project Manager, Independent Engineer or Expert (as applicable) must have regard to:
- (d) the period of the delay to the carrying out of the relevant Works for that Segment as a result of that Target Available Date Adjustment Trigger; and
 - (e) any previous occurrence of a Target Available Date Adjustment Trigger which has not previously resulted in a variation to the Target Available Date for that Segment.

12 Consultation and reporting

12.1 Extension Committee

- (a) The Project Manager and the Trustee must establish a committee (**Extension Committee**) which will provide a forum for:
 - (i) the Project Manager and the Independent Engineer to report to the Trustee, the Preference Unit Holders and the PUH Engineer about matters relating to the Extension and the carrying out of the Works for the Extension; and
 - (ii) consultation between the Project Manager, the Trustee, the Preference Unit Holders, the Independent Engineer and the PUH Engineer about matters relating to the Extension and the carrying out of the Works for the Extension.
- (b) The Project Manager and the Trustee may each appoint one senior representative to attend meetings of the Extension Committee and may replace their respective representatives from time to time.
- (c) The Project Manager must invite each Preference Unit Holder to appoint one senior representative to attend meetings of the Extension Committee.
- (d) The Independent Engineer will attend all meetings of the Extension Committee.
- (e) The PUH Engineer may attend any meetings of the Extension Committee.
- (f) The Project Manager may invite Works Contractors and officers, employees, agents and contractors of the Project Manager to attend meetings of the Extension Committee as it considers reasonably necessary.
- (g) Meetings of the Extension Committee will be held in Brisbane at least once every calendar quarter.
- (h) The Project Manager must give the Trustee, each Preference Unit Holder, the Independent Engineer and the PUH Engineer at least ten Business Days' notice of each meeting of the Extension Committee.
- (i) A representative appointed by the Project Manager will chair Extension Committee meetings.
- (j) The Project Manager must:
 - (i) at the time it gives the Trustee, each Preference Unit Holder, the Independent Engineer and the PUH Engineer notice of a meeting of the Extension Committee, give each of them a copy of a proposed agenda for the meeting;
 - (ii) arrange for minutes of each Extension Committee meeting to be taken; and

- (iii) give a copy of the minutes of each Extension Committee meeting to the Trustee, each Preference Unit Holder, the Independent Engineer and the PUH Engineer as soon as practicable, but no later than ten Business Days, after the meeting.
- (k) The Trustee, each Preference Unit Holder and the PUH Engineer will bear the travel and other expenses of their respective representatives attending Extension Committee meetings.
- (l) For the avoidance of doubt, the Project Manager's travel and other expenses of its representatives attending Extension Committee meetings will be a Reimbursable Expense.

12.2 Reporting

- (a) Within 15 Business Days after the end of each Month during the Construction Period, the Project Manager must give to the Trustee, the Independent Engineer and the PUH Engineer a report for that Month (**Monthly Report**) in respect of the matters set out in **schedule 5**.
- (b) After the end of the Construction Period until the Project Manager gives the Trustee the Final Certificate, the Project Manager must give the Trustee, the Independent Engineer and the PUH Engineer reports in respect of material matters (other than Defects which are required to be included in the Defects Register under **clause 4.6(a)**) relevant to this Agreement at intervals of not more than three Months.
- (c) The Trustee may, within 30 Business Days after the Project Manager gives the Trustee a Monthly Report under this **clause 12.2**, give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes the Estimated Available Date and/or Estimated Project Costs (as applicable) for a Segment notified by the Project Manager to the Trustee in the Monthly Report.
- (d) If a Dispute referred to in **clause 12.2(c)** is not resolved in accordance with **clause 21.2**, the Dispute must be referred to an Expert to determine a reasonable estimate (as at the date of the relevant report) of (as applicable):
 - (i) the date on which the Segment will become Available; or
 - (ii) the amount of the total Project Costs to be Incurred by the Trustee for the Segment.
- (e) If the Trustee does not give the Project Manager a Dispute Notice referred to in **clause 12.2(c)** within the time referred to in **clause 12.2(c)**, then:
 - (i) the Trustee must not give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes the Estimated Available Date and/or Estimated Project Costs (as applicable) for a Segment notified by the Project Manager to the Trustee in the relevant Monthly Report; and

- (ii) any such Dispute Notice which is given by the Trustee will be taken to be of no effect.
- (f) The Project Manager must give the Trustee the information (including its reasonable estimate of Project Costs) the Trustee reasonably requires to enable the Trustee to assess whether under clause [11.1] of the Unit Holders Deed the total Trust Costs are likely to exceed the aggregate "Application Price" of all "Preference Units" then on issue (each as defined in the Unit Holders Deed).
- (g) If the Trustee forms the opinion that total Trust Costs are likely to exceed the aggregate "Application Price" of all "Preference Units" then on issue (each as defined in the Unit Holders Deed) under clause [11.1] of the Unit Holders Deed, the Trustee must give the Project Manager a notice of this and the Project Manager must, promptly on receipt of the notice from the Trustee:
 - (i) issue a notice to the parties as contemplated under **clause 12.1**, convening a meeting of the Extension Committee on a date which is at least ten Business Days following the issue of that notice; and
 - (ii) give the Trustee any information reasonably required by the Trustee about estimated future Project Costs within five Business Days following the date on which the notice for the meeting is given under **clause 12.2(g)(i)**.

12.3 Estimated Terminal Available Date and Terminal Available Date

- (a) The Trustee must notify the Project Manager, the Independent Engineer and the PUH Engineer of the Estimated Terminal Available Date (and, in the case of a change to the Estimated Terminal Available Date, reasonable details relating to the reasons for the change) promptly after:
 - (i) the Commencement Date; and
 - (ii) the Trustee becomes aware of any change to the Estimated Terminal Available Date since it was previously notified to the Project Manager under this **clause 12.3(a)** (such notice to include reasonable details of the reasons for the change in the Estimated Terminal Available Date).
- (b) The Trustee must ensure that the Preference Unit Holders notify the Trustee of the Estimated Terminal Available Date (and, in the case of a change to the Estimated Terminal Available Date, reasonable details relating to the reasons for the change) promptly after:
 - (i) the Commencement Date; and
 - (ii) any change to the Estimated Terminal Available Date.
- (c) The Trustee must notify the Project Manager and the Independent Engineer of the Terminal Available Date promptly after the Trustee becomes aware of the Terminal Available Date.

- (d) The Trustee must ensure that the Preference Unit Holders notify the Trustee of the Terminal Available Date promptly after the Preference Unit Holders become aware of the Terminal Available Date.
- (e) The Project Manager may, within 60 Business Days after the Trustee gives the Project Manager a notice under **clause 12.3(a)** or **12.3(c)**, give the Trustee a Dispute Notice under **clause 21.1(a)** which Disputes the Estimated Terminal Available Date or Terminal Available Date (as applicable) notified by the Trustee to the Project Manager in the notice.
- (f) If a Dispute referred to in **clause 12.3(e)** is not resolved in accordance with **clause 21.2**, the Dispute must be referred to an Expert for the purposes of **clause 21.2(b)(i)** to determine the Estimated Terminal Available Date (as at the time the notice under **clause 12.3(a)** was given to the Project Manager) or the Terminal Available Date (as applicable) based on the information (if any) which accompanied the notice under **clause 12.3(a)** or **12.3(c)** (as applicable) and any relevant additional information which the Project Manager or the Trustee provides to the Expert for the purpose of his or her determination.
- (g) If the Project Manager refers a Dispute referred to in **clause 12.3(e)** to an Expert, the Trustee must:
 - (i) use its reasonable endeavours to obtain from each Preference Unit Holder and the Terminal developer all information and documentation relevant to the determination of the Dispute by the Expert; and
 - (ii) provide any information and documentation which it obtains to the Expert and the Project Manager.
- (h) If the Trustee does not give the Project Manager a Dispute Notice referred to in **clause 12.3(e)** within the time referred to in **clause 12.3(e)**, then the Trustee must not give the Project Manager a Dispute Notice under **clause 21.1(a)** which Disputes the Estimated Terminal Available Date or the Terminal Available Date (as applicable) notified by the Trustee to the Project Manager under **clause 12.3(a)** or **12.3(c)**.

12.4 Provision of Relevant Information

- (a) Subject to **clauses 12.4(b)** and **12.4(c)**, the Project Manager must, within a reasonable period after any request from the Trustee, provide the Trustee with a copy of any Record, in existence at the time of the request, containing information which relates to the Extension or the Works for the Extension and which is reasonably required by the Trustee for the purpose of the performance of an obligation, or the exercise of a right, by the Trustee under this Agreement or another Transaction Document (**Relevant Information**).
- (b) **Clause 12.4(a)** does not apply to a Record referred to in **clause 12.4(a)** if the disclosure of the copy of the Record to the Trustee would (despite the deletion of information as contemplated in **clause 12.4(c)**) give rise to a breach of an obligation or duty of confidence by the Project Manager

or require the disclosure of a Record that would be privileged from production in a legal proceeding on the ground of legal professional privilege.

- (c) The Project Manager may delete from the copy of any Record which the Project Manager is required to provide to the Trustee under **clause 12.4(a)** any information contained in the Record which:
 - (i) is not Relevant Information;
 - (ii) is Price Sensitive Information;
 - (iii) would be privileged from production in a legal proceeding on the ground of legal professional privilege;
 - (iv) if disclosed to the Trustee, would give rise to a breach of an obligation or duty of confidence by the Project Manager;
 - (v) relates to the planning and development of subsequent actual or potential projects for the development of new rail infrastructure or modifications of, or additions to, existing rail infrastructure; or
 - (vi) which relates to the assessment of the Project Manager's commercial position in relation to any matter.

13 Reimbursable Expenses

13.1 Monthly Statements

Within 15 Business Days after the last day of each Month during the Construction Period, the Project Manager must give to the Trustee a statement for that Month (**Monthly Statement**) setting out:

- (a) the Reimbursable Expenses for each Segment Incurred by the Project Manager on or after the Commencement Date up to and including the last day of that Month and which have not been included in a previous Monthly Statement;
- (b) the amount which is [insert] percent of the amount of the Project Costs Incurred by the Trustee for that Month; and

[Drafting notice: This represents a provisional payment in respect of the project management fee.]

- (c) the total statement amount being the sum of the amounts referred to **clauses 13.1(a)** and **clause 13.1(b)**.

13.2 Provisional Reconciliation Statement

Within 15 Business Days after the last day of the Month following the Month in which the Construction Period ends, the Project Manager must give to the Trustee a statement (**Provisional Reconciliation Statement**) setting out:

- (a) the sum of all Reimbursable Expenses for each Segment Incurred by the Project Manager prior to the end of the Construction Period;
- (b) the sum of the Provisional Project Management Fees for each Segment;

- (c) the sum of the amounts of all RCTIs previously given by the Project Manager under **clause 13.6(b)** in respect of Monthly Statements (or, if the amount specified in a Monthly Statement is Disputed, the total statement amount for that Monthly Statement as agreed or determined under the Dispute Resolution Process);
- (d) the sum of all amounts previously invoiced by the Project Manager under **clause 13.6(a)** in respect of Monthly Statements (or, if the amount specified in a Monthly Statement is Disputed, the total statement amount for that Monthly Statement as agreed or determined under the Dispute Resolution Process); and
- (e) the total statement amount (which may be a positive or negative amount) being the sum of the amounts referred to in **clauses 13.2(a), 13.2(b) and 13.2(c)** less the amount referred to in **clause 13.2(d)**.

13.3 After Construction Period

After the end of the Construction Period, the Project Manager may from time to time (but not more than once per Month) give to the Trustee a statement (**Additional Statement**) in respect of Reimbursable Expenses Incurred by the Project Manager which have not previously been included in a Monthly Statement, the Provisional Reconciliation Statement, the Final Reconciliation Statement or any earlier Additional Statement.

13.4 Final Reconciliation Statement

Promptly after the Final Reconciliation Statement Date, the Project Manager must give to the Trustee a statement (**Final Reconciliation Statement**) setting out:

- (a) the sum of the Reimbursable Expenses for each Segment Incurred by the Project Manager prior to the date that the Project Manager gives the Final Certificate to the Trustee;
- (b) in respect of each Dispute that has been referred to an Expert for determination in accordance with **clause 21.3** which is (or includes) a Claim that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement:
 - (i) in respect of each such Claim which is a Breach Claim or a Negligence Claim:
 - (A) for each Segment, the amount of the Provisional Damages in respect of such Claim which the Expert determined to be allocated to that Segment under **clause 21.4(b)(ii)**;
 - (B) for each Segment, the amount which the Expert determined under **clause 21.4(b)(iii)** to be the amount by which the Project Costs for the Segment are greater than they would have been had such Claim not occurred;
 - (C) for each Segment, the portion of the amount referred to in **clause 13.4(b)(i)(B)** which the Access Regulator has accepted into the Regulator Asset Base; and

- (D) for each Segment, the amount which is the amount referred to in **clause 13.4(b)(i)(A)** less the amount referred to in **clause 13.4(b)(i)(C)** (provided that if such amount is a negative number, it will be taken to be zero); and
- (ii) in respect of each such Claim which is a Wilful Default Claim, Gross Negligence Claim or Fraud Claim:
 - (A) for each Segment, the amount of the Provisional Damages in respect of such Claim which the Expert determined to be allocated to that Segment under **clause 21.4(b)(ii)**;
 - (B) for each Segment, the amount which the Expert determined under **clause 21.4(b)(iii)** to be the amount by which the Project Costs for the Segment are greater than they would have been had such Claim not occurred;
 - (C) for each Segment, the portion of the amount referred to in **clause 13.4(b)(ii)(B)** which the Access Regulator has accepted into the Regulator Asset Base; and
 - (D) for each Segment, the amount which is the amount referred to in **clause 13.4(b)(ii)(A)** less the amount referred to in **clause 13.4(b)(ii)(C)** (provided that if such amount is a negative number, it will be taken to be zero);
- (iii) for each Segment, the sum of the amounts calculated in accordance with **clause 13.4(b)(i)(D)** for the Segment in respect of all such Claims which are a Breach Claim or Negligence Claim; and
- (iv) in respect of each Segment, the sum of the amounts calculated in accordance with **clause 13.4(b)(ii)(D)** in respect of all such Claims which are a Wilful Default Claim, Gross Negligence Claim or Fraud Claim;
- (c) the sum of the amounts calculated in accordance with **clause 13.4(b)(iii)** for each Segment (provided that if that amount is greater than the amount referred to in **clause 13.4(e)**, that amount will be taken to be equal to the amount referred to in **clause 13.4(e)**);
- (d) the sum of the amounts calculated in accordance with **clause 13.4(b)(iv)** for each Segment;
- (e) the sum of the Final Project Management Fees for each Segment;
- (f) the sum of the amounts of all RCTIs previously given by the Project Manager under **clause 13.6(b)** in respect of Monthly Statements, the Provisional Reconciliation Statement or Additional Statements (or, if the amount specified in any such statement is Disputed, the total statement amount for that statement as agreed or determined under the Dispute Resolution Process);
- (g) the sum of all amounts previously invoiced by the Project Manager under **clause 13.6(a)** in respect of Monthly Statements, the Provisional

Reconciliation Statement and Additional Statements (or, if the amount specified in any such statement is Disputed, the total statement amount for that statement as agreed or determined under the Dispute Resolution Process); and

- (h) the total statement amount (which may be a positive or negative amount) being the sum of the amounts referred to in **clauses 13.4(a), 13.4(e) and 13.4(f)** less the amounts referred to in **clauses 13.4(c), 13.4(d) and 13.4(g)**.

13.5 Supporting information

Each statement given by the Project Manager to the Trustee under this **clause 13** must be accompanied by reasonable details of the calculation of the amounts specified in the statement.

13.6 Issue of invoices

- (a) At the time of giving the Trustee a statement under **clauses 13.1 or 13.3** (or a statement under **clauses 13.2 or 13.4** if the total statement amount is a positive number), the Project Manager must also give the Trustee a tax invoice for the total statement amount of the statement.
- (b) If the total statement amount specified in a statement given by the Project Manager under **clauses 13.2 or 13.4** is a negative amount, at the time of giving the Trustee the statement, the Project Manager must also give the Trustee a RCTI for the total statement amount of the statement (disregarding the negative sign).

13.7 Payment of invoices

- (a) Subject to **clause 13.8**, the Trustee must pay the amount of each tax invoice given by the Project Manager under **clause 13.6(a)** within five Business Days after the tax invoice is given to the Trustee.
- (b) The Project Manager must pay the amount of each RCTI given by the Project Manager under **clause 13.6(b)** within five Business Days after the RCTI is given to the Trustee.

13.8 Disputes

- (a) If the Trustee Disputes any amount specified in a statement given by the Project Manager under this **clause 13**:
 - (i) the Trustee may give the Project Manager a Dispute Notice under **clause 21.1(a)**; and
 - (ii) if the Dispute is not resolved in accordance with **clause 21.2**, either Party may refer the Dispute to an Expert.
- (b) Notwithstanding **clause 13.8(a)**, if an amount specified in a statement given by the Project Manager under this **clause 13** is Disputed:
 - (i) the Project Manager must give the Trustee a tax invoice or RCTI (as applicable) for the total statement amount under **clause 13.6**;

- (ii) if the Project Manager gives the Trustee a tax invoice under **clause 13.6(a)**, the Trustee must pay the portion of the tax invoice that is not in Dispute, plus 50% of the portion of the tax invoice that is in Dispute, within the time specified in **clause 13.7**; and
 - (iii) if the Project Manager gives the Trustee a RCTI under **clause 13.6(b)**, the Project Manager must pay the amount of the RCTI within the time specified in **clause 13.7**.
- (c) Upon resolution of any Dispute about the amount specified in a statement given by the Project Manager under this **clause 13**, if the total statement amount for the relevant statement as agreed or determined under the Dispute Resolution Process is:
 - (i) more than the amount that was paid by the Party (**Payor**) under the tax invoice or RCTI (as applicable), then the amount of the difference, together with interest on that amount calculated in accordance with **clause 13.9** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount in Dispute would have been due and payable but for the Dispute), must be paid by the Payor to the other Party (**Payee**) within five Business Days after the Project Manager gives the Trustee an adjustment note, further tax invoice or further RCTI (as applicable) under **clause 13.8(d)**; or
 - (ii) less than the amount that was paid by the Payor, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 13.9** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount was paid by the Payor), must be paid by the Payee to the Payor within five Business Days after the Project Manager gives the Trustee an adjustment note, further tax invoice or further RCTI (as applicable) under **clause 13.8(d)**.
- (d) If, upon resolution of any Dispute about the amount claimed in a statement given by the Project Manager under this **clause 13**, the total statement amount for the relevant statement as agreed or determined under the Dispute Resolution Process differs from the amount of the tax invoice or RCTI (as applicable), the Project Manager must, within five Business Days after resolution of the Dispute, give the Trustee an adjustment note, further tax invoice or further RCTI (as applicable) in respect of the difference.
- (e) The Trustee is barred from Disputing an amount specified in a tax invoice or RCTI given under **clause 13.6** unless, and then only to the extent that, the amount of the tax invoice or RCTI (as applicable) differs from the final statement amount for the statement (including, if applicable, as agreed or determined under the Dispute Resolution Process) to which the tax invoice or RCTI (as applicable) relates.
- (f) For the purpose of **clauses 13.1(a)** and **13.3**, if an amount included in a Monthly Statement or an Additional Statement is Disputed and it is

agreed or determined under the Dispute Resolution Process that the amount should not have been included in the relevant statement or a different amount should have been included in the relevant statement, then the amount will be taken to have not been included in the statement or the different amount will be taken to have been included in the statement (respectively).

- (g) If the Trustee does not give a Dispute Notice in respect of a Dispute about an amount specified in the Final Reconciliation Statement within 25 Business Days after the date on which the Project Manager gives the Final Reconciliation Statement to the Trustee:
 - (i) the Trustee must not give the Project Manager such a Dispute Notice;
 - (ii) any such Dispute Notice which is given by the Trustee will be taken to be of no effect; and
 - (iii) the Trustee will not have, and must not make, any Claim against the Project Manager in respect of that Dispute.

13.9 Interest on overdue payments

- (a) If, for any reason, a Party does not pay an amount payable under or in connection with this Agreement on or before the due date for payment, it must pay interest to the other Party (who is entitled to receive the payment).
- (b) Interest will accrue on the outstanding amount from the due date for payment until that amount, together with the interest thereon, has been paid.
- (c) Interest will be calculated at the Interest Rate, and any interest accrued but unpaid at the end of each Month will be capitalised and will thereafter itself bear interest.

13.10 Project Manager's right of set off

The Project Manager may deduct from any amounts which are due and payable by the Project Manager to the Trustee under this Agreement any amounts which are due and payable by the Trustee to the Project Manager under this Agreement.

13.11 Method of payment

All payments to be made under or in connection with this Agreement must be paid in Australian currency, without set-off or deduction (subject to **clause 13.10**), by:

- (a) electronic payment to an account nominated by the Party entitled to receive the payment; or
- (b) such other method as the Party entitled to receive the payment may reasonably require from time to time.

13.12 Obligation to pay Reimbursable Expenses

For the avoidance of doubt, the Trustee is required to pay the Reimbursable Expenses to the Project Manager under this Agreement whether or not:

- (a) the Project Costs for a Segment exceed the Target Cost for the Segment; and/or
- (b) the Available Date for a Segment is later than the Target Available Date for the Segment.

14 Optimisation Fee

14.1 Optimisation Fee

If the Access Regulator makes a decision not to accept part or all of the Project Costs for a Segment into the Regulatory Asset Base (**Optimisation Event**), the Project Manager must, within ten Business Days after the Optimisation Date:

- (a) give to the Trustee a written notice setting out reasonable details and evidence of the Optimisation Event;
- (b) give to the Trustee a RCTI for the Optimisation Fee (if any) for the Segment, including details of how the Optimisation Fee (if any) for the Segment was calculated; and
- (c) pay the Optimisation Fee (if any) for the Segment to the Trustee.

14.2 Multiple Optimisation Events

For the avoidance of doubt, if the Project Manager seeks to include separate parts of a Segment into the Regulatory Asset Base at different times, it will be possible for more than one Optimisation Event to occur, and therefore more than one Optimisation Fee to become payable under **clause 14.1**, in respect of a single Segment.

15 Allocation, Records and auditing

15.1 When costs and expenses Incurred

- (a) A cost or expense will be taken to be **Incurred** by the Project Manager:
 - (i) in the case of a cost or expense payable by the Project Manager to a third party (other than a Related Body Corporate of the Project Manager), when the cost or expense is paid by the Project Manager; and
 - (ii) in any other case, when the Project Manager becomes liable to pay the relevant cost or expense.
- (b) A Trust Cost (including a Project Cost) will be taken to be **Incurred** by the Trustee when it is taken to have been Incurred by the Trustee under the Unit Holders Deed.

15.2 Responsibility for payment of Project Costs

Subject to **clause 6.7**, the Trustee (and not the Project Manager in its own capacity or as agent for the Trustee):

- (a) is responsible for paying any Project Costs which are Incurred by the Trustee, and due and payable to a third party, as a consequence of the Project Manager acting as agent for the Trustee under this Agreement (for example, fees payable to an Authority in respect of an Authority Approval); and
- (b) must pay those Project Costs to those third parties on or before the date that the Project Manager notifies the Trustee is the date that the Project Costs are due and payable to the third party.

15.3 Keeping of Records

- (a) The Project Manager must maintain complete Records of and relating to the Project Costs and the Reimbursable Expenses.
- (b) The Project Manager must preserve and maintain the Records referred to in **clause 15.3(a)** for a period of not less than five years following the date that the Project Manager gives the Final Certificate to the Trustee.

15.4 Audit

- (a) The Trustee may appoint an independent auditor nominated by it and approved by the Project Manager (such approval not to be unreasonably withheld or delayed) (**Auditor**) to carry out audits in order to verify the Reimbursable Expenses specified in statements given by the Project Manager to the Trustee under **clause 13 (Audits)**.
- (b) The costs and expenses of an Auditor must be borne solely by the Trustee.
- (c) Prior to the Auditor undertaking its first Audit, the Trustee must ensure that the Auditor provides the Project Manager with a signed confidentiality undertaking from the Auditor in favour of the Project Manager in the form shown in **schedule 8** or in a form otherwise acceptable to the Project Manager (acting reasonably).
- (d) Upon at least ten Business Days prior written request given by the Trustee (not more than once each year of this Agreement), the Project Manager must:
 - (i) give the Auditor reasonable access during normal business hours to the books, accounts and Records of the Project Manager relevant to an Audit; and
 - (ii) otherwise provide reasonable assistance and co-operation to the Auditor in relation to the conduct of the Audit.
- (e) The Parties acknowledge and agree that, except to the extent otherwise provided in the confidentiality undertaking referred to in **clause 15.4(c)**, the Auditor will only be entitled to disclose to the Trustee:

- (i) whether or not the Auditor verified the Reimbursable Expenses specified in statements given to the Trustee under **clause 13**; and
 - (ii) if the Auditor was unable to verify the Reimbursable Expenses specified in statements given to the Trustee under **clause 13**, any information obtained by the Auditor in carrying out the Audit to the extent that the Trustee requires access to that information for the purpose of resolving a Dispute in respect of the amount specified in the statement under the Dispute Resolution Process.
- (f) The Parties acknowledges that the confidentiality undertaking referred to in **clause 15.4(c)** will:
- (i) not prevent the Auditor from disclosing the information (other than Price Sensitive Information) to the Trustee, any Preference Unit Holder or the PUH Engineer; and
 - (ii) require the Auditor to keep any Price Sensitive Information confidential (including from the Trustee, any Preference Unit Holder and the PUH Engineer).

15.5 Asset register

Within 120 days after the Available Date for the last of the Segments to become Available, the Project Manager must provide the Trustee with an asset register that sets out all items of the Extension Infrastructure and other assets provided as part of the Works for the Extension.

16 Insurance

16.1 Project Insurance Policies

- (a) During the term of this Agreement, the Trustee appoints the Project Manager as the disclosed agent of the Trustee for the purpose of procuring, negotiating, entering into, varying and administering Project Insurance Policies.
- (b) The Project Manager (as disclosed agent for the Trustee) must, as soon as reasonably practicable (and, in any event, within 20 Business Days) after the Commencement Date, procure and maintain:
 - (i) 'Contract Works Material Damage' insurance for the Works for the Extension and the Extension (excluding any constructional plant and equipment) in the joint names of the Trustee, Aurizon Network Pty Ltd, all Works Contractors, all subcontractors of Works Contractors and any Replacement Project Manager, for the full reinstatement and replacement value of the insured property;
 - (ii) 'Broadform Public and Products Liability' insurance in the joint names of the Trustee, Aurizon Network Pty Ltd, all Works Contractors, all subcontractors of Works Contractors and any Replacement Project Manager, that is written on an occurrence basis with a limit of indemnity of:

- (A) not less than \$[insert - amount to be set on a project specific basis – as at mid 2012 this amount would be ~\$250m] for each and every occurrence, and
- (B) in the case of ‘Product Liability’, not less than \$[insert - amount to be set on a project specific basis – as at mid 2012 this amount would be ~\$250m] in the aggregate during any one 12 month period of insurance,

which covers liability arising out of or in relation to the Works for the Extension, the Extension and Services, in respect of:

- (C) loss of, damage to, or loss of use of, any real or personal property; and
- (D) the bodily injury, disease or illness (including mental illness) or death of any person.

16.2 Professional Indemnity Insurance Policy

The Project Manager (in its own capacity) must, as soon as reasonably practicable (and, in any event, within 20 Business Days) after the Commencement Date, procure and maintain professional indemnity insurance of not less than \$[insert - a \$ amount is to be set on a project specific basis following a risk assessment for the applicable project – typically it is expected to be at least \$10m] for each claim and in the aggregate for all claims arising in the same insurance period, covering the liability of the Project Manager or its consultants arising from a breach of professional duty by reason of any act, error or omission of the Project Manager or its consultants.

16.3 Replacement Project Manager – professional indemnity insurance

In the event that the Trustee appoints a Replacement Project Manager, the Trustee must ensure that, on and from the Replacement Date, the Replacement Project Manager procures and maintains professional indemnity insurance which complies with the requirements of this **clause 16** in relation to the Professional Indemnity Insurance Policy as if the Replacement Project Manager was the Project Manager.

16.4 General

The Project Manager must ensure (as disclosed agent for the Trustee in relation to the Project Insurance Policies and in its own capacity in relation to the Professional Indemnity Insurance Policy) that:

- (a) the Project Insurance Policies are maintained until the end of the Defects Rectification Period;
- (b) the Professional Indemnity Insurance Policy is maintained for at least seven years after the later of:
 - (i) the date the Final Certificate is given under **clause 4.7**; and
 - (ii) the date of termination of this Agreement;

- (c) each of the Insurance Policies is effected with reputable insurers with a long term credit rating of A- or better from Standard & Poors or the equivalent long term credit rating from another recognised credit rating agency as at the date of being effected;
- (d) the Project Insurance Policies include a cross-liability clause under which the insurer agrees that the policy applies as if a separate policy was issued to each named insured (with the exception of limits of liability) and must provide that:
 - (i) failure by an insured to observe and fulfil the terms of the policy or to comply with any duty of disclosure does not prejudice the insurance of any other insured; and
 - (ii) the insurer waives all rights, remedies or relief to which it might become entitled against named insureds;
- (e) the Project Insurance Policies are on commercially reasonable terms commensurate with Good Industry Practice, having regard to the state of the insurance market at the time of placement or renewal as applicable, and the risk profile of Aurizon Network Pty Ltd as both the railway manager for the Railway Network and a developer of major rail infrastructure projects on the Railway Network;
- (f) the Project Contract Works Insurance Policy, subject to its availability on reasonable commercial terms in the insurance market at the time of placement or renewal as applicable, contains existing structures cover in relation to the Railway Network (excluding the Extension);
- (g) the Professional Indemnity Insurance Policy is on commercially reasonable terms commensurate with the professional indemnity insurance that a prudent, efficient and experienced provider of project management services for the development of a major brownfields rail infrastructure project in Australia would be expected to take out, having regard to the state of the insurance market at the time of placement or renewal as applicable, and the risk profile of the Project Manager as a provider of professional services to external parties on a commercial basis; and
- (h) it:
 - (i) does not do or omit to do or, insofar as possible, permit or suffer to be done, any act or omission whereby any of the Insurance Policies may be prejudiced, vitiated, rendered void or voidable;
 - (ii) if necessary, reinstates an Insurance Policy if it lapses;
 - (iii) does not cancel an Insurance Policy unless it has already put in place a replacement insurance policy that meets the requirement of this **clause 16**;
 - (iv) does not vary an Insurance Policy in a manner materially adverse to its obligations under this Agreement;

- (v) does not allow an Insurance Policy to lapse without replacement unless it has the prior written consent of the Trustee;
- (vi) immediately notifies the Trustee of any event which may result in an Insurance Policy lapsing or being cancelled; and
- (vii) gives full, true and particular information to the insurer of all matters and things known to the Project Manager the non-disclosure of which might in any way prejudice or affect any Insurance Policy or the payment of all or any benefits under the Insurance Policy.

16.5 Payment of premiums

- (a) The Trustee is responsible for, and must pay, from time to time, on or before the date that the Project Manager notifies the Trustee is the due date for payment, all premiums, charges and other expenses necessary for effecting and maintaining in force the Project Insurance Policies.
- (b) The Project Manager (in its own capacity) is responsible for and must pay, from time to time, all premiums, charges and other expenses necessary for effecting and maintaining in force the Professional Indemnity Insurance Policy and any such premiums, charges and other expenses paid by the Project Manager will be a Reimbursable Expense.

[Drafting note: The insurance requirements to be imposed upon Works Contractors and their sub-contractors are to be addressed on a transaction-by-transaction basis as part of the Procurement Methodology.]

17 Force majeure

- (a) If the Project Manager is prevented or hindered by a Force Majeure Event from fully or partly performing an obligation (except for the payment of money) under this Agreement, then the Project Manager will be excused from performing that obligation for the period that the Project Manager is so prevented or hindered.
- (b) On the occurrence of, and during the subsistence of, any Force Majeure Event which prevents or hinders the Project Manager from fully or partly performing any obligation under this Agreement, the Project Manager must:
 - (i) give written notice of the event to the Trustee as soon as reasonably practicable (and in any event within five Business Days) providing reasonable details of the Force Majeure Event and the impact the Force Majeure Event will have on its ability to perform the obligations affected by the Force Majeure Event;
 - (ii) continue to perform all of its other obligations under this Agreement which are not affected by the Force Majeure Event;

- (iii) use all reasonable endeavours to mitigate the effect of the Force Majeure Event upon the performance of its obligations under this Agreement;
- (iv) keep the Trustee informed (in each case, not less than weekly) of the steps being taken to mitigate the effect of the Force Majeure Event upon the performance of its obligations under this Agreement and an estimate of the continued duration of the effect; and
- (v) resume full performance of its obligations under this Agreement as soon as reasonably practicable, and notify the Trustee when it does so.

18 Limitation of liability

18.1 Project Manager's liability for Breach Claims and Negligence Claims

- (a) The Project Manager's liability to the Trustee in respect of any Breach Claim or Negligence Claim is limited, in aggregate for all Breach Claims and Negligence Claims, to:
 - (i) if this Agreement is terminated prior to the Final Reconciliation Statement Date:
 - (A) if this Agreement is terminated after the Project Manager has given the Trustee the Provisional Reconciliation Statement – the sum of the Provision Project Management Fees for all Segments; or
 - (B) if this Agreement is terminated before the Project Manager has given the Trustee the Provisional Reconciliation Statement – an amount equal to the sum of the Early Termination Project Management Fees for all Segments; or
 - (ii) otherwise - an amount equal to the sum of the Final Project Management Fee for all Segments.
- (b) For the avoidance of doubt, **clauses 18.4 and 18.5** (and **clause 18.6** in respect of Breach Claims and Negligence Claims) apply to any Claims referred to in **clause 18.1(a)**.

18.2 Project Manager's liability for Wilful Default Claims, Gross Negligence Claims and Fraud Claims

- (a) The Project Manager's liability to the Trustee in respect of any Wilful Default Claim, Gross Negligence Claim or Fraud Claim is not limited, individually or in aggregate for all such Claims, to a specified dollar amount.
- (b) For the avoidance of doubt, **clauses 18.4 and 18.5** (and **clause 18.6** in respect of Gross Negligence Claims and Wilful Default Claims) apply to any Claims referred to in **clause 18.2(a)**.

- (c) In this **clause 18.2**, a reference to:
- (i) a Wilful Default Claim is limited to a Wilful Default Claim in respect of which, and to the extent to which, it has been agreed or determined under the Dispute Resolution Process that the Project Manager intentionally breached any obligation imposed on the Project Manager under this Agreement;
 - (ii) a Gross Negligence Claim is limited to a Gross Negligence Claim in respect of which, and to the extent to which, it has been agreed or determined under the Dispute Resolution Process that the Project Manager committed negligence in connection with this Agreement involving such wanton and reckless conduct as constitutes an utter disregard for the harmful, foreseeable and avoidable consequences which result from such conduct; and
 - (iii) a Fraud Claim is limited to a Fraud Claim in respect of which, and to the extent to which, it has been agreed or determined under the Dispute Resolution Process that the Project Manager committed fraud in connection with this Agreement.

18.3 Project Manager's liability for other Claims

Except:

- (a) as provided in **clause 18.1** and **18.2**; and
- (b) to the extent prohibited by law,

the Project Manager's liability to the Trustee in respect of Claims arising out of, or in any way related to, this Agreement (excluding a Claim in respect of the non-payment by the Project Manager of an amount that it is expressly required to pay under the terms of this Agreement) is limited to, and will in no event exceed, the total amount of \$1.00.

18.4 Limitation of liability in respect of increased Project Costs

If:

- (a) the Project Manager breaches any obligation under this Agreement or commits negligence or fraud in connection with this Agreement; and
- (b) such breach, negligence or fraud results in the Project Costs for a Segment being greater than they otherwise would have been if the breach, negligence or fraud had not occurred,

the Project Manager is not liable to the Trustee in respect of that breach, negligence or fraud to the extent that those increased Project Costs for that Segment are accepted by the Access Regulator into the Regulatory Asset Base.

18.5 Exclusion of Consequential Loss

Except as provided under **clause 18.7** but otherwise despite any other provision of this Agreement, neither Party will be liable to the other for, nor will

any indemnity by either Party under this Agreement extend to, any Consequential Loss suffered by or Claimed against that other Party.

18.6 Claims against Project Manager

The Trustee will not have, and must not make, any Breach Claim, Wilful Default Claim, Negligence Claim or Gross Negligence Claim against the Project Manager, or give a Dispute Notice to the Project Manager in respect of such a Claim under **clause 21.1**, unless the Trustee first provides the Project Manager with a notice in respect of the purported breach and allows the Project Manager a reasonable period to rectify the relevant breach and the Project Manager fails to rectify that breach within that reasonable period.

18.7 Project Manager's liability as agent

The Trustee indemnifies the Project Manager from and against any Loss (including Consequential Loss), suffered or incurred by the Project Manager, or for which the Project Manager becomes liable, arising from any Claim against the Project Manager by any third party arising out of, or in connection with, any act or omission of the Project Manager when acting as the agent of the Trustee under this Agreement.

18.8 Trustee's limitation of liability

- (a) The Project Manager acknowledges that the Trustee enters into this Agreement only as trustee of the Trust, and in no other capacity (other than in respect of the warranties in relation to trustee capacity in **clause 27.2** which are given by the Trustee in its personal capacity).
- (b) A liability of the Trustee arising under, or in connection with, this Agreement is limited to and can be enforced against the Trustee only to the extent to which the Trustee is entitled to be indemnified out of the Trust for the liability and the liability can be satisfied out of property of the Trust.
- (c) The limitation of liability in this **clause 18.8** will not apply to any liability of the Trustee to the extent that the liability is not satisfied out of the property of the Trust because there is a reduction in the Trustee's right of indemnity as a result of the Trustee committing fraud, "Gross Negligence" or "Wilful Default" (each as defined in the Trust Deed).

18.9 Scope of Claim or Loss

For the avoidance of doubt, references in this **clause 18** to a Claim or Loss include:

- (a) a Claim for, or Loss arising from, breach of contract, tort (including negligence), breach of equitable duty, breach of statutory duty, breach of the *Competition and Consumer Act 2010* (Cth) or otherwise; and
- (b) a Claim or Loss arising out of the performance or non-performance of any obligation under this Agreement, or arising out of a termination of this Agreement for any reason (including breach, repudiation or otherwise).

19 Suspension or cessation of Works for Extension

19.1 Directions

The Trustee may direct the Project Manager to:

- (a) suspend or permanently cease carrying out all or any part of the Works for the Extension; or
- (b) recommence carrying out all or any part of the Works for the Extension following a suspension referred to in **clause 19.1(a)**,

in circumstances contemplated under the Unit Holders Deed.

19.2 Direction to suspend or cease carrying out Works

If the Trustee directs the Project Manager to suspend or permanently cease carrying out all or any part of the Works for the Extension in accordance with **clause 19.1**, then:

- (a) promptly after being directed to do so by the Trustee, the Project Manager must, acting as disclosed agent for the Trustee, project manage such suspension or permanent cessation of the relevant Works for the Extension (including directing relevant Works Contractors to give effect to that suspension or permanent cessation);
- (b) the Trustee agrees that the Project Manager may take all steps and actions the Project Manager considers reasonably necessary to effect the suspension or permanent cessation of the relevant Works for the Extension as directed by the Trustee and that any such steps and action will not constitute a breach of this Agreement; and
- (c) the Trustee agrees that:
 - (i) giving effect to the suspension or permanent cessation may cause the Project Manager (acting as disclosed agent for the Trustee) to breach a Works Contract; and
 - (ii) the Trustee has no Claim against the Project Manager arising from such a breach.

19.3 Direction to commencement of suspended Works

If the Trustee directs the Project Manager to recommence the carrying out of all or any part of those Works for the Extension in accordance with **clause 19.1**, the Project Manager must, acting as disclosed agent for the Trustee, project manage such commencement of the relevant Works for the Extension (including entering into Works Contracts to give effect to such commencement).

20 Termination

20.1 Termination by Project Manager

- (a) The Project Manager may terminate this Agreement by notice to the Trustee if:
 - (i) the Trustee does not pay any money which is due for payment to the Project Manager under this Agreement by the due date for payment and the Trustee does not pay that money within a further period of ten Business Days after the Project Manager gives a notice to the Trustee requesting payment of that amount;
 - (ii) the Trustee does not comply with **clause 6.7(b)** and does not rectify that non-compliance within ten Business Days after the Project Manager gives a notice to the Trustee requesting it to do so; or
 - (iii) the Trustee does not pay by the due date for payment any premium in respect of any policy of insurance effected by the Project Manager as disclosed agent for the Trustee under **clause 16** and does not pay such premium within ten Business Days after the Project Manager gives a notice to the Trustee requesting it to do so.
- (b) If the Trustee directs the Project Manager to permanently cease carrying out all of the Works for the Extension in the circumstances contemplated under the Unit Holders Deed, then this Agreement will terminate on the date that the Project Manager notifies the Trustee that it has given effect to such direction under **clause 19**.
- (c) If the Project Manager gives a notice of termination to the Trustee under **clause 20.1(a)**, then:
 - (i) on the date of such notice, the Project Manager will be taken to have been given a direction by the Trustee to permanently cease carrying out all of the Works for the Extension; and
 - (ii) this Agreement will terminate on the date that the Project Manager notifies the Trustee that it has given effect to such direction under **clause 19**.

20.2 Termination due to termination of Rail Corridor Agreement

This Agreement will automatically terminate, without the need for either Party to give notice to the other Party, if the Rail Corridor Agreement terminates for any reason.

20.3 No other rights of termination

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

- (b) Subject to **clause 18**, nothing in this **clause 20.3** prejudices in any way a Party's right to Claim and recover damages for any breach of this Agreement by the other Party.

20.4 Effect of termination

- (a) If this Agreement is terminated, without prejudicing in any way the Project Manager's right to claim and recover damages for any breach of this Agreement by the Trustee, the Trustee must pay to the Project Manager an amount equal to the sum of:
 - (i) any Reimbursable Expenses Incurred by the Project Manager prior to the date of termination which have not been included in a statement already given by the Project Manager to the Trustee under **clause 13**;
 - (ii) unless the Project Manager has given the Trustee the Provisional Reconciliation Statement at the time of termination, the sum of the Early Termination Project Management Fees for each Segment; and
 - (iii) any amounts due and payable to the Project Manager under this Agreement as at the date of termination,

within ten Business Days after the Project Manager gives the Trustee a tax invoice in respect of such amount.

- (b) If this Agreement is terminated, promptly after the later of:
 - (i) the RAB Decision Date; and
 - (ii) the date that any Dispute which is (or includes) a Claim that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement is resolved in accordance with the Dispute Resolution Process,

the Project Manager must give to the Trustee a statement (**Early Termination Statement**) setting out in respect of each Dispute that has been referred to the Expert for determination in accordance with **clause 21.3** which is (or includes) a Wilful Default Claim, Gross Negligence Claim or Fraud Claim:

- (iii) for each Segment, the amount of the Provisional Damages in respect of such Claim which the Expert determined to be allocated to that Segment under **clause 21.4(b)(ii)**;
- (iv) for each Segment, the amount which the Expert determined under **clause 21.4(b)(iii)** to be the amount by which the Project Costs for the Segment are greater than they would have been had such Claim not occurred;
- (v) for each Segment, the portion of the amount referred to in **clause 20.4(b)(iv)** which the Access Regulator has accepted into the Regulator Asset Base;

- (vi) for each Segment, the amount which is the amount referred to in **clause 20.4(b)(iii)** less the amount referred to in **clause 20.4(b)(v)** (provided that if such amount is a negative number, it will be taken to be zero);
 - (vii) for each Segment, the sum of the amounts calculated in accordance with **clause 20.4(b)(vi)** in respect of all such Claims; and
 - (viii) the sum of the amounts calculated in accordance with **clause 20.4(b)(vii)** for each Segment.
- (c) Within ten Business Days after the Project Manager gives the Trustee an Early Termination Statement, the Project Manager must pay to the Trustee the amount referred to in **clause 20.4(b)(viii)**, provided that amount is no greater than:
- (i) if this Agreement is terminated after the Project Manager has given the Trustee the Provisional Reconciliation Statement – the sum of the Provision Project Management Fees for all Segments; or
 - (ii) if this Agreement is terminated before the Project Manager has given the Trustee the Provisional Reconciliation Statement – an amount equal to the sum of the Early Termination Project Management Fees for all Segments.

21 Disputes

21.1 Notification of Disputes

- (a) If any Claim, dispute or question (**Dispute**) arises between the Parties under this Agreement, any Party may give to the other Party a notice in writing (**Dispute Notice**) specifying reasonable details of the Dispute and referring it for resolution in accordance with this **clause 21**.
- (b) Unless otherwise expressly provided to the contrary in this Agreement, a Dispute must be resolved in accordance with this **clause 21**.

21.2 Chief executive officer resolution

- (a) Within ten Business Days after the giving of a Dispute Notice, any Dispute must be referred in the first instance to the chief executive officer of the Project Manager (or his or her nominee) and the chief executive officer of the Trustee (or his or her nominee) for the purposes of this **clause 21.2** for resolution.
- (b) If the Dispute is not resolved within ten Business Days after the referral under **clause 21.2(a)**, or in the event that either chief executive officer appoints a nominee that is unacceptable to the other Party, then the relevant Dispute:
 - (i) must where:

- (A) the Dispute is (or includes) a Claim by the Trustee that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement; or
 - (B) this Agreement otherwise expressly requires referral to an expert; and
- (ii) may, by agreement of the Parties in any other case,
be referred for resolution by an expert (**Expert**) in accordance with **clause 21.3**.

21.3 Expert determination

Where any matter is referred to an Expert under **clause 21.2** or otherwise in accordance with the terms of this Agreement then the following provisions of this **clause 21.3** will apply:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within ten Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
 - (i) where the Parties agree the Dispute is purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;
 - (ii) where the Parties agree the Dispute is purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and
 - (iii) in any other case, the President (for the time being) of the Queensland Law Society, Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 21.3(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the Expert; and
 - (iii) the process specified in **clause 21.3(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the Expert accepts the appointment as the Expert;
- (c) subject to **clause 21.3(b)**, if the Expert is to be nominated by a person referred to in **clause 21.3(a)** and the person nominated as the Expert does not accept the appointment as the Expert, then an alternative

person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 21.3(a)**;

- (d) if the Expert is to be nominated by a person referred to in **clause 21.3(a)** the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert;
- (e) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert;
- (f) the Expert must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose any such interest or duty by notice to the Parties before his or her appointment;
 - (iii) not be, or have been in the last five years, an employee of the Trustee, the Project Manager or a Preference Unit Holder or a Related Body Corporate of the Trustee, the Project Manager or a Preference Unit Holder;
 - (iv) not be permitted to act until he or she has given notice to the Parties that he or she is willing and able to accept the appointment;
 - (v) have regard to the provisions of this Agreement and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter submitted by the Parties;
 - (vi) provide both Parties with a copy of his or her determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after his or her appointment;
 - (vii) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties); and

- (viii) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration (including, without limitation, the *Commercial Arbitration Act 1990* (Qld)), will not apply to him or her or the determination or the procedures by which he or she may reach a determination; and
- (g) if the determination of a matter referred to the Expert would require the Expert to be provided with any Price Sensitive Information by the Project Manager, the Expert must enter into a confidentiality agreement in favour of the Project Manager requiring the Expert to keep the Price Sensitive Information confidential (including from the Trustee and any Preference Unit Holder).

21.4 Claims involving breach, negligence or fraud

- (a) This **clause 21.4** applies if (and only if):
 - (i) a Dispute referred to the Expert for determination in accordance with **clause 21.3** is (or includes) a Claim that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement; and
 - (ii) the Expert determines that the Project Manager did breach this Agreement or commit negligence or fraud in connection with this Agreement.
- (b) In respect of a Dispute to which this **clause 21.4** applies, in determining the Dispute in accordance with **clause 21.3**, the Expert must:
 - (i) determine the quantum of any damages which are payable by the Project Manager to the Trustee in respect of the breach, negligence or fraud the subject of the Claim (**Provisional Damages**) applying the principles that would be applied by the Supreme Court of Queensland in determining the quantum of such Provisional Damages (including, for the avoidance of doubt, any applicable limitations and exclusions on the Project Manager's liability under **clause 18** but disregarding the limitations and exclusions on the Project Manager's liability under **clauses 18.1** and **18.4**);
 - (ii) after making the determination in **clause 21.4(b)(i)**, determine:
 - (A) whether or not the Provisional Damages (or a portion of them) solely relate to a Segment and, if so, allocate to that Segment the amount of the Provisional Damages which solely relate to that Segment;
 - (B) after making the determination in accordance with **clause 21.4(b)(ii)(A)**, whether or not the Provisional Damages (or a portion of them), excluding any amount of the Provisional Damages which the Expert has already allocated to a Segment in accordance with **clause 21.4(b)(ii)(A)**, relate to two or more Segments and, if so, allocate to those Segments the amount of such Provisional Damages that

relate to those Segments on a pro-rata basis, based on the proportion that the Target Cost for each of those Segments (as at the time of such determination) bears to the total of the Target Costs for all of those Segments (as at the time of such determination); and

- (C) after making the determination in accordance with **clause 21.4(b)(ii)(B)**, allocate any amount of the Provisional Damages which has not been allocated to a Segment in accordance with **21.4(b)(ii)(A)** or **21.4(b)(ii)(B)** to all Segments on a pro-rata basis, based on the proportion that the Target Cost for each Segment (as at the time of such determination) bears to the total of the Target Costs for all Segments (as at the time of such determination),

so that, following such allocations, the amount of the Provisional Damages has been allocated to one Segment or between two or more Segments;

- (iii) determine whether or not the breach, negligence or fraud resulted in:
 - (A) the Project Costs for a Segment being greater than they otherwise would have been if the breach, negligence or fraud had not occurred; and/or
 - (B) the time required to carry out the Works for a Segment being greater than it otherwise would have been if the breach, negligence or fraud had not occurred,

and if so, the amount by which the Project Costs or time required to carry out the Works (expressed as a number of calendar days) for the Segment is greater than it would have been had the breach, negligence or fraud not occurred.

- (c) In respect of a Dispute to which this **clause 21.4** applies, the Parties agree that:
 - (i) the Expert's determination of Provisional Damages under **clause 21.4(b)(i)** is provisional only;
 - (ii) the Project Manager will not be required to pay to the Trustee the amount of any Provisional Damages determined by the Expert under **clause 21.4(b)(i)**; and
 - (iii) any amount payable by the Project Manager to the Trustee in respect of the Dispute to which this **clause 21.4** applies will be calculated as a component of the calculation under **clause 13.4** or **20.4(b)** (as applicable).

21.5 Parties to assist Expert

The Parties must do everything reasonably requested by the Expert to assist the Expert in determining the Dispute, including producing information and

materials requested by the Expert and attending any hearing convened by the Expert.

21.6 Decision of Expert

In the absence of manifest error, the decision of the Expert is final and binding upon the Parties.

21.7 Costs

- (a) The costs of the Expert and any advisers engaged by the Expert will be borne equally by the Parties to the Dispute.
- (b) Each Party to the Dispute will bear its own legal costs and the costs of any advisers to it in respect of the Dispute Resolution Process.
- (c) Any costs borne by the Project Manager under this **clause 21** will be deemed to be Reimbursable Costs, unless the Expert determines that the position which the Project Manager had taken in relation to the Dispute was unreasonable, in which case such costs will be deemed not to be Reimbursable Costs.

21.8 Determination by court

- (a) If any Dispute is not otherwise resolved in accordance with this **clause 21**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane.
- (b) Each Party irrevocably and unconditionally:
 - (i) agrees that the courts of the State, and any courts which have jurisdiction to hear appeals from any of those courts, are to have exclusive jurisdiction to settle disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this Agreement may be brought in, and only in, such courts;
 - (ii) waives any objection which it may have now or hereafter to the laying of the venue of any Proceedings in such courts and any Claim that any such Proceedings have been brought in an inconvenient forum; and
 - (iii) agrees that a final judgment in any Proceedings brought in such courts will be final and binding upon such Party and may be enforced in the courts of any other jurisdiction.

21.9 Injunctive relief

Nothing in this Agreement will prevent a Party from seeking urgent injunctive relief from a court.

21.10 Disputes involving Unit Holders

If:

- (a) a Dispute which arises under this Agreement, or the outcome or consequences of that Dispute, may be relevant to the Trustee and/or one or more Unit Holders under the Unit Holders Deed; or
- (b) a “Dispute” (as defined under the Unit Holders Deed) which arises under the Unit Holders Deed, or the outcome or consequences of that dispute, may be relevant to the Trustee and/or the Project Manager under this Agreement,

then:

- (c) as applicable:
 - (i) the Project Manager and/or the Trustee may join all (for the avoidance of doubt, not only some) of the Unit Holders to the dispute resolution process under this Agreement; or
 - (ii) the Trustee may join the Project Manager to the dispute resolution process under the Unit Holders Deed; and
- (d) the Project Manager, the Trustee and each Unit Holder joined to participate in the dispute resolution process under this Agreement or the Unit Holders Deed (as applicable) will be bound by the outcome of the resolution of the Dispute irrespective of whether or not the Project Manager, the Trustee and the Unit Holder (as applicable) choose to actively participate in the dispute resolution process.

21.11 Time bar

- (a) If a Party does not give a Dispute Notice under **clause 21.1(a)** in respect of a Dispute within 12 Months after the date the Party became aware, or ought reasonably to have become aware, of the occurrence of the event or circumstance giving rise to the Dispute:
 - (i) the Party must not give the other Party such a Dispute Notice;
 - (ii) any such Dispute Notice which is given by the Party will be taken to be of no effect; and
 - (iii) the Party will not have, and must not make, any Claim against the other Party in respect of the Dispute.
- (b) Without limiting **clause 21.11(a)**, if the Trustee does not give a Dispute Notice under **clause 21.1(a)** in respect of a Dispute that is (or includes) a Claim by the Trustee that the Project Manager has breached this Agreement or committed negligence or fraud in connection with this Agreement by the date which is 20 Business Days after:
 - (i) if this Agreement terminates prior to the Final Certificate Date, the date of termination of this Agreement;
 - (ii) otherwise, the Final Certificate Date,then:
 - (iii) the Trustee must not give the Project Manager such a Dispute Notice;

- (iv) any such Dispute Notice which is given by the Trustee will be taken to be of no effect; and
- (v) the Trustee will not have, and must not make, any Claim against the Project Manager in respect of the Dispute.

22 Replacement Project Manager

22.1 Replacement Breach

- (a) If the Trustee considers that the Project Manager has committed a Replacement Breach, the Trustee may give the Project Manager a notice (**Replacement Breach Notice**):
 - (i) specifying reasonable details of the Replacement Breach; and
 - (ii) requiring the Project Manager to remedy the Replacement Breach within 20 Business Days after the date on which the Replacement Breach Notice is given to the Project Manager.
- (b) If the Trustee gives the Project Manager a Replacement Breach Notice under **clause 22.1(a)**:
 - (i) the Project Manager may, within ten Business Days after the Trustee gives the Replacement Breach Notice to the Project Manager, give the Trustee a Dispute Notice under **clause 21.1(a)** which Disputes that the Project Manager committed the Replacement Breach specified in the Replacement Breach Notice;
 - (ii) if the Dispute referred to in **clause 22.1(b)(i)** is not resolved in accordance with **clause 21.2**, the Project Manager may refer the Dispute to an Expert to determine whether or not the Project Manager committed the Replacement Breach specified in the Replacement Breach Notice; and
 - (iii) if the Dispute is referred to an Expert and the Expert determines that the Project Manager did not commit the Replacement Breach specified in the Replacement Breach Notice then the Replacement Breach Notice will be taken to have not been given under **clause 22.1(a)** and will be of no effect.
- (c) If the Trustee gives the Project Manager a Replacement Breach Notice under **clause 22.1(a)** and the Project Manager does not give the Trustee a Dispute Notice referred to in **clause 22.1(b)(i)** within the time referred to in **clause 22.1(b)(i)** then:
 - (i) the Project Manager must not give the Trustee a Dispute Notice under **clause 21.1(a)** which Disputes that the Project Manager has committed the Replacement Breach specified in the Replacement Breach Notice; and
 - (ii) any such Dispute Notice which is given by the Project Manager will be taken to be of no effect.

22.2 Unnecessary Delay

If, at a point in time, the Estimated Available Date for a Segment is more than six months later than the Latest Target Available Date at that time, **paragraph (a)** of the definition of Unnecessary Delay will not be taken to be satisfied in respect of that Segment if:

- (a) at that time, the Project Manager has given a Variation Notice which requests the Trustee's consent under **clause 9.3** to vary the Target Available Date for that Segment;
- (b) the Estimated Available Date for that Segment would not be more than six months later than the Latest Target Available Date if, at that time, the Target Available Date for the that Segment was varied as proposed in the relevant Variation Notice; and
- (c) there remains a possibility, at that time, that the Target Available Date for that Segment may be varied as proposed in the relevant Variation Notice by operation of **clause 9**.

22.3 Replacement Event Notice

- (a) If a Replacement Event occurs, the Trustee may give the Project Manager a notice stating that the Replacement Event has occurred (**Replacement Event Notice**).
- (b) If the Project Manager Disputes that a Replacement Event has occurred as stated in a Replacement Event Notice:
 - (i) the Project Manager may, within five Business Days after the Trustee gives the Project Manager the Replacement Event Notice, give the Trustee a Dispute Notice;
 - (ii) if the Dispute is not resolved in accordance with **clause 21.2**, the Project Manager may refer the Dispute to an Expert to determine whether or not the Replacement Event has occurred; and
 - (iii) if the Dispute is referred to an Expert and the Expert determines that the Replacement Event has not occurred, then the notice given under **clause 22.3(a)** will be taken to have not been given and will be of no effect.

22.4 Election to engage Replacement Project Manager

If:

- (a) the Trustee gives the Project Manager a Replacement Event Notice; and
- (b) either:
 - (i) the Project Manager does not give the Trustee a Dispute Notice referred to in **clause 22.3(b)(i)** within the time specified in **clause 22.3(b)(i)**; or
 - (ii) the Project Manager gives the Trustee a Dispute Notice referred to in **clause 22.3(b)(i)** within the time specified in **clause 22.3(b)(i)**

and it is agreed or determined through the Dispute Resolution Process that a Replacement Event has occurred,

then the Trustee may, within 15 Business Days after the applicable condition in this **clause 22.4(b)** applies (but not later), give the Project Manager a notice (**Replacement Election Notice**) specifying that it has elected to engage a Replacement Project Manager in accordance with **clause 22.5** to provide the Replacement Services.

22.5 Engagement of Replacement Project Management

- (a) This **clause 22.5** applies if (and only if) the Trustee gives the Project Manager a Replacement Election Notice.
- (b) The Trustee may engage a suitably skilled and experienced project manager, nominated by the Trustee and approved by the Project Manager (such approval not to be unreasonably delayed) (**Replacement Project Manager**), to provide the Replacement Services on and from the date of engagement of the Replacement Project Manager (**Replacement Date**) until the date on which the Project Manager gives the Trustee the Final Certificate under **clause 4.7 (Replacement Period)**.
- (c) The Project Manager may only withhold its approval to the engagement of a project manager nominated by the Trustee under **clause 22.5(b)** if the Project Manager considers, acting reasonably, that the nominated project manager does not have suitable skills and experience to provide the Replacement Services.
- (d) The Trustee must:
 - (i) appoint the Replacement Project Manager as the disclosed agent of the Trustee for the purpose of performing the Replacement Services (including for the same purposes for which the Project Manager was initially appointed by the Trustee under **clauses 3.2(b) and 6**); and
 - (ii) not itself, other than through the Replacement Project Manager acting as the Trustee's disclosed agent, do anything within the scope of the Replacement Services, except as expressly required to do so under this Agreement.
- (e) The Trustee must ensure that, in performing the Replacement Services during the Replacement Period, the Replacement Project Manager (acting as disclosed agent for the Trustee):
 - (i) procures through the Works Contractors the completion of the carrying out of the Works for the Extension in accordance with the Scope of Works for the Extension;
 - (ii) ensures that the Construction Works are carried out in accordance with the Approved Designs and Specifications for the Construction Works;
 - (iii) complies with the Procurement Methodology;

- (iv) ensures that each Segment becomes Available as soon as reasonably practicable after the Replacement Date;
- (v) complies with:
 - (A) all Legislation;
 - (B) Authority Approvals; and
 - (C) directions from Authorities,
 relating to the Works for the Extension and the carrying out of the Works for the Extension;
- (vi) includes in the Defects Register any Defect which is notified by the Project Manager to the Replacement Project Manager;
- (vii) procures through the Works Contractors the rectification of each Defect which the Trustee is required to procure the rectification of under clause [6.1] of the Extension Infrastructure Lease;
- (viii) exercises the Trustee's rights, and performs the Trustee's obligations, under the Rail Corridor Agreement (other than the Trustee's rights under clauses [3.1 and 3.2] of the Rail Corridor Agreement and its rights and obligations in respect of "Disputes" (as defined in the Rail Corridor Agreement) under clause [19] of the Rail Corridor Agreement) acting as disclosed agent for the Trustee;
- (ix) does not do or omit to do anything that would cause the Trustee to breach the Rail Corridor Agreement or the Extension Infrastructure Lease;
- (x) does not do or omit to do anything that would cause the Trustee or the "Sublessee" (as defined in the Extension Infrastructure Agreement) to breach the Extension Infrastructure Agreement
- (xi) ensures that the Trustee complies with its obligations under Works Contracts;
- (xii) within 15 Business Days after the end of each Month during the Construction Period, gives to the Project Manager and the Independent Engineer a report for that Month in respect of the matters set out in **schedule 5**;
- (xiii) within a reasonable time after requested by the Project Manager, provides the Project Manager any information or documentation relating to the Extension and the Works for the Extension reasonably required by the Project Manager;
- (xiv) complies with the matters set out in **clause 22.8**;
- (xv) maintains complete records of and relating to the Extension and the Works for the Extension for a period of not less than five years following the date on which the Project Manager gives the Final Certificate to the Trustee; and

- (xvi) within 120 days after the Available Date for the last of the Segments to become Available, provides “Aurizon” (as defined in the Extension Infrastructure Lease) with an asset register that sets out all items of the Extension Infrastructure.
- (f) The Trustee must promptly do all things which are necessary or reasonably required to be done by it to enable the Replacement Project Manager to perform the Replacement Services.
- (g) Despite the engagement of a Replacement Project Manager, any acts and omissions of the Replacement Project Manager (including defaults and negligence) will be taken to be acts or omissions of the Trustee.

22.6 Transition Services

- (a) This **clause 22.6** applies if (and only if) the Trustee engages a Replacement Project Manager under **clause 22.5**.
- (b) On request by the Replacement Project Manager (acting as the Trustee’s disclosed agent), the Project Manager must, subject to **clause 22.6(c)**, provide the Replacement Project Manager with any cooperation, assistance, explanations, information and documentation reasonably required to facilitate the efficient continuity of the carrying out of the Works for the Extension by the Replacement Project Manager (**Transition Services**).
- (c) Subject to **clause 22.6(d)**, the Project Manager is not required to provide any information or documentation to the Replacement Project Manager under **clause 22.6(b)** if the Project Manager would not have been required to provide the information or documentation to the Trustee under **clause 12.4**.
- (d) The Project Manager must provide Price Sensitive Information referred to in **paragraph (b)** of the definition of Price Sensitive Information in **clause 1.1** to the Replacement Project Manager if (and only if) the Replacement Project Manager agrees to keep confidential, and not disclose to any person (including the Trustee, a Preference Unit Holder or the PUH Engineer) the Price Sensitive Information on terms satisfactory to the Project Manager.
- (e) Without limiting **clause 22.6(b)**, promptly after the Replacement Date, the Project Manager must provide the Replacement Project Manager with copies of:
 - (i) all Works Contracts;
 - (ii) an asset register that sets out all items of the Extension Infrastructure which have been completed and commissioned prior to the Replacement Date;
 - (iii) all Approved Designs and Specifications;
 - (iv) reports given by the Project Manager under **clause 12.2**; and

- (v) Records required to be kept and maintained by the Project Manager under **clause 15.2**.
- (f) The Trustee must, upon invoice from the Project Manager, pay the Project Manager's reasonable costs and expenses of providing the Transition Services.

22.7 Variations to Agreement

- (a) This **clause 22.7** applies if (and only if) the Trustee engages a Replacement Project Manager under **clause 22.5**.
- (b) With effect on the Replacement Date:
 - (i) **clauses 3, 4** (other than **clauses 4.4(b), 4.4(c), 4.4(d)** and **4.7**), **6, 7, 8, 9, 10, 12** (other than **clause 12.1**) and **19** will cease to be of any further force or effect as between the Project Manager and the Trustee and the Project Manager will cease to have any further obligations to the Trustee under, or in respect of, those provisions (but will not be relieved of any accrued liabilities under those provisions);
 - (ii) the references to the "Project Manager" and "**clause 4.6(c)**" in **clauses 4.7(a)(iii), 4.7(b)(ii)(C)** and **4.7(b)(iii)(C)** will be taken to be references to the "Replacement Project Manager" and "**clause 22.5(e)(vi)**" respectively;
 - (iii) the references to the "Project Manager" in **clauses 4.6(a), 4.6(b), 12.1** and **19** will be taken to be references to the "Replacement Project Manager"; and
 - (iv) the references to "Trustee" in **clauses 4.6(b)** and **12.1** will be taken to be references to "Trustee and Project Manager".

22.8 Information and attendance at meetings

- (a) The Replacement Project Manager and the Trustee must each, upon request by the Project Manager, give to the Project Manager a copy of any notices, reports and other information in their possession or under their control relating to the Works for the Extension, the Extension or the performance of the Replacement Services, including:
 - (i) a copy of all notices, reports and other written information given by a Works Contractor to the Replacement Project Manager or Trustee, or vice versa, in connection with a Works Contract;
 - (ii) a copy of all notices, reports and written information given by the Replacement Project Manager to the Trustee, or vice versa, in connection with the Works for the Extension, the Extension or the Replacement Services.
- (b) The Replacement Project Manager must give the Project Manager reasonable notice of, and ensure that the Project Manager is permitted to attend (as an observer), all meetings which the Replacement Project

Manager attends in relation to the Works for the Extension, the Extension or the Replacement Services.

23 Confidentiality

23.1 Confidentiality obligations

A Party (**Recipient**):

- (a) may use Confidential Information of the other Party (**Disclosing Party**) only for the purposes of this Agreement or another Transaction Document; and
- (b) must keep confidential all Confidential Information of a Disclosing Party except for disclosures permitted under **clause 23.2**.

23.2 Disclosure of Confidential Information

A Recipient may disclose Confidential Information of a Disclosing Party:

- (a) to any person, where the Disclosing Party has consented in writing to such disclosure (such consent not to be unreasonably withheld or delayed, and may be given subject to reasonable conditions, such as the signing of an appropriate confidentiality undertaking);
- (b) to the extent necessary to progress negotiations with any other person relevant to matters contemplated in this Agreement (for example, another intended user of the Extension Land) who executes a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (c) to the extent necessary to effect the administration or enforcement of this Agreement, or further negotiations pursuant to this Agreement, by employees, professional advisers (including legal advisers) and consultants of the Recipient;
- (d) to any Related Body Corporate of the Recipient to the extent necessary for reporting purposes within a relevant group of companies, governance and oversight of the relevant group of companies and obtaining any approval or consent (whether or not directly from that Related Body Corporate) in relation to the Recipient entering into this Agreement;
- (e) to potential purchasers, assignees or transferees of the shares in the Recipient or a Related Body Corporate of it or of the rights or obligations of the Recipient under this Agreement and the other Transaction Documents who execute a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (f) to a bank or other financial institution (and its professional advisers and any security trustee or agent for it) in connection with and for the purpose of any loan or other financial accommodation sought to be arranged by, or provided to, the Recipient or a Related Body Corporate of it;

- (g) to legal, accounting and financial or other advisers or consultants to the Recipient or a Related Body Corporate of it:
 - (i) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (ii) who are under a duty of confidentiality to the Recipient; and
 - (iii) who have been advised of the confidential nature of the Confidential Information;
- (h) to any officers or employees of the Recipient or a Related Body Corporate of the Recipient who:
 - (i) have a need to know for the purposes of this Agreement or another Transaction Document (and only to the extent that each has a need to know); and
 - (ii) before disclosure, have been directed by the Recipient to keep confidential all Confidential Information of the Disclosing Party;
- (i) to any person who owns or operates, or will own or operate, the Terminal, provided that the disclosure is expressly made on a confidential basis;
- (j) if, and to the extent that, the Recipient is required to do so by law (other than by section 275 of the *Personal Property Securities Act 2009* (Cth)), any taxation authority or by any rules or regulations of a recognised stock exchange (including where the disclosure is to a Related Body Corporate of the Recipient that is responsible for making such disclosures for the relevant group of companies and for the purpose of such a Related Body Corporate determining whether, and the extent to which, such a disclosure is required to be made);
- (k) to any Governmental Agency to the extent required by law or where such disclosure is determined by the Trustee to be reasonably required for the administration of the Trust;
- (l) if disclosure is lawfully required by the Access Regulator, or in accordance with the Access Undertaking;
- (m) to an Auditor, Expert or the Independent Engineer under this Agreement or an "Auditor" or "Expert" (as defined in the Unit Holders Deed) under the Unit Holders Deed;
- (n) where the Project Manager is the Recipient, to Unit Holders to the extent:
 - (i) expressly provided in this Agreement; or
 - (ii) reasonably required for the purposes of this Agreement or another Transaction Document, including in connection with:
 - (A) the resolution of Disputes under this Agreement or "Disputes" (as defined under the Unit Holders Deed) under the Unit Holders Deed; or

- (B) the provision of information to Unit Holders under **clauses 7, 10 or 12**; and
- (o) where the Trustee is the Recipient, to Unit Holders to the extent:
 - (i) expressly provided in this Agreement, the Trust Deed or Unit Holders Deed; or
 - (ii) reasonably required for the purposes of this Agreement or another Transaction Document, including in connection with:
 - (A) the resolution of Disputes under this Agreement or “Disputes” (as defined under the Unit Holders Deed) under the Unit Holders Deed; or
 - (B) the provision of information to Unit Holders under **clauses 7, 10 or 12**.

23.3 Conditions of disclosure

If a Recipient discloses Confidential Information of a Disclosing Party to a person under **clause 23.2 (Disclosee)**, the Recipient must:

- (a) ensure that the Disclosee is aware that the Confidential Information is confidential information of the Disclosing Party; and
- (b) use reasonable endeavours to ensure that the Disclosee does not improperly disclose or improperly use the Confidential Information.

24 GST

24.1 Construction

In this **clause 24**:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
- (c) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.

24.2 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

24.3 Payment of GST

If GST is payable on any supply made by a Party (or any entity through which that Party acts) (**Supplier**) under or in connection with this Agreement, unless the consideration is expressly stated to be inclusive of GST, the recipient will pay to the Supplier an additional amount equal to the GST payable on the

supply. Subject to **clause 24.4**, the recipient will pay the amount referred to in this **clause 24.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

24.4 Tax invoices

- (a) **(Supplies by the Trustee)** The Parties agree that:
- (i) the Project Manager will issue a recipient created tax invoice (**RCTI**) in respect of any taxable supply which the Trustee makes to the Project Manager under or in connection with this Agreement (**Trustee Supplies**);
 - (ii) the Trustee will not issue tax invoices in respect of the Trustee Supplies;
 - (iii) the Trustee is registered for GST as at the date of this Agreement and must notify the Project Manager if it ceases to be registered;
 - (iv) the Project Manager is registered for GST as at the date of this Agreement and must notify the Trustee if it ceases to be registered;
 - (v) the Project Manager will issue an adjustment note to the Trustee for any adjustment events that arise in relation to a supply for which a RCTI has been issued;
 - (vi) each RCTI to be issued in accordance with this Agreement is a tax invoice belonging to the class of invoices that the Commissioner of Taxation has determined in writing may be issued by the recipient of a taxable supply; and
 - (vii) the agreement in this **clause 24.4(a)** will terminate immediately if the Project Manager or the Trustee cease to satisfy any of the requirements under the GST Law for issuing a RCTI.
- (b) **(Supplies by the Project Manager)** The Project Manager must deliver a tax invoice or an adjustment note to the Trustee before the Project Manager is entitled to payment of an amount on account of GST under **clause 24.3** in respect of the supplies it makes to the Trustee. The Trustee can withhold payment of the amount on account of GST until the Project Manager provides a tax invoice or an adjustment note, as appropriate.

24.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause 24.3** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

24.6 Reimbursements

Where a Party is required under this Agreement to pay or reimburse an expense or outgoing of the other Party, the amount to be paid or reimbursed by the first Party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other Party is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

25 Assignment

25.1 Assignment

Subject to **clauses 25.2, 25.3 and 25.4**, a Party must not assign, transfer, mortgage, charge, make the subject of a trust or otherwise deal with or encumber all or any of its rights or liabilities under this Agreement (or procure or permit any of those things) without the prior consent of the other Party.

25.2 Assignment by Project Manager

- (a) If an entity will acquire all of the Project Manager's interest in the parts of the Railway Network which include the Segments, the Project Manager must transfer all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires the Project Manager's interest in the relevant parts of the Railway Network.
- (b) The Trustee must, promptly upon demand by the Project Manager, execute a deed of assignment or novation in a form acceptable to the Project Manager (acting reasonably) to give effect to the transfer of any rights or liabilities of the Project Manager required under this **clause 25.2**.

25.3 Assignment by Trustee

- (a) If the Trustee is replaced by a new trustee of the Trust, the Trustee must, with effect upon the appointment of the new trustee of the Trust, assign its rights and liabilities under this Agreement to the new trustee of the Trust.
- (b) The Trustee must not otherwise assign its rights and liabilities under this Agreement.

25.4 Charging

The Project Manager may mortgage, charge or encumber (**Charge**) all or any of its rights and obligations under this Agreement in whole or in part, in favour of any financier, mortgagee or chargee (**Chargee**), provided that the Project Manager, the Chargee and the Trustee execute any reasonable form of covenant, including terms to the effect that the Trustee acknowledges the existence of the Charge, and that the Chargee must comply with the provisions

of this Agreement, including this **clause 25**, in the exercise of its rights under the Charge.

26 Notices

26.1 General

A notice, demand, certification, process or other communication (**Notice**) relating to this Agreement must be in writing in English and may be given by an agent of the sender.

26.2 How to give a Notice

In addition to any other lawful means, a Notice may be given by being:

- (a) personally delivered;
- (b) left at the Party's current business address for Notices;
- (c) sent to the Party's current postal address for Notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by fax to the Party's current fax number for Notices.

26.3 Particulars for giving of Notices

- (a) Each Party's particulars for the giving of Notices are initially the particulars set out in **item 1 of schedule 1**.
- (b) Each Party may change its particulars for the giving of Notices by notice to the other Party.
- (c) A Notice given to a Party which is signed is evidence that the Notice has been signed by a person duly authorised by the sender and that Party is entitled to rely on that Notice without further inquiry or investigation.

26.4 Notices by post

Subject to **clause 26.6**, a Notice is given if posted:

- (a) within Australia to an Australian postal address, three Business Days after posting; or
- (b) outside of Australia to an Australian postal address or within Australia to an address outside of Australia, ten Business Days after posting.

26.5 Notices by fax

Subject to **clause 26.6**, a Notice is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

26.6 After hours Notices

If a Notice is given:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or bank or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or public holiday in that place.

26.7 Process service

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this Agreement may be served by any method contemplated by this **clause 26** or in accordance with any applicable law.

27 Warranties

27.1 Warranties

Each Party warrants that:

- (a) it is a corporation validly existing under the laws applicable to it;
- (b) it is able to pay its debts as and when they fall due;
- (c) it has the power to enter into and perform this Agreement and has obtained all necessary consents to enable it to do so;
- (d) its obligations under this Agreement are enforceable in accordance with their terms;
- (e) no litigation, arbitration or administrative proceeding has been commenced before, and no judgment or award has been given or made by, any court, arbitrator, other tribunal or governmental agency against it which would have a material adverse effect on its ability to observe its obligations under this Agreement; and
- (f) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this Agreement.

27.2 Trustee warranties

The Trustee warrants that:

- (a) it has full power and authority to enter into this Agreement and to perform the Trustee's obligations under this Agreement and the Trust Deed;
- (b) it is the sole trustee of the Trust and no action has been taken to remove or replace the Trustee; and
- (c) it has the right to be fully indemnified out of the assets of the Trust in respect of all its obligations under this Agreement, and the Trustee has not done or omitted to do anything that would result in its right of indemnity being restricted or limited in any way.

27.3 Reliance

- (a) Each Party acknowledges that the other Party has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 27.1**.
- (b) The Trustee acknowledges that the Project Manager has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 27.2**.

28 General

28.1 Survival

This **clause 28** and **clauses [#]** and **[#]** survive the termination of this Agreement.

[Drafting note: The clause references are to be completed on a transaction by transaction basis and may for example include clause 13.8(g).]

28.2 Applicable law

This Agreement will be governed by and construed in accordance with the laws applicable in the State.

28.3 Subcontracting

- (a) For the avoidance of doubt, the Project Manager may delegate or subcontract the performance of all or any of its obligations under this Agreement to a third party (including a Related Body Corporate of it).
- (b) The subcontracting or delegation of an obligation, as applicable, under **clause 28.3(a)** does not relieve the Project Manager of any liability or obligation under this Agreement in respect of in respect of the obligation which has been subcontracted or delegated (as applicable) and the Project Manager will be liable to the Trustee for the acts and omissions of the subcontractor or delegate, as applicable, their employees and agents involved in undertaking those obligations as if they were the acts or omissions of the Project Manager.

28.4 Waiver

- (a) Waiver of any right arising from a breach of this Agreement or any right arising from a default under this Agreement must be in writing and signed by the Party granting the waiver.
- (b) A single or partial exercise or waiver by a Party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (c) A failure or delay in exercise, or partial exercise, of a right arising from a breach of this Agreement does not result in a waiver of that right.

28.5 Duty

- (a) As between the Parties, the Trustee is liable for and must pay all duty (including any fine or penalty except where it arises from default by the Project Manager) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If the Project Manager pays any duty (including any fine or penalty) which the Trustee is liable to pay under **clause 28.5(a)**, the Trustee must pay that amount to the Project Manager on demand.

28.6 Legal costs

Except as expressly stated otherwise in this Agreement, each Party must pay its own legal costs and expenses of the drafting, negotiating and execution of this Agreement.

28.7 Amendments to be in writing

Except where this Agreement expressly provides a process for amendment or variation, an amendment or variation of this Agreement will only be effective if it is in writing and executed by both Parties to this Agreement.

28.8 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

28.9 Consents

Except as expressly stated otherwise in this Agreement, a Party may conditionally or unconditionally give or withhold any consent to be given under this Agreement and is not obliged to give its reasons for doing so.

28.10 Further assistance

Each Party must promptly sign, execute and complete all additional documents which may be necessary and do whatever else is reasonably required to effect, perfect, or complete the provisions of this Agreement and to perform its obligations under it.

28.11 Counterparts

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

28.12 Entire understanding

- (a) This Agreement and the other Transaction Documents together contain the entire understanding between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and the

other Transaction Documents and are of no effect. Neither Party is liable to the other Party in respect of those matters.

- (c) No oral explanation or information provided by a Party to the other Party:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between the Parties.

28.13 Relationship of Parties

Except to the extent expressly provided in this Agreement, this Agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

28.14 Severability

- (a) Subject to **clause 28.14(b)**, if a provision of this Agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Agreement.
- (b) **Clause 28.14(a)** does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this Agreement; or
 - (B) relative commercial or financial positions of the Parties; or
 - (ii) would be contrary to public policy.

28.15 Survival of representations and warranties

All representations and warranties in this Agreement will survive the execution and delivery of this Agreement and the completion of the transactions contemplated by it.

28.16 Enurement

The provisions of this Agreement will, subject as otherwise provided in this Agreement, enure for the benefit of and be binding on the Parties and their respective successors and permitted novatees and assigns.

28.17 Merger

The obligations contained in this Agreement will continue until satisfied in full.

28.18 Powers of attorney

An attorney by executing this Agreement declares that he or she has received no notice of revocation of the power of attorney pursuant to which he or she executes this Agreement.

28.19 Indemnity

It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity conferred by this Agreement.

Executed as an agreement.

Executed by **[NewCo Pty Ltd]** as)
trustee for the **[Name of Trust]** in)
accordance with section 127 of the
Corporations Act 2001 (Cth):

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date: / /

Executed by **Aurizon Network Pty**)
Ltd in accordance with section 127 of)
the *Corporations Act 2001* (Cth):

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date: / /

Schedule 1

Agreement details

1 Particulars for Notices

1.1 Trustee

Business address	Level 5 192 Ann Street BRISBANE QLD 4000
Postal address	GPO Box 456 BRISBANE QLD 4001
Facsimile No.	[insert]
Attention:	[insert]

1.2 Project Manager

Business address	Level 5 192 Ann Street BRISBANE QLD 4000
Postal address	GPO Box 456 BRISBANE QLD 4001
Facsimile No.	07 3235 3930
Attention:	Vice President, Commercial Development

2 Extension Investigation Reports

[Insert details of the reports of the project investigation studies.]

Schedule 2

Scope of Works

(Clauses 1.1, 4.1 and 7)

1 Scope of Works

1.1 Segment #1 – [insert]

[insert]

[Drafting note: Where Works are required for multiple Segments (for example, an upgrade in the train control centre) this should be noted for each relevant Segment.]

1.2 Segment #2 – [insert]

[insert]

[Drafting note: Where Works are required for multiple Segments (for example, an upgrade in the train control centre) this should be noted for each relevant Segment.]

Schedule 3

Target Cost, Target Available Dates and Reference Program

(Clauses 1.1, 4.3, 4.4, 7 and 10)

1 Target Costs

Segment		Target Cost (\$m)
Segment #	Name of Segment	
[insert]	[insert]	\$(insert)
[insert]	[insert]	\$(insert)
Total for all Segments		\$(insert)

2 Target Available Dates

Segment		Target Available Date
Segment #	Name of Segment	
[insert]	[insert]	[insert]
[insert]	[insert]	[insert]

3 Weather Delay Periods

Segment		Weather Delay Period
Segment #	Name of Segment	
[insert]	[insert]	[insert]
[insert]	[insert]	[insert]

4 Reference Program

[insert]

Schedule 4

Procurement Methodology

(Clauses 1.1 and 4.2)

[Drafting Note: *It is contemplated that the Procurement Methodology will specify separately requirements of the Trustee and the Project Manager. The Trustee will be entitled to waive 'Trustee requirements' in its sole discretion and the Project Manager will be entitled to waive 'Project Manager requirements' in its sole discretion.*]

[Drafting Note: *The appointment of Aurizon Network or a Related Body Corporate of it as a Works Contractor is to be considered and negotiated by the parties on a transaction-by-transaction basis.*

*It is intended that if the Trustee permits Aurizon Network, or a Related Body Corporate of it, may be engaged as a Works Contractor under a Works Contract (**Related Party Works Contract**), the parties will negotiate and specify in this document suitable 'arm's length' procurement and contract management arrangements. These arrangements will comply with the principles set out below.*

Procurement principles

If the procurement process is conducted on a competitive basis, the Trustee is entitled to require that the Project Manager provide to an independent third party (see 'Other Principles' below), information which is in the possession of the Project Manager in relation to the engagement of the Related Body Corporate for the Related Party Works Contract, subject to suitable confidentiality agreements agreed between the Project Manager and that independent third party.

*If the procurement process is conducted on the basis of a competitive tender, any evaluation of a Related Party Works Contract will be subject to the information requirements of **clause 7.5**, as if the 'Related Party Works Contract' were a Major Works Contract. The consent/non-consent provisions of **clause 7.8** will not apply and instead the entry into a Related Party Works Contract will be subject to the agreement of a "Special Majority" as defined in the Unit Holders Deed) of the Preference Unit Holders (not including any "Aurizon Unit Holder" (as defined in the Unit Holders Deed) (**Special Majority Requirements**).*

If the procurement process is not conducted on the basis of a competitive tender, entry into any Related Party Works Contract will be subject to the "Special Majority" Requirements.

Works Contract management principles

*Any variation to the scope of a Related Party Works Contract will be deemed to be a 'Material Variation' to a 'Major Works Contract' and accordingly treated pursuant to **clause 7.6** of this Agreement.*

*Any variation to a Related Party Works Contract will be deemed to be a 'Variation to a Major Contract' and accordingly treated pursuant to **clause 7.6** of this Agreement. The Special Majority Requirements will apply in this instance.*

*Any dispute under a Related Party Works Contract will be deemed a Type 1 Major Works Contract Dispute for the purposes of **clause 7.10**.*

The Trustee is entitled to obtain from the Project Manager information in the possession of the Project Manager, in its capacity as Project Manager and not in any other capacity, in relation to the management of a Related Party Works Contract.

Other principles

The Trustee is entitled to nominate an independent party to audit the Project Manager's compliance with this Agreement in relation to the procurement and contract management of a Related Party Works Contract and to report on its findings to the Trustee.

The Project Manager will be required to reasonably cooperate with any such third party nominated by the Trustee to enable it to fulfil its functions, including providing that independent third party with information, subject to suitable confidentiality provisions.]

Schedule 5

Monthly Reports

(Clause 12.2)

Each Monthly Report must contain the following information as at the end of the relevant Month:

- (a) Progress Summary for each Segment:
 - (i) original Target Available Date (as at the Commencement Date);
 - (ii) current Target Available Date;
 - (iii) current Estimated Available Date;
 - (iv) current Estimated Project Costs;
- (b) Safety Performance;
- (c) Milestone Achievement Summary – target date, forecast, actual
- (d) Three month rolling forecast – the amount of the Project Costs that the Project Manager reasonably estimates will be Incurred by the Trustee during the next three Months;
- (e) Project Cost Performance – target cost, forecast (providing a Month-by-Month breakdown of forecast Project Costs), actual, committed;
- (f) Segment Progress Measurement – planned % complete, forecast % complete, actual % complete;
- (g) Total Project Progress Measurement – planned % complete, forecast % complete, actual % complete;
- (h) Register of any variations to Scope of Works, Reference Program and Target Cost (if applicable) and Adjustment Events;
- (i) the occurrence of an Adjustment Event, including reasonable details of the Adjustment Event;
- (j) details of any dispute under Works Contract Disputes; and
- (k) a copy of the current Defects Register.

Schedule 6

Project Management Fee (Clause 1.1 and 13)

[Drafting note: This proposed fee regime will result in the same time measure (PTM or FTM) outcome for all Segments in a SUFA project at the provisional and final fee calculation stages. As the cost outcome may vary across Segments, the Provisional PMF Percentage and the Final PMF Percentage may differ from one Segment to another. The aggregate project management fee for all Segments will be borne by all Unit Holders (ie through the unit trust) on a pro rata basis.

This particular proposed fee regime is considered suitable for a project with a relatively simple configuration such as where all user funders are seeking incremental access between an (essentially shared) origin at one end of the corridor and a destination at the other end. This basic structure can be modified to accommodate multiple milestones if required for specific projects.]

1 Provisional Project Management Fee

1.1 Calculation of Provisional Project Management Fee

The Provisional Project Management Fee for a Segment is the amount which is the Provisional PMF Percentage for the Segment of the Target Cost for the Segment.

1.2 Calculation of Provisional PMF Percentage

(a) In this **item 1.2** of **schedule 6**:

Provisional Cost Measure or **PCM** for a Segment means the amount (expressed as a percentage) calculated in accordance with the following formula:

$$\text{PCM} = \frac{\text{APC} + \text{EPC}}{\text{TC}}$$

Where:

PCM = the PCM for the Segment

APC = the total Project Costs for the Segment Incurred by the Trustee prior to the end of the Construction Period less the amount of any Optimisation Fee paid or payable for the Segment

EPC = the total Project Costs for the Segment which the Project Manager reasonably estimates, as at the end of the Construction Period, will be Incurred or recovered after the end of the Construction Period

TC = the Target Cost for the Segment

Provisional Time Measure or PTM for a Segment means:

- (i) if the Available Date for the last of the Segments to become Available (**relevant Available Date**) is the same or earlier than the Extension Target Available Date – zero;
 - (ii) if the relevant Available Date is later than the Extension Target Available Date – the period (expressed as a number of calendar days) from the Extension Target Available Date to the relevant Available Date.
- (b) The Provisional PMF Percentage for a Segment is the percentage specified in the cell in the following table located in the row in which the PCM for the Segment occurs and the column in which the PTM for the Segment occurs:

PCM for Segment (%)	PTM for Segment				
	0	+1 to +45	+46 to +90	+91 to +180	>+180
<90	[insert]	[insert]	[insert]	[insert]	[insert]
≥90 & <95	[insert]	[insert]	[insert]	[insert]	[insert]
≥95 & <100	[insert]	[insert]	[insert]	[insert]	[insert]
≥100 & <105	[insert]	[insert]	[insert]	[insert]	[insert]
≥105 & <110	[insert]	[insert]	[insert]	[insert]	[insert]
≥110 & <115	[insert]	[insert]	[insert]	[insert]	[insert]
≥115 & <120	[insert]	[insert]	[insert]	[insert]	[insert]
≥120	[insert]	[insert]	[insert]	[insert]	[insert]

2 Final Project Management Fee

2.1 Calculation of Final Project Management Fee

The Final Project Management Fee for a Segment is the amount which is the Final PMF Percentage for the Segment of the Target Cost for the Segment.

2.2 Calculation of Final PMF Percentage

- (a) In this **item 2.2 of schedule 6**:

Final Cost Measure or FCM for a Segment means the amount (expressed as a percentage) calculated in accordance with the following formula:

$$FCM = \frac{FPC}{TC}$$

Where:

- FCM = the FCM for the Segment
- FPC = the total Project Costs for the Segment Incurred by the Trustee prior to the date that the Project Manager gives the Final Certificate to the Trustee less the amount of any Optimisation Fee paid or payable for the Segment and less the amount of the Increased Project Costs for the Segment
- TC = the Target Cost for the Segment

Final Time Measure or **FTM** for a Segment means:

- (i) if the Available Date for the last of the Segments to become Available (**relevant Available Date**) is the same or earlier than the Extension Target Available Date – zero;
- (ii) if the relevant Available Date is later than the Extension Target Available Date – the period (expressed as a number of calendar days) from the Extension Target Available Date to the relevant Available Date less the amount of the Increased Time for the Segment (provided that if such period is a negative number, such period will be taken to be zero).

Increased Project Costs for a Segment means the sum of the amounts which the Expert has determined under **clause 21.4(b)(iii)**, as at the Final Reconciliation Statement Date, to be the amounts by which the Project Costs for the Segment are greater than they otherwise would have been had the applicable breaches, negligence and/or fraud not occurred.

Increased Time for a Segment means the sum of the periods of time (expressed as a number of calendar days) which the Expert has determined under **clause 21.4(b)(iii)**, as at the Final Reconciliation Statement Date, to be the periods of time by which the time required for carrying out the Works for the Segment are greater than they otherwise would have been had the applicable breaches, negligence and/or fraud not occurred.

- (b) The Final PMF Percentage for a Segment is the percentage specified in the cell in the following table located in the row in which the FCM for the Segment occurs and the column in which the FTM for the Segment occurs:

FCM for Segment (%)	FTM for Segment				
	0	+1 to +45	+46 to +90	+91 to +180	>+180
<90	[insert]	[insert]	[insert]	[insert]	[insert]
≥90 & <95	[insert]	[insert]	[insert]	[insert]	[insert]
≥95 & <100	[insert]	[insert]	[insert]	[insert]	[insert]
≥100 & <105	[insert]	[insert]	[insert]	[insert]	[insert]

≥105 & <110	[insert]	[insert]	[insert]	[insert]	[insert]
≥110 & <115	[insert]	[insert]	[insert]	[insert]	[insert]
≥115 & <120	[insert]	[insert]	[insert]	[insert]	[insert]
≥120	[insert]	[insert]	[insert]	[insert]	[insert]

[Drafting note: This table to be completed on a transaction-by-transaction basis.]

3 Early Termination Project Management Fee

The Early Termination Project Management Fee for a Segment is the amount calculated in accordance with the following formula for the Segment:

$$\text{ETPMF} = \text{FPMF} \times \text{PC} / \text{EPC}$$

Where:

ETPMF = the Early Termination Project Management Fee for the Segment

FPMF = the amount which would be the Final Project Management Fee for the Segment assuming, for the purpose of calculating the Final Project Management Fee for the Segment, that:

- (a) “FPC” in **item 2.2** of this **schedule 6** is the amount of the Estimated Project Costs for the Segment as at the date of termination of this Agreement;
- (b) “TC” in **item 2.2** of this **schedule 6** is the Target Cost of the Segment as at the date of termination of this Agreement;
- (c) each Segment become Available on the Estimated Available Date for the Segment as at the date of termination of this Agreement; and
- (d) the Extension Target Available Date in **item 2.2** of this **schedule 6** is the Latest Target Available Date as at the date of termination of this Agreement.

PC = the Project Costs for the Segment Incurred by the Trustee as at the date of termination of this Agreement.

EPC = The Estimated Project Costs for the Segment as at the date of termination of this Agreement.

Schedule 7

Optimisation Fee

(Clause 1.1 and 14)

1 Optimisation Fee

1.1 Definitions

In this **schedule 7**:

Actual Project Costs for a Segment means the Project Costs for the Segment which Aurizon Network Pty Ltd sought to include in the Regulatory Asset Base.

Construction Interest for the Optimised Project Costs for a Segment means the amount calculated in accordance with **item 1.4** of this **schedule 7** for the Optimised Project Costs for the Segment.

Excluded Amount (Trustee) for a Segment means the sum of the following amounts for that Segment:

- (a) Not Prudent Costs (Independent Engineer Costs);
- (b) Not Prudent Costs (Landholder Costs);
- (c) Not Prudent Costs (Procurement Methodology Costs);
- (d) Not Prudent Costs (Reimbursable Expenses);
- (e) Not Prudent Costs (Replacement Project Manager Costs);
- (f) Not Prudent Costs (Scope); and
- (g) Not Prudent Costs (Standard).

Landholder means Aurizon Network Pty Ltd in its capacity as 'Landholder' under the Rail Corridor Agreement.

Not Prudent Costs (Independent Engineer Costs) for a Segment means, if the Access Regulator makes a decision that some or all of the Actual Project Costs for that Segment Incurred by the Trustee under, or in connection with, the Independent Engineer Appointment Deed, are not prudent (in accordance with the requirements for assessing the prudence of costs under the then current Access Undertaking), that portion of the Actual Project Costs for that Segment.

Not Prudent Costs (Landholder Costs) for a Segment means, if the Access Regulator makes a decision that some or all of the Actual Project Costs for that Segment Incurred by the Trustee under the Rail Corridor Agreement are not prudent (in accordance with the requirements for assessing the prudence of

costs under the then current Access Undertaking), that portion of the Actual Project Costs for that Segment.

Not Prudent Costs (Procurement Methodology Costs) for a Segment means, if the Access Regulator makes a decision that some or all of the Actual Project Costs for that Segment Incurred by the Trustee as a result of a requirement under the Procurement Methodology are not prudent (in accordance with the requirements for assessing the prudence of costs under the then current Access Undertaking), that portion of the Actual Project Costs for that Segment.

Not Prudent Costs (Reimbursable Expenses) for a Segment means, for a Segment means, if the Access Regulator makes a decision that some or all of the Reasonable Reimbursable Expenses for that Segment which form part of the Actual Project Costs for that Segment are not prudent (in accordance with the requirements for assessing the prudence of costs under the then current Access Undertaking), that portion of the Actual Project Costs for that Segment.

Not Prudent Costs (Replacement Project Manager Costs) for a Segment means, if the Access Regulator makes a decision that some or all of the Actual Project Costs for that Segment:

- (a) paid to the Replacement Project Manager as fees or other charges in connection with the performance of the Replacement Services; or
- (b) Incurred by the Trustee (including, under a Works Contract) as a consequence of the performance, standard of performance or non-performance of the Replacement Services by the Replacement Project Manager,

are not prudent (in accordance with the requirements for assessing the prudence of costs under the then current Access Undertaking), that portion of the Actual Project Costs for that Segment.

Not Prudent Costs (Scope) for a Segment means, if the Access Regulator makes a decision that some or all of the Scope of Works for that Segment are not prudent (in accordance with the requirements for assessing the prudence of scope of works under the then current Access Undertaking), the portion of the Actual Project Costs for that Segment that the Access Regulator decides not to include into the Regulatory Asset Base as a consequence of the decision that some or all of the Scope of Works for that Segment are not prudent.

Not Prudent Costs (Standard) for a Segment means, if the Access Regulator makes a decision that some or all of the Scope of Works for that Segment are not prudent (in accordance with the requirements for assessing the prudence of standard of works under the then current Access Undertaking), the portion of the Actual Project Costs for that Segment that the Access Regulator decides not to include into the Regulatory Asset Base as a consequence of the decision that some or all of the Scope of Works for that Segment are not prudent.

Optimised Project Costs for a Segment means the amount calculated in accordance with **item 1.3** of this **schedule 7** for that Segment.

Reasonable Reimbursable Expenses for a Segment means the Reimbursable Expenses for that Segment to the extent they have been reasonably Incurred by the Project Manager in the performance of its obligations under this Agreement.

1.2 Calculation of Optimisation Fee

The Optimisation Fee for the Segment is the amount calculated in accordance with the following formula:

$$OF = OPC + CI$$

where:

OF	=	The Optimisation Fee for the relevant Segment
OPC	=	The Optimised Project Costs for the relevant Segment
CI	=	The Construction Interest for the Optimised Project Costs for the relevant Segment

1.3 Calculation of Optimised Project Costs

The Optimised Project Costs for a Segment is the amount calculated in accordance with the following formula (provided that if the amount calculated in accordance with the following formula is a negative number, the Optimised Project Costs for the Segment will be zero):

$$OPC = APC - (RAB + EAT)$$

where:

OPC	=	The Optimised Project Costs for the relevant Segment
APC	=	The Actual Project Costs for the relevant Segment
RAB	=	The portion of the Actual Project Costs for the relevant Segment that the Access Regulator determines to include in the Regulatory Asset Base
EAT	=	The Excluded Amount (Trustee) for the relevant Segment

1.4 Calculation of Construction Interest

The Construction Interest for the Optimised Project Costs for a Segment is the amount calculated in accordance with the following formula:

$$CI = \left[\sum_{x=1}^t OPC_x \times (1 + R_{mzn})^{t-x+1} \right] - OPC$$

where:

CI	=	The Construction Interest for the Optimised Project Costs for the relevant Segment
OPC	=	The total Optimised Project Costs for the relevant Segment
OPC _x	=	The part of the Optimised Project Costs for the relevant Segment incurred in Month x
R	=	The annual interest rate, expressed as a decimal, that the Access Regulator uses to capitalise interest on costs included in the Regulatory Asset Base for the Extension
R _{month}	=	$(1+R)^{1/12} - 1$
t	=	The number of months from the date of the first OPC _x amount is incurred to the Optimisation Date for the Segment
x	=	Each month after the first OPC _x amount is incurred (x = 1 in the first month after the first OPC _x amount is incurred)

Schedule 8

Form of confidentiality agreement for engagement of Auditor
(Clause 15.4)

[Drafting note: *Form of confidentiality agreement for engagement of Auditor to be included in this schedule 8.*]

Schedule 9

Terms of Works Contracts

1 Mandatory provisions

1.1 Trustee's limitation of liability

A Works Contract must contain a provision to the effect that:

- (a) the Works Contractor acknowledges that the Trustee enters into the Works Contract only as trustee of the Trust, and in no other capacity; and
- (b) A liability of the Trustee arising under or in connection with the Works Contract is limited to and can be enforced against the Trustee only to the extent to which the Trustee is entitled to be indemnified out of the Trust for the liability and the liability can be satisfied out of property of the Trust.

1.2 Independent Engineer and PUH Engineer

A Works Contract must contain a provision to the effect that the Works Contractor must:

- (a) provide the Independent Engineer and PUH Engineer with a copy of all notices, reports or other written information which is required to be given by the Works Contractor to the Project Manager (acting as the Trustee's disclosed agent); and
- (b) permit the Independent Engineer and PUH Engineer to attend any meetings between the Works Contractor and the Project Manager (acting as the Trustee's disclosed agent) which the Works Contractor and Project Manager (acting as the Trustee's disclosed agent) are required to attend under the Works Contract,

subject to the Independent Engineer and PUH Engineer first providing a confidentiality undertaking in favour of the Works Contractor on terms satisfactory to the Works Contractor (acting reasonably).

1.3 Payment Claims

- (a) A Works Contract must contain a provision which requires the Works Contractor to:
 - (i) serve each Payment Claim (which must be a valid tax invoice) on the Project Manager (as disclosed agent for the Trustee); and

- (ii) provide a copy of each Payment Claim to each of the Trustee, the Independent Engineer and the PUH Engineer on the same day that the Payment Claim is served on the Project Manager.
- (b) A Works Contract which is not a “construction contract” (as defined in the BCIP Act) must contain a provision under which a Payment Claim under the Works Contract is due for payment within a specified number of Business Days (which must be at least [15] Business Days) after the date the Payment Claim is served on the Project Manager.

[Drafting note: The timing for the payment of Payment Claims under a Works Contract referred to in item 1.3(b) of this schedule 9 will be considered on a transaction-by-transaction basis having regard to what is commercially appropriate for such Works Contracts.]

- (c) A Works Contract which is a “construction contract” (as defined in the BCIP Act) must contain a provision under which the due date for payment of any Payment Claim under the Works Contract is [15] Business Days after the Payment Claim is served on the Project Manager.

[Drafting note: The timing for the payment of Payment Claims under a Works Contract referred to in item 1.3(c) of this schedule 9 will be considered on a transaction-by-transaction basis having regard to the then applicable payment provisions under the Queensland Building Services Authority Act 1991 (Qld) and the BCIP Act.]

2 Discretionary provisions

2.1 Intellectual Property and Moral Rights

A Works Contract may contain a provision to the effect that the Works Contractor grants (or procures the grant of) Intellectual Property Rights to, and procures Moral Rights Consents for, the Project Manager which are reasonably required in connection with the legitimate interests of the Project Manager (or any Related Body Corporate of it) specified in **clause 3.6(a)(iv)**.

2.2 Defects

A Works Contract may contain a provision to the effect that the Works Contractor must, upon demand by the Project Manager, provide a legally binding undertaking in favour of Aurizon Network Pty Ltd, under which the Works Contractor undertakes that Aurizon Network Pty Ltd may exercise any rights against the Works Contractor which the Trustee (as principal under the Works Contract) can exercise against the Works Contractor.

Schedule 10

Reimbursable Expenses

[Drafting note: As part of “Aurizon Network’s Extension Process”, it is proposed that all pre-feasibility and feasibility study costs are to be paid by the Trustee to Aurizon Network when the transaction becomes unconditional. Aurizon Network will then repay any amounts funds under the relevant Technical Services Agreement (TSA).

For the purpose of the template SUFA documentation it is assumed that either:

- there will no expenditure on the early stages of the Extension’s development, such as preliminary works or procurement of long lead items (**Early Works**), until all SUFA documents for that transaction have full force and effect; or
- such expenditure will be addressed under a separate commercial arrangement from the SUFA documentation suite for the relevant extension.

As a consequence, there is no concept of “Reimbursable Expenses” being incurred before the Commencement Date. On a transaction specific basis, this concept may need to be provided for if customers seek Aurizon Network to conduct early works without a separate commercial arrangement in respect of them. There may also be a need to include an obligation to seek to include these costs in the RAB at the same time as the Trust Capital Costs.]

1 Definitions

In this **schedule 10**:

Additional Costs means:

- (a) any costs or expenses, other than Internal Costs, to the extent Incurred by the Project Manager in connection with the provision of the Services or the performance of its obligations under this Agreement, but excluding:
 - (i) the GST component of any costs or expenses which would otherwise be Additional Costs under this **paragraph (a)** of this definition to the extent that the Project Manager (or the representative member of the GST group of which the Project Manager is part) is entitled to claim an input tax credit in respect of such costs or expenses; and
 - (ii) Aurizon Network Land Acquisition Costs; **plus**
- (b) the Overhead Margin of the amount of any costs and expenses referred to in **paragraph (a)** of this definition; **plus**
- (c) the Holding Cost Margin of the amount of any costs and expenses referred to in **paragraph (a)** of this definition.

Billable Personnel means Employees and Contractors, other than Support Personnel and Management Personnel, within the Project Manager's project delivery unit.

Billable Personnel Class means a class of Billable Personnel, as determined by the Project Manager, acting reasonably, having regard to the functions of the Billable Personnel.

Contractors means contractors engaged by the Project Manager on a dedicated basis within the Project Manager's project delivery unit (including contractors providing Support Services).

Employees means employees of the Project Manager, or a Related Body Corporate of it, working within the Project Manager's project delivery unit (including employees providing Support Services and Management Services).

Estimated Billable Hours for Billable Personnel in a Billable Personnel Class for a Period means the total number of Remunerated Hours which the Project Manager reasonably estimates, as at the start of that Period, those Billable Personnel will be available to perform the project delivery services during that Period (and, for the avoidance of doubt, does not include any Remunerated Hours which the Project Manager reasonably estimates, as at the start of that Period, in which those Billable Personnel will not be available to perform the project delivery services during that Period due to holiday leave, other leave (including sick leave), statutory holidays, safety training and other mandatory requirements).

Manage means supervision and management of Billable Personnel within the Project Manager's project delivery unit.

Management Personnel means Employees, other than Billable Personnel and Support Personnel, that Manage Billable Personnel within the Project Manager's project delivery unit.

Management Services means general management within the Project Manager's project delivery unit.

Holding Cost Margin means **11%** (which, by way of explanation, represents a payment in lieu of recovery of holding costs Incurred by the Project Manager in respect of the underlying costs (for example payroll costs) between:

- (a) the date on which the Project Manager pays those underlying costs; and
- (b) the date on which the Project Manager receives payment in respect of those underlying costs.)

Internal Costs for a Period means:

- (a) the amount calculated under **item 4** of this **schedule 10** for that Period; **plus**
- (b) the Overhead Margin of the amount of any costs and expenses referred to in **paragraph (a)** of this definition; **plus**
- (c) the Holding Cost Margin of the amount of any costs and expenses referred to in **paragraph (a)** of this definition.

Overhead Margin means 71% (which, by way of explanation, represents a payment in lieu of recovery of overhead costs, being administration, general management, internal audit, external relations and other similar costs, of the Project Manager and the Related Bodies Corporate of it, other than any such costs in respect of the Project Manager's project delivery unit.

Personnel Costs for a Period means:

- (a) for an Employee, the aggregate of all costs and liabilities to be Incurred by the Project Manager in respect of the Employee during that Period, including:
 - (i) salaries and wages (including overtime);
 - (ii) the cost of annual leave, sick leave, long service leave and other allowances;
 - (iii) payroll tax and other governmental taxes, levies and charges;
 - (iv) personal expenses, where these are payable or reimbursable;
 - (v) fringe benefits;
 - (vi) worker's compensation insurance; and
 - (vii) the cost of providing employee benefits including:
 - (A) superannuation; and
 - (B) employee's group life insurance, hospital benefit, pension, retirement and other similar benefit plans,

calculated, in the case of the costs and liabilities referred to in **paragraphs (a)(ii) to (vii)** of this definition, on a "percentage assessment" basis of the costs and liabilities referred to in **paragraph (a)(i)** of this definition;

- (b) for a Contractor, the aggregate of all fees to be paid by the Project Manager to the Contractor during that Period; and
- (c) the indirect costs of Employees and Contractors referred to in **paragraphs (a) and (b)** of this definition, including:
 - (i) uniforms, personal protective equipment and training;
 - (ii) Brisbane office occupancy costs (including, for example, rent, information technology, communications, office equipment, stationery and utilities); and
 - (iii) non project-related travel, accommodation and meals,

but excluding the GST component of any costs or liabilities Incurred by the Project Manager which would otherwise be Personnel Costs under this definition to the extent that the Project Manager (or the representative member of the GST group of which the Project Manager is part) is entitled to claim an input tax credit in respect of such costs or liabilities.

Period means each one year period commencing on 1 July (and, if the Commencement Date is other than 1 July, includes the shorter period commencing on the Commencement Date and ending on the next 30 June).

Remunerated Hours means:

- (a) for an Employee, the paid hours of that Employee; and
- (b) for a Contractor, the billed hours of that Contractor.

Support Personnel means Employees and Contractors, other than Billable Personnel and Management Personnel, that provide Support Services for Billable Personnel within the Project Manager's project delivery unit.

Support Services means corporate, clerical, administrative and other support services.

Unit Cost Rate for a Billable Personnel Class for a Period means the hourly rate (expressed as dollars per hour) calculated for that Billable Personnel Class for that Period in accordance with **item 3** of this **schedule 10**.

2 Internal Cost information

2.1 Unit Cost Rates Table

The Project Manager must:

- (a) for the first Period - on or before the Commencement Date; and
- (b) for each subsequent Period – prior to the start of that Period,

prepare a document which specifies for that Period:

- (c) each Billable Personnel Class; and
- (d) the Unit Cost Rate for each Billable Personnel Class,

for the purposes of calculating Internal Costs during that Period.

2.2 Billable Personnel Classification Table

On or before the Commencement Date, the Project Manager must prepare, and must vary so that it remains up-to-date, a document (**Billable Personnel Classification Table**) which sets out, in respect of each person who is Billable Personnel utilised by the Project Manager in connection with the provision of the Services or the performance of its obligations under this Agreement, the Billable Personnel Class to which that Billable Personnel belongs, for the purposes of calculating Internal Costs.

3 Unit Cost Rates

The Unit Cost Rate for each person who is Billable Personnel Class for each Period will be calculated in accordance with the following formula:

$$\text{UCR} = \frac{\text{PC}}{\text{PH}}$$

EBH

where:

- UCR = the Unit Cost Rate for the relevant Billable Personnel Class for the relevant Period (expressed as dollars per hour).
- PC = the Project Manager's reasonable estimate, as at the start of the relevant Period, of the sum of:
- (a) the Personnel Costs for each person who is Billable Personnel in the relevant Billable Personnel Class, as at the start of the relevant Period, for the relevant Period;
 - (b) the Personnel Costs for each person who is Support Personnel that provides Support Services to Billable Personnel in the relevant Billable Personnel Class (but only to the extent they will provide Support Services to Billable Personnel in the relevant Billable Personnel Class, as reasonably estimated by the Project Manager), as at the start of the relevant Period, for the relevant Period; and
 - (c) the Personnel Costs for each person who is Management Personnel that Manage Billable Personnel in the relevant Billable Personnel Class (but only to the extent they Manage Billable Personnel in the relevant Billable Personnel Class, as reasonably estimated by the Project Manager), as at the start of the relevant Period, for the relevant Period.
- EBH = the Project Manager's reasonable estimate, as at the start of the relevant Period, of the sum of the Estimated Billable Hours for all Billable Personnel in the relevant Billable Personnel Class, as at the start of the relevant Period, for the relevant Period (applying, for the purpose of making such estimate, the then standard internal management accounting practices generally adopted by the Project Manager).

4 Calculation of Internal Costs

The Internal Costs for a Period is the sum of the amount for each person who is Billable Personnel equal to the product of:

- (a) the number of hours during which that Billable Personnel was utilised by the Project Manager in the provision of the Services or the performance of its obligations under this Agreement during that Period; and
- (b) the Unit Rate Cost for the Period during which that Period occurs for the Billable Personnel Class to which that Billable Personnel belongs.

5 No double claims

For the avoidance of doubt, the Project Manager is only entitled to categorise an Employee or Contractor as either a Billable Personnel, Support Personnel or Management Personnel and accordingly is only entitled to seek the recovery of the costs in respect of that person in any one such category.

Schedule 11

Allocation Principles

1 Allocation on basis of share of costs

Where:

- (a) costs, expenses and/or recovered amounts relate to two or more Segments; and
- (b) components of those costs, expenses and/or recovered amounts may be allocated between each of those Segments on the basis of each Segment's share of the Works for the Extension that gave rise to those costs, expenses and/or recovered amounts regardless of whether those Works are within or outside the area of that Segment,

those components of costs, expenses and/or recovered amounts must be allocated to each of the Segments to which they relate.

2 Allocation on pro-rata basis

(a) Where:

- (i) costs, expenses and/or recovered amounts relate to two or more Segments; and
- (ii) **item 1** of this **schedule 11** does not apply,

those costs, expenses and/or recovered amounts must be allocated to each of those Segments on a pro-rata basis, based on the proportion that the Target Cost for each such Segment bears to the total of the Target Costs for all such Segments.

- (b) For the purpose of **item 2(a)** of this **schedule 11**, the allocation must be undertaken on the basis of the Target Cost for each Segment as at the time of that allocation. Any change to the Target Cost for any Segment does not affect any allocation conducted prior to, and only applies to an allocation conducted after, that change to the Target Cost.