

Appendix 1 Issues Table

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
<i>Access Agreement (AA)</i>			
1	Definition of Aurizon Network Cause (Operational Constraint)	Access Undertaking Definitions The QCA have inserted Operational Constraints into the definition of Aurizon Network Cause.	AN has removed Operational Constraints from the definition of Aurizon Network Cause. The effect of the change proposed by QCA would be to allocate a number of Rail Operator, environmental and Customer imposed risks on to Aurizon Network as well as to attribute a fault element to normal maintenance practices. The cumulative impact of the proposed changes would be to significantly increase the business risks faced by Aurizon Network without any corresponding adjustment to the return that AN can earn. For the reasons set out in part 8 of the Submission, Aurizon Network disagrees with the QCA's inclusion of Operational Constraints in the definition of Aurizon Network Cause.
2	Definitions relating to the Reduction of Nominated Monthly Train Services	Clause 1.1 of AA The QCA deleted clause 10 and 11 of the AA and TOD respectively including the following Definitions: <ul style="list-style-type: none"> • Defaulting Operator • Maximum Payload • New Train Service Type • Non-Defaulting Operator • Original Train Service Type • Reduction Notice 	These definitions have been reinserted by AN as they are referenced in clause 10 and 11 of the AA and TOD respectively. Please refer to our comments in relation to these clauses in Item 25 and 27 of this Table.

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		<ul style="list-style-type: none"> • Revised Maximum Payload • Revised Nominal Payload • Revised Nominated Monthly Train Services • Split Train Service Type 	
3	Definitions relating to Access Holder initiated increase to Maximum Payload	Clause 1.1 of AA The QCA deleted clause 11 of the AA including the following Definitions: <ul style="list-style-type: none"> • Maximum Payload • Notice of Enquiry • Revised Maximum Payload • Revised Nominal Payload • Revised Nominated Monthly Train Services • Surplus Access Rights • Variation Request Notice 	These definitions have been reinserted by AN as they are reference in clause 11 of the AA. Please refer to our comments in relation to clause 11 in Item 26 of this Table
4	Definitions relating to Reduction of Nominated Monthly Train Services if Nominal Payload increased	Clause 1.1 of AA The QCA deleted clause 11 and 12 of the AA and TOD respectively including the following definitions: <ul style="list-style-type: none"> • Maximum Payload • Notice of Intention to Increase Nominal Payload • Revised Maximum Payload • Revised Nominal Payload • Revised Nominated Monthly Train Services 	These definitions have been reinserted by AN as they are reference in clause 11 and 12 of the AA and TOD respectively. Please refer to our comments in relation to these clauses in Item 25, 26 and 27 of this Table

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The following definitions were only used in the clause 12 of the TOD and were deleted by the QCA:

- Average Annual Payload
- Foreseeable Costs and Detriments

5	Definition of Access Charge Provisions	Clause 1.1 of AA	<p>The QCA has removed the Access Charge Provisions from the Access Agreement (AA) and included them as Incorporated Provisions (i.e. provisions from the Access Undertaking (AU) which form part of the AA as if they were set out in full in the AA) in clause 3.1(b) of the AA.</p>	<p>The Access Charge Provisions are defined in the AA to include Part 6 and Schedule F of the AU. However, there are a number of provisions in these sections which are inappropriate for incorporation into the AA as they relate to matters that are only relevant to Aurizon Network and the QCA (for example Clause 4.1 Annual review of Reference Tariffs , Clause 4.2 Allowable Revenue, Clause 4.3 Revenue Adjustment Amounts, and Clause 4.4 Revenue Adjustment).</p> <p>Under the current UT3 arrangements (as well as UT1 and UT2), the basis upon which access charges are invoiced are clearly set out in a schedule to the access agreements. The drafting in the AA in relation to the payment of access charges is very clear, well understood by industry and supported by a regulatory and commercial track record.</p> <p>This is entirely logical given that the agreements are the means by which the parties agree to:</p> <ul style="list-style-type: none"> • in the case of AN provide, and • in the case of the access holder receive the benefit of the provision of <p>access rights for the operation of train services. It logically follows that the charges for the provision of these services should also be provided for in the same agreement (as is the case for most other commercial contracts).</p>
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In AN's view, the effect of the QCA's proposed drafting will make it both challenging and cumbersome for access holders and AN to have to refer to the Access Undertaking to administer the calculation of Access Charges for the purpose of billing under the AA.

No justification has been provided by the QCA as to why these provisions should not be included in the AA.

AN has also identified a number of other issues with the way the provisions are drafted in the Access Undertaking. For example:

- Indicative access charges for new cross system tariffs or a new haul would be calculated by applying the methodology in Part 6 of the Access Undertaking but if these new hauls are determined to meet Reference Train Characteristics we would require QCA approval prior to invoicing as the Access Charge Rates are only invoiced as an Access Charge (refer 2.4(b)(i)) when the Train Service Type differs from the relevant Reference Train Service). Under existing arrangements (UT3), we would include these in Schedule 3 of the success agreement as Base Access Charges (and invoice on these rates) with a note stating the cross system or new tariffs would be adjusted upon approval from the QCA;
- Clause 4.5 of Schedule F provides for the review of Access Charge Rates and Clause 6.5.2 of Part 6 provides for the review of Access Charges (changes to Reference Tariffs). Clause 6.5.2 of Part 6 also provides that a standard access agreement must contain review provisions in compliance with the Access Charge review provisions of the Access Undertaking. As the definition of Access Charge in the AA does not

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include Access Charge Rates (except where the train service is a non-Reference Train), a review under 6.5.2 of Part 6 would not flow through as an update to the Access Charge Rates. The effect of the QCA's drafting is that the connection between Access Charges and Access Charge Rates has been lost whereas the drafting that AN had previously proposed in Schedule 4 of the AA in relation to Access Charges clearly shows the connection between Access Charges and Access Charge Rates; and

- including calculations of the metrics (for example, gtk's and ntk's) in the AA would allow for the application of differing Loading Efficiency Factors where loading operations are not standard. Such metrics are also used for the purpose of billing for non-coal traffic (as the metrics differ for these types of traffic).

For these reasons, AN has include drafting in relation to access charges in the AA and the "Access Charge Provision" no longer forms part of the Incorporated Provisions.

6	Definition of Consequential Loss	Clause 1.1 of AA and TOD	The QCA has amended the definition of Consequential Loss and removed the references to Third Party Claims as a head of Consequential Loss.	Third Party Claims were excluded as Consequential Loss under the UT3 standard access agreements. Consistent with the UT3 standard access agreements and common commercial practice, AN considers that the Consequential Loss exclusion in this AA should extend to Third Party Claims. For the same reasons as those provided in our Submission on the QCA's Draft Decision in April 2015, it is important that this clause is unambiguous and it is clear what the various categories of loss are that form part of the
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			<p>definition of Consequential Loss. AN has also amended paragraph (g) of the definition so that the drafting more closely aligns with the first limb in <i>Hadley v Baxendale</i></p>
7	Definition of Force Majeure Event	Clause 1.1 of AA and TOD The definition of Force Majeure Event has been removed from the AA and included in the Access Undertaking instead	<p>AN considers that the force majeure provisions should not be a provision of the Access Undertaking and should be dealt with solely under the Access Agreement and Train Operations Deed. Consequently, we have included the definition of what constitutes a Force Majeure Event in clause 1.1 of both the AA and TOD.</p> <p>Please refer to Item 41 for further commentary in relation to the FM provisions.</p>
8	Definition of Incorporated Provisions	Clause 1.1 This definition was not included in the QCA draft AA.	<p>Given the way in which provisions of the Access Undertaking are proposed to be incorporated by reference and form part of the AA and the operative provisions that govern this process in clause 3.1, AN has included a definition of Incorporated Provisions.</p>

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9	Definition of Loading Facility	<p>Clause 1.1 of AA and TOD</p> <p>The QCA amended the definition so that the reference to Origin was a defined term.</p>	<p>AN has amended the definition such that the reference to Origin is not to the defined term but rather any origin.</p> <p>This is to reflect the fact that a Train Service Type could be a Through-Running Train Service Type, in which case the Loading Facility will not be an "Origin" (which is the relevant Network Interface Point). For that reason, this definition should refer to "origin" rather than "Origin".</p>
10	Definition of Security	<p>Clause 1.1</p> <p>The QCA has defined Security to include a Parent Company Guarantee in the form reasonably acceptable to AN from a holding company of the Access Holder that has an Acceptable Credit Rating</p> <p>The QCA had also provided that Security can be from a trading bank holding a current Australian banking licence with a credit rating equivalent to or better than a Standard & Poors BBB rating.</p>	<p>AN considers that the holding company providing a parent company guarantee should be an Australian incorporated entity to allow AN to evaluate its credit risk and to enable enforcement of the parent company guarantee in Australia.</p> <p>Consistent with the intention of the QCA's drafting, AN has amended this part of the definition of Security to refer to the definition of Acceptable Credit Rating given that this is a defined term.</p> <p>Please also refer to our comments in Item 21 in relation to Security in Clause 6</p>
11	Words and expressions AU	<p>Clause 1.6</p> <p>This clause was not included in the QCA's drafting</p>	<p>As many words and expressions in this Agreement are defined by reference to the Access Undertaking (eg definitions of Train and Track), AN would like to make clear that those words or expressions have the meaning given in the Access Undertaking at the date of this Agreement.</p> <p>AN would also like to clarify that words and expressions used in Incorporated Provisions have the meaning given in the Access Undertaking at the time the Incorporated Provisions were incorporated into the AA under clause 3.1 or</p>

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3.2 of the AA.

12	Incorporation of Terms	Clause 3.1	The QCA has attempted to provide for how certain terms of the Access Undertaking will be incorporated in and form part of the AA.	<p>The QCA's drafting requires further amendment to have the intended effect. AN considers that if provisions from the Access Undertaking are incorporated into the AA:</p> <ul style="list-style-type: none"> • clause 3.1 should operate to incorporate those provisions into the AA as in force under the Access Undertaking as at the Commencement Date; • it is not necessary to separately require AN comply with provisions of the Access Undertaking incorporated into the AA under clause 3.1 because AN will be bound to comply with those provisions as they will be separate terms of the AA; and • clause.2 should operate to replace provisions of the Access Undertaking incorporated into the AA under clause 3.1(a) with the relevant provisions of the Access Undertaking as revised following a Change in Access Undertaking (subject to either party giving an Amendment Notice). <p>For these reasons, AN has included drafting to provide for the intended effect.</p>
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13	Changes in AU	Clause 3.2 The QCA has attempted to provide for how certain changes in subsequent Access Undertaking which take place during the term of the AA will be incorporated into the AA.	AN has included additional drafting to clarify the process where a party elects to amend the AA to replace the Incorporated Provisions which form part of the AA with the corresponding Incorporated Provisions as changed by a subsequent amendment to the Access Undertaking. The replacement of the former Incorporated Provisions should take effect on the date the Change in Access Undertaking takes effect. It does not make sense to provide for the replacement to occur on an arbitrary later date nominated by the Notifying Party, particularly if there is no limit to when that date can be and the nomination of that date is not subject to dispute resolution. The Incorporated Provisions in the Access Undertaking will need to include transitional arrangements to cater for matters which are being dealt with under the Former Incorporated Provisions at the time of the Change in Access Undertaking.
14	Exercise of Access Rights and Operator Nomination	Clause 4.3(e)	AN has made some minor amendments to the provisions which apply where an access holder nominates an operator to utilise all or part of the access rights to provide greater clarity.
15	Access Interface Deed	Clause 4.4 The QCA has included a requirement for the Access Holder to enter into an Access Interface Deed (AID) in the AA.	This requirement is equivalent to the requirement under the UT3 SOAA for the operator to procure its customer to provide an AID. It is only where an Access Holder is an operator that it should be required to procure its customer to enter into an AID as AN needs to have a direct contractual relationship with the customer in order to limit its liability to

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the end customer in respect of the utilisation of access rights.

An AID is not required where an Access Holder who is an End User enters into the AA as AN's liability to the End User is limited under the AA. In the QCA's response to AN's request for information dated 13 February 2015,¹ it said that clause 4.4(a) is only triggered if the Access Holder wants to exercise its rights under clause 4.3(b). However clause 4.3(b) relates to an Access Holder nominating an operator to utilise all or part of the Access Rights and is not relevant to the AID.

16	Changes to Operators Nomination	Clause 4.5	<p>The QCA references the expiry date for the relevant Train Path in clause 4.5(a)(i)(B)</p> <p>In clause 4.5(d) the QCA required AN where it rejects the nomination to facilitate the resolution of any matter the subject of its reasons for the rejection.</p>	<p>AN has amended clause 4.5(a)(i)(B) to reference the Train Service Expiry Date for the relevant Train Service Type. This is the correct reference as clause 4.5(a)(i)(B) seeks to ensure that any variation to an Operators nomination does not extend beyond the date that an Access Holders has access rights for a specific Train Service (i.e. the Train Service Expiry Date)</p> <p>AN has inserted the words "ordered by the Operator to the extent permitted" in clause 4.5(c) to clarify that AN is only obliged to schedule the Train Services under clause 4.5(c) where an Operator orders those Train Services following the increase in nomination by the Access Holder.</p> <p>AN has amended clause 4.5(d) such that AN's obligation is to seek to resolve with the Access Holders any matter the subject of its reasons for the rejection (as it was not clear</p>
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¹ No 41 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015

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			<p>what the words “facilitate the resolution of” in the QCA’s drafting meant).</p>
17	Nominations with different Train Descriptions	Clause 4.6 The QCA has amended clause 4.6(b) such that AN would not be entitled to vary Access Charge Rates for increase in risk or the utilisation of capacity.	<p>AN has reinstated the ability to increase Access Charge Rates to reflect increase in risk and utilisation of capacity.</p> <p>To the extent that an Operator’s proposes to operate a Train Service which increases the risk to Network or the utilisation of capacity AN should be entitled to recover this via the Access Charge Rates, which would be calculated in accordance with the relevant Pricing Principles.</p>
18	Reduction of rights resulting in an Over-Allocation	Clause 4.7(a) The QCA included in clause 4.7(a)(ii) a reference to the reduction or variation of Nominated Monthly Train Services in the Operator’s Train Operations Deed.	<p>AN has deleted the reference to the Operator’s Train Operations Deed as it is not clear how the Nominated Monthly Train Services can be reduced or varied under a Train Operations Deed in a manner that results in an Over-Allocation.</p>
19	Invoicing	Clause 5.2 The QCA amended clause 5.2(b) such that AN is required to provide the Access Holder with an invoice even if no amounts are required to be paid in that Billing Period.	<p>AN has amended clause 5.2(b) to reflect the position adopted in its 2014AU submission that provides where no amounts are required to be paid in a Billing Period, AN is not obliged to issue an invoice to the Access Holder.</p> <p>AN does not understand why it should be obliged to provide an invoice to the Access Holder when no amount is payable. This imposes an unnecessary administrative burden for which there is no reasonable justification, therefore we have deleted the requirement.</p>

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20	Disputes in relation to amounts claimed in an invoice	Clause 5.4(a)	Unless a party has an express right to refer a dispute in connection with an amount claimed in an invoice to an expert, it cannot do so without the agreement of the other party. We have amended the drafting in this clause to allow for referral of payment disputes to an expert.
21	Security	<p data-bbox="420 797 1255 873">Clause 6</p> <p data-bbox="420 886 1255 1040">The QCA has removed from clause 6.2 the ability for AN to review Security where the Access Holder ceases to have an Acceptable Credit Rating.</p> <p data-bbox="420 1053 1255 1130">The QCA has removed from clause 6.6 the ability for AN to have recourse to security where the Access Holder fails to make a payment by the due date for that payment. Instead AN must first notify the Access Holder of the default after which the Access Holder has 20 business days to remedy the default prior to AN exercising its right of recourse to the Security.</p> <p data-bbox="420 1143 1255 1138">The QCA also removed the references to amounts payable by the End User to AN “under, or in connection with the Agreement.”</p>	<p data-bbox="1255 797 1932 873">AN have inserted clause 6.2(a)(ii) to include the Access Holder no longer ceasing to have an Acceptable Credit Rating as a trigger for AN to request security.</p> <p data-bbox="1255 886 1932 1094">AN considers that if the Access Holder has been assigned a credit rating and that rating is not an Acceptable Credit Rating, AN should be entitled to require the Access Holder to provide Security. It should not be necessary for AN to wait until the Access Holder is no longer financially sound or insolvent before AN can require the Access Holder to provide additional Security (particularly as the Access Holder will not be able to do so in those circumstances).</p> <p data-bbox="1255 1107 1932 1183">AN has amended clause 6.6 to clarify that AN is not required to suspend train services under Item 1 of Schedule 6 of the AA prior to exercise its rights under clause 6.6.</p> <p data-bbox="1255 1196 1932 1357">AN accepts the QCA requirement that AN notify the Access Holder of its payment default prior to seeking recourse under clause 6.6 but has amended the timeframe by which the Access Holder must remedy the payment default from 20 business days to 10 business days. An Access Holder has 14 business days to pay invoices under the AA, AN</p>

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			<p>considers a further 20 business days excessive and considers 10 business days should be sufficient to remedy the payment default.</p>
22	Accreditation Clause 7	<p>The QCA has deleted the provision that AN had included in its draft AA which provided that AN will not be in breach of the AA with respect to any act or omission to the extent that the act or omission is reasonably required in order for AN to comply with its Accreditation.</p>	<p>AN's obligation to comply with its Accreditation is a paramount obligation. AN considers that it should not be liable for breach of the AA for an act or omission if the act or omission is required in order to comply with its Accreditation or to ensure that its Accreditation is not at risk of suspension. AN should not be required to do anything under this Agreement that would put its Accreditation at risk. If it no longer has its Accreditation, no Train Services will be permitted to operate on the network.</p>
23	Resumption Clause 8	<p>The QCA has included a clause which provides that the Access Holder and AN must comply with the Resumption Provisions.</p>	<p>Given the way in which AN has amended clause 3.1 of the AA so that the Resumption Provisions are Incorporated Provisions under clause 3.1, this clause is not required.</p>
24	Conditional Access Provisions Clause 9	<p>The QCA has included a clause which provides that the Access Holder and AN must comply with the Conditional Access Provisions.</p>	<p>Given the way in which AN has amended clause 3.1 of the AA so that the Conditional Access Provisions are Incorporated Provisions under clause 3.1, this clause is not required.</p>
25	Reduction of Nominated Monthly Train Services if Maximum Clause 10 of the AA and Clause 11 of the TOD	<p>The QCA deleted in its entirety clause 10 and 11 of the AA and TOD respectively.</p>	<p>AN has reinserted the provisions allowing reduction of Nominated Monthly Train Services if Maximum Payload exceeded.</p>

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Payload exceeded			<p>Refer to section 8.4 and Item 9 of Appendix 3 of AN's April 2015 response to the QCA Draft Decision for further commentary.</p> <p>AN also notes that the QCA in its CDD 8.4 it queries why AN consider it necessary to introduce arrangements to deal with train services exceeding maximum payloads given overloading would not have been a persistent and prevalent issue.</p> <p>AN wishes to clarify that these provisions are not designed to address overloading, as the increase to maximum payload contemplated in this provision arises as a result of Operator improvements in the type of rollingstock and rollingstock configurations it utilizes during the term of the agreement comparative to the rollingstock and rollingstock configurations (which drives a certain payload assumption) at the time of executing the AA.</p> <p>In determining the number of Train Service Entitlements an Access Holders requires to meet their tonnage requirements, AN must assume a payload at time of AA execution. Over the term of an agreement Operators improve and change their rollingstock, usually resulting in an increase to payload which means Operators require less Train Service Entitlements to meet their tonnage requirements. The provisions AN reinserted is designed to deal with this and not management of overloads which is addressed elsewhere in the AA and TOD.</p>
26 Access Holder initiated increased to	Clause 11	The QCA deleted clause 11 in its entirety	AN has reinserted the provisions allowing Access Holders to initiate increases to Maximum Payload.

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Maximum Payload			Refer to section 8.4. and Item 10 of Appendix 3 of AN's April 2015 response to the QCA Draft Decision for further commentary.
27 Reduction of Nominated Monthly Train Services if Nominal Payload increased	Clause 12 of the AA and TOD	The QCA deleted in its entirety clause 12 of the AA and TOD	AN has reinserted the provisions allowing a reduction in Nominated Monthly Train services if Nominal Payload is increased. Refer to section 8.4 and Item 13 of Appendix 3 of AN's April 2015 response to the QCA Draft Decision for further commentary.
28 Relinquishment Provisions	Clause 13	The QCA has included a clause which provides that the Access Holder and AN must comply with the Relinquishment Provisions.	Given the way in which AN has amended clause 3.1 of the AA so that the Relinquishment Provisions are Incorporated Provisions under clause 3.1, this clause is not required.
29 Transfer Provisions	Clause 14	The QCA has included a clause which provides that the Access Holder and AN must comply with the Transfer Provisions.	Given the way in which AN has amended clause 3.1 of the AA so that the Transfer Provisions are Incorporated Provisions under clause 3.1, this clause is not required.
30 Reduction Factor Provisions	Clause 15	The QCA has included a clause which provides that the Access Holder and AN must comply with the Reduction Factor Provisions.	Given the way in which AN has amended clause 3.1 of the AA so that the Reduction Factor Provisions are Incorporated Provisions under clause 3.1, this clause is not required.

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31	Weighbridges and Overload Detectors	<p>Clause 19 of the AA and TOD</p> <p>The QCA deleted clause 19.1(a) and (b) in the AA and TOD</p> <p>The QCA amended clause 19.1(d) in the AA to refer to both Weighbridges and Overload Detectors.</p> <p>The QCA amended clause 19.2(a) in the TOD so Operator's only had a reasonable endeavors obligation to not exceed the relevant Maximum Allowable Gross Tonnage.</p>	<p>AN has reinserted the provisions clause 19.1(a) and (b) into the AA as these general provisions in relation to Weighbridges and Overload Detectors impose important operational obligations.</p> <p>AN has removed references to Overload Detectors in clause 19.1(d) as they are not verified under National Measurement Act 1960 (Cth) and therefore cannot be used to measure the weight of Rollingstock for charging purposes.</p> <p>AN has amended clause 19.2(a) of the TOD to reflect the current UT3 and previous AN UT4 Submissions so an Operator has an absolute obligation to not exceed the relevant Maximum Allowable Gross Tonnage.</p> <p>This is an important safety requirement and should be an absolute obligation. The Maximum Allowable Gross Tonnage is limit set by our safety standards and reflects the safe design specifications of the rollingstock and the infrastructure.</p>
32	Infrastructure Management	<p>Clause 20 of the AA and clause 22.3 of the TOD</p> <p>The QCA amended clause 20.1(b)(ii)(C) of the such that an Access Holder's obligation to notify AN of any harm to the Environment arises only when the Access Holder or Train Operator knows would result in a breach by AN of the terms of any environmental authority it holds in connection with the Nominated Network.</p> <p>The QCA amended clause 22.3 of the TOD so the Operator is not obliged to notify AN of any harm to the Environment.</p>	<p>AN has amended clause 20.1 of the AA and clause 22.3 of the TOD so that the Access Holder and Operator must notify AN as soon as reasonably practicable after they become aware of any harm to the Environment.</p> <p>AN should be advised of any harm to the Environment which the Access Holder's Operator is aware of on, or in the vicinity of, the Nominated Network so that AN who is best placed to understand the terms of any environmental authority it holds in connection with the Nominated Network can promptly investigate and address the relevant incident.</p> <p>To be consistent with the QCA's drafting in clause 20.1(c) of the AA, AN has included an obligation for the Operator to notify AN of any such harm.</p>

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33	Interface Representative	<p>Clause 21.2</p> <p>This clause provides for the nomination of an Interface Representative prior to the commencement of any Train Services.</p>	<p>One of the requirements of AN's safety management system is that an interface representative must be nominated by each access holder and operator to deal with any interface issues that arise in connection with the AA. Each party should be obliged to ensure that an Interface Representative is nominated at all times during the Term and we have amended the provision to specifically include this requirement.</p>
34	Duty to mitigate loss or damage	<p>Clause 23.3</p> <p>The QCA had amended the mitigation of loss or damage clause to exclude the duty to mitigate to the extent that such loss, damage, injury or death, cost or expense results from the breach of the AA or any negligent act or omission of the other Party or the other Party's Staff.</p>	<p>The duty to mitigate should not be qualified in the manner proposed by the QCA and the QCA has provided no justification for doing so.</p> <p>AN has deleted the QCA's amendments as they are not appropriate for a mitigation of loss provision of this type.</p>
35	Exclusions for Consequential Loss	<p>Clause 24.1</p> <p>The intention of this clause is to provide each party with an exclusion for Consequential Loss except otherwise provided for in the indemnities provided in the AA.</p>	<p>AN has amended clause 24.1 to ensure that the Consequential Loss exclusion does not cut across the indemnity for Third Party Claims in clause 23.2.</p>
36	Claims and exclusions in respect of non-provision of access	<p>Clause 24.4(b)(ii) of the AA and clause 28.4(b) of the TOD</p> <p>The QCA removed the specific reference to Operational Constraints in clause 21.4(b)(ii) of the AA and clause 28.4(b) of the TOD.</p>	<p>AN has reinserted the reference to Operational Constraints in the relevant provisions as this is an important exclusion that should be expressly stated in the provision similar to what has been provided for in clause 24.4(b) of the AA and 28.5(b)(ii) of the TOD.</p>

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37 Allowable Threshold and Claims in respect of no provision of access	Clause 24.4(v)(A)	The QCA has reduced the Allowable Threshold, below which claims cannot be made by an access holder in respect of the non provision of access from 10% to 5%.	<p>AN disagrees with the QCA's decision to reduce the 'allowable threshold' from 10% to 5%. This is which is a long-standing part of the liability limitations for non-provision of access within the Standard Access Agreement</p> <p>AN in its response to the QCA's Draft Decision submitted in April 2015 stated that it could not accept the reduction in the 'allowable threshold' due to the additional risk for which it was not being compensated. The QCA is seeking to alter a long-standing regulatory and contractual position that has existed over many years in a way that increases AN's commercial and regulatory risk. The QCA in the CDD has not addressed this material concern. Without compensation for the additional risk, the change to the allowable threshold remains unacceptable to AN.</p> <p>Please refer to AN's submission on Part 8 of the CDD for further commentary in relation to this issue.</p>
38 Claims and exclusion in respect of delays to Train movements	Clause 24.5(c)(v)		Consistent with the QCA's drafting in clause 24.4(b)(iv)(G), AN has amended this clause to include an exclusion from liability where there has been a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor.

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39	Adjustment for a Material Change	<p>Clause 26.1(a)(i)</p> <p>The QCA has amended the drafting proposed by AN so that AN may only seek to recover an amount equal to the Net Financial Effect of a Material Change that occurs if it directly affects the cost to Aurizon Network of performing its obligations or exercising its rights under the AA or TOD.</p>	<p>AN has the following two issues with the QCA's proposed amendments:</p> <ul style="list-style-type: none"> <p>The QCA's amendment to the material change clause reduces the scope of the material change trigger because it is limited to material changes that directly affect a relevant matter.</p> <p>Under AN's drafting, a material change would trigger the material change clause if it <i>directly</i> or <i>indirectly</i> affected a relevant matter. This is the same as the position in the UT3 standard access agreements.</p> <p>The QCA's amendment to clause 23.1 also reduces the scope of the material change trigger because it would no longer extend to material changes that affect the financial position of Aurizon Network.</p> <p>Under AN's drafting, a material change would trigger the material change clause if it affected the financial position of Aurizon Network. This is the same as the position in the UT3 standard access agreements.</p> <p>While most material changes that affect the financial position of AN could also be characterised as affecting AN's costs, it is possible that a material change could occur which affects AN's financial position without affecting its costs. A possible example would be a new tax (or the removal of an existing tax benefit) which affects AN's financial position but which cannot be characterised as affecting AN's costs.</p>

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Future changes to taxes or laws to address carbon pollution could be introduced which affect AN's financial position but which cannot be characterised as affecting AN's costs.

From a policy perspective, AN should be entitled to an adjustment for both:

- increased costs due to a material change, regardless of whether the material change directly or indirectly results in the increased costs; and
- an impact to its financial position due to a material change.

The objective of the clause is that AN is kept whole if it suffers a financial detriment due to a material change regardless of whether a material change *directly* or *indirectly* increases its cost of performing its obligations. It is not clear why the financial detriment should be limited to increased costs (even if that is the most likely type of financial detriment to be suffered).

40	Authorised representative resolution	Clause 27.2	This clause provides the process for authorised representative resolution and states that the matter in dispute may, by agreement by the parties, be referred to an expert for resolution essentially within 15 Business Days of the Dispute Notice being given.	AN believes that this period is insufficient to agree whether or not to refer a dispute to an Expert. AN proposes that this be replaced by a reasonable period of within 25 Business Days of the Dispute Notice being given (by amending clause 27.2(d) to provide for a 15 Business Day period).
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Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
41 Force Majeure	Clause 28 of the AA and clause 31 of the TOD	<p>The QCA have made a number of changes to the FM provisions which the QCA have incorporated by reference from the AU to the AA and TOD.</p> <p>The key changes are:</p> <ul style="list-style-type: none"> • AN is only suspended from the obligations to provide Access and not any other obligations under the SAA • AN is required to provide the FM notice within 48 hours of the event or circumstance causing the FM event, not the occurrence of the FM event itself. • If AN does not provide the FM notice within the above 48 hour timeframe, the suspension of obligations as a result of the FM event only occurs from the time the FM notice is sent and not the time of the FM Event 	<p>There is some duplication between the FM provisions that the QCA had included in Part 7 of the Access Undertaking and the provisions that it included in the AA and TOD.</p> <p>As FM provisions are only of relevance to access holders, operator and Aurizon network when an access agreement is on foot and train services have commenced, AN can see no justification for including them in the Access Undertaking.</p> <p>Consequently, we have deleted the Force Majeure provision from Part 7 of the Access Undertaking and included them in clause 28 of the AA and clause 32 of the TOD</p> <p>AN has also made the following amendments to the FM provisions:</p> <ul style="list-style-type: none"> • All obligations of AN are suspended on the occurrence of the FM event. • This is the usual formulation of FM and it is not clear why AN should not have the benefit of this. • AN will provide the FM notice as soon as reasonably practicable and in any event within 5 business days after AN becomes aware of the FM event. <p>The timeframe proposed by QCA is not practical as some events or circumstances, such as a cyclone can occur more than 48 hours prior to them becoming an FM event under the agreements and AN would be in breach of the timeframes. It is more appropriate for any timeframe to provide an FM notice to commence from the time AN becomes aware of the FM event.</p> <p>In some instances an incident will require investigation and confirmation from the assets and maintenance teams that it is an FM event, as some incidents are not immediately apparently a result of events or circumstances outside of</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
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AN's control. Accordingly the requirement and timeframes to provide a notice should only arise following AN's ability to confirm the FM event.

AN considers 5 business days from the time AN becomes aware of the FME an appropriate timeframe to notify Access Holders and Train Operators. This timeframe is required to ensure AN can with its existing resources and systems appropriately identify the relevant agreements under which it issues the FM notices.

It should be noted that since 2013 AN has amended its FM processes, including sending courtesy emails once an incident is suspected to be an FM Event, and currently dedicates a significant amount of resources to ensuring FM notices are sent to affected access holders and operators as soon as reasonably practicable. As a result of existing IT systems, identifying the relevant agreements and train services impacted by a specific FM event is a largely manual process. In the instance the QCA requires a tighter timeframe to notify of FM events, AN considers it will need increased resources and upgrades to its existing IT systems.

The suspension of obligations occurs on the occurrence of the FM event and is not impacted by whether or not AN issues the FM event within the required timeframes.

The usual formulation of an FM provision provides for the suspension of obligations on the occurrence of the FM event. It is unusual to link the suspension to the date of notification of FM given AN's ability to meet its obligations will be impacted by the event or circumstance outside of its control. AN considers it unreasonable to be potentially liable for non-provision of access where it is due to an FM event on the basis it has not issue a notice within the required timeframe.

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
42	Liability for wrongful suspension	Clause 30 This clause sets out the circumstances in which AN will be liable to the access holder for wrongful suspension of access rights where no reasonable person in AN's position could have formed the view that the stated grounds for suspension existed.	While AN agrees with the clause in principle, it is important to ensure that AN is not liable to the access holder in circumstances where the suspension is of an Operator's rights under a Train Operations Deed and the access holder's loss or damage is not, and has not been, included in a claim by the Operator in respect of that suspension. AN has amended the cause to cater for this so that there is no double recovery in respect of the same suspension event.
43	Termination	Clause 31 of the AA and clause 33 of the TOD The QCA amended the Termination Provisions specifying that AN must only exercise its right of termination from the 21 st Business Day after the date of the relevant Suspension Notice.	AN has deleted the clause specifying AN's right to termination arises only on the 21st Business day after the date of the relevant Suspension Notice as it is inconsistent with the timing for the giving of notices for Termination Events specified in schedule 6. For example, if the Access Holder commits a payment default referred to in item 1 occurs, AN is able to give a Suspension Notice 10 Business Days after it gives a notice to remedy the payment default and is able to terminate the agreement 20 Business Days after it gives the notice to remedy.
44	Access Charge Provisions	Schedule 4 The QCA has deleted most of the provisions of Schedule 4 but retained the Access Charge Rates table.	AN has reinstated in its entirety Schedule 4 save for the provisions relating to Operator Capping. An consider it cumbersome for parties to be required to refer to the AU to administer calculation of Access Charges for the purposes of billing under the AA. Under 4.5 of Schedule F of the AU the Access Charge Rate is to be adjusted if the Reference Tariffs on which the Access Charge Rate was determined is adjusted. However, the SAA does not invoice based on the Access Charge Rate but rather the Access Charge (by way of Access Charge

Provision). Other than an obligation to review the Access Charge Rate the AU does refer to the Access Charge Rates and in isolation the Schedule 4 of the SAA is not required.

On this basis we have reinserted the provisions outlining how Access Charges are calculated from the AU back into Schedule 4 of the AA and ensured that it is clear that the Access Charge Rates are the Access Charges which are invoiced under the AA.

Clause 6.5.2 of the AU also require AN to have a review provision in its AA however the removal of the provisions in Schedule 4 save for the Access Charge Rates table meant there was no review mechanism in the AA as required.

Removal of the Access Charge provisions from Schedule 4 also meant factors such as Loading Efficiency Factor may be different for different operations could not be accounted for in the calculation of specific metrics (ntks, gtns) as these factors and metrics cannot be amended in the AU as they can under the AA. As an example Minerva has a lower Loading Efficiency Factor to reflect the operations and infrastructure at the Minerva line.

By removal of Schedule 4 of the SAA, if the SAA was for a new haul (e.g a new cross system Reference Tariff), approval from the QCA of the new cross system Reference Tariff would be required prior to operating Train Services for the new haul as we would be unable to invoice on an indicative access charge.

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
45	Access Interface Deed Schedule 7 Pro Forma Access Interface Deed		<p>The QCA's amendments to the Access Interface Deed significantly alter the liability position as between an Access Holder and its Customer under the Access Interface Deed without any justification for that change. AN has reinstated its drafting of the Access Interface Deed which it had proposed to address the deficiencies in the UT3 Access Interface Deed.</p> <p>In AN's proposed draft, we had specifically addressed AN's liability in relation to delays to Train movements and failure to operate Tram Services at scheduled times. This has been replaced with a more general provision which does not address this issue.</p> <p>AN had also included more specific drafting in relation to the application to the AID of the exclusion of liability provisions under the AA in order to clarify how those provisions work under the AID. This had been provided to address concerns of both AN and customers that arise in practice, when negotiating and executing Access Interface Deeds under UT3.</p> <p>AN had also included a specific acknowledgment that the Customer has been provided with a copy of the exclusion of liability provisions under the AA by the Operator. As a practical matter, it is important for the Customer to be provided with the relevant provisions from the AA so that it understands how those provisions apply to the Customer in the context of the Access Interface Deed.</p> <p>We have also amended the definition of Consequential Loss in the Access Interface Deed to align with the amendments we have made in the AA and TOD (i.e. to include Third Party claims as a category of loss).</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
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Train Operations Deed

46	Definition of Regenerative Brake	Clause 1.1 of TOD	Definition not included in the QCA's draft.	This definition has been reinstated as AN has reinstated clause 10.5 which obliges the Operator to ensure that it does not use Regenerative Brakes on any Rollingstock operated on the network unless it has obtained AN's prior written consent. Please refer to Item 52 clause 10.5 of the TOD
47	Incorporation of Terms	Clause 3.1	The QCA has attempted to provide for how certain terms of the Access Undertaking will be incorporated in and form part of the TOD.	Please refer to our commentary in Item 12 of this Table in relation to similar provisions in Item 12. The same comments apply to clause 3.1 of the TOD.
48	Change in Access Undertaking	Clause 3.2	The QCA has attempted to provide for how certain changes in subsequent Access Undertaking which take place during the term of the TOD will be incorporated into the TOD.	Please refer to our commentary in Item 13 of this Table in relation to similar provisions in Item 13. The same comments apply to clause 3.2 of the TOD.

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
49	Accreditation Clause 9	<p>The QCA deleted clause 9(d) which required the Operator to provide evidence of a variation to its Accreditation or notice no variation to its Accreditation is required when the TOD is varied to include an additional Train Service Type or vary the Train Description for an existing Train Service Type,</p> <p>The QCA deleted clause 9(e) which provides AN will not be in breach of the TOD with respect to any act or omission to the extent that act or omission is reasonably required by AN to comply with its Accreditation.</p>	<p>AN has reinserted clause 9(d). This clause is required because an Operator's Accreditation may only permit it to operate Train Services for specific Origin / Destination hauls and it may need to be amended to operate new or varied Train Services. This provision is likely to be unintentionally deleted by the QCA given clause 10.3(a)(iii)(D) of the QCA draft still refers to clause 9(d)</p> <p>AN has reinserted clause 9(e). AN's obligation to comply with its Accreditation is a paramount obligation. AN considers that it should be liable for breach of this Deed for an act or omission if the act or omission is required for the above reasons. AN should not be required to do anything under this Deed that would put its Accreditation at risk.</p> <p>Refer to Section 8.4.2 and item 16 of Appendix 3 of AN's April 2015 response to the QCA Draft Decision for further commentary.</p>
50	Operation of Train Services Clause 10.1	<p>The QCA has included references to Ad Hoc Train Services in this clause.</p>	<p>An Ad Hoc Train Service is taken to be a Train Service for this Deed once scheduled in the Daily Train Plan. It is therefore unnecessary to separately refer to Ad Hoc Train Services in clause 10.1. The reference to Ad Hoc Train Services in clause 10.1 may give rise to interpretational issues in other clauses in which Ad Hoc Train Services are not separately referred to. For that reason, the references to Ad Hoc Train Services have been deleted.</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
51	Commencement of Train Services for Train Service Type	Clause 10.3(a)(iii)(A) The QCA had included a clause which required the Operator to demonstrate Supply Chain Rights in respect of a Train Service Type.	The words in clause 10.3(a)(iii)(A) are no longer required because the QCA has deleted the requirement for an Operator to demonstrate that it holds or has the benefit of Supply Chain Rights.
52	Use of Regenerative Brakes	Clause 10.5 The QCA deleted clause 10.5 which obliges the Operator to ensure that it does not use Regenerative Brakes on any Rollingstock operated on the network unless it has obtained AN's prior written consent.	Where an Operator's Rollingstock is equipped with technology which enables its locomotives to generate electric power as a product of braking events, this power can be transmitted through the Aurizon Network electrical infrastructure and in some cases exported from AN's network. AN has obligations under its connection agreements with electricity retailers in relation to any electricity which may be exported from its network. Therefore, it is important that it is aware at all times of the number and location of all Rollingstock which is enabled for and using Regenerative Brakes. From experience, the current Operators on the network have been facilitative of this approach as they each understand the concerns so AN can see no justification for the deletion of this clause by the QCA.
53	Authorised Parking	Clause 13.5 The QCA deleted the reference in clause 13.5(a)(ii)(A) to "including removing the Train or relevant Rollingstock"	AN has reinserted the reference to removal of rollingstock. It should be clear that AN's rights under the clause extend to removing rollingstock. AN will only do so if it has made reasonable efforts to first consult with the Operator.

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
54	Compliance	Clause 14	<p>The QCA included Train Control Directions and Emergency Response Plans as things which both parties must observe and comply with.</p> <p>AN has deleted the references to Train Control Directions and Emergency Response Plan from clause 14.1(a)(i) and included it in clause 14.1(a)(ii) as the Emergency Response Plan and Train Control Directions are items which the Operator is only required to comply and does not make sense for AN to also be obliged to comply with.</p>
55	Certain matters to apply consistently to all Railway Operators	Clause 14.3	<p>The QCA deleted the reference to “as far as practicable” in clause 14.3.</p> <p>AN has reinserted the qualification which is required there are circumstances in which it is not practicable to apply the above requirements consistently. AN should only be obliged to do so as far as reasonably practicable to do so.</p>
56	Approval of Plans	Clause 15.1-15.2	<p>The QCA have made a number of amendments to clause 15.1 and 15.2</p> <p>AN has made some amendments to clauses 15.1 and 15.2 to include common processes in relation to Operating Plans and Emergency Response Plans and to address drafting issues.</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
57	Train Operations	<p data-bbox="436 423 541 444">Clause 16</p> <p data-bbox="636 423 1220 524">The QCA inserted clause 16.2(c) requiring AN to, where clause 16.2(a) or (b) applies, reschedule the relevant Train Service in accordance with the Network Management Principles</p> <p data-bbox="636 542 1251 695">The QCA has amended clause 16.4(a)(i) by deleting the word “materially” so that the clause ceased to be subject to a materiality threshold and AN would be required to notify an Operator each time a circumstance impacts their ability to run a Train Service in accordance with its Scheduled Time (i.e. +/- 3 mins).</p>	<p data-bbox="1297 423 1902 472">AN amended clause 14.1(b) to clarify the intent of the clause and to be consistent with clause 16.4(a)(i).</p> <p data-bbox="1297 490 1898 618">AN has made a minor amendment to clause 16.2(c). Consistent with AN’s obligation to reschedule Train Services under the Access Agreement, AN should only be required to reschedule a Train Service to the extent permitted in accordance with the Network Management Principles</p> <p data-bbox="1297 636 1898 813">AN has reinstated the materiality threshold in clause 16.4(a)(i). That is AN is only obliged to notify the Operator of circumstances where it materially impacts the ability of the Operator to operate the Train Service in accordance with its Scheduled Time. Scheduled Time as it is defined refers to the time for each section of a train journey as set out in the train plan.</p> <p data-bbox="1297 831 1902 932">This is the current UT3 position and reflects the fact that time delays are not the only factor that account for whether a Train Service will be materially impacted by an event or circumstance.</p> <p data-bbox="1297 950 1881 1078">A train being delayed in one section of its journey does not mean that the entirety of the train journey will be impacted and the length of the delay in and of itself is not the determining factor for whether the delay is material and requires notification to an Operator.</p> <p data-bbox="1297 1096 1860 1144">A more holistic approach is required and AN considers a variety of factors such as:</p> <ul data-bbox="1346 1162 1898 1333" style="list-style-type: none"> <li data-bbox="1346 1162 1818 1211">• the ability to recover to plan in the following sections of the train journey; <li data-bbox="1346 1229 1898 1333">• delays at the Port [which may mean queuing at the port, such that the train not arriving at its scheduled Port Time may not impact on its ability to get a port slot and unload]; and

- impact to the Operator's planned crew change, provisioning times, reliability examinations and planned connections.

The obligation for AN to notify Operators of impacts to train services is to ensure that to the extent an Operator's ability to operate its train service in accordance with its planned cycle time and load / unload at the mine / port is impacted by a circumstance that AN as the network controller is aware of, AN advises the Operator, so it can in consultation with AN adjust its train service accordingly.

AN also considers that Operators are unlikely to want to be notified of delays to train services to the extent it does not impact on their ability to meet crew change times, load / unload at the mine and port or to meet connections for the next train service.

On average in a 24 hour period, AN records over 1000 delays over 3 minutes. Not all these delays will result in an impact to Operator's ability to load / unload within its cycle time. To require AN to notify Operator's on the basis of a specified time delay would, assuming each call required 2 minutes to convey train details, location and duration of delay, take 2000 minutes (or more than 30 hours) and would practically require AN to hire dedicated and additional resources to notify Operators. (Similarly, Operators would potentially have to hire additional staff simply to manage this volume of notifications).

AN is not currently resourced to complete this task and considers delay notification to Operators for minor deviations from scheduled time impracticable and unnecessary for on the reasons outlined above.

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
58	Authorisation of Rollingstock and Rollingstock Configurations	<p data-bbox="436 423 541 444">Clause 17</p> <p data-bbox="636 423 1178 472">The QCA deleted clause 17.1(a)(iv) which required the Operator to comply with all applicable Laws.</p> <p data-bbox="636 532 1255 732">The QCA amended clause 17.5(b) so a Certificate of Compliance for Rollingstock or Rollingstock Configurations is final and binding on the Parties in the absence of fraud or manifest error unless AN within 20 business days of the date it is provided with the Certificate of Compliance notifies the Operator that it is not satisfied that the Rollingstock or Rollingstock Configurations is compliant with the Rollingstock Interface Standards.</p> <p data-bbox="636 792 1241 841">The QCA inserted into clause 17.7 references to Rollingstock Configurations.</p> <p data-bbox="636 901 1247 922">The QCA inserted into clause 17.8 references to Rollingstock.</p>	<p data-bbox="1297 423 1850 472">As this is an important obligation AN has reinstated this obligation in clause 17.1(a)(iv).</p> <p data-bbox="1297 532 1902 915">AN is responsible for ensuring the rail safety on its Network and does not accept that it will be bound by a Certificate of Compliance issued by a Certifier. AN always reserves the right to consider whether proposed new Rollingstock or Rollingstock Configurations comply with the Rollingstock Interface Standards (even if a Certificate of Compliance has been issued). The QCA's drafting of the clause introduces a timing issue because it provides for proposed Rollingstock or Rollingstock Configurations to be authorised, despite AN having 20 Business Days to notify the Operator that the proposed Rollingstock or Rollingstock Configurations do not comply with the Rollingstock Interface Standards. The Rollingstock or Rollingstock Configurations should only be authorised after the time for giving a notice under the above clause has expired.</p> <p data-bbox="1297 976 1885 1073">AN has deleted the references to Rollingstock Configurations as Schedule 5 includes the Maximum Gross Mass and Tare Weight of Rollingstock (rather than Rollingstock Configurations).</p> <p data-bbox="1297 1133 1898 1208">AN has deleted the references to Rollingstock as AN only issues TRAs and ATTs in respect of Authorised Rollingstock Configurations (not Authorised Rollingstock).</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
59	Discretionary System Amendment with negative financial impact	Clause 18.4 The QCA has not specified what the role of the Expert is where there is a disagreement between the Operator and AN about the Net Financial Effect on the Operator of a Discretionary System Amendment	To address this concern, AN has included drafting to clarify that where there is a disagreement between the Operator and AN about the Net Financial Effect on the Operator of a Discretionary System Amendment About Discretionary System Amendment The role of the Expert is to determine an appropriate financial arrangement to compensate the Operator for the Net Financial Effect on the Operator of the Discretionary System Amendment.
60	Management of Incident Response	Clause 22.4 The QCA has drafted a clause to cater for the management of incident responses on the network which AN largely agrees with. However, there are some concerns which need to be addressed.	AN has made some amendments to this clause as follows: <ul style="list-style-type: none"> • insertion of a reasonable endeavors obligation to consult and agree on the removal of Relevant Rollingstock within 6 hours following an Incident in clause 22.4(f)(iii) • Removal of the word “deliberate” in clause 22.2(k)(i)(A). As the removal of Rollingstock will be a deliberate permitted act by AN which could cause relevant damage or loss, the carve-out should be amended so that it does not extend to deliberate acts of AN. <p>In addition to the limitation of liability in clause 22.4(k), AN should have the benefit of an indemnity from the Operator. AN has included an indemnity in clause 22.4(l).</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
61	Notification	<p>Clause 24.11(d)</p> <p>The QCA has amended this clause to provide for a mutual obligation on the Operator and AN to provide each other with any notices, directions or orders relating to the operation of Train Services under this Deed that it receives from any Safety Regulator or Environmental Regulator</p>	<p>The purpose of this clause is to provide AN with the information and assurance necessary for it to discharge its obligations as Rail Infrastructure Manager, particularly in relation to potential safety or environmental risks to the network arising from the actions of rail operators. AN requires this information in order to manage matters that are not directly within its control. For example, a Regulator may provide a notice to the Operator in relation to wheel maintenance which AN, as Railway Infrastructure Manager, needs to know about given the safety implications for the network. A mutual obligation is not required in these circumstances, as AN is obliged through its safety management system to respond to notices of this kind by implementing operational restrictions and notifying operators.</p>
62	Inspection and audit rights	<p>Clause 25.2</p> <p>This clause provides for the right of inspection and audit of trains by AN</p>	<p>AN has included drafting to clarify that it should only exercise its right to require any of the Operator's Rollingstock to be available at such location as AN may reasonably require under clause 25.2(a) if it has a reasonable belief of non-compliance in accordance with clause 25.2(a). In those circumstances, AN should not be required to indemnify the Operator for its compliance with clause 25.2(a).</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
63	Claims and exclusion in respect of non provision of Operational Rights	Clause 28.4	<p>Consistent with the QCA's drafting in clause 24.4(b)(iv)(G) of the AA, AN has amended this clause to include an exclusion from liability where there has been a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor.</p> <p>We have also clarified the circumstances in which AN will be liable to the Operator where there has been an Operational Constraint. AN will only be liable if that Operational Constraint resulted from a breach of the TOD by AN or the negligence of AN. Please refer to our commentary in Item 1 of this Table and in Part 8 of AN's Submission in relation to Operational Constraint.</p>
64	Confidential Information	<p>Deleted the provision which allowed AN to use the Confidential Information provided to it for the purpose of:</p> <ul style="list-style-type: none"> • Capacity assessment; and • Planning infrastructure enhancements. 	<p>In AN's submission in April 2015, we explained that this provision had been included to expressly allow AN to use the Operator's Confidential Information for legitimate purposes in connection with its business. Importantly the use of the Confidential Information for those purposes remain subject to the confidentiality provisions in the TOD.</p> <p>The deletion of these two matters limits AN's ability to conduct its business efficiently if we are required to obtain consent to use information such as contracted Access Rights prior to being able to conduct capacity assessment and maintenance planning. The QCA has accepted this position in the corresponding clause 34.1(b) in the AA. Clause 36.1(b) should be consistent with clause 34.1(b) of the Access Agreement.</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
65	Schedule 9 – Part A	<p>Item 1: The QCA amended so the failure to provide the information required under clause 16.4 had a materiality threshold.</p> <p>Item 2: The QCA deleted reference to “or is likely to adversely affect” and “or is likely to cause”</p> <p>Item 3: The QCA deleted in its entirety</p>	<p>Item 1: AN has deleted the materiality threshold. The information required in clause 16.4 and by reference clause 1.2(b) of Schedule 10 is information which AN requires to safely operate train services and should not have a materiality threshold applied to it.</p> <p>Item 2: AN has reinserted the reference “or is likely to adversely affect” and “or is likely to cause” as the operation of the Train Service that does not comply with the Train Service Description has the ability to impact other future Train Services and AN should have the ability to suspend on this basis and not be required to wait until the impact occurs before it can suspend.</p> <p>Item 3: AN has reinserted Item 3. AN considers it necessary to have a right to suspend train services where the Operator is not compliant with its obligation to comply with the Train Service Description separate to the right under Item 2. Such non-compliances may still have an impact on the operation of the network. For example, an Operator may continually not adhere to load times which may have an impact on system capacity. To the extent the Operator continues it’s non-compliance following the Suspension Event and AN does not vary the Train Service Description under clause 14.2, AN should be entitled to exercise a right of termination.</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
66	Schedule 9 – Part B	<p>Item 2:</p> <ul style="list-style-type: none"> QCA deleted references to “or is likely to adversely affect” and “or is likely to cause” under the Suspension Event QCA deleted in its entirety the corresponding Termination Event. <p>Item 7:</p> <p>QCA inserted a requirement that AN promptly notifies the Operator of any such direction, notice or order by the Environmental Regulator.</p> <p>Item 8:</p> <p>QCA deleted in its entirety Item 8 from the Suspension and Termination Events.</p> <p>Item 11:</p> <p>QCA deleted in its entirety Item 11 from the Suspension and Termination Events.</p> <p>Item 12:</p> <p>The QCA deleted the corresponding Termination Event.</p>	<p>Item 2:</p> <ul style="list-style-type: none"> AN has reinserted the reference “or is likely to adversely affect” and “or is likely to cause” as the operation of the Train Service that does not comply with the Train Service Description has the ability to impact other future Train Services and AN should have the ability to suspend on this basis and not be required to wait until the impact occurs before it can suspend. AN has reinserted the corresponding Termination Event as to the extent the Operator is not compliant with its obligations in a material respect that non-compliance continues despite the Suspension Event, AN should have a right to terminate. <p>Item 7:</p> <p>AN has amended to clarify that AN’s obligation to notify the Operator of the relevant direction, notice or order where that direction, notice or order was given to AN. This is required as the Suspension and Termination event is in relation to direction, notices or orders provided to AN or the Operator.</p> <p>Item 8:</p> <p>AN has reinserted Item 8 as an Suspension and Termination Event. Given the potential consequences of activities that cause or threaten to cause serious environmental harm, AN requires the right to suspend or terminate.</p> <p>Item 11:</p> <p>AN has reinserted Item 11 as an Suspension and Termination Event. Given the potential consequences of an</p>

Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
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Operator failing to comply with applicable laws, Train Control Directions, Safeworking Procedures and Safety Standards , AN should have the right to suspend and in the case of continued breach terminate.

Item 12:

- AN has inserted a materiality threshold in Item 12 so the suspension and termination is only in relation to a failure to comply with material obligations
- AN has reinserted the corresponding Termination Event as to the extent the Operator is not compliant a material obligation and that non-compliance continues despite the Suspension Event, AN should have a right to terminate.

Incorporated Provisions

(these are provisions which are incorporated in and form part of the AA or TOD (as applicable) by operation of clause 3.1 of the AA or TOD (as applicable))

67	Clause 7.4 of the Access Undertaking	Transfers	These provisions are incorporated and form part of the AA by operation of clause 3.1 of the AA.	Please refer to AN's Submission in relation to Part 7 (Capacity Management) of the QCA's CDD in relation to Transfers and Short Term Transfers.
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Issue	CI	QCA Consolidated Draft Decision	Aurizon Network Commentary
68	Clause 7.4.3 of the Access Undertaking	Relinquishment Provisions These provisions are incorporated and form part of the A by operation of clause 3.1 of the AA.	AN has addressed some deficiencies in the drafting and reinstated previous drafting in relation to the assumptions that AN can make when assessing Transfer Fees, Relinquishment Fees and the Reduction Factor.
69	Clause 8.9 of the Access Undertaking	Conditional Access Provisions These provisions are incorporated and form part of the AA by operation of clause 3.1 of the AA.	AN has addressed some deficiencies in the drafting. Please refer to the revised draft marked up against the QCA's draft which has been submitted with this response.
70	clauses 2 to 4 of Schedule C of the Access Undertaking	IRMP Provisions The QCA has included Interface Risk Provisions in clauses 2 to 4 of Schedule C of the Access Undertaking. These provisions are incorporated and form part of the TOD by operation of clause 3.1 of the TOD.	AN has amended clause 2.2 of Schedule C to reinstate matters to be addressed when assessing environmental risk. AN has amended clause 4 of Schedule C of the Access Undertaking (audits and inspections) to reinstate aspects of AN's 2014 draft EUAA which were omitted by the QCA but which AN considers important in order to manage the parties' respective liability positions in relation to the conduct of audits and inspections.

[AN mark-up of](#) QCA Consolidated Draft Decision

Aurizon Network Pty Ltd

[Insert name of Access Holder]

Access Agreement – Coal

[Drafting note: References in this Agreement to clauses in the Train Operations Deed to be reviewed to ensure they refer to the correct clauses in the Train Operations Deed.]

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Date

Parties

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

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

Background

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

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

[AA Dispute Provisions has the meaning given in clause 35.1\(a\)\(ii\).](#)

[\[AN note: Included missing definition.\]](#)

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

Access has the meaning given in the Access Undertaking.

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

Access Charges means:

- (a) where the term is used in respect of a Billing Period, the Access Charges for that Billing Period as calculated in accordance with ~~the Access Charge Provisions~~[item 3.2 of schedule 4](#); and
- (b) otherwise, the charges calculated in accordance with ~~the Access Charge Provisions~~[schedule 4](#) and any interest payable in relation to such charges under this Agreement.

Access Charge Provisions means:

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

[AN note: The above definition amended as a consequence of inclusion of access charge provisions in schedule 4.]

[AN note: The above definition deleted as a consequence of inclusion of access charge provisions in schedule 4. See note in relation to clause 3.]

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

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

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

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

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

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

Access Seeker has the meaning given in the Access Undertaking.

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

[AN note: See amendments made to clause 3.1.]

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

Accredited means to have Accreditation.

Ad Hoc Train Service for a Train Service Type means:

- (a) a Network Train Service which is additional to the Nominated Monthly Train Services for that Train Services Type but which is otherwise in accordance with the Train Description for that Train Service Type; or

- (b) a Network Train Service which is not a Train Service for a Train Service Type but which Aurizon Network permits an Operator to operate for the Access Holder under this Agreement as if it was a Train Service for the Train Service Type (subject to any derogations to the Train Description for the Train Service Type permitted by Aurizon Network, which includes a change in the Origin and Destination for that Train Service Type provided that the changed Origin and Destination forms part of the Nominated Network).

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

Affected Train Service Type has the meaning given in [clause 10.2\(b\)](#).

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

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

Assessment Date has the meaning given in [clause 10.1](#).

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

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

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

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

Authority has the meaning given in the Access Undertaking.

Available Capacity has the meaning given in the Access Undertaking.

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

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

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

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

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

Capacity has the meaning given in the Access Undertaking.

Capacity Assessment has the meaning given in the Access Undertaking.

Capacity Shortfall has the meaning given in the Access Undertaking.

Change in Access Undertaking means:

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

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

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

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

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

Charge means:

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

Chargee has the meaning given in **clause ~~29.3-32.3~~**.

Chargor has the meaning given in **clause ~~29.3-32.3~~**.

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

Coal System has the meaning given in the Access Undertaking.

Collateral has the meaning given in the PPS Act.

Commencement Date means the date of this Agreement.

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

Compliant Nomination Requirements means:

- (a) subject to **paragraph (b)** of this definition, the Train Description for the Train Service Type which the Access Holder wishes to allocate to the nominee

Operator in the nominee Operator's new or existing Train Operations Deed (as applicable) must be the same as the Train Description for that Train Service Type in this Agreement;

- (b) in respect of each Train Service Type which is the subject of the nomination, the aggregate of:
- (i) the "Nominated Monthly Operational Rights (for a 30 day Month)" in the Train Description for that Train Service Type in the nominee Operator's Train Operations Deed; and
 - (ii) the "Nominated Monthly Operational Rights (for a 30 day Month)" in the Train Description for that Train Service Type in all other Train Operations Deeds related to this Agreement (if any),

[AN note: All Train Operations Deeds are related to this Agreement. See definition of "Train Operations Deed". The inclusion of the additional words in this clause creates uncertainty where the term is used in other clauses without the additional words.]

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

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

Conditional Access Provisions means:

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

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

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

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

- (c) is already in the public domain or becomes available to the public through means other than a breach of the confidentiality undertaking by the Parties under this Agreement;
- (d) was in the Recipient's lawful possession before the disclosure by the Discloser;

- (e) is received by the Recipient independently from a Third Party who is free to disclose such information, data or other matter to the Recipient; or
- (f) has ceased to retain its confidential nature, for example, where the disclosure of the information, data or other matter by the Recipient would no longer reasonably be expected to affect the commercial affairs of the Discloser.

Connecting Infrastructure has the meaning given in the Access Undertaking.

Consequential Loss means:

- (a) any loss of revenue, loss of profits or loss of production;
- (b) any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport;
- (c) loss of business opportunities;
- (d) loss of or damage to reputation or goodwill;
- (e) any wasted overheads or demurrage;
- (f) loss or damage arising out of any Claim by a Third Party;

[AN note: Third Party Claims were excluded as Consequential Loss under the UT3 standard access agreements. Consistent with the UT3 standard access agreements and common commercial practice, Aurizon Network considers that the Consequential Loss exclusion in this Access Agreement should extend to Third Party Claims.]

- (g) ~~(f)~~ loss of or damage to credit rating; and
- (h) ~~(g)~~ in respect of a breach of this Agreement, loss or damage that does not naturally, according to the usual course of things, ~~flowarise~~ from ~~athe~~ breach ~~of contract,~~

[AN note: This paragraph has been amended so that the drafting more closely aligns with the first limb in Hadley v Baxendale.]

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

- (i) ~~(h)~~ any costs or expenses incurred by the Party in connection with mitigating the effects of any breach of this Agreement by the other Party (including implementing a workaround solution in respect of or otherwise mitigating any failure of a Party to comply with the requirements (including warranties) of this Agreement) provided that if a loss arising from the breach of the Agreement is itself not recoverable because it is a Consequential Loss, the costs or expenses incurred in mitigating that loss must also be treated as (non-recoverable) Consequential Loss;
- (j) ~~(i)~~ a loss (including a loss arising out of a Claim by a Third Party) in respect of:
 - (i) the cost of repairing, replacing or reinstating any real or personal property of any person (including a Party) that has been lost, damaged or destroyed;
 - (ii) personal injury to or death of any person; or

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

Control has the meaning given in the Corporations Act.

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

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

Customer has the meaning given in the [Access Undertaking](#).

[AN note: Included missing definition.]

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

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

- (a) 2%; and
- (b) the Commonwealth Bank of Australia’s “Corporate Overdraft Reference Rate” (monthly charging cycle) quoted by the Commonwealth Bank of Australia on its public website for the last trading day of the previous Month (or in the event that such a rate is not so quoted at or in respect of any relevant date, such other similar rate as is quoted by a major commercial bank as agreed by the Parties or, failing agreement, as determined by an Expert under **clause 24.27**).

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

(a) in clause 10, has the meaning given in clause 10.1(a); and

(b) in clause 17, has the meaning given in clause 17.1(a).

[AN note: This definition amended due to the reinstatement of clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

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

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

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

Dispute has the meaning given in **clause 24.1.27.1**.

Dispute Notice has the meaning given in **clause 24.1.27.1**.

[AN note: Dispute Provisions not defined in the Access Undertaking.] Effective Date has the meaning given in ~~the Access Undertaking~~ clause 12.1(d)(ii).

[AN note: This definition used in reinstated clause 12.]

Emergency Possession has the meaning given in the Access Undertaking.

Environment has the meaning given in the *Environmental Protection Act 1994 (Qld)*.

Environmental Law has the meaning given in the Access Undertaking.

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

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

Evaluation Period has the meaning given in the Access Undertaking.

Expansion has the meaning given in the Access Undertaking.

Expert has the meaning given in ~~clause 24.3~~ 27.3.

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

Financial Obligation means any obligation of the Access Holder to:

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

FM Access Rights means the Access Rights for each Train Service Type which cannot be made available by Aurizon Network for an Operator to operate Train Services for the Access Holder due to damage to, or the destruction of, a part of the Nominated Network referred to in ~~clause 25.228.5~~ (assuming that part of the Nominated Network will not be repaired or replaced).

Force Majeure Event ~~has the meaning given in the Access Undertaking.~~ means any cause, event or circumstance, or combination of causes, events or circumstances, which:

~~**Force Majeure Provisions** means:~~

- (a) ~~the provisions of the Access Undertaking which include Force Majeure Events and the details of the application of the Force Majeure Event (which, as at the Commencement Date, is clause 7.7 of the Access Undertaking); and~~ is beyond the reasonable control of the affected Party; and
- (b) ~~any other provisions of the Access Undertaking which affect or relate to a Force Majeure Event.~~ by the exercise of due diligence the affected Party was not reasonably able to prevent or is not reasonably able to overcome,

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

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

- (d) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the affected Party is a party to such industrial action or would be able to influence or procure the settlement of such industrial action;
- (e) act of God;
- (f) war, invasion, terrorist act, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;
- (g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Good Engineering Practices;
- (h) malicious damage or sabotage;
- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (j) failure of electricity supply from the electricity grid;
- (k) delay, restraint, restriction, embargo or other material adverse effect arising from any act or omission of any Authority;
- (l) fire, flood, storm surge, cyclone, tornado, earthquake, washaway, landslide, explosion, severe weather conditions or other catastrophe or natural calamity;
- (m) epidemic or quarantine restriction; and
- (n) delay of a supplier due to any of the foregoing whether any such cause of delay exists before or after the Commencement Date.

[AN note: This definition is used in clause 28.2.]

[AN note: Aurizon Network considers that the force majeure provisions should not be a provision of the Access Undertaking and should be dealt with solely under the Access Agreement and Train Operations Deed.]

Former Incorporated Provisions has the meaning given in clause 3.2(b)(i).

[AN note: This definition used in amended clause 3.2.]

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

[AN note: This definition is used in paragraph (g) of the definition of "Force Majeure Event".]

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

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

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

recording events during the course of an Incident and liaison with external agencies.

Incremental Costs has the meaning given in the Access Undertaking.

Incorporated Provisions means each of the following provisions of the Access Undertaking:

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

[AN note: See comments in relation to clause 3.]

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

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

Infrastructure Enhancement has the meaning given in the Access Undertaking.

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

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

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

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

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

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

Interface Risk Provisions means:

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

[AN note: Given the matters to which clause 4.10.2 and Schedule A relate, it is not appropriate for them to be Interface Risk Provisions incorporated in this Agreement under clause 3.]

Interface Risk has the meaning given in the Access Undertaking.

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

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

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

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

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

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

Landowner has the meaning given in ~~clause 34.17.~~ 37.17.

Last Refusal Date means, in respect of a proposed Short Term Transfer, the latest date for the giving of a Short Term Transfer Refusal Notice under the Access Undertaking in respect of the proposed Short Term Transfer.

[AN Note: This definition used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

Law has the meaning given in the Access Undertaking.

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

[AN note: If the Train Service Type is a Through-Running Train Service Type, the Loading Facility will not be an “Origin” (which is the relevant Network Interface Point). For that reason, this definition should refer to “origin” rather than “Origin”.]

Loading Facility Confirmation has the meaning given to that term in the Access Undertaking.

[AN Note: This definition used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

Maintenance Work has the meaning given in the Access Undertaking.

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

Material Change means a:

- (a) Change in Relevant Taxes;
- (b) Change in Law;
- (c) Change in Access Undertaking; or
- (d) matter deemed to be a Material Change under **clause 34.1737.17(d)**.

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

[AN note: This definition used in schedule 4.]

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

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

[AN note: This definition used in reinstated clauses 10, 11 and 12 and in the Train Description.]

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

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

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

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

Month means calendar month.

Net Financial Effect on a Party of an event or circumstance means the net effect in financial terms of the occurrence of the event or circumstance on the Party in relation to performing its obligations and exercising its rights under this

Agreement and/or a Train Operations Deed including any increases in costs (whether capital or operating, fixed or variable) and other detriments incurred, or to be incurred, by the Party but deducting the amount of any savings or other benefits or advantages received, or to be received, by the Party, and on the basis that the Party uses reasonable endeavours to mitigate the net effect of the event or circumstance.

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

Network Incident has the meaning given in the Access Undertaking.

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

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

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

[New Incorporated Provisions has the meaning given in clause 3.2\(b\)\(i\).](#)

[AN note: This definition used in amended clause 3.2.]

[New Train Service Type has the meaning given in clause 10.2\(a\)\(i\).](#)

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

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

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

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

as varied in accordance with this Agreement.

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

Nominated Network FM Reduction Notice ~~has the meaning~~ means a notice given ~~in~~ under ~~clause 7.7 of the Access Undertaking~~ 28.5(d).

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

Non-Charging Party has the meaning given in **clause 29.3-32.3**.

Non-Defaulting Operator has the meaning given in **clause 10.2(a)**.

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated Monthly Train Services if Maximum Payload exceeded).]

Notice has the meaning given in **clause 33.1-36.1**.

Notice of Enquiry has the meaning given in **clause 11.1(a)**.

[AN note: This definition used in reinstated clause 11 (Access Holder initiated increase to Maximum Payload).]

Notice of Intention to Increase Nominal Payload has the meaning given in **clause 12.1(a)**.

[AN note: This definition used in reinstated clause 12 (Reduction in Nominated Monthly Train Services if Nominal Payload increased).]

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

Operational Constraint has the meaning given in the Access Undertaking.

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

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

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

~~**Other Conditional Access Holder** for:~~

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

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

Original Train Service Type has the meaning given in **clause 10.2(a)(ii)**.

[AN note: This definition used in reinstated clause 10 (Reduction of Nominated

Monthly Train Services if Maximum Payload exceeded).]

[AN note: See comments in relation to clause 9.]

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

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

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

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

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

Payload of a Train Service means the weight of product loaded onto any Train used in operating that Train Service.

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

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

Planned Possession has the meaning given in the Access Undertaking.

Possession has the meaning given in the Access Undertaking.

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

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

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

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

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

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

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

Railway Operator has the meaning given in the Access Undertaking.

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

Reduction Factor has the meaning given in the Access Undertaking.

Reduction Factor Provisions means:

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

Reduction Notice has the meaning given in **clause 10.1**.

Reference Tariff has the meaning given in the Access Undertaking.

Reference Tariff Provisions means:

- (a) the schedule of the Access Undertaking which includes the Reference Tariffs and the details of the application of the Reference Tariffs for a particular Reference Train Service (which, as at the Commencement Date, is **schedule F** of the Access Undertaking); and
- ~~(a)~~ ~~(b)~~ any other provisions of the Access Undertaking which affect or relate to the application or calculation of Reference Tariffs or access charges (including any TOP Charge).

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

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

Relevant Access Agreement means [an Access Agreement that contains a Short Term Transfer Provision.](#)

[AN Note: This definition used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

Relevant Access Holder means [the party that has been granted Access Holder under a Relevant Access Agreement.](#)

[AN Note: This definition used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

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

Relevant Rollingstock Configuration for a Train Service Type means [an Authorised Rollingstock Configuration for that Train Service Type which has a maximum Payload which exceeds the Maximum Payload for that Train Service Type.](#)

Relevant Short Term Transfer Notice has the meaning given in **clause 40.6(a)**.

[AN Note: This definition used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

Relevant Tax means any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on Aurizon Network by, or payable by Aurizon

Network to, any Authority but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.

Relinquishment Fee has the meaning given in the Access Undertaking.

[AN note: This definition used in clauses 11.2(a)(ii)(D), 11.3(b)(vi) and 15.2.]

Relinquishment Provisions means:

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

Resumption Notice has the meaning given in the Access Undertaking.

Resumption Provisions means:

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

Revised Maximum Payload for a Train Service Type means:

- (a) in **clause 10**, the amount calculated for that Train Service Type in accordance with **clause 10.4**; and
- (b) in **clause 12**, the amount calculated for that Train Service Type in accordance with **clause 12.2**.

[AN note: This definition used in reinstated clauses 10, 11 and 12.]

Revised Nominal Payload for a Train Service Type:

- (a) in **clause 10**, means the amount calculated for that Train Service Type in accordance with **clause 10.3**;
- (b) in **clause 11**, means the amount calculated for that Train Service Type in accordance with **clause 11.2(a)**; and
- (c) in **clause 12**, has the meaning given in **clause 12.1(d)(i)(A)**.

[AN note: This definition used in reinstated clauses 10, 11 and 12.]

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

- (a) in **clause 10**, the amount calculated for that Train Service Type in accordance with **clause 10.5**;
- (b) in **clause 11**, the amount calculated for that Train Service Type in accordance with **clause 11.2(a)**; and
- (c) in **clause 12**, the amount calculated for that Train Service Type in accordance with **clause 12.3**.

[AN note: This definition used in reinstated clauses 10, 11 and 12.]

Rollingstock means locomotives, carriages, Wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicles which operate on or use a Track, and where used in respect of an

Operator's Rollingstock includes Rollingstock which is owned, hired or leased by an Operator, supplied by a contractor of an Operator or is otherwise in the possession or control of an Operator.

Rollingstock Configuration has the meaning given in the Access Undertaking.

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

- (a) notified by Aurizon Network to the Access Holder; or
- (b) published on the Website,

(as amended and replaced from time to time).

Scheduled Time means the time of arrival or departure for a Train Movement at specified locations on the Nominated Network as set out in the Train Schedule or as amended by Aurizon Network from time to time on the day of operation pursuant to the Network Management Principles.

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

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

Security means:

- (a) a parent company guarantee in a form reasonably acceptable to Aurizon Network and from an Australian incorporated holding company (as defined in the Corporations Act) of the Access Holder that has an Acceptable Credit Rating;

[AN note: Aurizon Network considers that the holding company providing a parent company guarantee should be an Australian incorporated entity to allow Aurizon Network to evaluate its credit risk and to enable enforcement of the parent company guarantee.]

- (b) an unconditional and irrevocable bank guarantee in favour of Aurizon Network which:
 - (i) is issued by a trading bank holding a current Australian banking licence ~~and having a credit rating equivalent to or better than a Standard & Poor's BBB rating;~~that has an Acceptable Credit Rating;
[AN note: Drafting amended to be consistent with paragraph (a) above.]
 - (ii) requires the issuing bank to pay on demand by Aurizon Network, without recourse to the Access Holder or any other person, an amount or amounts up to the amount specified in the bank guarantee;
 - (iii) has no expiry date (or, if it is not possible for the Access Holder to obtain a bank guarantee with no expiry date, has an expiry date no

- earlier than 12 months after the date of issue of the bank guarantee);
- (iv) states that it is assignable by Aurizon Network to an assignee from Aurizon Network under this Agreement (subject to the relevant bank and the Access Holder being given notice of the identity of the assignee); and
 - (v) is otherwise in a form and upon terms reasonably acceptable to Aurizon Network; or
- (c) any other form of security reasonably acceptable to Aurizon Network, in a form and upon terms reasonably acceptable to Aurizon Network, as security for the due and proper performance by the Access Holder of its obligations under this Agreement.

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

Security Interest has the meaning given in **clause ~~34.20~~37.20(a)**.

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

Short Term Access Rights has the meaning given to that term in the Access Undertaking.

Short Term Transfer has the meaning given to that term in the Access Undertaking.

Short Term Transfer Notice has the meaning given to that term in the Access Undertaking.

Short Term Transfer Refusal Notice has the meaning given to that term in the Access Undertaking.

Short Term Transferee has the meaning given in **clause 40.3(a)**.

Short Term Transferor means a Relevant Access Holder that has given the Access Holder a Short Term Transfer Notice under its Relevant Access Agreement.

[AN Note: The above definitions used in clause 40 (Short Term Transfer of Access Rights by Access Holder).]

Split Train Service Type has the meaning given in **clause 10.2(a)**.

[AN note: This definition used in reinstated clauses 10, 11 and 12 and in the Train Description.]

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

[AN note: Included missing definition.]

State means the State of Queensland.

Stowage has the meaning given in the Access Undertaking.

Supplier has the meaning given in **clause ~~30.3~~33.3**.

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

Surplus Access Rights has the meaning given in **clause 11.2(a)(ii)(C)**.

[AN note: This definition used in reinstated clause 11 (Access Holder initiated increase to Maximum Payload).]

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

Suspension Notice has the meaning given under **clause ~~26.1~~29.1**.

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

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

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

Third Party Land has the meaning given in **clause ~~34.17~~37.17(a)**.

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

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

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

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

TOP Charge in respect of this Agreement:

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

Track has the meaning given in the Access Undertaking.

Train has the meaning given in the Access Undertaking.

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

- (a) ~~(e)~~ recording Train running times on Train diagrams and in Aurizon Network's information systems;
- (b) ~~(d)~~ reporting of Incidents occurring on the Infrastructure;
- (c) ~~(e)~~ managing Incidents occurring on the Infrastructure from within a Train Control centre;

- (d) ~~(f)~~ field Incident management;
- (e) ~~(g)~~ yard control services; and
- (f) ~~(h)~~ exchanging information with Railway Operators.

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

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

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

Train Movement has the meaning given in the Access Undertaking.

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

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

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

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

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

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

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

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

[Transfer Fee has the meaning given in the Access Undertaking.](#)

[\[AN note: This definition used in clause 15.2.\]](#)

Transfer Provisions means:

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

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

[Transferring Access Agreement has the meaning given in clause 40.6\(a\).](#)

[\[AN Note: This definition used in clause 40 \(Short Term Transfer of Access Rights by Access Holder\).\]](#)

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

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

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

[Unloading Facility Confirmation has the meaning given to that term in the Access Undertaking.](#)

[\[AN Note: This definition used in clause 40 \(Short Term Transfer of Access Rights by Access Holder\).\]](#)

Urgent Possession has the meaning given in the Access Undertaking.

[Variation Request Notice has the meaning given in clause 11.2\(b\).](#)

[\[AN note: This definition used in reinstated clause 11 \(Access Holder initiated increase to Maximum Payload\).\]](#)

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

Website has the meaning given in the Access Undertaking.

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

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

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

1.2 Interpretation

In this Agreement, unless expressed to the contrary:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes all other genders;
- (c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it; and

- (e) a reference to:
- (i) a person includes a partnership, unincorporated association, corporation or other entity, government or statutory body;
 - (ii) a person includes its legal personal representative, successors and assigns;
 - (iii) conduct includes any omission and any representation, statement or undertaking, whether or not in writing;
 - (iv) conduct includes a benefit, remedy, discretion, authority or power;
 - (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
 - (vi) the words “include”, “includes” or “including” must be read as if they are followed by the words “without limitation”;
 - (vii) writing includes:
 - (A) any mode of representing or reproducing words in tangible and permanently visible form, including fax transmission; and
 - (B) words created or stored in any electronic medium and retrievable in perceivable form;
 - (viii) time is to local time in Brisbane, Queensland;
 - (ix) “A\$”, “\$” or “dollars” is a reference to the lawful currency of Australia;
 - (x) this or any other document or agreement includes the document or agreement as novated, amended or replaced from time to time and despite any changes in the identity of the parties;
 - (xi) anything (including any amount) is a reference to the whole or part or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
 - (xii) under a clause includes in accordance with that clause;
 - (xiii) a clause or schedule is a reference to a clause or schedule (as applicable) in this Agreement;
 - (xiv) any legislation or any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;
 - (xv) any code, guideline, recommendation or policy, or any provision of any code, guideline, recommendation or policy, includes any modification of it, or the substitution of it or any of its provisions for others, unless otherwise specified or directed by Aurizon Network;
 - (xvi) any Authority, association or body whether statutory or otherwise (**first body**) is, if the first body ceases to exist or is re-constituted, re-named or replaced or the powers or functions of the first body is transferred to any other Authority, association or body (**replacement body**), deemed to refer to the replacement body established or

constituted in lieu of the first body or as nearly as may be succeeding to the powers or functions of the first body;

- (xvii) access or access rights does not include rights granted by Aurizon Network to a Railway Operator under a Train Operations Deed; and
- (xviii) the Access Holder, if the Access Holder is comprised of more than one entity (for example, if the Access Holder is comprised of the participants in an unincorporated joint venture), is a reference to each entity comprising the Access Holder.

1.3 References to Access Rights

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

1.4 Material published on the Website

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

1.5 Headings

Headings do not affect the interpretation of this Agreement.

1.6 Words and expressions defined in Access Undertaking

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

[AN note: As many words and expressions in this Agreement are defined by reference to the Access Undertaking (eg definitions of Train and Track), Aurizon Network would like to make clear that those words or expressions have the meaning given in the Access Undertaking at the date of this Agreement. Aurizon Network would also like to clarify that words and expressions used in Incorporated Provisions have the meaning given in the Access Undertaking at the time the Incorporated Provisions were incorporated into this Agreement under clause 3.1 or 3.2.]

1.7 ~~1.6~~ Inconsistency

- (a) If there is any inconsistency between the substantive terms of this Agreement (comprising **clauses 1 to 3640**) and the schedules of this Agreement, the substantive terms of this Agreement prevail to the extent of the inconsistency.
- (b) Subject to **clause 9.1(b)**, if there is any inconsistency between matters contained in the Access Undertaking (as amended by any Change in Access Undertaking) and this Agreement, the provisions of this Agreement

prevail to the extent of the inconsistency unless expressly provided to the contrary [in this Agreement](#).

2 Term

2.1 Term

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

2.2 Right to renewal

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

3 Access Undertaking

[\[AN note: Aurizon Network considers that if provisions from the Access Undertaking are incorporated into this Agreement:](#)

- [• clause 3.1 should operate to incorporate those provisions into this Agreement as in force under the Access Undertaking as at the Commencement Date.](#)
- [• it is not necessary to separately require Aurizon Network comply with provisions of the Access Undertaking incorporated into this Agreement under clause 3.1 because Aurizon Network will be bound to comply with those provisions as they will be separate terms of this Agreement.](#)
- [• clause 3.2 should operate to replace provisions of the Access Undertaking incorporated into this Agreement under clause 3.1\(a\) with the relevant provisions of the Access Undertaking as revised following a Change in Access Undertaking \(subject to either party giving an Amendment Notice\).](#)
- [• If the approach proposed by Aurizon Network is adopted, the definition of "Access Undertaking" does not need to be defined separately for the purposes of clauses 3.1 and 3.2.\]](#)

3.1 Incorporation

~~(a) —The parties agree that, for the purposes of the Access Undertaking, the~~

[\[AN note: The Access Holder is considered not an Access Seeker—under the Access Undertaking.\]](#)

~~(a)~~ [\(b\) Aurizon Network and the Access Holder must comply with the following under the Access Undertaking: Subject to clause 3.2, the following provisions of the Access Undertaking \(as in force as at the Commencement Date\) form part of this Agreement as if they were set out in full in this Agreement:](#)

- Interface Risk Provisions;
- Transfer Provisions;
- Relinquishment Provisions;
- Reduction Factor Provisions;

- ~~(v) Force Majeure Provisions;~~
- ~~(v) (vi) Resumption Provisions; and~~
- ~~(vi) (vii) Conditional Access Provisions.~~
- ~~(c) Aurizon Network and the Access Holder must comply with the following under the Access Undertaking:~~
 - ~~(i) Access Charge Provisions; and~~
 - ~~(ii) Reference Tariff Provisions.~~
- (b) The Reference Tariff Provisions of the Access Undertaking (as changed by a Change in Access Undertaking from time to time) form part of this Agreement as if they were set out in full in this Agreement.
- (c) (d) For the avoidance of doubt, the provisions set out in clause 3.1(b) and 3.1(c) form part of this Agreement as if they were set out in full in this Agreement and, despite any other provision in the Access Undertaking:
 - (i) ~~clause 24~~ clause 24 applies to any ~~claim~~ Claim in respect of a breach of any ~~such provision~~ Incorporated Provisions which form part of this Agreement under this clause 3; and
 - (ii) ~~clause 24~~ clause 27 applies in respect of any Dispute between the Parties in respect of any right or obligation (or in respect of the enforcement) of any ~~such provision~~ Incorporated Provisions which form part of this Agreement under this clause 3.

3.2 Changes in Access Undertaking

- (a) If there is a Change in Access Undertaking at any time relating to the provisions which changes any of the Incorporated Provisions set out in clause 3.1(ba), then this clause 3.2 applies.
- (b) A Party (Notifying Party) may, within 20 Business Days from the date of the Change in the Access Undertaking (or such longer period as the Parties may agree), notify (Amendment Notice) the other Party (Receiving Party) of:
 - (i) that it elects to amend this Agreement to replace the Incorporated Provisions which form part of this Agreement under clause 3.1(a) or this clause 3.2 (Former Incorporated Provisions) with the corresponding Incorporated Provisions as changed by the Change In Access Undertaking (New Incorporated Provisions); and
 - (ii) ~~(i) the~~ of any other changes to the other terms of this Agreement (if any) which the Notifying Party requires as a consequence of, or to give full effect to, any Change in Access Undertaking relating to the provisions set out in clause 3.1(b); and
 - ~~(ii) the date from which the changes become effective (and if any changes become effective from different dates, the dates applicable to each change), which must be on or after the date on which the Change in Access Undertaking became effective (Change Date(s)) the replacement of the Former Incorporated Provisions with the New Incorporated Provisions under this clause 3.2.~~

- (c) An Amendment Notice must include an amended version of this Agreement, with the changes referred to in **clause 3.2(b)(iii)** clearly identified.
- (d) Promptly following receipt of an Amendment Notice, the Receiving Party must notify the Notifying Party the extent to which the Receiving Party accepts or does not accept the drafting of the amendments to the terms of this Agreement proposed in the Amendment Notice ~~(but the Receiving Party must not refuse to accept the incorporation into this Agreement of the Changes in the Undertaking outlined in the Amendment Notice).~~

[AN note: This clause makes clear that a party does not have the ability to refuse to accept the incorporation of New Incorporated Provisions. This clause only relates to consequential amendments required to effect the change.]

- (e) If the Receiving Party does not accept the drafting of the amendments to the terms of this Agreement, then the Parties must promptly meet to negotiate and attempt to agree the changes to the terms of this Agreement (if any) which are necessary as a consequence of, or to give full effect to, ~~the Changes in the Undertaking specified in the Amendment Notice.~~ the replacement of the Former Incorporated Provisions with the New Incorporated Provisions under this clause 3.2.
- (f) If the Parties do not agree the amendments in respect of the matters outstanding under ~~clause 3.2(e) by the Change Date(s)~~ 3.2(e) (if any) within 20 Business after the Notifying Party gives the Amendment Notice, the matter must be referred to the QCA for determination in accordance with the ~~Dispute Provisions~~ provisions of the Access Undertaking which provide for the determination of disputes by the QCA.

[AN note: Dispute Provisions is not defined in the Access Undertaking.]

- (g) With effect on and from the date the relevant Change in Access Undertaking takes effect:
 - (i) the New Incorporated Provisions will form part of this Agreement as if set out in full in this Agreement;
 - (ii) the Former Incorporated Provisions will cease to form part of this Agreement; and
 - (iii) ~~(g) Amendments to~~ if applicable, the terms of this Agreement will be amended as:
- (A) ~~(i)~~ accepted under **clause 3.2(d)**;
 - (B) ~~(ii)~~ agreed under **clause 3.2(e)**; or
 - (C) ~~(iii)~~ determined by the QCA under **clause 3.2(f)**;
- ~~become effective from the Change Date(s) (or such other time as the QCA may determine).~~
- ~~(h) Within 10 Business Days from the date:~~
 - ~~(i) of the notice given under **clause 3.2(d)**;~~
 - ~~(ii) the Parties agree under **clause 3.2(e)**; or~~
 - ~~(iii) the QCA determines such amendments,~~

[AN note: Aurizon Network considers that the replacement of the Replaced Incorporated Provisions should take effect on the date the Change in Access Undertaking takes effect. It does not make sense to provide for the replacement to occur on an arbitrary later date nominated by the Notifying Party, particularly if there is not limit to when that date can be and the nomination of that date is not subject to dispute resolution. The Incorporated Provisions in the Access Undertaking will need to include transitional arrangements to cater for matters which are being dealt with under the Former Incorporated Provisions at the time of the Change in Access Undertaking.]

(h) Within 10 Business Days from the date that the amendments to the terms of this Agreement are accepted, agreed and/or determined (as applicable) under this clause 3.2, Aurizon Network must prepare and send to the Access Holder a copy of this Agreement as modified.

4 Access Rights

4.1 Grant of Access Rights

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

4.2 Nature and scope of Access Rights

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

4.3 Exercise of Access Rights and Operator nomination

- (a) The Parties acknowledge and agree that:
 - (i) the grant of the Access Rights to the Access Holder does not entitle the Access Holder to itself operate Train Services on the Nominated Network (unless it is also an Accredited Railway Operator and is nominated as an Operator in accordance with this Agreement);
 - (ii) the Access Holder can only utilise the Access Rights by nominating an Operator from time to time, in accordance with this Agreement; and
 - (iii) the Access Holder may nominate more than one Operator.
- (b) Subject to **clause 4.6(a)**, the Access Holder may, from time to time, provided that it is not in material breach of any of its obligations under this Agreement, nominate an Operator to utilise all or part of the Access Rights upon giving at least 20 Business Days prior written notice to Aurizon Network. The notice must:

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

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

4.4 Access Interface Deed

- (a) If the Access Holder proposes to utilise any Access Rights to provide Train Services for a Train Service Type for or on behalf of a Customer:
 - (i) the Access Holder must notify Aurizon Network and the nominated Operator for those Train Services that those Train Services will be operated for or on behalf of the Customer;

[AN note: This is to reflect that the Access Holder may not be the Customer or the Operator. The Operator will be prohibited under the Train Operations Deed from operating the Train Services until an AID is executed.]
 - (ii) the Access Holder must have procured the Customer to execute and deliver the Access Interface Deed to Aurizon Network prior to the Operator commencing to operate any Train Services for that Customer;
 - (iii) prior to the Customer executing the Access Interface Deed, the Access Holder must provide the Customer with a copy of the "Access

Agreement Liability Provisions” (as defined in the Access Interface Deed); and

(iv) ~~(a) If the Access Holder has entered into this Agreement for or on behalf of a Customer (as that term is defined in the Access Undertaking), prior to or on the date it exercises its rights under clause 4.3(b), the Access Holder must if a Customer does not~~ execute and deliver the Access Interface Deed to Aurizon Network: within two months after the Train Service Commitment Date for that Train Service Type, then:

(A) Aurizon Network may, by notice to the Access Holder and the Operator, reduce the Access Rights by the Train Services for that Train Service Type; and

(B) those Access Rights will cease to form part of the Access Rights under this Agreement on and from the date such notice is given to the Access Holder and the Operator.

[AN note: Under UT3, Aurizon Network has the right to terminate the Access Agreement if the Access Interface Deed is not executed within the required timeframe. Aurizon Network considers that it should have a similar right of termination under this Agreement.]

- (b) As soon as practicable after receiving the Access Interface Deed duly executed by the ~~Access Holder~~Customer, Aurizon Network must:
- (i) ~~provide a copy of~~notify the Access Holder that the Customer has executed the Access Interface Deed ~~to the Access Holder~~; and
 - (ii) if the Access Holder is not the Operator, notify the Operator in writing that the Access Interface Deed has been executed by the ~~Access Holder~~Customer and Aurizon Network.

4.5 Changes to Operator nominations

- (a) The Access Holder may, from time to time, upon giving at least 2 Business Days prior written notice to Aurizon Network and each affected Operator:
- (i) vary any nomination previously given by the Access Holder under this Agreement so as to vary either or both of the following:
 - (A) the Access Rights which the Access Holder has allocated to an Operator; or
 - (B) the period for which the Access Rights are to be allocated to an Operator (provided that the period does not extend beyond the ~~expiry date~~Train Service Expiry Date for the relevant Train Path ~~(as that term is defined in the Access Undertaking)~~Service Type); or
 - (ii) withdraw any nomination previously given by the Access Holder under **clause 4.3(b)** or this **clause 4.5(a)**; and
 - (iii) if the variation or withdrawal of a nomination results from the operation of clause [10.2(d)] under a Train Operations Deed, the Access Holder may nominate, in accordance with **clause 4.3**, an alternative Operator to utilise the “Category 1 Reduced Operational Rights” (as defined in the Train Operations Deed) and/or the

“Category 2 Reduced Operational Rights” (as defined in the Train Operations Deed) (as applicable).

- (b) Aurizon Network must notify the Access Holder and the Operator if it accepts or rejects (providing its reasons) in accordance with **clauses 4.3(d)(ii) to 4.3(d)(iv)(B)** the variation within the lesser of 10 Business Days or the period remaining prior to the relevant Intermediate Train Plan being finalised.
- (c) Where an Operator receives an increased allocation of Access Rights following a varied nomination in accordance with this **clause 4.5**, and the date on which that variation commences is during the period covered by the then current Intermediate Train Plan, then Aurizon Network will schedule any additional Train Services ordered by the Operator to the extent permitted in accordance with the Network Management Principles.
- (d) If Aurizon Network rejects the nomination, it must ~~facilitate~~ seek to resolve with the resolution of Access Holder any matter the subject of its reasons for the rejection.
- (e) If Aurizon Network accepts the nomination, it must promptly do all things reasonably required to ensure that any delay to Train Services is minimised to the extent practicable including vary the relevant Train Operations Deed to include the right to operate Train Services utilising the Access Rights (or the “Category 1 Reduced Operational Rights” (as defined in the Train Operations Deed) and/or the “Category 2 Operational Rights” (as defined in the Train Operations Deed), as applicable) in respect of which the Operator was nominated.

4.6 Nominations with different Train Descriptions

- (a) If at any time:
 - (i) the Access Holder intends to:
 - (A) nominate an Operator to utilise all or part of the Access Rights;
or
 - (B) vary a nomination previously given by the Access Holder;
and the Train Services of the relevant Operator will have a Train Description different from that contemplated in **Schedule 2**; or
 - (ii) the Access Holder otherwise wishes to vary the Train Services from the Train Description nominated in **Schedule 2**,
- then:
- (iii) prior to nominating the Operator or varying the nomination, Aurizon Network and the Access Holder must negotiate and endeavour to agree any amendments to this Agreement (including any amendments to the Access Rights and, subject to **clause 4.6(b)**, the Access Charge Rates) that may be necessary to reflect the Train Description of the Train Services to be operated by the relevant Operator for that part of the Access Rights to be allocated to that Operator; and
 - (iv) no amendment to the Access Rights that results in the Access Holder being granted increased rights to access the Nominated Network has

any effect unless and until the Access Holder and Aurizon Network have complied with Aurizon Network's Access Undertaking (as amended by any Change in Access Undertaking) (including with respect to the allocation of those increased Access Rights).

- (b) Any variation to the Access Charge Rates under **clause 4.6(a)(iii)**:
 - (i) must not exceed the amount required to fully compensate Aurizon Network for:
 - (A) any reasonable increase in cost or risk to Aurizon Network; or
 - (B) any increase in utilisation of Capacity.
 - ~~(i) — must not exceed the amount required to compensate Aurizon Network for any reasonable and direct increase in cost to Aurizon Network~~ arising from the nomination, or variation to the nomination of, the Operator; and
 - (ii) must be reasonably justified (including calculations) by Aurizon Network to the Access Holder.

4.7 Reduction of rights resulting in an Over-Allocation

If at any time:

- (a) ~~the Access Rights of either:~~
 - (i) the Access Rights of the Access Holder are reduced, relinquished or transferred under this Agreement; or
 - (ii) the Nominated Monthly Train Services in respect of a Train Service Type are reduced or varied under this Agreement ~~or the Operator's Train Operations Deed~~; and

[AN note: It is not clear how the Nominated Monthly Train Services can be reduced or varied under a Train Operations Deed in a manner that results in an Over-Allocation.]

- (b) as a result of such reduction, relinquishment or transfer of Access Rights or reduction or variation of Nominated Monthly Train Services in respect of a Train Service Type, the Access Rights allocated by the Access Holder to any one or more Operators under **clause 4.3** or **4.4.5** for a Train Service Type exceed, in aggregate, the Access Holder's Access Rights under this Agreement for that Train Service Type following the reduction, relinquishment or transfer (such excess being the **Over-Allocation**),

then, unless the Access Holder varies the nominations in accordance with **clause 4.5(a)** within 2 Business Days of such reduction, relinquishment ~~or~~ transfer or variation to eliminate the Over-Allocation, the Access Holder will be deemed to have varied the nominations in accordance with **clause 4.5(a)** as follows:

- (c) if the Access Holder has nominated only one Operator for that Train Service Type, reducing the Access Rights for that Train Service Type which the Access Holder has allocated to the Operator under its Train Operations Deed by the Over-Allocation; or
- (d) if the Access Holder has nominated multiple Operators in respect of an affected Train Service Type, reducing the Access Rights for that Train Service Type which the Access Holder has allocated to each Operator

under this Agreement and each Operator's respective Train Operations Deed by a share of the Over-Allocation that is as closely as possible proportionate to the Train Services allocated to the Operator for the affected Train Service Type as a share of the total Train Services allocated to all Operators for that Train Service Type,

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

4.8 Operation of Ad Hoc Train Service

If:

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

then:

(c) to the extent permitted by the Network Management Principles, Aurizon Network:

- (i) must if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking; or
- (ii) otherwise must use reasonable endeavours to,

~~(c) to the extent permitted by the Network Management Principles, Aurizon Network must (if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking but otherwise must use reasonable endeavours to)~~ schedule the Ad Hoc Train Service for the Train Service Type in the Daily Train Plan; and

- (d) on and from the time that the Ad Hoc Train Service is scheduled in the Daily Train Plan, the terms and conditions of this Agreement apply to the Ad Hoc Train Service as if the Ad Hoc Train Service is a Train Service for the Train Service Type the relevant Operator is entitled to operate utilising the Access Rights for that Train Service Type.

4.9 Supply Chain Rights

- (a) The Access Holder must demonstrate to the satisfaction of Aurizon Network (acting reasonably) that the Access Holder holds, or has the benefit of, or is reasonably likely to hold, or have the benefit of, Supply Chain Rights for the commencement of the operation of the Train Services for each Train Service Type.
- (b) The Access Holder may not nominate an Operator under this Agreement in respect of a Train Service Type for which the Access Holder does not hold, or have the benefit of, Supply Chain Rights for those Train Services.

- (c) The Access Holder must, for each Train Service Type, use all reasonable endeavours to continue to hold, or have the benefit of, those Supply Chain Rights until at least the Train Service Expiry Date for the Train Service [Type](#), provided that if the term of any Supply Chain Rights expires or terminates prior to the Train Service Expiry Date for that Train Service [Type](#), the Access Holder must use reasonable endeavours to secure equivalent Supply Chain Rights for the period until the Train Service Expiry Date for that Train Service [Type](#).
- (d) If, prior to the commencement of the operation of the Train Services for each Train Service Type, Aurizon Network:
 - (i) acting reasonably, considers the Access Holder's circumstances have changed; and
 - (ii) notifies the Access Holder that it requires details of the changed circumstances,

the Access Holder must, within 10 Business Days after its notice, provide Aurizon Network reasonable details of:
 - (iii) the Supply Chain Rights for the Train Services for a Train Service Type that the Access Holder holds, or has the benefit of at the time; and
 - (iv) if applicable, the steps which the Access Holder has taken, or intends to take to secure any additional, renewed, extended or replacement Supply Chain Rights for the Train Services for the Train Service Type and the status of any such steps.

5 Billing and payments

5.1 Charges

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

5.2 Invoicing

- (a) As soon as reasonably practicable after the end of each Billing Period, Aurizon Network must give to the Access Holder an invoice for:
 - (i) the Access Charges for that Billing Period; plus

- (ii) any amounts payable but unpaid by the Access Holder to Aurizon Network under this Agreement, and which have not previously been invoiced, as at the end of the Billing Period.
- (b) Aurizon Network ~~must~~ is not required to give the Access Holder an invoice under **clause 5.2(a)** after the end of a Billing Period ~~even~~ if no amount is required to be invoiced under **clause 5.2(a)** for that Billing Period.

[AN note: Aurizon Network does not understand why it should be obliged to provide an invoice to the Access Holder when no amount is payable. This imposes an unnecessary administrative burden for which there is no reasonable justification.]

- (c) If this Agreement terminates or expires on a date other than 30 June then, as soon as reasonably practicable after the first 30 June to occur after the termination or expiry of this Agreement, Aurizon Network must give to the Access Holder an invoice for the TOP Charge (if any) for the Year during which this Agreement terminated or expired.
- (d) Each invoice given under this **clause 5.2** must be accompanied by reasonable details of Aurizon Network's calculation of the amounts claimed in the invoice including a breakdown of the Access Charges and itemised description of any other amounts (for the amounts ~~in~~ deducted under clause 5.6, particulars must include the amounts against which the ~~set-off~~ deduction is applied).

5.3 Payment

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

5.4 Disputes

- (a) Any Disputes in connection with an amount claimed in an invoice ~~must be resolved in accordance with clause 24.~~
 - (i) must be resolved in accordance with clause 27; and

(ii) which is not resolved in accordance with clause 27.2, may be referred by either Party to an Expert for determination in accordance with clause 27.3.

[AN note: Unless a party has an express right to refer such a dispute to an expert, it cannot do so without the agreement of the other party.]

- (b) Despite **clause 5.4(a)**, if an amount claimed in an invoice given by Aurizon Network under **clause 5.2** is Disputed, then unless the amount is nil due to the operation of **clause 5.6**, the Access Holder must pay to Aurizon Network:
- (i) the portion of the amount claimed in the invoice that is not in Dispute; and
 - (ii) 50% of the portion of the amount claimed in the invoice that is in Dispute,
- within the time specified in **clause 5.3(a)(i)**.
- (c) Upon resolution of any Dispute about an amount claimed in an invoice given by Aurizon Network, if the total amount which Aurizon Network was entitled to claim in the invoice (as resolved) is:
- (i) more than the amount paid by the Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 5.5** (from the date when the amount in Dispute would have been due and payable under **clause 5.3(a)(i)** but for **clause 5.4(b)**, until the date on which the difference, together with any interest, has been paid in full), must be paid by the Access Holder to Aurizon Network within 20 Business Days after the resolution of the Dispute; or
 - (ii) less than the amount paid by the Access Holder, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 5.5** (from the date when the amount in Dispute was paid by the Access Holder until the date on which the credit is applied or the amount is paid (as applicable) under this **clause 5.4(c)(ii)**), must be:
 - (A) applied by Aurizon Network as credit in favour of the Access Holder against the amount claimed in the next invoice to be issued by Aurizon Network to the Access Holder under **clause 5.2** after the resolution of the Dispute (and, if necessary, to subsequent invoices issued by Aurizon Network under **clause 5.2** until the amount of the difference (including any interest) has been fully credited in favour of the Access Holder against amounts payable under invoices issued by Aurizon Network to the Access Holder under **clause 5.2**); or
 - (B) if there will be no further invoices issued by Aurizon Network to the Access Holder under **clause 5.2** after the resolution of the Dispute or the last credit referred to in **clause 5.4(c)(ii)(A)**, paid by Aurizon Network to the Access Holder within 20 Business Days after resolution of the Dispute or the last credit referred to in **clause 5.4(c)(ii)(A)** (as applicable).

5.5 Interest on overdue payments and Disputed amounts

- (a) Without prejudice to the rights, powers and remedies of a Party under this Agreement or otherwise at Law, if for any reason a Party does not pay an amount payable under or in connection with this Agreement on or before the due date for payment, then that Party must pay interest on the outstanding amount calculated in accordance with this **clause 5.5**.
- (b) Interest accrues on outstanding amounts from the due date for payment until that amount, together with the interest on that amount, has been paid in full.
- (c) Interest under **clauses 5.4(c)(i), 5.4(c)(ii) and 5.5(b)** is calculated at the Default Rate. Any interest accrued but unpaid at the end of each Month is capitalised and, once capitalised, will itself bear interest.

5.6 Right of set-off

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

5.7 Consequences of failure to comply with Performance Levels

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

amount to the Access Holder within 10 Business Days after receipt of an invoice from the Access Holder.

6 Security

6.1 Requirement to provide Security after Commencement Date

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

6.2 Requirement to provide Security on certain events occurring

- (a) If at any time during the Term when the Access Holder is not required to provide Security to Aurizon Network under this **clause 6**:
 - (i) the Access Holder does not pay any amount (together with any interest) payable under this Agreement and which is not the subject of a Dispute by the due date for payment or within five Business Days after Aurizon Network gives written notice to the Access Holder requiring payment; ~~or~~
 - (ii) if the Access Holder has been assigned a credit rating by an internationally recognised ratings agency, it does not have an Acceptable Credit Rating; or

[AN note: Aurizon Network considers that if the Access Holder has been assigned a credit rating and that rating is not an Acceptable Credit Rating, Aurizon Network should be entitled to require the Access Holder to provide Security. It should not be necessary for Aurizon Network to wait until the Access Holder is no longer financially sound or insolvent before Aurizon Network can require the Access Holder to provide additional Security (particularly as the Access Holder will not be able to do so in those circumstances).]

- (iii) ~~(ii)~~-Aurizon Network considers (acting reasonably) that the Access Holder may:
 - (A) no longer be financially sound;
 - (B) no longer be able to meet its debts as and when they fall due; or
 - (C) not otherwise be capable of performing its obligations under this Agreement,

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

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

- (ii) the Access Holder ceasing to have an Acceptable Credit Rating.

6.3 Requirement to provide Security for the Security Amount

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

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

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

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

6.4 Requirement to provide Security for additional Train Service Type

Without limiting **clause 6.3**, if:

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

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

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

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

6.5 Replacement of Security

[AN note: Aurizon Network considers that the Access Holder should be required to replace Security provided under clause 6 in the circumstances provided in this clause.]

- (a) The Access Holder may, with Aurizon Network's consent, replace any Security provided by the Access Holder under this **clause 6** with replacement Security which satisfies the requirements of this **clause 6**.
- (b) If:
- (i) the Security provided by an Access Holder under this clause 6 is a bank guarantee and, at any time, the issuer of that bank guarantee ceases to have an Acceptable Credit Rating; or
 - (ii) the Security provided by an Access Holder under this clause 6 is a parent company guarantee from a holding company and, at any time, that holding company ceases to have an Acceptable Credit Rating,
- then, within 10 Business Days after the earlier of:
- (iii) the date the Access Holder becomes aware that the issuer or holding company (as applicable) has ceased to have an Acceptable Credit Rating; and
 - (iv) the date Aurizon Network notifies the Access Holder that the issuer or holding company (as applicable) has ceased to have an Acceptable Credit Rating,
- the Access Holder must replace that bank guarantee or parent company guarantee (as applicable) with replacement Security which satisfies the requirements of this clause 6.
- (c) If the Security provided by an Access Holder under this clause 6 is a bank guarantee that has an expiry date, then:
- (i) the Access Holder must, at least 20 Business Days prior to the expiry of the bank guarantee, deliver to Aurizon Network replacement Security which satisfies the requirements of this clause 6; and
 - (ii) if the Access Holder does not deliver to Aurizon Network replacement Security in accordance with clause 6.5(c)(i):
 - (A) Aurizon Network may, in its absolute discretion, draw on the existing bank guarantee;
 - (B) any such amount drawn by Aurizon Network (Cash Deposit) will be treated as a deposit of cash delivered by or on behalf of the Access Holder as Security under this Agreement in place of the relevant bank guarantee;
 - (C) this clause 6 will apply (with any necessary changes) in respect of the Cash Deposit; and

(D) if requested by the Access Holder at any time, Aurizon Network must return the Cash Deposit to the Access Holder in exchange for the Access Holder delivering to Aurizon Network replacement Security which satisfies the requirements of this clause 6.

6.6 Recourse to Security

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

- (a) if the Access Holder fails to pay the amount by the due date for payment under this Agreement, Aurizon Network notifies the Access Holder of ~~at~~ the payment default ~~under item 1 of Schedule 6~~ and the Access Holder fails to remedy the payment default within ~~20~~10 Business Days after the date the notice is given, following the expiry of such period;
- (b) if the amount is not payable by a specified date and the Access Holder fails to make payment within ~~20~~10 Business Days after Aurizon Network has requested payment of such amount, following the expiry of such period; or
- (c) if the amount is the subject of a Dispute, in accordance with **clause 5.4(c)(i)**.

[AN note: The above amendment clarifies that Aurizon Network can have recourse to Security in respect of amount payable under, and in connection with, this Agreement.]

6.7 Review of requirement to provide Security

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

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

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

6.8 Return of Security

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

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

7 Accreditation

- (a) Aurizon Network must have and maintain Accreditation to the extent required to perform its obligations and exercise its rights under this Agreement and, if requested to do so in writing by the Access Holder, provide to the Access Holder copies of documentation evidencing currency, renewal or amendment of its Accreditation within five Business Days of such request.
- (b) Aurizon Network must notify the Access Holder as soon as possible of any notice from an Authority affecting, or likely to affect, its Accreditation, and must provide a copy of that notice to the Access Holder on request.
- (c) Despite any other provision of this Agreement, Aurizon Network will not be in breach of this Agreement with respect to any act or omission to the extent that the act or omission is reasonably required in order for Aurizon Network to:
 - (i) comply with its Accreditation; or
 - (ii) ensure that its Accreditation is not at risk of:
 - (A) amendment such that it cannot perform its role as Rail Infrastructure Manager (as defined in the Access Undertaking) for the Infrastructure; or
 - (B) suspension, cancellation or revocation.

[AN note: Aurizon Network's obligation to comply with its Accreditation is a paramount obligation. Aurizon Network considers that it should not be liable for breach of this Agreement for an act or omission if the act or omission is required for the above reasons. Aurizon Network should not be required to do anything under this Agreement that would put its Accreditation at risk.]

8 Resumption of Access Rights

- (a) Unless otherwise specified in this Agreement, Aurizon Network may resume some or all of the Access Rights in accordance with the Resumption Provisions- which form part of this Agreement under clause 3.
- ~~(b) The Access Holder and Aurizon Network must comply with~~ [AN note: As the Resumption Provisions, are Incorporated Provisions under clause 3.1, the above clause is not required.]
- ~~(b)~~ ~~(e)~~ Within the later of two Business Days after:
 - (i) a Resumption Notice is given to the Access Holder; and
 - (ii) the resolution of the Dispute if:
 - (A) there is a Dispute in connection with a decision by Aurizon Network to resume the Access Holder's Access Rights; and
 - (B) the outcome of the Dispute is that the Access Rights ~~must~~may be resumed,

the Access Holder may give notice to Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which

the Access Holder has allocated to an Operator to take into account any resumption of Access Rights determined or agreed under the Resumption Provisions [which form part of this Agreement under clause 3](#) or as determined under the relevant dispute resolution process.

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

9 Reduction of Conditional Access Rights due to Capacity Shortfall

9.1 Application

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

9.2 Conditional Access Rights

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

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

~~(c) — the Access Holder and Aurizon Network must comply with~~ [AN note: As the Conditional Access Provisions are Incorporated Provisions under clause 3.1, this clause is not required.]

9.3 Effect on Operator nominations

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

[AN note: As the QCA has deleted provisions which dealt with Aurizon Network inviting other conditional access holder to participate in a dispute, this clause has been amended to remove the reference to a joint dispute process.]

the Access Holder may notify Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which the Access Holder has allocated to an Operator to take into account the variation to the Conditional Access Rights under ~~this~~ Conditional Access Provisions which form part of this Agreement under clause 9.3.

- (b) Except to the extent that the Access Holder has given a notice as contemplated in **clause 9.3(a)** in respect of the variation to the Conditional Access Rights under ~~this~~ the Conditional Access Provisions which form part of this Agreement under clause 9.3 for each affected Train Service Type, the variation to the Conditional Access Rights for each affected Train Service Type:
- (i) are deemed to reduce the Access Rights for that Train Service Type for which the Access Holder has not nominated an Operator; and
 - (ii) if, after the operation of **clause 9.3(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, **clause 4.7** applies in respect of that Over-Allocation.

9.4 Future capacity developments

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

[AN note: For the reasons stated in Aurizon Network's previous submissions, Aurizon Network considers that clauses 10, 11 and 12 should be included in the Access Agreement.]

10 Reduction of Nominated Monthly Train Services if Maximum Payload exceeded

10.1 Notification of reduction of Nominated Monthly Train Services

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

(b) The Reduction Notice must:

(i) specify:

(A) the Average Annual Payload for the Affected Train Service Type as at the Assessment Date;

(B) the Revised Nominal Payload for the Affected Train Service Type;

(C) the Revised Maximum Payload for the Affected Train Service Type; and

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

including reasonable details of the calculation of those amounts; and

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

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

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

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

10.2 Determining the Affected Train Service Type

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

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

(ii) the Train Service Type operated by the Non-Defaulting Operator

(Original Train Service Type).

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

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

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

(v) subject to clauses 10.2(a)(iii) and 10.2(a)(iv), the Train Description for:

(A) the New Train Service Type; and

(B) the Original Train Service Type.

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

(b) The Affected Train Service Type is:

(i) if clause 10.2(a) applies, the New Train Service Type operated by the Defaulting Operator; and

(ii) in any other case, the Train Service Type operated by the Defaulting Operator which has exceeded the Maximum Payload.

10.3 Calculation of Revised Nominal Payload

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

10.4 Calculation of Revised Maximum Payload

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

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

where:

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

RNP \equiv the Revised Nominal Payload for the Affected Train Service Type

CF \equiv 1.02 (or such other conversion factor agreed between the Parties)

10.5 Calculation of Revised Nominated Monthly Train Services

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

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

where:

RNMTS \equiv the Revised Nominated Monthly Train Services for the Affected Train Service Type

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

IT \equiv the Indicative Tonnage for the Train Service Type

RNP \equiv the Revised Nominal Payload for the Affected Train Service Type

10.6 Dispute

- (a) If Aurizon Network gives the Access Holder a Reduction Notice in respect of an Affected Train Service Type, the Access Holder may, within 20 Business Days after Aurizon Network gives the Reduction Notice to the Access Holder, give Aurizon Network a Dispute Notice which Disputes the Reduction Notice in accordance with **clause 27**.
- (b) If a Dispute referred to in **clause 10.6(a)** is not resolved in accordance with **clause 27.2**, then the Parties must refer the Dispute to an Expert to determine:
- (i) the Average Annual Payload for the Affected Train Service Type as at the relevant Assessment Date; and
 - (ii) if the Expert determines that the Average Annual Payload for the Affected Train Service Type as at the relevant Assessment Date exceeds the Maximum Payload for the Train Service Type:
 - (A) the Revised Nominal Payload for the Affected Train Service Type;
 - (B) the Revised Maximum Payload for the Affected Train Service Type; and
 - (C) the Revised Nominated Monthly Train Services for the Affected Train Service Type.

- (c) If the Access Holder does not give Aurizon Network a Dispute Notice referred to in **clause 10.6(a)** within the time referred to in **clause 10.6(a)**, then:
- (i) the Access Holder must not give Aurizon Network a Dispute Notice Disputing the relevant Reduction Notice or the variation of the Nominal Payload, Maximum Payload or the Nominated Monthly Train Services for the relevant Affected Train Service Type under this **clause 10**;
 - (ii) any such Dispute Notice which is given by the Access Holder will be taken to be of no effect; and
 - (iii) the Access Holder will not have, and must not make, any Claim against Aurizon Network in respect of that Dispute.

10.7 Variation to Train Description

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

- (a) the Nominal Payload for the Train Service Type operated by the Defaulting Operator will be taken to be the Revised Nominal Payload for the Train Service Type;
- (b) the Maximum Payload for the Train Service Type operated by the Defaulting Operator will be taken to be varied to be the Revised Maximum Payload for the Train Service Type; and
- (c) the Nominated Monthly Train Services for the Train Service Type operated by the Defaulting Operator will be taken to be varied to be the Revised Nominated Monthly Train Services for the Train Service Type,

as:

- (d) specified in the relevant Reduction Notice; or
- (e) if **clause 10.6(a)** applies, agreed or determined through the Dispute resolution process under **clause 27**.

with effect on the later of:

- (f) the date specified in the relevant Reduction Notice; and
- (g) if the Access Holder gives Aurizon Network a Dispute Notice referred to in **clause 10.6(a)**, the date agreed through the Dispute resolution process, or the date the Expert notifies the Parties of his or her determination, under **clause 27**.

10.8 Variation to Train Operations Deeds

Where there is a variation to a Train Description in accordance with **clause 10.7**:

- (a) the Access Holder will be deemed to have given a notice to Aurizon Network to reduce the number of Nominated Monthly Train Services the Defaulting Operator may operate for that Train Service Type utilising the Access Rights under a Train Operations Deed in accordance with the Reduction Notice; and
- (b) Aurizon Network shall provide written notice of that reduction to the Defaulting Operator as soon as practicable and shall:

- (i) issue a notice to the Access Holder setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in **schedule 2** of this Agreement for each of:
 - (A) the Affected Train Service Type; and
 - (B) the Original Train Service Type (if applicable); and
- (ii) issue a notice to the Defaulting Operator and the Access Holder setting out the changes to the Train Description and the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of the Defaulting Operator’s Train Operations Deed.

10.9 No prejudice to other rights

This **clause 10** does not prejudice Aurizon Network’s other rights and remedies in respect of any non-compliance by the Access Holder, Defaulting Operator or any other Operator with the Train Description for a Train Service Type.

11 Access Holder initiated increase to Maximum Payload

11.1 Request for increased Maximum Payload

- (a) At any time during the Term, the Access Holder may give Aurizon Network a notice requesting that Aurizon Network consider increasing the Maximum Payload for a Train Service Type (**Notice of Enquiry**).
- (b) A Notice of Enquiry must specify:
 - (i) subject to **clause 11.1(c)**, the proposed increased Maximum Payload for the relevant Train Service Type;
 - (ii) the date on which the Access Holder proposes that the proposed increased Maximum Payload for that Train Service Type takes effect; and
 - (iii) if **clause 11.2(c)** would apply to the giving of a Variation Request Notice, details of the proposed Rollingstock Configuration for the Train Service Type (including the maximum Payload of the proposed Rollingstock Configuration).
- (c) The proposed increased Maximum Payload for a Train Service Type specified in a Notice of Enquiry must not exceed:
 - (i) the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload; or
 - (ii) if the Maximum Payload for the Train Service Type exceeds the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload, the maximum Payload of the proposed Rollingstock Configuration for the Train Service Type specified in the Notice of Enquiry.

11.2 Response Notice and Variation Request Notice

- (a) Within 20 Business Days after the Access Holder gives Aurizon Network a Notice of Enquiry in respect of a Train Service Type, Aurizon Network must give the Access Holder a notice (**Response Notice**) specifying:

- (i) whether or not the proposed increased Maximum Payload for the Train Service Type specified in the Notice of Enquiry can be accommodated; and
- (ii) if so:

 - (A) the Revised Nominal Payload for that Train Service Type (calculated as the amount (rounded to the nearest whole tonne) which is 98% of the Maximum Payload for the Train Service Type specified in the Notice of Enquiry);
 - (B) the Revised Nominated Monthly Train Services for that Train Service Type (calculated in accordance with **clause 10.5** as if the Revised Nominal Payload for the Train Service Type for the purpose of that calculation is the Revised Nominal Payload calculated in accordance with **clause 11.2(a)(ii)(A)**);
 - (C) the difference between the Nominated Monthly Train Services for the Train Service Type and the Revised Nominated Monthly Train Services for the Train Service Type (**Surplus Access Rights**);
 - (D) the Relinquishment Fee that would be payable under the Relinquishment Provisions which form part of this Agreement under **clause 3** in respect of the relinquishment of the Surplus Access Rights by the Access Holder; and
 - (E) the earliest date on which the increase in the Maximum Payload for the Train Service Type could take effect.
- (b) Within 20 Business Days after Aurizon Network gives the Access Holder a Response Notice that specifies that the proposed increased Maximum Payload for a Train Service Type specified in the Notice of Enquiry can be accommodated, the Access Holder may give Aurizon Network a notice (**Variation Request Notice**) which:

 - (i) requests that Aurizon Network increase the Maximum Payload for the Train Service Type to the proposed increased Maximum Payload specified in the Notice of Enquiry with effect on a date specified in the notice (which date must not be earlier, or more than six months later, than the date specified in the relevant Response Notice in accordance with **clause 11.2(a)(ii)(E)**); and
 - (ii) sets out the details of any changes to the nominations previously given under **clause 4.3** or **4.5** to take into account the relinquishment of the Surplus Access Rights.
- (c) If the proposed increased Maximum Payload for a Train Service Type specified in a Notice of Enquiry exceeds the maximum Payload of the Authorised Rollingstock Configuration for the Train Service Type which has the greatest maximum Payload, then the Access Holder must not give Aurizon Network a Variation Request Notice in respect of the Train Service Type unless, at the same time, each Operator which operates Train Services in respect of that Train Service Type also gives Aurizon Network an Authorisation Request Notice (as defined in that Operator's Train Operations Deed) in respect of a proposed Rollingstock Configuration

which has a maximum Payload which is the same as the proposed increased Maximum Payload.

11.3 Consequences of a Variation Request Notice

(a) If the Access Holder gives Aurizon Network a Variation Request Notice in respect of a Train Service Type, then the Access Holder will be taken, at the same time, to have given Aurizon Network a Notice of Intention to Relinquish under the Relinquishment Provisions which form part of this Agreement under **clause 3** in respect of which:

- (i) the Nominated Access Rights under those Relinquishment Provisions will be taken to be the Surplus Access Rights for the Train Service Type specified in the relevant Response Notice; and
- (ii) the Relinquishment Date under those Relinquishment Provisions will be taken to be the date specified in the Variation Request Notice.

(b) Subject to **clause 11.2(c)**, if the Access Holder gives Aurizon Network a Variation Request Notice in respect of a Train Service Type, then:

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

with effect on the latest of:

- (iv) the date specified in the Variation Request Notice;
- (v) if **clause 11.2(c)** applies, the date the proposed Rollingstock Configuration for the Train Service Type specified in the Authorisation Request Notice becomes an Authorised Rollingstock Configuration for the Train Service Type; and
- (vi) the date the Access Holder pays Aurizon Network the Relinquishment Fee under the Relinquishment Provisions which form part of this Agreement under **clause 3** in respect of the relinquishment of the Surplus Access Rights.

12 Reduction of Nominated Monthly Train Services if Nominal Payload increased

12.1 Notice of Intention to Increase Nominal Payload

(a) Subject to **clause 12.1(b)**, at any time during the Term, Aurizon Network may give the Access Holder a notice of Aurizon Network's intention to increase the Nominal Payload for a Train Service Type (**Notice of Intention to Increase Nominal Payload**).

- (b) Aurizon Network must not give a Notice of Intention to Increase Nominal Payload for a Train Service Type unless Aurizon Network has first consulted with all relevant Access Holders and relevant Railway Operators about options for increasing the capacity of the relevant part of the Network on which Train Services for the Train Service Type are operated.
- (c) If Aurizon Network gives a Notice of Intention to Increase Nominal Payload to the Access Holder, Aurizon Network must also give a copy of that Notice of Intention to Increase Nominal Payload to each affected Operator (if any).
- (d) A Notice of Intention to Increase Nominal Payload must:
- (i) specify:
- (A) the increased Nominal Payload (**Revised Nominal Payload**) for the Train Service Type (as determined by Aurizon Network in its discretion); and
- (B) the Revised Maximum Payload for the Train Service Type; and
- (C) the Revised Nominated Monthly Train Services for the Train Service Type.
- including reasonable details of the calculation of those amounts;
- (ii) specify the date (**Effective Date**) on which the variations specified in the Notice of Intention to Increase Nominal Payload will take effect (provided that such Effective Date must not be less than 18 months (or such other period as agreed between the Parties) after the date on which Aurizon Network gives the Notice of Intention to Increase Nominal Payload to the Access Holder); and
- (iii) notifying the Access Holder that, subject to **clause 12.5**, with effect on the Effective Date:
- (A) the Nominal Payload for the Train Service Type will be taken to be varied to be the Revised Nominal Payload for the Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload);
- (B) the Maximum Payload for the Train Services Type will be taken to be varied to be the Revised Maximum Payload for that Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload); and
- (C) the Nominated Monthly Train Services for that Train Service Type will be taken to be varied to be the Revised Nominated Monthly Train Services for that Train Service Type (as specified in the Notice of Intention to Increase Nominal Payload).

12.2 Calculation of Revised Maximum Payload

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

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

where:

<u>RMP</u>	=	<u>the Revised Maximum Payload for the Train Service Type (rounded to the nearest whole tonne)</u>
<u>RNP</u>	=	<u>the Revised Nominal Payload for the Train Service Type as specified in the relevant Notice of Intention to Increase Nominal Tonnage</u>
<u>CF</u>	=	<u>1.02 (or such other conversion factor agreed between the Parties)</u>

12.3 Calculation of Revised Nominated Monthly Train Services

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

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

where:

<u>RNMTS</u>	=	<u>the Revised Nominated Monthly Train Services for the Train Service Type</u>
<u>Loaded Train Services</u>	=	<u>IT/RNP (rounded to the nearest whole Train Service on the basis that where the first decimal place is greater than three, the number of Train Services is to be rounded up to the nearest number of whole Train Services and, where the first decimal place is three or less, the number of Train Services is to be rounded down to the nearest number of whole Train Services)</u>
<u>IT</u>	=	<u>the Indicative Tonnage for the Train Service Type</u>
<u>RNP</u>	=	<u>the Revised Nominal Payload for the Train Service Type as specified in the relevant Notice of Intention to Increase Nominal Payload</u>

12.4 Dispute in relation to variations to Train Description

(a) If Aurizon Network gives the Access Holder a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, the Access Holder may, within 20 Business Days after Aurizon Network gives the Notice of Intention to Increase Nominal Payload to the Access Holder, give Aurizon Network a Dispute Notice which Disputes:

- (i) the Revised Maximum Payload for the Train Service Type; and/or
- (ii) the Revised Nominated Monthly Train Services for the Train Service Type,

specified in the Notice of Intention to Increase Nominal Payload in accordance with **clause 27.**

(b) The Access Holder must not Dispute the Revised Nominal Payload specified in a Notice of Intention to Increase Nominal Payload and any

Dispute Notice which is given by the Access Holder in respect of such a Dispute will be taken to be of no effect.

(c) If a Dispute referred to in **clause 12.4(a)** is not resolved in accordance with **clause 27.2**, then the Parties must refer the Dispute to an Expert to determine:

(i) the Revised Maximum Payload for the Train Service Type; and

(ii) the Revised Nominated Monthly Train Services for the Train Service Type.

in each case, based on the Revised Nominal Payload specified in the Notice of Intention to Increase Nominal Payload.

(d) If the Access Holder does not give Aurizon Network a Dispute Notice referred to in **clause 12.4(a)** within the time referred to in **clause 12.4(a)**, then:

(i) the Access Holder must not give Aurizon Network a Dispute Notice Disputing the

(A) the Revised Maximum Payload for the Train Service Type; and/or

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

specified in the Notice of Intention to Increase Nominal Payload;

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

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

12.5 Withdrawal of Notice of Intention to Increase Nominal Payload

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

(b) If Aurizon Network withdraws a Notice of Intention to Increase Nominal Payload under **clause 12.5(a)**, the variations to the Nominal Payload, Maximum Payload and Monthly Nominal Train Services for the Train Service Type set out in the Notice of Intention to Increase Nominal Payload will not take effect.

12.6 Variation to Train Description

If Aurizon Network gives the Access Holder a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, then, unless the Notice of Intention to Increase Nominal Payload is withdrawn under **clause 12.5**, with effect on the Effective Date:

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

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

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

as:

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

(e) if **clause 12.4(c)** applies, agreed or determined through the Dispute resolution process under **clause 27**.

12.7 Variation of Train Operations Deeds and Operator nominations

If Aurizon Network gives the Access Holder a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, then, unless the Notice of Intention to Increase Nominal Payload is withdrawn under **clause 12.5**, with effect on the Effective Date the Access Holder will be deemed to have given a notice to Aurizon Network in accordance with **clause 4.5(a)** varying the Access Rights which the Access Holder has allocated to each Operator under a Train Operations Deed in respect of that Train Service Type:

(a) if the Access Holder has only nominated one Operator, so as to be consistent with the Revised Nominal Payload, Revised Maximum Payload and Revised Nominated Monthly Services for the Train Service Type set out in the relevant Notice of Intention to Increase Nominal Payload; and

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

13 ~~10~~ Relinquishment of Access Rights

~~(a) — The Access Holder may relinquish some or all of the Access Rights in accordance with the Relinquishment Provisions- which form part of this Agreement under **clause 3**.~~

~~(b) — The Access Holder and Aurizon Network must comply with **AN note: As the Relinquishment Provisions- are Incorporated Provisions under **clause 3.1**, the above clause is not required.**~~

14 ~~11~~ Transfer of Access Rights by Access Holder

~~(a) — The Access Holder may Transfer all or part of the Access Rights to itself or a Third Party in accordance with the Transfer Provisions- which form part of this Agreement under **clause 3**.~~

~~(b) — The Access Holder and Aurizon Network must comply with **AN note: As the Transfer Provisions- are Incorporated Provisions under **clause 3.1**, the above clause is not required.**~~

15 ~~12~~ Reduction Factor

15.1 ~~12.1~~ Determination of the Reduction Factor

(a) ~~——~~ If Nominated Access Rights are intended to be relinquished or Transferred under the Transfer Provisions or the Relinquishment Provisions which form part of this Agreement under ~~clause 10 or 11, 3~~, the Reduction Factor must be calculated in accordance with the Reduction Factor Provisions ~~- which form part of this Agreement under clause 3.~~

(b) ~~— The Access Holder and Aurizon Network must comply with the Transfer Provisions.~~

[AN note: As the Reduction Factor Provisions are Incorporated Provisions under clause 3.1, the above clause is not required.]

15.2 ~~12.2~~ Replacement Access Agreement

If Aurizon Network identifies an opportunity for it to enter into an Access Agreement with an existing or prospective Network Customer that would result in a lessening of the Relinquishment Fee or Transfer Fee (as applicable) that would otherwise be payable to Aurizon Network under ~~clause 10 or 11~~ the Transfer Provisions or the Relinquishment Provisions which form part of this Agreement under clause 3 (as applicable), Aurizon Network will not unreasonably delay the process for negotiating and executing an Access Agreement with that existing or prospective Network Customer.

16 ~~13~~ Resumptions, reductions, relinquishments and transfers - General

16.1 ~~13.1~~ Termination where no Access Rights remain

(a) Where Access Rights have been resumed, reduced, relinquished or transferred in accordance with this Agreement (including under the Resumption Provisions, the Conditional Access Provisions, the Transfer Provisions and the Relinquishment Provisions which form part of this Agreement under clause 3 and clauses 7, 9, 10, 11, 12 and 25.328.6) to the extent that there is no longer any Access Rights remaining the subject of this Agreement, then Aurizon Network may terminate this Agreement by notice to the Access Holder (without prejudice to those provisions which are stated to survive this Agreement).

(b) Any termination under this ~~clause 13.1~~ 16.1 is without prejudice to any rights of any Party which accrued on or before termination.

16.2 ~~13.2~~ Effect on entitlement to operate and Access Charge Rates

Where Access Rights have been resumed, reduced, relinquished or transferred in accordance with this Agreement (including under the Resumption Provisions, the Conditional Access Provisions, the Transfer Provisions and the Relinquishment Provisions which form part of this Agreement under clause 3 and clauses 7, 9, 10, 11, 12 and 25.328.6), then for the avoidance of doubt:

(a) the Access Holder's entitlement to have an Operator operate Train Services is also reduced in accordance with that resumption, reduction, relinquishment or transfer of Access Rights;

- (b) the Access Holder's Nominated Monthly Train Services for each applicable Train Service Type will be taken to be varied to be reduced in accordance with that resumption, reduction, relinquishment or transfer of Access Rights; and
- (c) the Access Holder will no longer be obliged to pay Access Charges in respect of the resumed, reduced, relinquished or transferred Access Rights (except for any such Access Charges that accrued prior to the resumption, reduction, relinquishment or transfer, including any TOP Charge payable in respect of the part of the Year prior to the resumption, reduction, relinquishment or transfer).

16.3 ~~13.3~~ **No compensation or liability**

- (a) Except for any payment specifically provided in this Agreement or liability for any breach by Aurizon Network of this Agreement, Aurizon Network is not liable for any loss or damage, however caused (including in contract, tort (including negligence) or otherwise) suffered or incurred by the Access Holder in connection with any resumption, reduction, relinquishment or transfer of Access Rights in accordance with [the Resumption Provisions, the Conditional Access Provisions, the Transfer Provisions and the Relinquishment Provisions which form part of this Agreement under clause 3 and clauses 7, 9, 10, 11, 12 and 25.3-28.6.](#)
- (b) The Access Holder releases Aurizon Network from any Claim for loss or damage referred to in **clause 13.3**~~16.3~~**(a)** that the Access Holder may otherwise have.

17 ~~14~~ **Consequences of a failure of an Operator to satisfy conditions**

17.1 ~~14.1~~ **Reduction of allocation of Access Rights**

If:

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

then, on such notice being given by Aurizon Network:

- (c) the Access Holder is deemed to have withdrawn its allocation of Access Rights to the Defaulting Operator in respect of:
 - (i) in the case of a notice under clause **[10.2(c)]** of the Defaulting Operator's Train Operations Deed, all of the Access Rights for which the Defaulting Operator has been nominated; and
 - (ii) in the case of a notice under clause **[10.3(c)(iv)(A)(1)]** of the

Defaulting Operator's Train Operations Deed, that part of the Access Rights for which the Defaulting Operator has been nominated but in respect of which the Defaulting Operator has failed to satisfy the relevant conditions in clause [10.3] of its Train Operations Deed; and

- (d) without limiting the Access Holder's rights under **clauses 4.3** and **4.4, 4.5**, the Access Holder will have the right under **clauses 4.3(b)** and **4.4, 4.5** to nominate a new Operator to use, or vary the previous nomination of another Operator to include, the Access Rights which were previously allocated to the Defaulting Operator.

17.2 ~~14.2~~ **Reversing changes to Train Descriptions**

- (a) If:
 - (i) a Defaulting Operator fails to satisfy the conditions for the commencement of Train Services for a Train Service Type (**relevant Train Service Type**) under clause [10.3] of its Train Operations Deed; and
 - (ii) Aurizon Network has given a notice to the Access Holder and the Defaulting Operator in accordance with clause [10.3(c)(iv)(B)(1)] of the Defaulting Operator's Train Operations Deed,

the Access Holder may elect to allocate the varied Train Service Type to another Operator (either through a new nomination or variation of an existing nomination).

- (b) If the Access Holder fails to notify Aurizon Network of its election within 10 Business Days then the Train Description for the relevant Train Service Type will be taken not to have been varied (even if the relevant variation has taken effect) and the Train Description for the relevant Train Service Type will be taken to be the Train Description for the relevant Train Service Type in force immediately before the variation took effect.

18 ~~15~~ **Compliance**

18.1 ~~15.1~~ **General requirements – Parties**

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

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

18.2 ~~15.2~~ **General Requirements – Aurizon Network**

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

- (a) the conditions of its Accreditation;

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

18.3 ~~15.3~~ Non-compliance by Operator with Train Description

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

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

- (iii) notify the Access Holder of any such non-compliance and the failure to demonstrate future consistent compliance with the relevant Train Description (**Notice of Defaulting Operator**); and
 - (iv) commence consultation with the Access Holder and the Defaulting Operator in respect of the non-compliance.
- (b) Without limiting any right Aurizon Network has to suspend or terminate the Train Services for a Train Service Type under the Train Operations Deed, before taking any steps under **clause ~~15.3~~18.3(c)**, Aurizon Network must provide the Access Holder with at least 20 Business Days from the date of the Notice of Defaulting Operator to:
 - (i) unless the Train Services for a Train Service Type have been terminated under a Train Operations Deed, procure the Defaulting Operator to rectify the non-compliance notified under **clause ~~15.3~~18.3(a)**; or
 - (ii) nominate an alternative Operator to provide the relevant Train Services in accordance with its rights to do so under this Agreement, and

unless the Train Services for a Train Service Type have been terminated under a Train Operations Deed, provide the Access Holder prior notice of any action Aurizon Network intends to take under **clause ~~15.3~~18.3(c)**.

- (c) If, following the provision of the Notice of Defaulting Operator under **clause ~~15.3~~18.3(a)** and taking of the steps in **clause ~~15.3~~18.3(b)**, the Access Holder has not nominated an alternative Operator to provide the relevant Train Services within 20 Business Days from the provision of the Notice of Defaulting Operator or Aurizon Network continues to not be reasonably satisfied that the Defaulting Operator will consistently comply with the Train

Description under the Train Operations Deed for the remainder of the term of that Train Operations Deed, Aurizon Network may:

- (i) vary the ~~applicable~~-Train Description for the ~~Affected~~applicable Train Service Type to a level it reasonably expects to be achievable by the Defaulting Operator for the remainder of the Term, having regard to the extent of previous compliance with the applicable Train Description (but not taking into account, for the purpose of assessing previous compliance, any non-compliance to the extent that the non-compliance was attributable to another Railway Operator or to Aurizon Network); and
 - (ii) reasonably vary this Agreement in accordance with **clauses ~~32-335.3(f)~~, ~~32-335.3(g)~~ and ~~32-335.3(h)~~** to reflect the impact of the change in the applicable Train Description.
- (d) If Aurizon Network varies the ~~applicable~~-Train Description for ~~the Affected~~a Train Service Type under **clause ~~15-318.3(c)(i)~~**, it must issue a notice to the Access Holder setting out the changes to the “Nominated Monthly Train Services (for a 30 day Month)” set out in **Schedule 2** of this Agreement.
 - (e) The Access Holder is entitled to dispute any variation proposed by Aurizon Network pursuant to this **clause ~~15-318.3~~** in accordance with the process set out in **clause ~~32-335.3(h)~~**.

19 ~~16~~-Weighbridges and Overload Detectors

19.1 ~~16.1~~-Verification

- (a) Where a Weighbridge or Overload Detector is located en route between an Origin and Destination for a Train Service Type, the Party responsible for that Weighbridge or Overload Detector (as specified in item 5 of schedule 3) must use reasonable endeavours to ensure that such Weighbridge or Overload Detector is operational, calibrated and available to weigh Trains operated over such Weighbridge or Overload Detector.
- (b) Aurizon Network may vary at any time the numbers and locations of Weighbridges and Overload Detectors, subject to providing reasonable notice to the Access Holder.

[AN note: The above general provisions in relation to Weighbridges and Overload Detectors impose important operational obligations.]

- (c) If a party to a Train Operations Deed gives a notice under clause ~~17-19.4~~19.4 of the Train Operations Deed ~~applies~~, then:
 - (i) ~~(a)~~ subject to **clause ~~16-1(b)~~19.1(c)(ii)**, unless otherwise determined by calibration testing under clause ~~17-4~~19.4 of the Train Operations Deed, the relevant Weighbridge or Overload Detector (as applicable) is deemed to have malfunctioned from the date the notice is given under clause ~~17-4~~19.4(a) of the Train Operations Deed until the testing referred to in clause ~~17-4~~19.4(b) of the Train Operations Deed has been carried out and, if required, the Weighbridge or Overload Detector has been recalibrated. Until such testing has been carried out and the Weighbridge or Overload Detector has been recalibrated, the mass of the relevant Train or Wagon which would

otherwise have been measured by that Weighbridge or Overload Detector will be the Maximum Desirable Gross Tonnage (as the term is defined in the Train Operations Deed) for the Train or Wagon, as applicable; and

- (ii) ~~(b)~~ where the person conducting the test in accordance with clause ~~17.4~~ 19.4(b) of the Train Operations Deed determines that the Weighbridge or Overload Detector (as applicable) is measuring within the tolerances specified in item 5 of Schedule 3 of the Train Operations Deed, the Weighbridge or Overload Detector will be treated as having been measuring accurately from the date on which the relevant notice was given under clause ~~17.4~~ 19.4(a) of the Train Operations Deed ~~and the Access Charges will be determined from that date in accordance with Schedule 4. The invoice for Access Charges for the Billing Period immediately following the Billing Period in which such determination is made will be adjusted to appropriately account for the difference in payment of Access Charges arising from the Weighbridge or Overload Detector having been treated as malfunctioning under clause 16.1(a).~~

- (d) If clause 19.1(c)(ii) applies in respect of a Weighbridge, the invoice for Access Charges for the Billing Period immediately following the Billing Period in which the determination referred to in clause 19.1(c)(ii) is made will be adjusted to appropriately account for the difference in payment of Access Charges arising from the Weighbridge having been treated as malfunctioning under clause 19.1(c)(i).

[AN note: Aurizon Network has removed references to Overload Detectors in the above clause as they are not verified under National Measurement Act 1960 (Cth) and therefore cannot be used to measure the weight of Rollingstock for charging purposes.]

20 ~~17~~ Infrastructure management

20.1 ~~17.1~~ Notifications

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

Incident or Obstruction; or

- (C) any harm to the Environment on, or within the ~~area~~vicinity of, the Nominated Network, ~~which the Access Holder knows would result in a breach by Aurizon Network of the terms of any environmental authority it holds in connection with the Nominated Network.~~

[AN note: Aurizon Network should be advised of any harm to the Environment which the Operator is aware of on, or in the vicinity of, the Nominated Network so that Aurizon Network can investigate and address the relevant incident.]

20.2 ~~17.2~~ Investigations

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

21 ~~18~~ Interface management

21.1 ~~18.1~~ Compliance with Interface Risk Management Plan

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

21.2 ~~18.2~~ Interface representative

- (a) Prior to the commencement of any Train Services, each Party must nominate one or more appropriately qualified representatives (by identifying the name, title, experience (including length of experience) and qualifications of each representative) (**Interface Representative**) who is or are (as applicable) to be responsible for:
- (i) making decisions in relation to interface issues that arise in connection with this Agreement;
 - (ii) liaising and cooperating with representatives of the other Party on those interface issues; and
 - (iii) meeting with representatives of the other Party at locations, times and by means (including in person) specified by Aurizon Network from time to time.
- (b) Each Party must ensure that any representative it nominates under this ~~clause 18.2~~21.2 is available to efficiently and effectively perform the responsibilities of the Interface Representative specified in **clause**

~~18.2(a)-21.2(a)~~ and that it has [nominated an Interface Representative under this clause 21.2 at all times during the Term.](#)

[\[AN note: Each party should be obliged to ensure that an Interface Representative is nominated at all times during the Term.\]](#)

22 ~~19~~-Insurance by Access Holder

22.1 ~~19.1~~ Maintain insurance policies

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

22.2 ~~19.2~~ Required insurance policies

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

22.3 ~~19.3~~ Disclosure of insurance policies

The Access Holder must provide to Aurizon Network evidence of the insurance policies effected and maintained pursuant to this **clause 19.2** (including evidence that the cover provided under those insurance policies complies with this **clause 19.2** and of the currency of those insurance policies) to Aurizon Network's reasonable satisfaction:

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

22.4 ~~19.4~~ Failure to disclose insurance policies

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

22.5 ~~19.5~~ Minimum terms of policies

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

- (a) note the interests of the Access Holder, any contractor of the Access Holder engaged by the Access Holder in relation to the performance of the Access Holder's obligations under this Agreement and Aurizon Network;
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amends the cover provided without the

written consent of Aurizon Network (not to be unreasonably withheld or delayed); and

- (c) include the terms and be for the amounts referred to in **Schedule 5**.

22.6 ~~19.6~~ **Access Holder not to render policy void**

The Access Holder must not render any of the insurances effected in accordance with this **clause ~~19.22~~** void or voidable or liable to refusal of any claim.

22.7 ~~19.7~~ **Compliance**

The Access Holder must at all times comply with the terms and conditions of all insurance policies effected pursuant to this **clause ~~19.22~~**.

22.8 ~~19.8~~ **Notice of potential claims**

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

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

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

22.9 ~~19.9~~ **Access Holder to pay all excess/deductibles**

- (a) The Access Holder must, in respect of any Claims by it or any other insured for which it is responsible, pay and bear all excesses/deductibles provided for in any insurances effected in accordance with this **clause ~~19.22~~**.
- (b) If the Access Holder fails to pay any excess/deductible provided for in any insurances effected in accordance with this **clause ~~19.22~~**, Aurizon Network may pay the relevant excess/deductible and any amount so paid will be a debt due from the Access Holder to Aurizon Network.

22.10 ~~19.10~~ **Settlement of claims**

If:

- (a) Aurizon Network makes a Claim against the Access Holder for damage to the Infrastructure;
- (b) the Claim is in respect of the same matter as the Access Holder claims under a policy required by this Agreement for damage to Infrastructure; and
- (c) the Access Holder has not disputed Aurizon Network's Claim,

then upon settlement of the Access Holder's Claim, under such policy, the portion of monies owed by the Access Holder to Aurizon Network must be paid to Aurizon Network from the monies received by the Access Holder under the policy against which the Access Holder made a Claim.

23 ~~20~~ **Indemnities**

23.1 ~~20.1~~ **Indemnity for personal injury and property damage**

Subject to **clause ~~20.223.2~~** and **clause ~~21.24~~**, each Party is solely liable for, and releases, indemnifies and will keep indemnified the other Party, its directors and

Staff against, all Claims of any nature suffered or incurred by, or made or brought against, the other Party, its directors or Staff in respect of:

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

23.2 ~~20.2~~ **Indemnity by Access Holder for certain liabilities to Third Parties**

Despite ~~clause 20.1~~23.1 but subject to ~~clause 21, 24~~, the Access Holder is solely liable for, and releases, indemnifies and will keep indemnified Aurizon Network, Aurizon Network's directors and Aurizon Network's Staff against, all Claims of any nature suffered or incurred by, or made or brought against, Aurizon Network, Aurizon Network's directors or Aurizon Network's Staff by a Third Party in respect of:

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

23.3 ~~20.3~~ **Duty to mitigate**

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

[AN note: Aurizon Network has amended the above provision because the amendments proposed by the QCA were not appropriate for a mitigation provision of this type.]

23.4 ~~20.4~~ **General provisions regarding indemnities**

- (a) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties and survives the expiry or termination of this Agreement.
- (b) It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity in this Agreement.

24 ~~21~~ Limitations and exclusions of liability

24.1 ~~21.1~~ Exclusion of Consequential Loss

Except as expressly provided otherwise in [clause 23.2](#) and ~~clause 27,30~~, neither Party is liable to the other under or in connection with this Agreement (including under an indemnity) for any Consequential Loss however caused (including any breach of this Agreement or negligent act or omission of a Party).

[AN note: The above amendment ensures that the Consequential Loss exclusion does not cut across the indemnity for Third Party Claims in clause 23.2.]

24.2 ~~21.2~~ Time limit and minimum threshold on Claims

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

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

24.3 ~~21.3~~ Claims and exclusions in respect of Infrastructure standard

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

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

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

24.4 ~~21.4~~ Claims and exclusions in respect of non-provision of access

- (a) Subject to ~~clause 21.4~~[24.4\(b\)](#), only and despite any other provision of this Agreement, Aurizon Network, Aurizon Network's directors and Aurizon Network's Staff are not liable to the Access Holder for any Claim, and the Access Holder must not make any Claim against Aurizon Network, Aurizon Network's directors and/or Aurizon Network's Staff, in respect of any failure by Aurizon Network to make the Infrastructure available for an Operator to operate a Train Service for the Access Holder at the Scheduled Time in the Train Schedule.
- (b) Aurizon Network is liable to the Access Holder in respect of any failure by Aurizon Network to make the Infrastructure available ~~to enable~~[for](#) an

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

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

Network to make the Infrastructure available (other than any failure by Aurizon Network to make the Infrastructure available which is attributable to an event or circumstance specified in **clauses 21.424.4(b)(iiiiv)(A) to 21.424.4(b)(iiiiv)(GH)**) exceeds ~~five~~ten percent of the total number of Train Services scheduled in the Daily Train Plan for that Billing Period; or

[AN note: See Aurizon Network's submission in relation to this amendment.]

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

24.5 ~~21.5~~ **Claims and exclusions in respect of delays to Train Movements**

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

- (a) the delay was a result of a breach of this Agreement by the Defaulting Party, or a negligent act or omission on the part of the Defaulting Party; and
- (b) if the delay was caused by or the result of an Operational Constraint:
 - (i) where Aurizon Network is the Affected Party, the Operational Constraint resulted from a breach of this Agreement by the Access Holder; or
 - (ii) where the Access Holder is the Affected Party, the Operational Constraint was not permitted under this Agreement or a Train Operations Deed or resulted from a breach of this Agreement by, or negligent act or omission of, Aurizon Network; and
- (c) the delay is not attributable to:
 - (i) the Affected Party or where the Affected Party is:
 - (A) Aurizon Network - Aurizon Network's Staff; or
 - (B) the Access Holder - the Access Holder's Staff, an Operator or an Operator's Staff;
 - (ii) another Railway Operator (other than the Defaulting Party) or any employees, contractors, volunteers or agents of another Railway Operator (other than the Defaulting Party);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of, or Infrastructure Enhancements to, the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor; or

- (vi) ~~(v)~~ any action taken by Aurizon Network, acting reasonably, in response to an emergency or a genuine safety risk; and
- (d) either:
 - (i) the Parties and the relevant Operator have not agreed upon and implemented a performance and adjustment regime for the purposes of the relevant Train Operations Deed; or
 - (ii) the Parties and the relevant Operator have agreed upon and implemented a performance and adjustment regime for the purposes of the relevant Train Operations Deed, but the delays are of a magnitude which is beyond the scope of that performance and adjustment regime.

24.6 ~~21.6~~ **Defence of Claims by Third Parties**

- (a) Each Party must provide such reasonable assistance as requested by the other Party in the defence of any Claim made against the other Party by a Third Party arising out of any Incident or other event giving rise to the Claim.
- (b) The Party that requested assistance under **clause 21.6**~~24.6~~**(a)** must, within five Business Days after a demand is made, pay to the other Party any costs and expenses reasonably incurred by the other Party in providing the assistance requested under **clause 21.6**~~24.6~~**(a)**.

24.7 ~~21.7~~ **Exclusion of Claims in certain other circumstances**

- (a) Except to the extent that an Operational Constraint results from a breach by, or negligent act or omission of, Aurizon Network of this Agreement or a Train Operations Deed, any delays or cancellations of Train Services caused by or resulting from Operational Constraints will not constitute a default by Aurizon Network of its obligations under this Agreement and Aurizon Network will not be liable for any Claims suffered or incurred by or made or brought by or against the Access Holder as a result of or arising from the imposition of such an Operational Constraint.
- (b) Except as otherwise provided in this Agreement, Aurizon Network will not be liable for any delays or cancellations of Train Services or Claims suffered or incurred by or made or brought by or against the Access Holder and the Access Holder must not make any Claim against Aurizon Network, its director and/or Aurizon Network's Staff as a result of an Operator complying with a request by Aurizon Network in accordance with clause ~~20.4~~~~[22.4(i)]~~ of a Train Operations Deed.
- (c) If Aurizon Network takes action in accordance with clause ~~20.4~~~~[22.4(e)]~~ of a Train Operations Deed, then Aurizon Network has no liability for any damage to or loss of freight caused by such actions.
- (d) Aurizon Network will not be liable for any delays or cancellations of Train Services or Claims suffered or incurred by or made or brought by or against the Access Holder as a result of the exercise by Aurizon Network of its rights under clause ~~23~~~~[25]~~ of a Train Operations Deed, provided that Aurizon Network complies with the relevant provisions under the IRMP regarding conduct of an audit or inspection.

25 ~~22~~-Determination of liability and loss adjustment

25.1 ~~22.1~~-Determination of liability

In the event of an Incident involving the Access Holder or any other event which results or could result in a Claim by or against the Access Holder or Aurizon Network, liability as between the Access Holder and Aurizon Network is determined, for the purposes of **clauses** ~~20~~23 and ~~21.3~~24.3:

- (a) as agreed between the Parties;
- (b) subject to **clause** ~~22.1~~25.1(c), failing such agreement within one Month of either Party giving notice to the other requiring agreement on liability, by a loss adjuster appointed under **clause** ~~22.2~~25.2; or
- (c) where the amount of the Claim exceeds \$200,000 and either Party is dissatisfied with the report of the loss adjuster, by a court of competent jurisdiction.

25.2 ~~22.2~~-Loss Adjuster

Subject to **clause** ~~32,35~~, where a matter is to be referred to a loss adjuster in accordance with **clause** ~~22.1~~25.1:

- (a) the loss adjuster:
 - (i) must be appointed by the Parties; or
 - (ii) in default of such appointment within 10 Business Days after the need to appoint a loss adjuster, is to be nominated at either Party's request by the President of The Australasian Institute of Chartered Loss Adjusters;
- (b) if the loss adjuster is to be nominated under **clause** ~~22.2~~25.2(a)(ii) and the President of The Australasian Institute of Chartered Loss Adjusters declines to nominate a person as the loss adjuster but provides a list of people that could be appointed as the loss adjuster, then:
 - (i) the first person specified in that list will be taken to be nominated as the loss adjuster;
 - (ii) if the first person specified in that list does not accept the appointment as the loss adjuster, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the loss adjuster; and
 - (iii) the process specified in **clause** ~~22.2~~25.2(b)(ii) will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the loss adjuster accepts the appointment as the loss adjuster;
- (c) the Parties must comply with, and do all things necessary to satisfy and give effect to, the reasonable requirements of an agreed or nominated loss adjuster (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of the President of The Australasian Institute of Chartered Loss Adjusters agreeing to nominate a loss adjuster;
- (d) the loss adjuster must:

- (i) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (ii) have no interest or duty which conflicts or may conflict with the loss adjuster's function as a loss adjuster (the loss adjuster being required to fully disclose any such interest or duty before their appointment); and
 - (iii) not be, or have been in the last five years, an employee of an Operator, the Access Holder or Aurizon Network or of a Related Body Corporate of any of them;
- (e) the loss adjuster appointed under this **clause ~~22.2~~25.2**:
- (i) is not permitted to act until the loss adjuster has given written notice of the acceptance of the appointment to both Parties;
 - (ii) is required to undertake to keep confidential all matters coming to the loss adjuster's knowledge by reason of their appointment and the performance of their duties; and
 - (iii) is deemed to be and act as an expert and not an arbitrator, and the Law relating to arbitration, including the *Commercial Arbitration Act 2013* (Qld), does not apply to the loss adjuster or their determination or the procedures by which they may reach a determination.

25.3 ~~22.3~~ **Parties to assist loss adjuster**

- (a) Each Party must ensure to the best of its ability that the loss adjuster appointed under **clause ~~22.2~~25.2** is given the opportunity to interview any employee, agent or contractor involved in, or with knowledge of, the Incident or event giving rise to the Claim or with any other relevant information that may be of use to the loss adjuster.
- (b) Each Party must make available to the loss adjuster appointed under **clause ~~22.2~~25.2** any files, documents, data, recordings or other information in the possession or control of the Party that may be of use to, or is requested by, the loss adjuster for the purposes of their investigation.

25.4 ~~22.4~~ **Decision of the loss adjuster**

- (a) The loss adjuster appointed under **clause ~~22.2~~25.2** will determine the quantum of the relevant Claim and the liability of the Access Holder and/or Aurizon Network in respect of such Claim and must provide a copy of their report on such matters to each of the Parties within a reasonable time after their appointment.
- (b) In the absence of manifest error, the decision of the loss adjuster is final and binding upon the Parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than \$200,000.

25.5 ~~22.5~~ **Costs of the loss adjuster**

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

26 ~~23~~-Material Change

26.1 ~~23.1~~-Adjustment for a Material Change

- (a) If there is no Reference Tariff applicable to the Train Services for a Train Service Type under this Agreement, then:
- (i) if at any time after the Commencement Date a Material Change occurs which ~~directly~~-affects the financial position of Aurizon Network or the cost to Aurizon Network of performing its obligations or exercising its rights under this Agreement and/or a Train Operations Deed, then Aurizon Network must notify the Access Holder giving details of the Net Financial Effect on Aurizon Network of the Material Change;
 - (ii) within 10 Business Days after receipt of a notice under **clause ~~23.1~~26.1(a)(i)**, the Parties must meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement to remove as far as practicable the Net Financial Effect on Aurizon Network of the Material Change and return Aurizon Network to the position it would have been in had it not been for the Material Change; and
 - (iii) if the Parties have not agreed on the relevant adjustments within 15 Business Days after Aurizon Network's notice, then either Party may refer the matter to an Expert for determination in accordance with **clause ~~24.3~~27.3**.
- (b) If there is a Reference Tariff applicable to the Train Services for a Train Service Type under this Agreement, then the relevant Reference Tariff Provisions which form part of this Agreement under clause 3 will provide for the consequences of Material Change.

26.2 ~~23.2~~-Parties' obligations continue

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

27 ~~24~~-Disputes

27.1 ~~24.1~~-Method

If any claim, dispute or question (**Dispute**) arises under this Agreement, then unless otherwise expressly provided to the contrary in this Agreement, such Dispute must be resolved in accordance with this **clause ~~24.2~~27.1** and either Party may give to the other Party a notice (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in accordance with this **clause ~~24.2~~27.1**.

27.2 ~~24.2~~-Authorised representative resolution

- (a) Except as otherwise provided in this Agreement, within five Business Days after a Dispute Notice is given, the Dispute must be referred for resolution to an authorised representative of each of the Parties with authority to settle the Dispute on behalf of the relevant Party.
- (b) Within 10 Business Days after a Dispute Notice is given, the officers referred to in **clause ~~24.2~~27.2(a)** must meet to resolve the Dispute.

- (c) Meetings referred to in **clause 24.227.2(b)** may be held in person or by telephone, video conference or other means of instantaneous communication.
- (d) If the Dispute is not resolved within 10 Business Days after:
 - (i) the date that the authorised representatives first meet to resolve the Dispute in accordance with **clause 24.227.2(b)**; or
 - (ii) if the authorised representatives do not meet within the time required under **clause 24.227.2(b)**, the date the Dispute Notice is given,

then the relevant Dispute may, by agreement between the Parties within ~~five~~**15** Business Days of expiration of the 10 Business Day period referred to in **clause 24.227.2(d)**, be referred for resolution by an Expert in accordance with **clause 24.327.3** or by arbitration in accordance with **clause 24.4,27.4**, failing which either Party may refer the Dispute to the courts of the State in accordance with **clause 24.6–27.6**. [AN note: Five Business Days is insufficient to agree whether or not to refer a dispute to an Expert. Aurizon Network proposes a reasonable period of 15 Business Days.]

27.3 ~~24.3~~ Expert

Subject to **clause 32.1,35.1**, where any matter may be referred to an expert (**Expert**) pursuant to **clause 24.227.2(d)**, or is expressly required by this Agreement to be referred to an Expert, then except as otherwise provided for in this Agreement:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within 10 Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
 - (i) if the Parties agree the Dispute is purely of:
 - (A) a financial or accounting nature; or
 - (B) a technical nature,

the President (for the time being) of the Resolution Institute in Australia; or
 - (ii) in any other case, the President (for the time being) of the Queensland Law Society Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 24.327.3(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert, then:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, then the next person specified in that list will be taken to be nominated as the Expert; and
 - (iii) the process specified in **clause 24.327.3(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that

is taken to be nominated as the Expert accepts the appointment as the Expert;

- (c) subject to **clause 24.327.3(b)**, if the Expert is to be nominated by a person referred to in **clause 24.327.3(a)** and the person nominated as the Expert does not accept appointment as the Expert, then an alternative person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 24.327.3(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 24.327.3(a)** the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert;
- (e) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert;
- (f) the Expert must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with their function as Expert, the Expert being required to fully disclose any such interest or duty by notice to the Parties before their appointment;
 - (iii) not be, or have been in the last five years, an employee of an Operator, the Access Holder, or Aurizon Network or of a Related Body Corporate of any of them;
 - (iv) not be permitted to act until the Expert has given notice to the Parties that the Expert is willing and able to accept the appointment;
 - (v) have regard to the provisions of this Agreement and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter provided to the Expert by the Parties;
 - (vi) provide both Parties with a copy of the Expert's determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after their appointment; and
 - (vii) be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties);

- (g) the Expert is deemed to be and must act as an expert and not an arbitrator and the Law relating to arbitration (including the *Commercial Arbitration Act 2013* (Qld)) will not apply to the Expert or the determination or the procedures by which the Expert may reach a determination;
- (h) in the absence of manifest error, the decision of the Expert is final and binding upon the Parties;
- (i) the costs of the Expert (and the costs of any advisers to the Expert) must be borne severally (and not jointly and severally) by the Parties in equal shares, with each Party bearing its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties);
- (j) the expert determination will be conducted in accordance with the expert determination rules adopted by the Resolution Institute from time to time, except that to the extent of any inconsistency between those rules and this Agreement, the terms of this Agreement prevail;
- (k) any determination made by an Expert must be consistent with the provisions of this Agreement; and
- (l) the Parties must:
 - (i) procure the Expert to use reasonable endeavours to make its determination or finding in respect of the Dispute within 2 months from the date the initial statement regarding the Dispute is submitted by the claimant to the Expert; and
 - (ii) do everything reasonably requested by the Expert to assist the Expert in determining the Dispute, including providing or making available to the Expert, as soon as reasonably practicable, all information and materials in their possession or control requested by the Expert and attending any hearing convened by the Expert.

27.4 ~~24.4~~ Arbitration

- (a) Subject to **clause 32.4, 35.1**, the Parties may agree to refer any Dispute to arbitration by a single arbitrator sitting in Brisbane agreed upon between the Parties and, failing agreement upon such arbitrator within 10 Business Days after the date of notice from one Party to the other requiring the appointment of an arbitrator, by an arbitrator appointed by the President of the Resolution Institute. Every such reference will be an arbitration within the meaning of the *Commercial Arbitration Act 2013* (Qld), and subject to the provisions relating to arbitration contained in that Act.
- (b) If the Resolution Institute declines to nominate a person as the arbitrator but provides a list of people that could be appointed as the arbitrator, then:
 - (i) the first person specified in that list will be taken to be nominated as the arbitrator;
 - (ii) if the first person specified in that list does not accept the appointment as the arbitrator, then the next person specified in that list will be taken to be nominated as the arbitrator; and
 - (iii) the process specified in **clause 24.427.4(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the arbitrator accepts the appointment as the arbitrator;

- (c) subject to **clause 24.4**~~27.4~~(b), if the person nominated as the arbitrator under **clause 24.4**~~27.4~~(a) does not accept appointment, then either Party may request that the Resolution Institute appoints an alternative person as the arbitrator.

27.5 ~~24.5~~ **Queensland Competition Authority (QCA)**

Subject to **clause 32.1**,~~35.1~~, the Parties may agree to refer, and where required by this Agreement must refer, any Dispute to the QCA.

27.6 ~~24.6~~ **Determination by Court**

If any Dispute is not:

- (a) resolved in accordance with **clause 24.2**~~27.2~~;
- (b) referred to an Expert in accordance with **clause 24.3**~~27.3~~; ~~nor~~
- (c) referred to arbitration in accordance with clause 27.4; ~~nor~~
- (d) ~~(e)~~ referred to the QCA in accordance with **clause 24.5**,~~27.5~~.

then either Party may refer the Dispute to the courts of the State.

28 ~~25~~ **Force Majeure**

[AN note: See Aurizon Network's comment in relation to clause 3. Also see Aurizon Network's submission.]

28.1 ~~25.1~~ **Suspension of obligations**

~~(a)~~ — If, by reason of a Force Majeure Event ~~affecting Aurizon Network~~, Aurizon Network is prevented or hindered (or likely to be prevented or hindered) from carrying out, whether wholly or in part, its obligations under this Agreement (other than an obligation to pay money), then the obligations of Aurizon Network ~~to provide Access Rights under this Agreement~~ will be suspended ~~for~~during that time to the time extent that the performance of such obligations is prevented or hindered by the Force Majeure Event ~~provided Aurizon Network notifies the Access Holder in accordance with the requirements of the Force Majeure Provisions~~.

28.2 **Notice for Force Majeure Event**

- (a) Aurizon Network must notify (by electronic means or in accordance with clause 36) the Access Holder as soon as reasonably practicable (and, in any event, within five (5) Business Days) after Aurizon Network becomes aware of an event or circumstance which Aurizon Network considers is a Force Majeure Event, including:
- (i) details of the Force Majeure Event and (if applicable) that part of the Nominated Network affected or likely to be affected; and
- (ii) the details of the obligations affected or likely to be affected.
- (b) ~~Without prejudice to its rights under this clause 25.1 and the Force Majeure Provisions, Aurizon Network may issue further notices in respect of the Force Majeure Event as it considers reasonably necessary to update the Access Holder as to each of the matters set out in the Force Majeure Provisions. If the notice provided in clause 28.2(a) does not include the following information, Aurizon Network must, as soon as reasonably~~

practicable, provide the Access Holder with a further notice which contains (in addition to the information in **clause 28.2(a)**):

- (i) details of the action Aurizon Network has taken to remedy the situation and details of the action that Aurizon Network proposes to take to remedy the situation; and
 - (ii) a reasonable estimate of the time during which Aurizon Network will be (or is likely to be) prevented or hindered from carrying out, whether wholly or in part, its obligations under this Agreement due to the Force Majeure Event.
- (c) ~~If Aurizon Network notifies~~ must include the affected Access Holder ~~in accordance with this clause 25.1;~~ (and its Customer, if any) and its Railway Operator, if any, in any meeting which Aurizon Network may have in respect of the Force Majeure Event.

28.3 Duty to mitigate

- (a) Subject to **clause 28.3(b)**, Aurizon Network must use reasonable endeavours to remedy or overcome the effect of the Force Majeure Event affecting its obligations under an Access Agreement as soon as possible and must attempt to:
- (i) ~~mitigate the effect of the Force Majeure Provisions apply~~Event; and
 - (ii) ~~the Parties must comply with the Force Majeure Provisions.~~ identify alternative viable means of providing the Access Rights affected (if applicable).
- ~~(d) Despite **clause 1.6(b)**, if the terms of this **clause 25** are inconsistent, ambiguous or conflict with the terms of the Force Majeure Provisions, the terms of the Force Majeure Provisions will prevail to the extent of the inconsistency, ambiguity or conflict.~~
- (b) Aurizon Network is not obliged to settle any strike, lockout or other labour dispute other than on terms acceptable to it.

28.4 End of period of Force Majeure

Subject to **clauses 28.5** and **28.7**, the suspension of the obligations of Aurizon Network due to a Force Majeure Event ends when, but only to the extent that, Aurizon Network is able to resume performance of its obligations under this Agreement, at which time it must:

- (a) notify the Access Holder advising the extent to which it is recommencing the performance of its obligations; and
- (b) recommence the performance of its obligations to the extent outlined in such notice.

28.5 ~~25.2~~ Reduction of Access Rights due to loss or damage to Nominated Network

- (a) If:
- (i) any part of the Nominated Network specified in **item 2** of **schedule 3** is damaged or destroyed by a Force Majeure Event; and
 - (ii) in Aurizon Network's reasonable opinion the cost of repairing such damage or destruction or replacing that part of the Nominated

Network is not economic on the basis of the then and committed future utilisation of that part of the Nominated Network,

then Aurizon Network may by notice advise the Access Holder (and its Customer, if applicable), other affected Access Holders, each affected Railway Operator and the QCA of:

- (iii) the estimated cost of effecting the necessary repairs or replacement;
- (iv) the level of insurance available to effect the necessary repairs and replacement;
- (v) a detailed explanation as to why the cost of repairing or replacing is not economic; and
- (vi) Aurizon Network's intention to not repair or replace the relevant part of the Nominated Network unless the Access Holder and other Access Holders (or their Customers or Railway Operators, as applicable) using that part of the Nominated Network pay the difference between the amount of insurance available to effect the necessary repairs or replacement and the actual anticipated cost to effect those repairs or replacements.

(b) If the Access Holder (or its Customer or Operator, as applicable) notifies Aurizon Network that:

- (i) it agrees to bear the whole incremental cost of necessary repairs or replacement (after the amount of insurance available has been applied); or
- (ii) it agrees to bear that part requested by Aurizon Network of the incremental cost of necessary repairs or replacement (and subject to Aurizon Network being satisfied that all other relevant Access Holders (or their Customers or Railway Operators, as applicable) have also agreed to bear their respective part of such costs),

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

- (iii) if **clause 28.5(b)(i)** applies, receipt by Aurizon Network from the Access Holder (or its Customer or Operator) of payment of the relevant amount; and
- (iv) if **clause 28.5(b)(ii)** applies, receipt by Aurizon Network from the Access Holder (or its Customer or Operator) of the last payment of the relevant amount.

(c) If an Access Holder (or its Customer or Operator, as applicable) pays to Aurizon Network any of the costs under **clause 28.5(b)**, on completion of the necessary repairs or replacement:

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

(as applicable).

- (d) ~~If a Nominated Network FM Reduction Notice is given in accordance with the Force Majeure Provisions, then, within 40 Business Days after receipt of a notice from Aurizon Network under **clause 28.5(a)**, the Access Holder (or its Customer or Operator, as applicable) has not given notice to Aurizon Network pursuant to **clause 28.5(b)**, then Aurizon Network may, by giving not less than 20 Business Days notice in writing to the Access Holder, reduce the Access Rights by the FM Access Rights, in which case, the FM Access Rights will cease to form part of the Access Rights on and from the date specified in the notice (which must be at least 20 Business Days from the date of the notice).~~

28.6 ~~25.3~~ Effect of Nominated Network FM Reduction Notice on Operator nominations

- (a) Within 10 Business Days after the Nominated Network FM Reduction Notice is given to the Access Holder, the Access Holder may give written notice to Aurizon Network and each affected Operator in accordance with **clause 4.5(a)** to vary the Access Rights which the Access Holder has allocated to an Operator to take into account the reduction to the Access Rights by the FM Access Rights.
- (b) Except to the extent that the Access Holder has given a notice as contemplated in **clause ~~25.3~~28.6(a)** in respect of the reduction to the Access Rights by the FM Access Rights, the FM Access Rights for each Train Service Type:
- (i) firstly, are deemed to reduce the Access Rights for that Train Service Type for which the Access Holder has not nominated an Operator; and
 - (ii) if, after the operation of **clause ~~25.3~~28.6(b)(i)**, there remains an Over-Allocation for the relevant Train Service Type, **clause 4.7** applies in respect of that Over-Allocation.
- (c) As soon as practicable after the expiry of the period referred to in **clause ~~25.3~~28.6(a)**, Aurizon Network must issue a notice to the Access Holder and each affected Operator summarising, in respect of each Train Service Type affected by the FM Access Rights, the changes to:
- (i) the “Nominated Monthly Train Services (for a 30 day Month)” set out in **Schedule 2** of this Agreement; and
 - (ii) the “Nominated Monthly Operational Rights (for a 30 day Month)” in schedule 2 of each affected Operator’s Train Operations Deed.

28.7 ~~25.4~~ Termination after extended Force Majeure Event

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

- (a) the Parties must meet to endeavour to identify any alternative viable means to perform the suspended obligations; and
- (b) failing any alternative means being agreed within one Month after the end of the three Month period, the Access Holder may terminate this Agreement by 20 Business Days’ notice to Aurizon Network and ~~clause 25.2~~

~~applies~~[clauses 28.4 and 28.5 apply](#) without prejudice to any of the rights of the Parties which accrued before the date of such termination.

29 ~~26~~-Suspension

29.1 ~~26.1~~-Suspension of Access Rights

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

29.2 ~~26.2~~-Details of suspension

A Suspension Notice given by Aurizon Network to the Access Holder and the relevant Operator under ~~clause 26.4~~[29.1](#) must set out:

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

29.3 ~~26.3~~-Effect of suspension

The suspension of any rights under this ~~clause 26.2~~[29](#) does not affect or suspend any other obligation of the Access Holder, including the obligation to pay Access Charges under this Agreement, and is without prejudice to Aurizon Network's other rights and remedies in respect of that or any other default.

29.4 ~~26.4~~-Duration of suspension

The suspension of any rights under ~~clause 26.4~~[29.1](#) continues until such time as the Access Holder has remedied the relevant default or non-compliance notified in the Suspension Notice.

29.5 ~~26.5~~-Suspension of an Operator's rights under a Train Operations Deed

- (a) The Access Holder acknowledges that, under a Train Operations Deed, Aurizon Network has a right to suspend the right of a particular Operator to operate some or all of the Operator's Train Services for a Train Service Type or Train Services generally upon the occurrence of any one or more of a number of specified events or circumstances in respect of that Operator.
- (b) Aurizon Network will notify the Access Holder if it suspends the right of a particular Operator to operate some or all of the Operator's Train Services for a Train Service Type or Train Services generally under a Train Operations Deed and the Access Holder will have the right to nominate an alternate Operator to operate the affected services in accordance with ~~clause 4.3 or 4.4~~[4.5](#).
- (c) The suspension of any of an Operator's rights under a Train Operations Deed does not affect or suspend any obligation of the Access Holder, including the obligation to pay Access Charges under this Agreement.

30 ~~27~~-Liability for wrongful suspension

Where Aurizon Network suspends some or all of the Access Holder's Access Rights [or an Operator's rights under a Train Operations Deed](#), Aurizon Network

will be liable to the Access Holder in respect of loss or damage (including damages for Consequential Loss arising from the suspension) if, and only if:

- (a) no reasonable person in Aurizon Network's position could have formed the view that the stated grounds for the suspension existed (Aurizon Network must bear the burden of establishing that a reasonable person in Aurizon Network's position could have formed that view);
- (b) where the suspension is of an Operator's rights under a Train Operations Deed, the Access Holder's loss or damage is not, and has not been, included in a claim by the Operator in respect of that suspension; and
- (c) ~~(b)~~ the Access Holder has used all reasonable endeavours to mitigate the loss or damage arising from the suspension.

31 ~~28~~ Termination

31.1 ~~28.1~~ Termination of Agreement

- (a) Subject to **clause 28.431.1(b)** and without limiting any rights of termination contained elsewhere in this Agreement, Aurizon Network may, by notice in writing to the Access Holder, terminate this Agreement if a Termination Event specified in **Schedule 6** occurs.
- (b) If there is a Corresponding Suspension Event in respect of the Termination Event referred to in **clause 28.431.1(a)**, then Aurizon Network may only exercise its rights under **clause 28.1(a);31.1(a) if it has first exercised its right of suspension in respect of the Corresponding Suspension Event under clause 29.**
 - ~~(i) — if it has first exercised its right of suspension in respect of the Corresponding Suspension Event under clause 26; and~~
 - ~~(ii) — from the 21st Business Day after the date of the Suspension Notice in respect of the Corresponding Suspension Event.~~

[AN note: The above paragraph (deleted) is inconsistent with the timing for the giving of notices for Termination Events specified in schedule 6. For example, if the Access Holder commits a payment default referred to in item 1 occurs, Aurizon Network is able to give a Suspension Notice 10 Business Days after it gives a notice to remedy the payment default and is able to terminate the agreement 20 Business Days after it gives the notice to remedy.]

31.2 ~~28.2~~ Termination by the Access Holder

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

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

Agreement, and such default continues for at least 20 Business Days after the Access Holder gives Aurizon Network notice of the default; or

- (d) Aurizon Network is in default of the due performance of any other obligation under this Agreement, and such default continues for at least 40 Business Days after the Access Holder gives Aurizon Network notice of the default.

31.3 ~~28.3~~ **Grounds for termination to be specified**

A notice given under **clause ~~28.1~~31.1** or **~~28.2~~31.2** must set out the grounds for the termination.

31.4 ~~28.4~~ **Obligations and other rights upon termination or expiry**

- (a) Neither termination of this Agreement by a Party under this **clause ~~28~~31** nor expiry of this Agreement prejudices:
 - (i) a Party's right to make a Claim, recover damages or avail itself of other remedies under this Agreement or at law; or
 - (ii) either Party's rights to recover money due to it under this Agreement.
- (b) On termination of this Agreement, Aurizon Network and the Access Holder are released from all further obligations or liabilities under this Agreement, except for:
 - (i) rights which accrued on or before termination, including for any breach of this Agreement which occurred before termination. Any liability in respect of such prior breach will be limited in the manner provided in this Agreement; or
 - (ii) any provisions which are expressed as surviving the expiry or termination of this Agreement.

32 ~~29~~ **Assignment**

32.1 ~~29.1~~ **Assignment by Aurizon Network**

- (a) Aurizon Network may Assign the whole or any part of its rights or obligations under this Agreement without the prior consent of the Access Holder, provided that:
 - (i) the Assignee is Accredited; and
 - (ii) Aurizon Network procures that the Assignee covenants with the Access Holder by deed to be bound by and to perform the obligations of Aurizon Network under this Agreement to the extent of the rights and obligations Assigned to the Assignee.
- (b) On the Assignee entering into the deed referred to in **clause ~~29.1~~32.1(a)**, Aurizon Network is released and discharged from further liability under this Agreement in respect of the obligations which the Assignee has undertaken under that deed to be bound by and to perform.

32.2 ~~29.2~~ **Assignment by the Access Holder**

- (a) The Access Holder may not Assign its rights or obligations under this Agreement other than in accordance with this **clause ~~29.2~~32.2**.

- (b) The Access Holder may, provided it is not in default in the performance or observance of any of its obligations under this Agreement, Assign the whole or any part of its rights and obligations under this Agreement to:
 - (i) a Related Body Corporate of the Access Holder which is capable of performing the obligations of the Access Holder under this Agreement, provided that:
 - (A) the Access Holder remains liable for the performance of the duties, responsibilities and obligations assumed by the Assignee; and
 - (B) the performance by the Assignee will (to the extent of such performance) discharge the Access Holder's liability for the performance of the duties, responsibilities and obligations Assigned; or
 - (ii) a person other than a Related Body Corporate of the Access Holder with the prior written consent of Aurizon Network, provided that such consent will not be unreasonably withheld if Aurizon Network is satisfied that such person is:
 - (A) financially sound; and
 - (B) otherwise capable of performing the obligations of the Access Holder under this Agreement.
- (c) Any Assignment by the Access Holder of its rights and obligations under this Agreement is conditional on and will not take effect until:
 - (i) the Assignee covenants with Aurizon Network by deed, in such terms as Aurizon Network may reasonably require, to be bound by and to perform the obligations of the Access Holder under this Agreement; and
 - (ii) if required by Aurizon Network, the Assignee delivers Security to Aurizon Network which satisfies the requirements of **clause 6** for an amount of not less than the Security Amount.
- (d) Subject to **clause 29.232.2(e)**, if a Change in Control of the Access Holder occurs without Aurizon Network's prior written consent, the occurrence of the Change in Control will be taken to be an Assignment of the Access Holder's rights and obligations under this Agreement which is not permitted under this **clause 29.2-32.2**.
- (e) **Clause 29.232.2(d)** does not apply to a Change in Control where:
 - (i) the Access Holder or its Ultimate Holding Company is listed on a recognised stock exchange;
 - (ii) the Change in Control is a result of a Change in Control of that listed entity; and
 - (iii) that listed entity remains listed on that recognised stock exchange both before and after that Change in Control.
- (f) This **clause 29.232.2** does not limit the Access Holder's right to Transfer Access Rights in accordance with [the Transfer Provisions which form part of this Agreement under clause 41.3](#).

32.3 ~~29.3~~ **Charging**

A Party (**Chargor**) may create a Charge over all of its rights under this Agreement in favour of a recognised financial institution (**Chargee**) to secure financial accommodation provided to the Chargor in relation to its obligations under this Agreement, provided that the Chargee must first covenant in writing in favour of the other Party (**Non-Charging Party**), pursuant to a deed in such terms as the Non-Charging Party may reasonably require, that in relation to the exercise of any power of sale or other right or remedy under the Charge granted to the Chargee, the Chargee and any person (including any receiver or receiver and manager or agent) claiming through the Chargee will comply with the provisions of this **clause ~~29.32~~** as if it were originally a party to this Agreement, and will not exercise any power of sale of the rights and/or obligations of the Chargor under this Agreement except in accordance with this **clause ~~29.32~~**.

33 ~~30~~ **GST**

33.1 ~~30.1~~ **Construction**

In this **clause ~~30.33~~**:

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

33.2 ~~30.2~~ **Consideration GST exclusive**

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

33.3 ~~30.3~~ **Payment of GST**

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

33.4 ~~30.4~~ **Timing of GST payment**

The recipient will pay the amount referred to in **clause ~~30.333.3~~** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

33.5 ~~30.5~~ **Tax invoice**

The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under **clause ~~30.333.3~~**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

33.6 ~~30.6~~ **Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause ~~30.333.3~~** 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.

33.7 ~~30.7~~ Reimbursements

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

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

34 ~~31~~ Confidentiality

34.1 ~~31.1~~ Confidentiality

Subject to **clause ~~31.2~~, 34.2**, the Recipient must:

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

34.2 ~~31.2~~ Permitted disclosures

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

- (a) the Recipient has obtained the prior written approval of the Discloser to such disclosure. The Discloser must not unreasonably withhold such approval if the Recipient has procured a confidentiality undertaking in respect of the information from such Third Party in favour of both Parties on terms and conditions satisfactory to both Parties, acting reasonably; or
- (b) disclosure is:
 - (i) required or compelled by any order of a court of competent jurisdiction;
 - (ii) required or compelled by any Law;
 - (iii) required or compelled by notice validly issued by any Authority;
 - (iv) necessary for the conduct of any legal proceedings, including any dispute resolution process under this Agreement;
 - (v) reasonably required for the performance of Train Control functions;
 - (vi) required under any stock exchange listing requirement or rule;
 - (vii) required by the Rail Safety Regulator or an Environmental Regulator;

- (viii) to an Operator provided that:
 - (A) the Disclosure is:
 - (1) required by the terms of this Agreement;
 - (2) reasonably necessary for the performance of obligations or the exercise of rights under this Agreement or the Operator's Train Operations Deed; or
 - (3) reasonably necessary in connection with the safe operation of the Nominated Network; and
 - (B) the Discloser must ensure that the Operator keeps the Confidential Information confidential on terms no less onerous than this **clause 31.34**;
- (ix) to the Recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the Discloser;
- (x) to an expert for the purposes of a dispute resolution process, or an auditor for the purposes of an audit, under a "User Funding Agreement" (as defined in the Access Undertaking), if such expert or auditor has executed a legally enforceable confidentiality deed in favour of the Discloser;
- (xi) to legal practitioners and accountants of the Recipient or a Related Body Corporate of it:
 - (A) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (B) who are under a duty of confidentiality to the Recipient; and
 - (C) who have been advised of the confidential nature of the Confidential Information; or
- (xii) otherwise permitted or required in accordance with this Agreement or the Access Undertaking (as amended by any Change in Access Undertaking).

34.3 ~~31.3~~ Discloser may give certain directions

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

- (a) subject to the lawful requirements of the Recipient to retain copies of Confidential Information for business records and document control registers, to immediately deliver to the Discloser the Confidential Information specified by the Discloser;
- (b) to immediately destroy the Confidential Information specified by the Discloser; and
- (c) where the Recipient has disclosed the Confidential Information to any Third Party, to procure the compliance by that Third Party with the requirements of this **clause 31.34.3** as if that Third Party were the Recipient.

34.4 ~~31.4~~ PPS Act

In addition to the obligations imposed under this **clause ~~31.34~~**, each Party agrees to not disclose any information of the kind described in section 275(1) of the PPS Act, including:

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

34.5 ~~31.5~~ Survival

Without limiting **clause ~~34.1,37.1~~**, this **clause ~~31.34~~** survives the destruction or return of Confidential Information in accordance with this Agreement.

34.6 ~~31.6~~ Injunctive relief

The Recipient acknowledges and agrees that a breach of this **clause ~~31.34~~** would be harmful to the business interests of the Discloser and that, as a result, the Discloser may seek urgent injunctive relief, specific performance or a similar remedy to prevent the occurrence or continuance of any breach or suspected breach of this **clause ~~31.34~~** in addition to any other remedies available at law or in equity under or independently of this Agreement.

35 ~~32~~ Relationship with Train Operations Deed

35.1 ~~32.1~~ Disputes

- (a) Prior to any referral of a matter to a loss adjuster, expert, arbitrator or the QCA (**Adjudicator**) in accordance with **clause ~~22.125.1~~** or **~~24.27~~**, either Party may notify the other Party that an Operator should be a party to that referral and, if such a notice is given, then the Party which has given the notice must:
 - (i) notify the relevant Operator of the matter to be referred to the Adjudicator; and
 - (ii) provide the relevant Operator with a copy of the provisions of this Agreement governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, the Adjudicator (**AA Dispute Provisions**).
- (b) If an Operator is given a notice under **clause ~~32.135.1(a)~~**, then:
 - (i) where the Adjudicator is to be a loss adjuster, expert or arbitrator, the Parties are deemed not to have agreed the appointment of the loss adjuster, expert or arbitrator unless the Operator has also agreed to the appointment of that loss adjuster, expert or arbitrator;
 - (ii) the Parties must comply with the **AA Dispute Provisions** in respect of the Operator as though the Operator was a Party to this Agreement for the purposes of the matter referred to the Adjudicator; and
 - (iii) the Adjudicator, in addition to determining the matter between the Parties, must also determine any claim, dispute, question or liability involving the Operator and the relevant Train Operations Deed

arising in connection with any of the events or facts the subject of the matter referred to the Adjudicator (unless that claim, dispute, question or liability has already been agreed by Aurizon Network and the Operator or otherwise determined).

- (c) If the Access Holder is notified of a matter to be referred to an Adjudicator in accordance with a Train Operations Deed, then the Access Holder:
- (i) must comply with the provisions of that agreement governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, an Adjudicator;
 - (ii) must provide the Adjudicator with a copy of this Agreement;
 - (iii) agrees that the [AA](#) Dispute Provisions do not apply to any claim, dispute, question or liability involving the Access Holder and this Agreement in connection with the matter referred to the Adjudicator; and
 - (iv) agrees that, for the avoidance of doubt, the decision of that Adjudicator, in the absence of manifest error, will be final and binding upon the Access Holder.

35.2 ~~32.2~~ Performance Levels

- (a) If a notice is given under the Train Operations Deed that a party considers that the Performance Levels are no longer appropriate, the Parties and the Operator must use reasonable endeavours to agree on varied Performance Levels.
- (b) If the Parties and the Operator are unable to agree to such variations then the existing Performance Levels will continue to apply unless varied by Aurizon Network in accordance with clause 12.2(a)(iv) of the Train Operations Deed.

35.3 ~~32.3~~ Amendments due to changes to Train Operations Deed

If:

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

then:

- (f) the Parties must amend this Agreement (including, but not limited to, by Aurizon Network varying the Access Charge Rates or Train Description) as reasonably necessary to reflect the change or variation to the Train Operations Deed and otherwise comply with this Agreement (including, for example, the Access Holder varying its nomination of the Operator (if necessary)), provided that any such amendment ceases to apply to the

extent the relevant Operator ceases to be nominated as the Operator of the relevant Train Services;

- (g) Aurizon Network must advise the Access Holder of any variations to the Access Charge Rates payable by the Access Holder as a result of that change or variation; and
- (h) where the Parties cannot agree on the amendments to this Agreement, to the extent that those amendments:
 - (i) are not variations to the Access Charge Rates, the matter will be referred to an expert in accordance with **clause 24.327.3**; and
 - (ii) are variations to the Access Charge Rates (and any other amendments have been agreed by the Parties or otherwise determined), either Party may refer the matter to the QCA for determination in accordance with **clause 24.5-27.5**.

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

35.4 ~~32.4~~ **Notice to Access Holder**

- (a) If any of the matters referred to in **clauses 32.335.3(a) to 32.335.3(e)** is proposed by Aurizon Network or the Operator and the proposal, if agreed, would require amendments to this Agreement or otherwise adversely affect the Access Rights or utilisation of the Access Rights, then Aurizon Network must provide:
 - (i) written notice to the Access Holder of the proposal as soon as practicable; and
 - (ii) the Access Holder with a reasonable opportunity to participate in any negotiations or discussions between Aurizon Network and the Operator of such a proposal.
- (b) If the Access Holder disputes the proposed amendments to this Agreement or the effect on the Access Rights or utilisation of the Access Rights (as applicable) arising from a matter referred to in **clauses 32.335.3(a) to 32.335.3(e)**, then the Access Holder may refer the dispute to the QCA for determination in accordance with **clause 24.5-27.5**.

36 ~~33~~ **Notices**

36.1 ~~33.1~~ **Form of Notice**

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

36.2 ~~33.2~~ **Method of service**

A Notice may be given by being:

- (a) personally delivered to a Party;
- (b) left at the Party's current address for service;
- (c) sent to the Party's current address for service by pre-paid ordinary mail;

- (d) sent by facsimile transmission to the Party's current facsimile number for service; or
- (e) if agreed by the Parties, sent by email to the Party's current email address for service.

36.3 ~~33.3~~ **Deemed Notice**

Subject to **clause ~~33.5~~, 36.5**, a Notice given in accordance with this **clause ~~33~~36** is deemed to be given if:

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

36.4 ~~33.4~~ **Addresses for notices**

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

36.5 ~~33.5~~ **Train Control Direction or Incident Commander's Direction**

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

37 ~~34~~ **General**

37.1 ~~34.1~~ **Survival**

This **clause ~~34~~37** and **clauses ~~5, 6, 13, 17, 21, 22, 24, 28, 30, 31 and 33~~16, 20, 24, 25, 27, 31, 33, 34 and 36** survive the expiration or termination of this Agreement.

37.2 ~~34.2~~ **Amendment**

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

37.3 ~~34.3~~ **Entire agreement**

- (a) This Agreement, the Schedules and other documents referred to in the Schedules constitute the entire understanding and agreement between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the

subject matter of this Agreement are merged in and superseded by this Agreement and are of no force or effect. No Party is liable to any other Party in respect of those matters.

- (c) Neither Party has relied on any representations made by the other Party relating to the subject matter of this Agreement or otherwise.
- (d) No oral explanation or information provided by any Party to another:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

37.4 ~~34.4~~ **Counterparts**

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

37.5 ~~34.5~~ **Non-merger**

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

37.6 ~~34.6~~ **Authority to enter into agreement**

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

37.7 ~~34.7~~ **Consents and approvals**

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

37.8 ~~34.8~~ **Relationship**

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

37.9 ~~34.9~~ **Certificate**

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

37.10 ~~34.10~~ **Costs**

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

37.11 ~~34.11~~ Duty

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

37.12 ~~34.12~~ Waiver and exercise of rights

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

37.13 ~~34.13~~ Computation of time

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

37.14 ~~34.14~~ Severance of invalid or illegal terms

- (a) If any term of this Agreement, or its application to any Party, person or circumstance, is or becomes invalid, void, voidable or otherwise unenforceable for any reason whatever, then:
 - (i) that term, or its application to such Party, person or circumstance, is severed from this Agreement;
 - (ii) the remainder of this Agreement, excluding the severed part, remains in force, and any term which includes the severed part applies to such Party, person or circumstance without reliance on the part severed; and
 - (iii) to the extent permissible by Law, the Parties must agree to replace the severed term, effective from the date of severance, with a valid and enforceable term which so far as possible achieves the same purpose, object or effect as the invalid, void, voidable or otherwise unenforceable term was intended to achieve and does not cause any substantial reduction in the benefits of either Party or material re-allocation of risks between the Parties.
- (b) The Parties must act reasonably and in good faith in seeking an agreement under this **clause ~~34.14~~37.14** as to a replacement term.

- (c) If the Parties cannot agree upon a replacement term, this Agreement is continued in accordance with ~~clauses 34.14~~37.14(a)(i) and ~~34.14~~37.14(a)(ii).

37.15 ~~34.15~~ **Rights cumulative**

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

37.16 ~~34.16~~ **Approvals and consents**

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

37.17 ~~34.17~~ **Third Party Land**

The Access Holder acknowledges that:

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

and agrees that in respect of that Third Party Land:

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

37.18 ~~34.18~~ **Implementation of agreement**

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

37.19 ~~34.19~~ **Governing law and jurisdiction**

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

37.20 ~~34.20~~ PPS Act

- (a) If a Party (**first party**) reasonably determines that this Agreement contains a “Security Interest” for the purposes of the PPS Act (**Security Interest**), the other Party (**second party**) agrees to do anything (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the first party (after consultation with the second party) reasonably asks and considers necessary for the purposes of:
- (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
 - (ii) enabling the first party to apply for any registration, or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the first party; or
 - (iii) enabling the first party to exercise rights in connection with the Security Interest.
- (b) A Party is not required to give any notice under the PPS Act to the other Party or any other person and each Party waives the right to receive any such notice (including a notice of ‘Verification Statement’ as this term is defined under the PPS Act) unless the notice is required by the PPS Act and that obligation cannot be excluded.
- (c) To the extent that this Agreement gives rise to a Security Interest, the Parties agree that for the purposes of section 115 of the PPS Act, the following sections of the PPS Act will not apply to any Relevant Collateral:
- (i) section 95 (notice by Secured Party of removal of Accession);
 - (ii) section 121(4) (notice by Secured Party of enforcement of Security Interest in liquid assets);
 - (iii) section 125 (obligation of Secured Party to dispose of or retain Collateral after seizure);
 - (iv) section 130, to the extent that it requires a party to give any notice to the other party (notice by Secured Party of disposal of Collateral);
 - (v) section 132(3)(d) (obligation of Secured Party to show amounts paid to other Secured Parties in statement of account);
 - (vi) section 132(4) (statement of account by Secured Party if it does not dispose of Collateral within prescribed period);
 - (vii) section 135 (notice by Secured Party of retention of Collateral);
 - (viii) section 142 (redemption of Collateral); and
 - (ix) section 143 (reinstatement of Security Agreement).

38 ~~35~~ Most favoured nation status

38.1 ~~35.1~~ Notice of contravention of price differentiation limitations

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

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

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

38.2 ~~35.2~~ **Aurizon Network's response**

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

- (a) whether or not Aurizon Network agrees that the Access Agreement with the other Network Customer is for a Like Train Service and, if not, the reasons why Aurizon Network considers this to be the case;
- (b) if Aurizon Network agrees that the Access Agreement with the other Network Customer is for a Like Train Service, whether or not Aurizon Network agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation set out in the Access Undertaking and, if not, the reasons why Aurizon Network considers that the access charge applicable to the Like Train Service has not been developed in contravention of the limits on price differentiation; and
- (c) if Aurizon Network agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation, then within 40 Business Days after the advice provided under this **clause 35.2, 38.2**, Aurizon Network must advise the Claimant Access Holder:
 - (i) whether or not Aurizon Network has been able to vary the access charge applicable to the Like Train Service such that it no longer contravenes the limits on price differentiation set out in the Access Undertaking; or
 - (ii) if Aurizon Network has not been able to vary the access charge applicable to the Like Train Service, that Aurizon Network agrees to the reduction of the Access Charges payable by the Claimant Access Holder, including the amount of the proposed reduced Access Charges.

38.3 ~~35.3~~ **Disputes**

If the Access Holder does not agree with Aurizon Network's response, the dispute must be referred to an Expert for resolution in accordance with **clause 24.3-27.3**.

38.4 ~~35.4~~ **Interaction with other Network Customers**

If:

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

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

39 ~~36~~-JV Participants and liability

39.1 ~~36.1~~ Applicability

This **clause ~~36.1~~39** only applies if **item 5 of Schedule 1** states that it applies.

39.2 ~~36.2~~ Warranty

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

39.3 ~~36.3~~ JV Participants and percentage interests

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

39.4 ~~36.4~~ Liability of JV Participants

- (a) The liability of each JV Participant under this Agreement will, subject to **clause ~~36.4~~39.4(c)**, be several in respect of Financial Obligations in proportion to their respective percentage interests.
- (b) Each JV Participant will be jointly and severally liable in respect of the performance of any obligations under this Agreement that are not Financial Obligations.
- (c) Subject to **clause ~~36.4~~39.4(e)**, if a JV Participant is in default of a Financial Obligation, and the Access Holder has not given notice to Aurizon Network identifying the defaulting JV Participant within five Business Days after the date of Aurizon Network giving a notice to the Access Holder identifying the default, all JV Participants will be jointly and severally liable for the performance of the Financial Obligation.
- (d) Any notice given by the Access Holder under **clause ~~36.4~~39.4(c)** is conclusive evidence that the JV Participant specified in the notice is the JV Participant that is in default and the notice binds all JV Participants.

- (e) If a Financial Obligation is a payment obligation which does not have a specified due date, then **clause 36.439.4(c)** comes into effect only if:
 - (i) Aurizon Network notifies the JV Participants of the failure to comply with the Financial Obligation; and
 - (ii) the default is not remedied after a reasonable time (of at least 20 Business Days) from the date the JV Participants receive the notice under **clause 36.439.4(e)(i)**.

39.5 ~~36.5~~ Termination and Suspension

For the avoidance of doubt, where a Suspension Event or Termination Event is attributable to or relates to an act or omission of one or more (but not all) of the JV Participants, Aurizon Network will be entitled to suspend or terminate (as applicable) this Agreement under **clauses 2629** and **2831** (as applicable) despite the Suspension Event or Termination Event (as applicable) not being attributable to or relating to an act or omission of all of the JV Participants.

40 Short Term Transfer of Access Rights by Access Holder

40.1 Acknowledgement

The Parties acknowledge and agree that this **clause 40** is a Short Term Transfer Provision.

40.2 Access Holder's right to Short Term Transfer

The Access Holder may Short Term Transfer all or part of the Access Rights for a Train Service Type to itself or a Relevant Access Holder in accordance with this **clause 40**.

40.3 Short Term Transfer Notice

- (a) If the Access Holder proposes to Short Term Transfer all or part of the Access Rights for a Train Service Type to itself or a Relevant Access Holder (**Short Term Transferee**) under this **clause 40**, the Access Holder must give Aurizon Network a Short Term Transfer Notice in respect of the proposed Short Term Transfer.
- (b) A Short Term Transfer Notice given under **clause 40.3(a)** must comply with the requirements for a Short Term Transfer Notice under the Access Undertaking.

40.4 Short Term Transfer

- (a) If:
 - (i) the Access Holder gives a valid Short Term Transfer Notice under **clause 40.3**; and
 - (ii) Aurizon Network does not give the Access Holder a Short Term Transfer Refusal Notice in respect of the proposed Short Term Transfer on or before the Last Refusal Date,
- (b) then, with effect on and from the Last Refusal Date, the Access Holder will be taken to have relinquished the 'Nominated Access Rights' for the Train Service Type specified in the Short Term Transfer Notice for the 'Short Term Transfer Period' as specified in the Short Term Transfer Notice.

- (c) No Transfer Fee or Relinquishment Fee is payable in respect of a Short Term Transfer.

40.5 Short Term Transfer Refusal Notice

- (a) If the Access Holder gives Aurizon Network a Short Term Transfer Notice for a proposed Short Term Transfer under this **clause 40**, Aurizon Network may, before the Last Refusal Date for the proposed Short Term Transfer, give the Access Holder and the Short Term Transferee a Short Term Transfer Refusal Notice in respect of the proposed Short Term Transfer.
- (b) Aurizon Network may only give the Access Holder a Short Term Transfer Refusal Notice in respect of a proposed Short Term Transfer in the circumstances specified in the Access Undertaking.

40.6 Short Term Transfer from Relevant Access Agreement

If:

- (a) a Short Term Transferor gives Aurizon Network a valid Short Term Transfer Notice (**Relevant Short Term Transfer Notice**) under its Relevant Access Agreement (**Transferring Access Agreement**) in respect of a proposed Short Term Transfer;
- (b) the Access Holder is the 'Short Term Transferee' specified in the Relevant Short Term Transfer Notice;
- (c) Aurizon Network does not give the Short Term Transferor and the Access Holder a Short Term Transfer Refusal Notice in respect of the proposed Short Term Transfer on or before the Last Refusal Date,

then, with effect on and from the Last Refusal Date:

- (d) the Short Term Access Rights for the proposed Short Term Transfer will be taken to be Access Rights for an additional Train Service Type under this Agreement;
- (e) **schedule 2** will be taken to be varied to include the Train Description for the Short Term Access Rights as an additional Train Service Type which will be taken to be the same as the 'Train Description' for the 'Nominated Access Rights' under the Transferring Access Agreement specified in the Relevant Short Term Transfer Notice except that:
- (i) the Train Service Compliance Date and Train Service Commitment Date will be taken to be the 'Short Term Transfer Date' specified in the Relevant Short Term Transfer Notice;
- (ii) the Train Service Expiry Date will be taken to be the last day of the 'Short Term Transfer Period' specified in the Relevant Short Term Transfer Notice;
- (iii) the Origin will be taken to be the 'Short Term Origin' specified in the Relevant Short Term Transfer Notice';
- (iv) the Destination will be taken to be the 'Short Term Destination' specified in the Relevant Short Term Transfer Notice';
- (v) the 'Loaded distance from Origin to Destination (km)' and the 'Empty distance from Destination to Origin (km)' will be the distances from the 'Short Term Origin' specified in the Relevant Short Term Transfer

- Notice to the 'Short Term Destination' specified in the Short Term Transfer Notice determined by Aurizon Network, acting reasonably;
- (vi) the Loading Facility will be the Loading Facility specified in the 'Loading Facility Confirmation' that accompanied the Relevant Short Term Transfer Notice;
 - (vii) the Unloading Facility will be the Unloading Facility specified in the 'Unloading Facility Confirmation' that accompanied the Relevant Short Term Transfer Notice;
 - (viii) the Maximum Time at Loading Facility and Maximum Time at Unloading Facility will be the periods determined by Aurizon Network, acting reasonably;
 - (ix) the Nominated Monthly Train Services for each Month during the Short Term Transfer Period will be the 'Train Service Entitlements' for the 'Nominated Access Rights' under the Transferring Access Agreement for that Month specified in the Relevant Short Term Transfer Notice;
- (f) **schedule 4** will be taken to be varied to include the Access Charge Rates for the Short Term Access Rights which will be taken to be determined by Aurizon Network, acting reasonably, based on the same Reference Tariffs that were applied in setting the access charges for the 'Nominated Access Rights' under the Transferring Access Agreement specified in the Relevant Short Term Transfer Notice; and
- (g) the Access Holder will be taken to have given a notice under **clause 4.5** to vary the nomination for the Operator under the "Short Term Transferee Train Operations Deed" specified in the Relevant Short Term Transfer Notice to include the Short Term Access Rights.

40.7 Variation to Short Term Transfer Provision

- (a) If Aurizon Network becomes obliged under the Access Undertaking to vary the Short Term Transfer Provisions under all access agreements or particular classes of access agreements of which this Agreement forms part, then Aurizon Network must give the Access Holder a notice setting out the variations to this **clause 40** which Aurizon Network is obliged to make to this **clause 40** in accordance with the Access Undertaking.
- (b) If Aurizon Network gives the Access Holder a notice under **clause 40.7(a)**, then this **clause 40** will be taken to be varied as set out in that notice with effect on the date specified in that notice.

Execution

Executed as an agreement

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Schedule 1 – Reference schedule

Item	Description	Details
Access Holder details		
1	Access Holder	Name: [insert] ABN: [insert]
Particulars for Notices		
2	Address for Notices	Aurizon Network Address: [insert] Facsimile: [insert] Email: [insert] Attention: [insert] Access Holder Address: [insert] Facsimile: [insert] Email: [insert] Attention: [insert]
Security details		
3	Does clause 6.1 apply?	[yes/no]
4	Security Amount	The Security Amount (if applicable), at a time, will be an amount equivalent to the maximum amount of aggregate TOP Charges for all Train Service Types under this Agreement that could potentially be payable in up to 6 months assuming: (a) all of the Train Services were not operated for the Access Holder during the applicable period; and (b) the reason that the Train Services are not operated is not as a result of Aurizon Network Cause.
[Joint Venture]		
5	Does clause 36<u>39</u> apply?	[yes/no]
6	Name of Joint Venture	[insert name of Joint Venture or "Not Applicable" if no Joint Venture]
7	JV Participants and percentage interests	Name of JV Participant Percentage Interest [insert name]: [insert interest]% [insert name]: [insert interest]% [insert name]: [insert interest]%

Schedule 2 – Train Descriptions

Part A – Matters applicable to specific Train Service Types

1 Train Service Type #1

1.1 Applicable Reference Tariff

[insert name of applicable type of Reference Tariff]

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

Details of dates

Train Service Compliance Date [insert]

Train Service Commitment Date [insert]

Train Service Expiry Date [insert]

General details

Commodity Coal

Coal System [insert]

Reference Train Service [yes /no]

Conditional Access Rights

~~Does clause 9~~ Do the Conditional [yes/no]

Access Provisions apply? [if yes, insert description of Expansion]

Operator(s)

Name: [insert]

Address: [insert]

Facsimile: [insert]

Email: [insert]

Attention: [insert]

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

Details of route and facilities

Origin [insert]

Destination [insert]

Loaded distance from Origin to Destination (km) [insert]

Empty distance from Destination to [insert]

Details of route and facilities

Origin (km)	
Loading Facility	[insert]
Unloading Facility	[insert]
Depot	[insert]
Through-Running Train Service Type	[yes /no]

Details of maximum dwell times

Maximum Time at Loading Facility (hours)	[insert]
Maximum Time at Unloading Facility (hours)	[insert]
Maximum Time at Depot (hours)	[insert]
Maximum Other Dwell Times (hours)	[insert]

Maximum Sectional Running Times

Maximum Sectional Running Times	The Maximum Sectional Running Time for a Section for the Train Service Type are set out in appendix A to this Schedule 2 .
---------------------------------	--

Nominated Monthly Train Services

Nominated Monthly Train Services	The Nominated Monthly Train Services for the Train Service Type is set out in appendix B to this Schedule 2 .
----------------------------------	---

Maximum Payload

Maximum Payload	The Maximum Payload for the Train Service Type is set out in appendix B to this Schedule 2 .
-----------------	--

1.4 Special operating restrictions

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

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

1.5 Cycle description

Subject to:

- (a) any Train Control Direction given to the Operator in respect of a Train

Service;

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

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

Item	Exceptions
1	[insert]
2	[insert]

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

1.6 Permitted Train Movements on the Nominated Network

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

Part B – Matters applicable to all Train Service Types

1 Matters applicable to all Train Service Types

1.1 Overview

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

1.2 Special operating restrictions

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

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

1.3 Cycle description

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

Item	Exceptions
1	[insert]
2	[insert]

1.4 Stowage

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

Appendix A to Schedule 2 - Sectional Running Times

1 Train Services that are Reference Train Services

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

Maximum Sectional Running Times: Reference Train Services

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

Standard Sectional Running Times: Reference Train Services

		Empty (mins)		Loaded (mins)			
Location From	Location To	Pass to Stop	Start to Pass	S t a r t t o o p p	P a s s t o o p s	S t o p s	S t o p p

2 Train Services that are not Reference Train Services

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

Maximum Sectional Running Times: Non- Reference Train Services

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

Standard Sectional Running Times: Non-Reference Train Services

Empty (mins)	Loaded (mins)

Location From	Location To	Pass to Stop	Start to Pass	S	P	S	S
				t	a	t	t
				a	s	a	a
				r	s	r	r
				t		t	t
					t		
				t	o	t	t
				o		o	o
					S		
				S	t	P	S
				t	o	a	t
				o	p	s	o
				p		s	p

Appendix B to Schedule 2 – Nominated Monthly Train Services

1 Train Service Type #1

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

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

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

where:

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

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

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

AAP = the Nominal Payload for the Train Service Type

Appendix C to Schedule 2 – Conditional Access Rights

1 Train Service Type #1

Details of Expansion

Details of Expansion

[insert]

Details of Segments

Details of Segment #1

Description: [insert]

Initial Available Capacity: [insert]

Details of Segment #2

Description: [insert]

Initial Available Capacity: [insert]

Details of Segment # [#]

Description: [insert]

Initial Available Capacity: [insert]

Schedule 3 – Nominated Network

1 Nominated Network

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

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

2 Parts of Nominated Network subject to clause ~~25.2~~28.5

For the purpose of clause ~~25.2~~28.5, the specified parts of the Nominated Network are those parts of the Nominated Network described by reference the diagrams and/or tables set out below:

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

[Drafting note: Aurizon Network may specify parts of the Nominated Network for the purpose of clause ~~25.2~~28.5 which are life expired, obsolete and/or only used by a single user.]

3 Train Control centres and signal cabins

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

4 Third Party Land

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

5 Weighbridges and Overload Detectors

5.1 Weighbridges

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

5.2 Overload Detectors

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

Schedule 4 – Access Charges

1 Definitions

1.1 Definitions

In this schedule 4:

~~1~~ **Access Charge Rates** for a Train Service Type means the rates specified in **item 2** of this **schedule 4** for the Train Service Type.

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

Access Charges:

- (a) for a Billing Period means the amount calculated in accordance with **item 3.1** of this **schedule 4** for the Billing Period; and
- (b) for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.2** of this **schedule 4** for the Train Service Type and Billing Period.

Adjustment Charge for a Billing Period means the amount calculated in accordance with **item 3.10** of this **schedule 4** for the Billing Period.

Advice Date in respect of a Change in Reference Tariff Provisions means the date on which the QCA's decision making or approving the Change in Reference Tariff Provisions is first published by the QCA.

Allocated Tariff 1 Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.5** of this **schedule 4** for the Train Service Type and Billing Period.

Allocated Tariff 2 Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.6** of this **schedule 4** for the Train Service Type and Billing Period.

Change in Reference Tariff Provisions means any change (including variation, repeal or replacement) of:

- (a) the Reference Tariff Provisions; or
- (b) the Reference Tariffs (including the creation of a new Reference Tariff), made or approved by the QCA from time to time.

Corresponding Train Service for a Train Service Type means a Network Train Service which:

- (a) has an origin and destination which is the same as the Origin and Destination for the Train Service Type;
- (b) has the same End User for the Train Service Type; and
- (c) is subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type.

and operated under an Access Agreement.

Electric Energy Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.8** of this **schedule 4** for the Train Service Type and Billing Period.

Electric Tariff Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.7** of this **schedule 4** for the Train Service Type and Billing Period.

End User means in respect of Network Train Services operated in relation to an origin to destination, the person who is either the “Customer” (as defined under the Access Undertaking) for those Network Train Services or the “Access Holder” (as defined in the Access Undertaking) for those Network Train Services (but who has no “Customer” (as defined under the Access Undertaking)) under an Access Agreement.

Escalation Date means each 1 July.

Gross Tonnes for a Train Service (whether loaded or empty) operated for a Train Service Type means the amount which is the sum of:

- (a) for each locomotive comprised in the Train Service, the Maximum Gross Mass for that locomotive;
- (b) for each loaded or partly loaded Wagon comprised in the Train Service:
 - (i) if there is a functioning Weighbridge located en route between the Origin and Destination for the Train Service Type, the mass of the Wagon as determined at such Weighbridge (provided that if there is more than one functioning Weighbridge located en route between the Origin and Destination for the Train Service Type, the mass will be determined by the Weighbridge that is located closest to the Origin for the Train Service Type); and
 - (ii) if there is no functioning Weighbridge located en route between the Origin and Destination for the Train Service Type, the amount (expressed in tonnes rounded to two decimal places) calculated in accordance with the following formula for each loaded or partly loaded Wagon comprising the Train Service:

$$(MGM - TW) \times LEF + TW$$

where:

MGM ≡ the Maximum Gross Mass for the Wagon

TW ≡ the Tare Weight for the Wagon

LEF ≡ the Loading Efficiency Factor for the Train Service

- (c) for each empty Wagon comprised in the Train Service, the Tare Weight for the Wagon; and

- (d) for all other Rollingstock comprised in the Train Service, the Maximum Gross Mass for the Rollingstock.

Gtk for an operated Train Service (whether loaded or empty) for a Train Service Type means the amount which is the Gross Tonnes for the Train Service for the Train Service Type multiplied by:

- (a) if the Train Service was operated from the Origin to Destination for the Train Service Type, the number of kilometres of the loaded distance from Origin to Destination for the Train Service Type as specified in the Train Description for that Train Service Type; or
- (b) if the Train Service was operated from the Destination to Origin for the Train Service Type, the number of kilometres of the empty distance from the Destination to Origin for the Train Service Type as specified in the Train Description for that Train Service Type.

Gtk Forecast has the meaning given in the Access Undertaking.

Incremental Capacity Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.4** of this **schedule 4** for the Train Service Type and Billing Period.

Incremental Maintenance Charge for a Train Service Type for a Billing Period is the amount calculated in accordance with **item 3.3** of this **schedule 4** for the Train Service Type and Billing Period.

Load Variation Table means a table published by Aurizon Network with respect to the relevant Reference Train Service or Train Service Type identifying allowable overloads for Wagons and bogies and specifying relevant Operational Constraints and additional charges, where applicable, for such overloads.

Loading Efficiency Factor for a loaded Train Service means:

- (a) if a loading efficiency factor is not specified in Aurizon Network's Access Undertaking, 98%; or
- (b) if a loading efficiency factor (however described) is specified in Aurizon Network's Access Undertaking, the loading efficiency factor specified in Aurizon Network's Access Undertaking (expressed as a percentage).

Net Tonnes for a Train Service (whether loaded or empty) operated for a Train Service Type means:

- (a) the Gross Tonnes for the Train Service; less
- (b) the sum of:
 - (i) for each locomotive comprised in the Train Service, the Maximum Gross Mass for the locomotive;
 - (ii) for each Wagon (whether loaded or empty) comprised in the Train Service, the Tare Weight for the Wagon; and
 - (iii) for all other Rollingstock (whether loaded or empty) comprised in the Train Service, the Tare Weight for the Rollingstock.

Nominal Train Payload has the meaning given in the Access Undertaking.

Ntk for a Train Service (whether loaded or empty) operated for a Train Service Type means the amount which is the Net Tonnes for the Train Service multiplied by:

- (a) if the Train Service was operated from the Origin to Destination for the Train Service Type, the number of kilometres of the loaded distance from Origin to Destination for the Train Service Type as specified in the Train Description for that Train Service Type; or
- (b) if the Train Service was operated from the Destination to Origin for the Train Service Type, the number of kilometres of the empty distance from the Destination to Origin for the Train Service Type as specified in the Train Description for that Train Service Type.

Operator Access Agreement has the meaning given in the Access Undertaking.

QCA Levy Charge for a Train Service Type for a Billing Period means the amount calculated in accordance with **item 3.9** of this **schedule 4** for the Train Service Type and Billing Period.

Reference Train Path or RTP has the meaning given to the term “rtp” in the Access Undertaking.

Review Date in respect of a Change in Reference Tariff Provisions means the first day of the Month during which the Change in Reference Tariff Provisions takes effect.

Schedule 4 Variation Notice has the meaning given in **item 5.2(a)** of this **schedule 4**.

Tariff Gtk in respect of a Train Service Type means the aggregate of the “gtk” (as defined in the Access Undertaking) for all coal carrying Network Train Services that are subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type.

TOP Charge:

- (a) for a Year means the amount which is the sum of the “TOP Charge” (as defined in **paragraph (b)** of this definition) for each Train Service Type for the Year; and
- (b) for a Train Service Type for a Year means the amount calculated in accordance with **item 4** of this **schedule 4** for the Train Service Type and Year.

1.2 Access Charge Rates definitions

In this **schedule 4**, a reference to any Access Charge Rate for a Train Service Type means the Access Charge Rate as varied or escalated from time to time in accordance with this Agreement.

1.3 Final Year of Agreement

In this **schedule 4**, the final Year of this Agreement will be the 12 month period commencing on the 1 July occurring before the date of the expiration or termination of this Agreement and ending on the 30 June occurring after the date of the expiration or termination of this Agreement.

2 Access Charge Rates

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

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

3 Calculation of Access Charges

3.1 Calculation of Access Charges for Billing Period

The Access Charges for a Billing Period is the sum of each of the following for Billing Period:

- (a) the Access Charge for each Train Service Type for the Billing Period (as calculated in accordance with item 3.2 of this schedule 4 for each Train Service Type for the Billing Period); and
- (b) the Adjustment Charge (if any) applicable to the Billing Period.

3.2 Calculation of Access Charges for Train Service Type and Billing Period

The Access Charges for a Train Service Type for a Billing Period is the sum of

each of the following for the Train Service Type and Billing Period:

- (a) the Incremental Maintenance Charge;
- (b) the Incremental Capacity Charge;
- (c) the Allocated Tariff 1 Charge;
- (d) the Allocated Tariff 2 Charge;
- (e) the Electric Tariff Charge;
- (f) the Electric Energy Charge;
- (g) the QCA Levy Charge; and
- (h) if the Billing Period is a Billing Period ending on 30 June, the TOP Charge for the Train Service Type for the Year in which that 30 June occurs.

3.3 Calculation of Incremental Maintenance Charge

The Incremental Maintenance Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$IMC = (AT_1 \times GTK) / 1000$$

where:

<u>IMC</u>	<u>≡</u>	<u>the Incremental Maintenance Charge for the relevant Train Service Type and Billing Period</u>
<u>AT₁</u>	<u>≡</u>	<u>AT₁ for the relevant Train Service Type</u>
<u>GTK</u>	<u>≡</u>	<u>the amount which is the sum of the GtK for all Train Services for the relevant Train Service Type operated during the relevant Billing Period</u>

3.4 Calculation of Incremental Capacity Charge

The Incremental Capacity Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ICC = AT_2 \times RTP$$

where:

<u>ICC</u>	<u>≡</u>	<u>the Incremental Capacity Charge for the relevant Train Service Type and Billing Period</u>
<u>AT₂</u>	<u>≡</u>	<u>AT₂ for the relevant Train Service Type</u>
<u>RTP</u>	<u>≡</u>	<u>the sum of number of Reference Train Paths used by an individual Train Service for that Train Service Type operated during the relevant Billing Period</u>

3.5 Calculation of Allocated Tariff 1 Charge

The Allocated Tariff 1 Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ALT1 = (AT_3 \times NTK) / 1000$$

where:

<u>ALT1</u>	≡	<u>the Allocated Tariff 1 Charge for the relevant Train Service Type and Billing Period</u>
<u>AT₃</u>	≡	<u>AT₃ for the relevant Train Service Type</u>
<u>NTK</u>	≡	<u>the amount which is the sum of the Ntk for all Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period</u>

3.6 Calculation of Allocated Tariff 2 Charge

The Allocated Tariff 2 Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ALT2 = AT_4 \times NT$$

where:

<u>ALT2</u>	≡	<u>the Allocated Tariff 2 Charge for the relevant Train Service Type and Billing Period</u>
<u>AT₄</u>	≡	<u>AT₄ for the relevant Train Service Type</u>
<u>NT</u>	≡	<u>the amount which is the sum of the Net Tonnes for all Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period</u>

3.7 Calculation of Electric Tariff Charge

The Electric Tariff Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$ET = (AT_5 \times eGTK) / 1000$$

where:

<u>ET</u>	≡	<u>the Electric Tariff Charge for the relevant Train Service Type and Billing Period</u>
<u>AT₅</u>	≡	<u>AT₅ for the relevant Train Service Type</u>
<u>eGTK</u>	≡	<u>the amount which is the sum of the Gtk for all electric locomotive hauled Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period</u>

3.8 Calculation of the Electric Energy Charge

The Electric Energy Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:]

$$EEC = (EC \times eGTK) / 1000$$

where:

<u>EEC</u>	<u>≡</u>	<u>the Electric Energy Charge for the relevant Train Service Type and Billing Period</u>
<u>EC</u>	<u>≡</u>	<u>EC for the relevant Train Service Type</u>
<u>eGTK</u>	<u>≡</u>	<u>the amount which is the sum of the Gtk for all electric locomotive hauled Train Services (loaded and empty) for the relevant Train Service Type operated during the relevant Billing Period</u>

3.9 Calculation of QCA Levy Charge

The QCA Levy Charge for a Train Service Type for a Billing Period is the amount (expressed in dollars) calculated in accordance with the following formula:

$$QLC = QL \times NT$$

where:

<u>QLC</u>	<u>≡</u>	<u>the QCA Levy Charge for the relevant Train Service Type and Billing Period</u>
<u>QL</u>	<u>≡</u>	<u>QL for the relevant Train Service Type</u>
<u>NT</u>	<u>≡</u>	<u>the amount which is the sum of the Net Tonnes for all Train Services (loaded and empty) for the relevant Train Service Type operated during the Billing Period</u>

3.10 Calculation of Adjustment Charge

Adjustment Charges (if any) for a Billing Period will be calculated and approved in accordance with the Access Undertaking.

4 Calculation of TOP Charge

4.1 Variables used in formulas in this item 4

If a variable (for example, “ATPY” and “NTSY”) used in a formula in this **item 4** of **schedule 4** is defined for that formula, unless provided otherwise, that variable has the same meaning in each other formula in which it is used in this **item 4** of **schedule 4**.

4.2 System test

(a) This **item 4.2** of **schedule 4** only applies to a Train Service Type which has a Reference Tariff Type which is a ‘System Reference Tariff’ (as defined in the Access Undertaking).

(b) Subject to **item 4.2(a)** of this **schedule 4**, the TOP Charge for a Train Service Type for a Year will be zero if:

$$TGtkY > (FGtkY - NGtkY)$$

where:

<u>TGtkY</u>	<u>≡</u>	<u>the Tariff Gtk for that Train Service Type for the relevant Year</u>
<u>FGtkY</u>	<u>≡</u>	<u>the Gtk Forecast for the relevant Year</u>
<u>NGtkY</u>	<u>≡</u>	<u>the “gtk” (as defined in the Access Undertaking) not achieved due to the non-operation of Network Train Services (that are</u>

subject to the same type of Reference Tariff as the Reference Tariff Type for that Train Service Type) for Aurizon Network Cause for the relevant Year

4.3 Calculation of TOP Charge

Subject to item 4.2 of this schedule 4 (if item 4.2 of this schedule 4 applies), the TOP Charge for a Train Service Type for a Year is the amount (expressed in dollars) calculated in accordance with the following formula (provided that, if the amount calculated in accordance with the following formula is less than zero, the TOP Charge for the Train Service Type for the Year will be zero):

$$ATP = ATPY - ORA - SXRA$$

where:

<u>ATP</u>	≡	<u>the TOP Charge for the relevant Train Service Type and Year</u>
<u>ATPY</u>	≡	<u>ATPY for the relevant Train Service Type and Year calculated in accordance with item 4.4 of this schedule 4</u>
<u>ORA</u>	≡	<u>ORA for the relevant Train Service Type and Year calculated in accordance with item 4.5 of this schedule 4</u>
<u>SXRA</u>	≡	<u>SXRA for the relevant Train Service Type and Year calculated in accordance with item 4.6 of this schedule 4</u>

4.4 Calculation of ATPY

ATPY for a Train Service Type for a Year is the amount calculated in accordance with the following formula:

$$ATPY = AT_2 * RTP * (CNTSY - NNTSY - NTSY) + AT_3 * (CNTKY - NNTKY - NTKY) / 1000 + AT_4 * (CNTY - NNTY - NTY)$$

where:

<u>AT₂</u>	≡	<u>AT₂ for the relevant Train Service Type</u>
<u>RTP</u>	≡	<u>the Reference Train Path for the relevant Train Service Type</u>
<u>CNTSY</u>	≡	<u>the number of Train Services for the relevant Train Service Type that the Operator was entitled to operate during the relevant Year</u>
<u>NNTSY</u>	≡	<u>the number of Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause</u>
<u>NTSY</u>	≡	<u>the number of Train Services (loaded and empty) for the relevant Train Service Type that were operated during the relevant Year</u>
<u>AT₃</u>	≡	<u>AT₃ for the relevant Train Service Type</u>
<u>CNTKY</u>	≡	<u>the sum of the Ntk that would have been determined for the relevant Year had all of the Train Services for the relevant</u>

		<u>Train Service Type that the Operator was entitled to operate during the relevant Year been operated, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the CNTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Description for the relevant Train Service Type</u>
<u>NNTKY</u>	=	<u>the sum of the Ntk of the Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NNTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Description for the relevant Train Service Type</u>
<u>NTKY</u>	=	<u>the sum of the Ntk for all Train Services for the relevant Train Service Type operated during the relevant Year, where Ntk is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NTSY for loaded Train Services for the relevant Train Service Type by the distance from Origin to Destination specified in the Train Description for the relevant Train Service Type</u>
<u>AT4</u>	=	<u>AT₄ for the relevant Train Service Type</u>
<u>CNTY</u>	=	<u>the sum of the Nt that would have been determined for the relevant Year had all of the Train Services for the relevant Train Service Type that the Operator was entitled to operate during the relevant Year been operated, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the CNTSY for loaded Train Services for the relevant Train Service Type</u>
<u>NNTY</u>	=	<u>the sum of the Nt of the Train Services for the relevant Train Service Type that were not able to be operated during the relevant Year solely as a result of Aurizon Network Cause, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NNTSY for loaded Train Services for the relevant Train Service Type</u>
<u>NTY</u>	=	<u>the sum of the Nt for all Train Services for the relevant Train Service Type operated during the relevant Year, where Nt is determined by multiplying the applicable Nominal Train Payload for the relevant Train Service Type by the NTSY for loaded Train Services for the relevant Train Service Type</u>

4.5 Calculation of ORA – the ‘mine cap’

ORA for a Train Service Type for a Year is the amount calculated in accordance with the following formula (if the amount calculated in accordance with the following formula is less than zero, the ORA for the Train Service Type for the Year will be zero):

$$ORA = XORA \times \frac{(ICCNNTSY_m + ALT1CNTSY_m + ALT2CNTSY_m)}{\sum_o^n (ICCNNTSY_o + ALT1CNTSY_o + ALT2CNTSY_o)}$$

where:

XORA \equiv for a Train Service Type for a Year is the amount which is the lesser of:

(a) the ATPY for the relevant Train Service Type for the relevant Year; and

(b) the sum of the ICC_{CTS}, ALT1_{CTS} and ALT2_{CTS} earned by Aurizon Network for Corresponding Train Services for the Train Service Type operated by, or for, a different Access Holder which exceed the number of Corresponding Train Services which that Access Holder was entitled to operate, or have operated for it, during the relevant Year (provided that such amount earned by Aurizon Network has not already been taken into account, or will not be taken into account, in the calculation of "ORA" under a corresponding provision of another Access Agreement)

ALT1_{CTS} \equiv in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the "Base Access Charge" or "Access Charge Rate" (however described) referred to as "AT₃"

ALT2_{CTS} \equiv in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the "Base Access Charge" or "Access Charge Rate" (however described) referred to as "AT₄"

ICC_{CTS} \equiv in respect of a Corresponding Train Service, that part of the access charges payable to Aurizon Network in respect of the operation of that Corresponding Train Service which is calculated by reference to the "Base Access Charge" or "Access Charge Rate" (however described) referred to as "AT₂"

ALT1CNTSY \equiv in respect of a Corresponding Train Service, that part of the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the "Base Access Charge" or "Access Charge Rate" (however described) referred to as "AT₃"

ALT2CNTSY \equiv in respect of a Corresponding Train Service, that part of

		<u>the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT₄”</u>
<u>ICCNTSY</u>	<u>≡</u>	<u>in respect of a Corresponding Train Service, that part of the access charges that would have been payable had the operator of the Corresponding Train Service operated all Train Services it was entitled to operate during the relevant Year which is calculated by reference to the “Base Access Charge” or “Access Charge Rate” (however described) referred to as “AT₂”</u>
<u>m</u>	<u>≡</u>	<u>the relevant Train Service Type in this Agreement in respect of a Corresponding Train Service where NTSY is less than CNTSY</u>
<u>o</u>	<u>≡</u>	<u>all Corresponding Train Services in other Access Agreements where NTSY is less than CNTSY</u>
<u>CNTSY</u>	<u>≡</u>	<u>as defined in item 4.4 of this schedule 4</u>
<u>NTSY</u>	<u>≡</u>	<u>as defined in item 4.4 of this schedule 4</u>

4.6 Calculation of SXRA – the ‘tariff cap’

SXRA for a Train Service Type for a Year is the amount calculated in accordance with the following formula (if the amount calculated in accordance with the following formula is less than zero, the SXRA for the Train Service Type for the Year will be zero):

$$\underline{SXRA}_k \equiv (TR - AR) \times \frac{(\underline{ATPY}_k - \underline{ORA}_k)}{\sum_p (\underline{ATPY}_p - \underline{ORA}_p)}$$

where:

- TR ≡ the sum of the following amounts for the relevant Reference Tariff Type for the relevant Year:
- (a) the sum of the access charges Aurizon Network is entitled to earn from “AT₂₋₄” (as defined in the Access Undertaking) under this Agreement or other Access Agreements for coal carrying Network Train Services which were subject to the relevant Reference Tariff Type and operated in the relevant Year;
 - (b) the sum of any “Transfer Fees” or “Relinquishment Fees” (each as defined under the Access Undertaking) applicable to the relevant Reference Tariff Type that Aurizon Network is entitled to earn and which will be included in the calculation of the “Revenue Adjustment Amounts” for “AT₂₋₄” (each as defined under the Access Undertaking) for the relevant Year;

	(c)	<u>the amount for “Take or Pay charges” (as defined under the Access Undertaking) for coal carrying Network Train Services that Aurizon Network is entitled to earn under an Access Agreement executed before 30 June 2006 in accordance with those Access Agreements for the relevant Year; and</u>
	(d)	<u>ATPY (as defined in this formula below),</u>
		<u>less</u>
	(e)	<u>ORA (as defined in this formula below).</u>
<u>AR</u>	<u>=</u>	<u>the “Allowable Revenue” for “AT₂₋₄” (each as defined in the Access Undertaking) for the relevant Reference Tariff Type for the relevant Year</u>
<u>ATPY</u>	<u>=</u>	<u>the amount of “ATPY” that Aurizon Network was entitled to earn in relation to coal carrying Network Train Services under this Agreement or other Access Agreements renewed or executed on or after 30 June 2006 for the relevant Year (where “ATPY” is calculated in accordance with the Standard Access Agreement approved as at the date this Agreement or the relevant Access Agreement was renewed or executed)</u>
<u>ORA</u>	<u>=</u>	<u>the amount of ORA that is calculated under this Agreement and other Access Agreement for coal carrying Network Train Services renewed or executed on or after 1 October 2010 for the relevant Year (where “ORA” is calculated in accordance with the Standard Access Agreement approved at the date that this Agreement or the relevant Access Agreement was renewed or executed)</u>
<u>p</u>	<u>=</u>	<u>this Agreement and other Access Agreements executed or renewed after 30 June 2006</u>
<u>k</u>	<u>=</u>	<u>the relevant Train Services Type for the relevant Year</u>

4.7 Entitlement to operate

Without limiting **clause 1.3**, for the purpose of any calculations under this **schedule 4**, an Operator is taken to be entitled to operate all Train Services for a Train Service Type on and from the Train Service Commitment Date for that Train Service Date, even if:

- (a) the Access Holder has not nominated an Operator to utilise Access Rights relevant to all or any Train Services for that Train Service Type;
- (b) the Access Holder must ensure an Operator does not operate, or Aurizon Network suspends the right of the Access Holder to have an Operator operate, all or any Train Service for that Train Service Type; or
- (c) under a Train Operations Deed, the relevant Operator must not operate, or Aurizon Network suspends the right of the relevant Operator to operate, all or any Train Service for that Train Service Type unless, and to the extent that:
 - (i) the reason why the Operator must not operate any Train Services for

- that Train Service Type is due to the Operator's failure to comply with clause 10.2(a) of the relevant Train Operations Deed; and
- (ii) the Operator's failure to comply with clause 10.2(a) of the relevant Train Operations Deed is due to Aurizon Network's breach of clause 10.2(b) of the relevant Train Operations Deed.

5 Review of schedule 4

5.1 Acknowledgment

The Parties agree that items 2 to 4 of this schedule 4 were determined by reference to the Reference Tariff Provisions as at:

- (a) if the Train Service Type was a Train Service Type as at the Commencement Date – the Commencement Date; or
- (b) if schedule 2 was varied to include the Train Service Type – the date schedule 2 was varied to include the Train Service Type.

5.2 Review of schedule 4

- (a) Within 20 Business Days after the Advice Date for a Change in Reference Tariff Provisions, Aurizon Network may give the Access Holder a notice (Schedule 4 Variation Notice) specifying variations to:
- (i) the Access Charge Rates for any Train Service Type;
- (ii) the TOP Methodology; and
- (iii) any other aspect of this schedule 4.
- (b) In considering any variations to this schedule 4 under item 5.2(a) of this schedule 4 as a result of a Change in Reference Tariff Provisions, Aurizon Network must have regard to, amongst any other relevant matters:
- (i) any pre-existing differences between the Access Charge Rates and the Reference Tariffs;
- (ii) any increased costs or risk to be incurred by Aurizon Network as a result of the Change in Reference Tariff Provisions;
- (iii) any change to Reference Tariffs (including new Reference Tariffs);
- (iv) any change to the methodology for calculating take or pay charges under the Access Undertaking;
- (v) any change to the characteristics of the Reference Train Service;
- (vi) any differences between the Train Description for a Train Service Type and the characteristics of the Reference Train Service;
- (vii) any change to RTP for the Train Service Type or its calculation;
- (viii) other related factors in the Reference Tariff Provisions; and
- (ix) the Access Undertaking.

5.3 Dispute

- (a) If Aurizon Network gives the Access Holder a Schedule 4 Variation Notice in respect of a Change in Reference Tariff Provisions, the Access Holder may, within 10 Business Days after Aurizon Network gives the Schedule 4

Variation Notice to the Access Holder, give Aurizon Network a Dispute Notice which Disputes the variations specified in the Schedule 4 Variation Notice in accordance with **clause 27**.

- (b) If the Access Holder gives Aurizon Network a Dispute Notice referred to in **item 5.3(a)** of this **schedule 4**, then, at the meeting referred to in **clause 27.2**, the chief executive officers (or their nominees) must negotiate in good faith to attempt to resolve the Dispute.
- (c) If a Dispute referred to in **item 5.3(a)** of this **schedule 4** is not resolved in accordance with **clause 27.2**, then the Parties must refer the Dispute to an Expert to determine the Dispute in accordance with **clause 27.3** and **item 5.4** of this **schedule 4**.
- (d) If the Access Holder does not give Aurizon Network a Dispute Notice referred to in **item 5.3(a)** of this **schedule 4** within the time referred to in **item 5.3(a)** of this **schedule 4**, then:
 - (i) the variations specified in the Schedule 4 Variation Notice will take effect on the Review Date for relevant the Change in Reference Tariff Provisions;
 - (ii) the Access Holder must not give Aurizon Network a Dispute Notice Disputing the variations specified in the Schedule 4 Variation Notice;
 - (iii) any such Dispute Notice which is given by the Access Holder will be of no effect; and
 - (iv) the Access Holder must not make any Claim against Aurizon Network in respect of that Dispute.

5.4 Expert determination

If a Dispute referred in **item 5.3(a)** of this **schedule 4** is referred to an Expert, then:

- (a) promptly after the date the Dispute is referred to the Expert, Aurizon Network must provide the Expert with documentation to support the variations specified in the Schedule 4 Variation Notice;
- (b) the Expert must:
 - (i) undertake to keep confidential all matters coming to its knowledge by reason of the Expert's appointment and performance of its duties, other than that already in the public domain; and
 - (ii) not include such information in its reasons for reaching the determination;
- (c) the Expert must review the documentation provided by Aurizon Network under **item 5.4(a)** of this **schedule 4** and determine whether or not the variations specified in the Schedule 4 Variation Notice are reasonable as a result of the relevant Change in Reference Tariff Provisions;
- (d) if the Expert determines that the variations specified in the Schedule 4 Variation Notice are reasonable as a result of the relevant Change in Reference Tariff Provisions, the variations will take effect on the Review Date for the relevant Change in Reference Tariff Provisions;

- (e) if the Expert determines that the variations specified in the Schedule 4 Variation Notice are not reasonable as a result of the relevant Change in Reference Tariff Provisions, then:
- (i) the Expert must use reasonable endeavours to attempt to reach agreement with Aurizon Network as to, and failing such agreement must determine, the variations to this **schedule 4** which are reasonable as a result of the relevant Change in Reference Tariff Provisions, having regard to:
- (A) the matters specified in **item 5.2(b)** of this **schedule 4**; and
- (B) any other matters which a Party submits that the Expert should have regard to in determining the Dispute.
- (ii) the variations agreed between the Expert and Aurizon Network, or determined by the Expert, in accordance with **item 5.4(e)(i)** of this **schedule 4** will take effect on the Review Date for the relevant Change in Reference Tariff Provisions.
- (f) Despite **clause 27.3(i)**, the costs of the Expert (and the costs of any advisers to the Expert) will be borne by:
- (i) the Access Holder if the Expert determines that the variations specified in the Schedule 4 Variation Notice are reasonable as a result of the relevant Change in Reference Tariff Provisions;
- (ii) Aurizon Network if the Expert determines that the variations specified in the Schedule 4 Variation Notice are not reasonable as a result of the relevant Change in Reference Tariff Provisions; or
- (iii) in such other proportion as the Expert may otherwise determine.

6 Escalation of Access Charge Rates

6.1 Escalation

- (a) Subject to **item 6.1(b)** of this **schedule 4**, the Access Charge Rates (except for QL) and any other charges under this Agreement will be varied on each Escalation Date, in accordance with the following formula:

$$ACR_n = ACR_{n-1} * CPI_n / CPI_{n-1}$$

where:

ACR_n means the varied value of the relevant Access Charge Rate or other charge;

ACR_{n-1} means the value of the relevant Access Charge Rate or other charge immediately prior to the relevant Escalation Date;

CPI_n means the Consumer Price Index Brisbane (Australian Bureau of Statistics Publication No.6401.0), as first published, for the Quarter the midpoint of which is six months prior to the midpoint of the Quarter commencing on the relevant Escalation Date for which the variable ACR_n is being determined; and

CPI_{n-1} means the Consumer Price Index Brisbane (Australian Bureau

of Statistics Publication No.6401.0), as first published, for the Quarter the midpoint of which is 18 months prior to the midpoint of the Quarter commencing on the relevant Escalation Date for which the variable ACR_n is being determined.

- (b) An Access Charge Rate will not be varied on an Escalation Date under **item 6.1(a)** of this **schedule 4** if, within the 12 months prior to the relevant Escalation Date, the Reference Tariff(s) for the 12 months commencing on the Escalation Date which are applicable to the Access Charge Rate have been escalated to take account of the annual change in the consumer price index and/or any other applicable price index.

6.2 Review of index

- (a) If a Party is of the reasonable opinion that the index used in the formula in **item 6.1** of this **schedule 4** is no longer suitable because:
- (i) it ceases to be published; or
 - (ii) it ceases to be published at sufficiently regular intervals, or is likely to cease to be published at sufficiently regular intervals, for the purpose of the formula in **item 6.1** of this **schedule 4**; or
 - (iii) the method of calculation of the index changes in a material way from the method applicable as at the Commencement Date (or the date the index was last varied under this **item 6.2** of this **schedule 4**).

then that Party may notify the other Party of its opinion that the index is no longer suitable.

- (b) If a Party gives a notice to the other Party under **item 6.2** of this **schedule 4**, the Parties must negotiate in good faith to attempt to agree to vary the application of the index or to adopt an alternative index and failing agreement within 30 Business Days of such notice being given, then the matter must be referred to an Expert to determine a variation to the application of the index or an alternative index in accordance with **clause 27.3**.

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

Schedule 5 – Insurance

1 Workers compensation insurance

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

Schedule 6 – Suspension Events and Termination Events

Item	Suspension Event	Termination Event
1	The Access Holder fails to pay by the due date any amount payable under this Agreement, and such default continues for at least 10 Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to pay by the due date any amount payable under this Agreement, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
2	An Insolvency Event occurs in respect of the Access Holder.	An Insolvency Event occurs in respect of the Access Holder and continues for a period of at least 40 Business Days.
3	The Access Holder fails to: (a) effect or maintain the insurances required under clause 19.222.2 ; or (b) provide evidence of the insurances required under clause 19.222.2 having been effected and maintained, and such default continues for at least five Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to: (a) effect or maintain the insurances required under clause 19.222.2 ; or (b) provide evidence of the insurances required under clause 19.222.2 having been effected and maintained, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
4	The Access Holder fails to establish, maintain or replace the Security as required under this Agreement, and such default continues for at least five Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to establish, maintain or replace the Security as required under this Agreement, and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.
5	The Access Holder purports to Assign any of its rights or interests in this Agreement other than as permitted in this Agreement.	The Access Holder purports to Assign any of its rights or interests in this Agreement other than as permitted by this Agreement.
6	The Access Holder fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the Access Holder, may (either of itself or if other requirements are satisfied) result in any other Suspension Event occurring), and such default continues for at least 20 Business Days after Aurizon Network notifies the Access Holder of the default.	The Access Holder fails to comply with any obligation under this Agreement (other than any obligation which, if not complied with by the Access Holder, may (either of itself or if other requirements are satisfied) result in any other Termination Event occurring), and such default continues for at least 40 Business Days after Aurizon Network notifies the Access Holder of the default.

Schedule 7 – Pro forma Access Interface Deed

Aurizon Network Pty Ltd

[Insert Customer]

Access Interface Deed

[AN note: The QCA's amendments to the Access Interface Deed significantly alter the liability position as between an Access Holder and its Customer under the Access Interface Deed without any justification for that change. Aurizon Network has reinstated its drafting of the Access Interface Deed.]

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Date

Parties

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

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

Background

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

Agreed terms

1 Interpretation

1.1 Definitions

In this Deed:

~~Access has the meaning given in the Access Agreement.~~

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

Access Agreement Liability Provision has the meaning given in clause 2.4(a).

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

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

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

Consequential Loss means:

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

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

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

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

[AN note: Amended to be consistent with the definition of "Consequential Loss" in the Access Agreement.]

Deed means this Access Interface Deed.

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

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

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

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

Incident has the meaning given in the Access Agreement.

Operator means [insert].

Party means a party to this Deed.

Product has the meaning given in clause 3.1(a).

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

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

Scheduled Time has the meaning given in the Access Agreement.

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

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

Train Movement has the meaning given in the Access Agreement.

Train Schedule has the meaning given in the Access Agreement.

Train Service has the meaning given in the Access Agreement.

1.2 Construction

In this Deed, unless expressed to the contrary:

- (a) the singular include the plural and vice versa;
- (b) a gender includes all other genders;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it;
- (e) a reference to:
 - (i) a person includes a partnership, unincorporated association, corporation or other entity, government or statutory body;

- (ii) a person includes its legal personal representatives, successors and assigns;
- (iii) conduct includes any omission or any representation, statement or undertaking, whether or not in writing;
- (iv) conduct includes a benefit, remedy, discretion or power;
- (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
- (vi) the words "include", "includes" or "including" must be read as if they are followed by the words "without limitation";
- (vii) writing includes:
 - (A) any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions; and
 - (B) words created or stored in any electronic medium and retrievable in perceivable form;
- (viii) time is to local time in Brisbane, Queensland;
- (ix) "A\$", "\$" or "dollars" is a reference to the lawful currency of Australia;
- (x) this or any other document or agreement includes the document or agreement as novated, varied or replaced from time to time and despite any change in the identity of the parties;
- (xi) anything (including any amount) is a reference to the whole or part or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (xii) under a clause includes in accordance with that clause;
- (xiii) a clause or schedule is a reference to a clause or schedule (as applicable) in this Deed;
- (xiv) any legislation or any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;
- (xv) any Authority, association or body whether statutory or otherwise (**first body**) is, if the first body ceases to exist or is re-constituted, re-named or replaced or the powers or functions of the first body is transferred to any other Authority, association or body (**replacement body**), deemed to refer to the replacement body established or constituted in lieu of the first body or as nearly as may be succeeding to the powers or functions of the first body;
- (xvi) access or access rights does not include rights granted by the Railway Manager to a Railway Operator under a train operations deed; and
- (xvii) the Customer, if the Customer is comprised of more than one entity (for example, if the Customer is comprised of the participants in an unincorporated joint venture), is a reference to each entity comprising the Customer.

1.3 Headings

Headings do not affect the interpretation of this Deed.

2 Relations between the Parties

2.1 No liability for Consequential Loss

~~The Railway Manager and the Customer are not~~ Neither Party (first party) is liable to the other Party and the other party must not make any Claim against the ~~other~~ first Party under or in connection with this Deed, the Access Agreement, the Access Rights or the Infrastructure for or in respect of any Consequential Loss whether as a result of:

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

2.2 Indemnities between Customer and the Railway Manager

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

- (i) any negligent act or omission of the Customer; or
- (ii) any breach of the Access Agreement by the Operator which is caused by or (to the extent of the contribution) contributed to by an act or omission of the Customer.

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

- (i) any negligent act or omission of the Railway Manager;
- (ii) any breach of the Access Agreement by the Railway Manager.

2.3 Extent of ~~Aurizon Network~~Railway Manager's liability to Customer for non-~~Consequent~~Consequential Loss

- (a) Subject to clauses 2.1, 2.3(b) and 2.4, the Railway Manager indemnifies and will keep indemnified the Customer against all Claims in respect of any damage, loss, cost, liability or expense incurred or suffered by the Customer due to or arising out of:
- (i) any failure by the Railway Manager to make the Infrastructure available for the Operator to operate a Train Service at the Scheduled Time in the Train Schedule; or
 - (ii) any delays to Train Movements,
- in each case caused, or (to the extent of the contribution) contributed to, by:
- (iii) any negligent act or omission of the Railway Manager; or
 - (iv) any breach of the Access Agreement by the Railway Manager.
- (b) ~~Subject to clauses 2.1, 2.4 and 2.5, the Railway Manager will be liable to the Customer for any Claim to the same~~The indemnity in clause 2.3(a) only applies where , and to the extent that, the Railway Manager would have been liable ~~for that Claim to the Operator~~ under the Access Agreement ~~if the Claim was made by the Operator~~(assuming for such purpose that the Operator has suffered a loss) in respect of the relevant failure to make the Infrastructure available or delay.

2.4 Exclusions of ~~Liability~~liability in Access Agreement apply

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

2.5 ~~Application of References to Operator in Access Agreement~~

- (i) the liability of ~~the Railway Manager or the Customer~~ (as applicable);
and
 - (ii) the making of a Claim by the Railway Manager or the Customer (as applicable),
- under or in connection with this Deed, the Access Agreement, the Access Rights or the Infrastructure on the basis that each Access Agreement Liability Provision is to be read (unless clause 2.4(b) or 2.4(c) applies) as if:
- (iii) the Customer was a party to the Access Agreement in addition to the Operator; and
 - (iv) all references to the Operator include a reference to the Customer.
- (b) If:
- (i) ~~For the purposes of applying clauses 2.3 and 2.4, all references to~~

~~the Operator in relevant provisions of the Access Agreement will be deemed to include reference to the Customer, except to the extent that any such provision~~ an Access Agreement Liability Provision refers to or requires the Operator or the Railway Manager and the Operator to agree anything ~~which will only be deemed to be a reference to the Customer where:~~

- (ii) ~~(a)~~ the matter to be agreed solely relates to the Claim or subject of the Claim by the Customer; and
- (iii) ~~(b)~~ the matter has not, prior before the Claim is first notified to the Claim other Party, been agreed by the Railway Manager and the Operator ~~for the purposes of the Access Agreement.~~

the reference to, or requirement for, the agreement of the Operator or the Operator and the Railway Manager in the Access Agreement Liability Provision (as applied under clause 2.4(a)) is to be read as if it was a reference to the agreement of the Customer or the agreement of the Customer and the Railway Manager (as applicable).

(c) If:

- (i) an Access Agreement Liability Provision refers to or requires the Operator or the Railway Manager and the Operator to agree anything;
- (ii) the matter to be agreed relates (solely or partly) to the Claim or subject of the Claim by the Customer; and
- (iii) the matter has, before the Claim is first notified to the other Party, been agreed by the Railway Manager and the Operator.

the Access Agreement Liability Provision (as applied under clause 2.4(a)) must be read subject to the matter as agreed by the Railway Manager and the Operator.

(d) The Customer acknowledges that it has been provided with a copy of the Access Agreement Liability Provisions by the Operator.

2.5 Duty to mitigate

Each Party must use all reasonable endeavours to mitigate the damage, loss, cost, liability or expense in respect of which an indemnity in this clause 2 applies.

2.6 Acceptance of benefit in Operator's conditions of carriage

To the extent that the Rail Haulage Agreement or the Operator's conditions of carriage with the Customer includes any exclusion or limitation of liability for the Railway Manager's benefit, this clause 2.6 constitutes the Railway Manager's notice to the Customer of the Railway Manager's acceptance of the benefit of any such exclusion or limitation of liability for the purposes of section 55 of the Property Law Act 1974 (Qld).

2.7 Defence of Claims by third parties

The Customer must provide such reasonable assistance as requested by the Railway Manager in the defence of any Claim made against the Railway Manager by a third party (other than the Operator) arising out of any Incident or other event giving rise to the Claim.

2.8 **General provisions regarding indemnities**

- (a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the Parties.
- (b) It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity in this Deed.

3 **Warranties by the Customer**

3.1 **Warranties**

Each Customer warrants that at all times during the term of the Access Agreement and whilst the Customer is a party to this Deed, the Customers together are:

- (a) the owner of all of the mine or other production facility (if any) which produces the product which is to be transported using the Access Rights (**Product**);
- (b) the owner of the Product while that Product is being transported using the Access Rights; and
- (c) entitled to the proceeds of the sale of the Product while that Product is being transported using the Access Rights.

3.2 **Reliance on warranties**

The Customer acknowledges that the Railway Manager has entered (or will enter) into the Access Agreement and this Deed in reliance upon the warranties in **clause 3.1**.

4 **~~3~~ Assignment**

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

5 **~~4~~ General**

5.1 **~~4.1~~ Amendment**

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

5.2 **~~4.2~~ Entire understanding**

- (a) This Deed and the Access Agreement contain the entire understanding and agreement between the Parties as to the subject matter of this Deed.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Deed are merged in and superseded by this Deed and are of no effect whatsoever. No Party is liable to any other Party in respect of those matters.

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

5.3 ~~4.3~~ **Counterparts**

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

5.4 ~~4.4~~ **Duty**

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

5.5 ~~4.5~~ **Legal costs**

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

5.6 ~~4.6~~ **Waiver and exercise of rights**

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

5.7 ~~4.7~~ **Computation of time**

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

5.8 ~~4.8~~ **Governing law and jurisdiction**

- (a) This Deed is governed by, and is to be construed in accordance with, the law in force in Queensland.

- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Queensland and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

5.9

~~4.9~~ **Liability**

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

Execution

Executed as a deed

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Executed by [insert]:)
)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

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Total changes	3595

[AN's mark-up of](#) QCA Consolidated Draft Decision

Aurizon Network Pty Ltd

[Insert name of Operator]

Train Operations Deed – Coal

[\[Drafting note: References in this Deed to clauses in the Access Agreement to be reviewed to ensure they refer to the correct clauses in the Access Agreement.\]](#)

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Date

Parties

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

The person specified in **item 1** of **schedule 1** (**Operator**)

Background

- A Aurizon Network must provide access to the Nominated Network in accordance with the Access Undertaking.
 - B Aurizon Network is a party to one or more access agreements under which Aurizon Network has granted Access Rights to Network Customers (as defined in the Access Agreement) for the operation of Train Services over the Nominated Network.
 - C The Access Holder has nominated the Operator in respect of all or part of the Access Holder's Access Rights as reflected in the Train Description.
 - D Aurizon Network has agreed that the Operator may operate Train Services over the Nominated Network and to provide Train Control for those Train Services on the terms and conditions of this Deed.
 - E The Parties may enter into separate agreements for the provision of services by Aurizon Network to the Operator other than the grant of the Operational Rights.
-

1 Definitions and interpretation

1.1 Definitions

In this Deed:

Access has the meaning given in the Access Undertaking.

Access Agreement means the agreement between Aurizon Network and the Access Holder identified in **schedule 1**.

Access Charges has the meaning given in the Access Agreement.

Access Holder means the access holder identified in **item 3** of **schedule 1**.

Access Holder's Staff means employees, contractors, volunteers and agents of the Access Holder and any other person under the control or supervision of the Access Holder who is involved in any Activity.

Access Rights means:

- (a) the rights of access to the Infrastructure granted to the Access Holder pursuant to the Access Agreement; and
- (b) for a Train Service Type, the "Access Rights" (as defined in paragraph (a) of

this definition) granted to the Access Holder in respect of the operation of Train Services for that Train Service Type.

Access Undertaking means the access undertaking submitted by Aurizon Network to the QCA and approved by the QCA under the *Queensland Competition Authority Act 1997* (Qld) from time to time, ~~except that in clause 3, it is the access undertaking in force at the time of entering into this Deed or any later version adopted by the Parties under clause 3.2.~~

[AN note: See amendments made to clause 3.1.] Accreditation means the ability to lawfully carry out railway operations under the Rail Safety Act (whether by being accredited under the Rail Safety Act or by being exempt from the requirement to be accredited under the Rail Safety Act), and **Accredited** means to have Accreditation.

Activities means any activity associated with the Train Services, including “railway operations” as defined under the Rail Safety Act.

Ad Hoc Train Service for a Train Service Type means:

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

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

Amendment Notice has the meaning given in **clause 16.118.1(a)**.

Ancillary Services means those services set out in **schedule 11** (if any) which Aurizon Network has agreed to provide to the Operator in addition to the grant of the Operational Rights.

Ancillary Services Charges means the ancillary services charges (if any) determined in accordance with **schedule 11** and any interest payable in relation to such charges under this Deed.

Applicable Safety Standards means:

- (a) in respect of the Operator, any Safety Standards identified in the IRMP as being applicable to the Operator; and
- (b) in respect of Aurizon Network, any Safety Standards identified in the IRMP as being applicable to Aurizon Network.

Applicable Safeworking Procedures means:

- (a) in respect of the Operator, any Safeworking Procedures identified in the IRMP as being applicable to the Operator; and
- (b) in respect of Aurizon Network, any Safeworking Procedures identified in the IRMP as being applicable to Aurizon Network.

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

Approved Derogation means, in respect of any Rollingstock or Rollingstock Configuration which does not comply with the Rollingstock Interface Standards, a departure from the Rollingstock Interface Standards which the IRMP identifies can be effectively managed by complying with measures specified in the IRMP in respect of such Rollingstock or Rollingstock Configuration.

Assign means to assign, novate, transfer, part possession with, license, charge, mortgage, become trustee of, grant an option or other right over or otherwise deal with or encumber.

Aurizon Network Land means each parcel of land on, under or above which the Nominated Network is situated and which is:

- (a) land that is owned, leased or controlled by Aurizon Network; or
- (b) land in respect of which entry is required to be given by Aurizon Network as part of the definition of Access.

Aurizon Network Representative means the Aurizon Network officer for the time being appointed pursuant to **item 2.2(b) of schedule 10**.

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

Authorisation Request Notice has the meaning given in **clause 15-217.2(a)**.

Authorised Parking has the meaning given in **clause 13.5(a)**.

[AN note: Included missing definition.]

Authorised Rollingstock means Rollingstock which is taken to be authorised Rollingstock under **clause 15-517.5(bc)(iii)** from time to time.

Authorised Rollingstock Configurations for a Train Service Type means Rollingstock Configurations for a Train Service Type which are taken to be authorised Rollingstock Configurations for that Train Service Type under **clause 15-517.5(bc)(ivii)** from time to time.

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

Authority to Travel means an authorisation issued by Aurizon Network which authorises the Operator to operate Train Services for a Train Service Type on the Nominated Network, for a specified period, using specified Authorised Rollingstock Configurations for that Train Service Type.

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

[AN note: Definition is used in reinstated clause 11.]

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

- (a) the first Billing Period starts on the Commitment Date and ends on the last

day of the Month in which the Commitment Date occurs; and

- (b) the last Billing Period commences on the first day of the Month during which this Deed terminates or expires and ends on the date of termination or expiry.

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

[Category 1 Reduced Operational Rights has the meaning given in clause 10.2\(d\)\(i\)\(A\).](#)

[Category 2 Reduced Operational Rights has the meaning given in clause 10.2\(d\)\(i\)\(B\).](#)

[\[AN note: Included missing definitions.\]](#)

Certificate of Compliance means a certification issued by a Certifier under clause ~~15.5~~17.5(a)(vi).

Certifier means a person that Aurizon Network is reasonably satisfied is suitably qualified, experienced and competent to assess whether or not Rollingstock and Rollingstock Configurations comply with the Rollingstock Interface Standards subject to any Approved Derogations.

Change in Access Undertaking means:

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

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

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

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

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

[\[AN note: Definition not used.\]](#)

Charge means:

- (a) any mortgage, charge, a general or special notarial bond, pledge, hypothec or lien; or

- (b) any other interest or arrangement of any kind that in substance secures the payment of money or the performance of an obligation, or that gives a creditor priority over unsecured creditors in relation to any property.

[Chargee has the meaning given in clause 34.3.](#)

[Chargor has the meaning given in clause 34.3.](#)

[\[AN note: Included missing definitions.\]](#)

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

Coal System has the meaning given in the Access Undertaking.

Collateral has the meaning given in the PPS Act.

Commencement Date means the date of this Deed.

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

Compliance Date means the earliest Train Service Compliance Date under this Deed.

Compliance Statement has the meaning given in **clause ~~15.3~~17.3(b)**.

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

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

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

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

Consequential Loss means:

- (a) any loss of revenue, loss of profits or loss of production;
- (b) any loss of whatever nature concerning the supply of product from a mine to any third party or to make product available to transport;

- (c) loss of business opportunities;
- (d) loss of or damage to reputation or goodwill;
- (e) any wasted overheads or demurrage;
- (f) loss or damage arising out of any Claim by a Third Party;

[AN note: Third Party Claims were excluded as Consequential Loss under the UT3 standard access agreements. Consistent with the UT3 standard access agreements and common commercial practice, Aurizon Network considers that the Consequential Loss exclusion in this Access Agreement should extend to Third Party Claims.]

- (g) ~~(f)~~ loss of or damage to credit rating; and
- (h) ~~(g)~~ in respect of a breach of this Deed, loss or damage that does not naturally, according to the usual course of things, ~~flowarise~~ from ~~athe~~ breach ~~of contract,~~

[AN note: This paragraph has been amended so that the drafting more closely aligns with the first limb in *Hadley v Baxendale*.]

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

- (i) ~~(h)~~ any costs or expenses incurred by the Party in connection with mitigating the effects of any breach of this Deed by the other Party (including implementing a workaround solution in respect of or otherwise mitigating any failure of a Party to comply with the requirements (including warranties) of this Deed) provided that if a loss arising from the breach of this Deed is itself not recoverable because it is a Consequential Loss, the costs or expenses incurred in mitigating that loss must also be treated as (non-recoverable) Consequential Loss;
- (j) ~~(i)~~ a loss (including a loss arising out of a Claim by a Third Party) in respect of:
 - (i) the cost of repairing, replacing or reinstating any real or personal property of any person (including a Party) that has been lost, damaged or destroyed;
 - (ii) personal injury to or death of any person; or
- (k) ~~(j)~~ in respect of any personal injury Claim, special loss or economic loss as those terms are used in the context of personal injury claims; or
- (l) ~~(k)~~ any fines or penalties imposed by a governmental or regulatory body for failure by the Party to comply with the law as a result of the other Party's failure to comply with the requirements of this Deed, and any costs or expenses incurred by the first Party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failures or breaches.

Contaminating Materials means any material, substance, gas, liquid, chemical, biological substance, mineral or other physical matter which is toxic, flammable, harmful to the Environment (including any life form) or may cause pollution, contamination, harm to the Environment or otherwise cause damage.

Control has the meaning given in the Corporations Act.

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

Corresponding Suspension Event in respect of a Termination Event means the Suspension Event specified in the same row as that Termination Event in **schedule 9**.

Daily Train Plan means that document detailing the scheduled times for all Network Train Services operating on the Infrastructure and any Planned Possessions, Urgent Possessions and Emergency Possessions on a particular day on a specified part of the Infrastructure, in a form that indicates the time/distance (location) relationship of all activities on that specific part of the Infrastructure.

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

Dangerous Goods Code means the following codes (as amended or replaced from time to time) or any other codes developed to replace or supplement them (from time to time):

- (a) the *Australian Code for the Transport of Dangerous Goods by Road and Rail* (7th Edition);
- (b) the *Australian Code for the Transport of Explosives by Road and Rail* (3rd Edition); and
- (c) the *Code of Practice for the Safe Transport of Radioactive Material* (2008 Edition).

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

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

- (a) ~~(e)~~ 2%; and
- (c) ~~(d)~~ 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 28.30**).

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

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

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

Discretionary System Amendment has the meaning given in **clause 16.4.18.1(a)(iii)**.

Dispute has the meaning given in **clause 28.1.30.1**.

Dispute Provisions Notice has the meaning given in **clause 35(a)(ii).30.1**.

[AN note: Included missing definition.]

[AN note: See amendment to clause 35.] Disputed Aspect has the meaning given in clause 15.1(d)(iii).

[AN note: Included missing definition.]

Effective Date has the meaning given in the Access Agreement.

[AN note: Definition used in clause 12.]

Emergency Possession has the meaning given in the Access Undertaking.

Emergency Response Plan has the meaning given in **clause ~~13.4~~15.1(a)(i)(B)**.

Emergency Procedures means the procedures developed and advised by Aurizon Network from time to time (as varied by Aurizon Network in accordance with this Deed) for dealing with a Network Incident including all actions to be taken to prevent, mitigate or remedy any risks to the safety of persons, to property or to the Environment.

Environment has the meaning given in the *Environmental Protection Act 1994* (Qld).

Environmental Authorities means:

- (a) a “development approval” or “registration certificate” for a chapter 4 activity or an “environmental authority”, as those terms are defined under the Environmental Protection Act; or
- (b) any approval (however described) which is deemed by the Environmental Protection Act to be a “development approval”, “registration certificate” or “environmental authority” referred to in **paragraph (a)** of this definition.

Environmental Harm has the meaning given in the Access Undertaking.

Environmental Incident means any:

- (a) release, spillage or leakage of any Contaminating Materials; or
- (b) any incident which results in Environmental Harm.

Environmental Law has the meaning given in the Access Undertaking.

Environmental Management Plan has the meaning given in **clause ~~13.4~~15.1(gh)**.

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

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

Environmental Risks means all risks to the Environment arising or potentially arising from the Operator’s Activities in connection with this Deed (including risks associated with the environmental management matters identified as part of an Interface Risk Assessment).

Expert has the meaning given in **clause ~~28.3~~30.3**.

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

FM Access Rights means the Access Rights for each Train Service Type which cannot be made available by Aurizon Network for the Operator to operate Train

Services due to damage to, or the destruction of, a part of the Nominated Network referred to in **clause 29.5(a)31.5** (assuming that part of the Nominated Network will not be repaired or replaced).

Force Majeure Event ~~has the meaning given in the Access Undertaking means any cause, event or circumstance, or combination of causes, events or circumstances, which:~~

Force Majeure Provisions means:

- (a) ~~the provisions of the Access Undertaking which include Force Majeure Events and the details of the application of the Force Majeure Event (which, as at the Commencement Date, is clause 7.7 of the Access Undertaking); and~~ is beyond the reasonable control of the affected Party; and
- (b) by the exercise of due diligence the affected Party was not reasonably able to prevent or is not reasonably able to overcome.

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

- (c) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the affected Party;
- (d) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the affected Party is a party to such industrial action or would be able to influence or procure the settlement of such industrial action;
- (e) act of God;
- (f) war, invasion, terrorist act, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;
- (g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Good Engineering Practices;
- (h) malicious damage or sabotage;
- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (j) failure of electricity supply from the electricity grid;
- (k) delay, restraint, restriction, embargo or other material adverse effect arising from any act or omission of any Authority;
- (l) fire, flood, storm surge, cyclone, tornado, earthquake, washaway, landslide, explosion, severe weather conditions or other catastrophe or natural calamity;
- (m) epidemic or quarantine restriction; and
- (n) delay of a supplier due to any of the foregoing whether any such cause of delay exists before or after the Commencement Date.

[AN note: This definition is used in clause 31.]

Foreseeable Costs and Detriments has the meaning given in **clause 12.4(b).**

[AN note: This definition is used in clause 12.]

~~(b) — any other~~ [AN note: Aurizon Network considers that the force majeure provisions should not be a provision of the Access Undertaking which affect or relate to a Force Majeure Event, and should be dealt with solely under the Access Agreement and Train Operations Deed.]

Former Interface Risk Provisions has the meaning given in **clause 3.2(b)(i)**.

[AN note: This definition used in amended clause 3.2.]

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

[AN note: This definition is used in paragraph (g) of the definition of “Force Majeure Event”.]

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

Incident means any Network Incident involving the Activities of the Operator.

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

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

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

Infrastructure Enhancement has the meaning given in the Access Undertaking.

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

[AN note: This definition is used in clauses 28.4(b)(iv)(G) and 28.5(c)(v).]

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

[AN note: This definition is used in clauses 28.4(b)(iv)(G) and 28.5(c)(v).]

Infrastructure Service Providers has the meaning given in the Access Undertaking.

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

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in section 459F(1) of the Corporations Act;
- (b) a meeting is convened to pass a resolution to place it in voluntary liquidation or to appoint an administrator unless the resolution is withdrawn within 10 Business Days or the resolution fails to pass;

- (c) an application is made to a court for it to be wound up and the application is not dismissed within 10 Business Days after it is made;
- (d) the appointment of a liquidator, provisional liquidator or controller (as defined in the Corporations Act) of any of its assets if that appointment is not revoked within 10 Business Days after it is made;
- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement; or
- (f) any similar event occurs in respect of the Party under the laws of any jurisdiction other than Australia.

Interface Coordination Arrangements means the plan set out in **schedule 10** as updated from time to time which identifies the procedures to be followed and the responsible officers from each Party, in respect of all regular operational interfaces between the Parties that arise in the exercise by the Parties of their respective rights and the performance of their respective obligations under this Deed other than those specified in the Network Management Principles.

Interface Representative has the meaning given in **clause ~~22.3~~24.3(a)**.

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

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

Interface Risk Provisions means:

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

[\[AN note: Given the matters to which clause 4.10.2 and Schedule A relate, it is not appropriate for them to be Interface Risk Provisions incorporated in this Deed under clause 3.\]](#)

Interface Risks means all risks to the safety of persons or property arising or potentially arising from the interaction between the Operator's Activities in connection with this Deed and:

- (a) the Infrastructure;
- (b) any Land;
- (c) Activities on the Infrastructure or any Land (including other Network Train Services); or
- (d) persons on, using or near the Infrastructure or any Land.

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

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

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

Land means any:

- (a) parcel of land on, under or above which the Infrastructure is situated;
- (b) Aurizon Network Land; and
- (c) Third Party Land.

Law has the meaning given in the Access Undertaking.

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

Maintenance Work has the meaning given in the Access Undertaking.

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

Material Change means a:

- (a) Change in Law;
- (b) Change in Access Undertaking; or
- (c) matter deemed to be a Material Change under **clause ~~37.17~~[39.17](#)(d)**.

Maximum Allowable Gross Tonnage means the maximum allowable gross tonnage for a Wagon, other Rollingstock or Train as specified in an Authority to Travel or a Train Route Acceptance.

Maximum Desirable Gross Tonnage means the maximum desirable gross tonnage for a Wagon, other Rollingstock or Train as specified in an Authority to Travel or a Train Route Acceptance.

Maximum Gross Mass means the maximum gross mass for the Wagon or other Rollingstock as specified in **schedule 5**.

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

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

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

Maximum SRT means the sum of Maximum Sectional Running Time for all relevant Sections for the relevant Train Service Type except if it is the first or last movement of the relevant Train Service where the time to start and stop the Train Service is included (as specified in **appendix A to schedule 2** for the relevant Train Service Type).

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

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

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

Month means calendar month.

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

Network Incident has the meaning given in the Access Undertaking.

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

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

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

New Authorisation has the meaning given in **clause ~~15.6~~17.7**.

[New Interface Risk Provisions has the meaning given in clause 3.2\(b\)\(i\).](#)

[\[AN note: This definition used in amended clause 3.2.\]](#)

Noise Code means:

- (a) unless and until a code of practice, guideline or other standard in relation to the management of railway noise (however described and whether or not a Law) is published by an Authority, the *QR Code of Practice: Railway Noise Management*; or
- (b) if a code of practice, guideline or other standard referred to in **paragraph (a)** of this definition is published by an Authority, that document.

Noise Levels means the levels for railway noise specified in the Noise Code.

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

Service Type.

Nominated Monthly Operational Rights for a Train Service Type means the number of Train Services for that Train Service Type that the Operator is entitled to operate during any Month:

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

as varied in accordance with this Deed.

Nominated Monthly Train Services has the meaning given in the Access Agreement.

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

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

[Non-Charging Party has the meaning given in clause 34.3.](#)

[\[AN note: Included missing definition.\]](#)

Notice has the meaning given in ~~clause 36.1~~ [38.1](#).

[Notice of Intention to Increase Nominal Payload has the meaning given in clause 12.1\(a\).](#)

[\[AN note: This definition is used in clause 12.\]](#)

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

Operating Document means each of the following as in force from time to time:

- (a) this Deed;
- (b) the System Wide Requirements;
- (c) the IRMP;
- (d) the Operating Plan; and
- (e) each Authority to Travel and Train Route Acceptance issued by Aurizon Network to the Operator in respect of the operation of Train Services for a Train Service Type.

Operating Plan has the meaning given in ~~clause 13.1~~ [15.1\(a\)\(i\)\(A\)](#).

Operational Constraint has the meaning given in the Access Undertaking.

Operational Rights means the rights to operate Train Services on the Nominated Network granted to the Operator pursuant to this Deed.

Operator's Controller means the person for the time being nominated in that position pursuant to **item 1.2(h) of schedule 10**.

Operator's Incident Response Coordinator means the person appointed pursuant to **item 3.1 of schedule 10**.

Operator's Recovery Team Leader means the person appointed pursuant to **item 3.2 of schedule 10**.

Operator's Representative means the person for the time being appointed pursuant to **item 2.2(a) of schedule 10**.

Operator's Safety Management System has the meaning given in **clause ~~22.4~~[24.4](#)**.

Operator's Staff means employees, contractors, volunteers and agents of the Operator and any other person under the control or supervision of the Operator who is involved in any Activity associated with the Train Services.

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

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

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

Party means a party to this Deed, and **Parties** means the parties to this Deed. For the avoidance of doubt, the Access Holder is not a party to this Deed.

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

Payload of a Train Service means the weight of product loaded onto any Train used by the Operator in operating that Train Service.

Performance Levels means the performance levels which apply to the performance by the respective Parties of their obligations under this Deed are set out in **schedule 6**.

Plan means a plan developed and approved in accordance with the process outlined in **clause ~~13~~[15](#)**.

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

Planned Possession has the meaning given in the Access Undertaking.

Possession has the meaning given in the Access Undertaking.

Possession Protocols means the protocols developed and advised by Aurizon Network from time to time (as varied in accordance with this Deed) for managing and scheduling Possessions.

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

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

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

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

Railway Operator has the meaning given in the Access Undertaking.

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

Recovery means action to be taken in respect of any derailed, malfunctioning or immobilised Rollingstock for which the Operator is responsible to enable prompt recommencement of Train Movements, but does not include the Retrieval of such Rollingstock.

Reduced Operational Rights:

~~(a) — in clause 10.2, has the meaning given in clause 10.2(e); and~~

~~(b) — in clause 10.3, **Reduced Operational Rights** has the meaning given in clause 10.3(c)(iv)(A)(1).~~

[AN note: Reduced Operational Rights not defined in clause 10.2(e).]

Reference Tariff has the meaning given in the Access Undertaking.

Reference Tariff Provisions means:

- (a) the schedule of the Access Undertaking which includes the Reference Tariffs and the details of the application of the Reference Tariffs for a particular Reference Train Service; and
- (b) any other provisions of the Access Undertaking which affect or relate to the application or calculation of Reference Tariffs or Access Charges.

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

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

Regenerative Brake means an energy recovery system installed on Rollingstock which slows the Rollingstock by converting its kinetic energy into electrical energy, which can then be returned to the overhead electric traction system.

[AN note: Definition used in reinstated clause 10.5.]

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

Relevant Rollingstock means any Rollingstock of the Operator with a minimum value of \$1 million and which has been specified as Relevant Rollingstock in schedule 5.

~~**Relevant Tax** means any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on Aurizon Network by, or payable by Aurizon Network to, any Authority directly arising in connection with the performance of this Deed by Aurizon Network, but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.~~

[AN note: Definition not used.]

Required Information means any information in relation to any Operator's Staff engaged in Safety Related Work on the Infrastructure that Aurizon Network considers is reasonably required to be known by Aurizon Network to comply with its Accreditation and a Law.

Restoration means the removal of any Obstruction on the Infrastructure, the rectification of any Incident and the prompt recommencement of Train Movements including all requisite repairs to the Infrastructure, but does not include Recovery or Retrieval.

Retrieval means the subsequent removal of Rollingstock, from the Infrastructure and Land, following the Recovery of such Rollingstock.

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

Rollingstock Configuration has the meaning given in the Access Undertaking.

Rollingstock Interface Standards has the meaning given in the Access Undertaking.

Rollingstock Interface Standards Risk Assessment means, in respect of any Rollingstock or Rollingstock Configurations for a Train Service Type used, or proposed to be used, by the Operator in the operation of Train Services on the Nominated Network, means an assessment to:

- (a) for each non-compliance with the Rollingstock Interface Standards specified in a Compliance Statement for the Rollingstock or Rollingstock Configurations, identify all reasonably foreseeable Interface Risks and Environmental Risks arising from each non-compliance;
- (b) assess:
 - (i) the likelihood of those Interface Risks and Environmental Risks occurring;
 - (ii) the consequences (including commercial consequences) of those Interface Risks and Environmental Risks occurring; and
 - (iii) whether those Interface Risks and Environmental Risks can be effectively managed and, if so, any factors relevant to the effective management of those Interface Risks and Environmental Risks; and
- (c) if those Interface Risks and Environmental Risks can be effectively managed by complying with appropriate measures, identify the measures to be complied with in respect of such Rollingstock or Rollingstock Configurations to effectively manage those Interface Risks and Environmental Risks within a risk management framework.

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

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

Safety Related Work means:

- (a) “rail safety work” as defined under the Rail Safety Act; and
- (b) any other work notified by Aurizon Network to the Operator as safety related work.

Safety Standards means the:

- (a) standards relating to safety, including work health and safety, established in published guidelines, industry practice or Aurizon Network policies specified in Aurizon Network’s document entitled *Safety Standards* notified by Aurizon Network to the Operator (as amended and replaced from time to time); and
- (b) standards relating to safety, including work health and safety, prescribed by any Law.

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

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

Scheduled Time means the time of arrival or departure for a Train Movement at specified locations on the Nominated Network as set out in the Train Schedule or as amended by Aurizon Network from time to time on the day of operation pursuant to the Network Management Principles.

Schedules means the schedules attached to this Deed.

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

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

Security Interest has the meaning given in **clause ~~37-20~~[39.20\(a\)](#)**.

Signalling and Telecommunications Equipment means all electronic, electrical and other equipment, including signalling systems, safety devices and communications facilities, installed on or as part of the Infrastructure or on Rollingstock, for the purpose of compliance with Safeworking Procedures and to facilitate Train Control.

Staff means Aurizon Network’s Staff or the Operator’s Staff (as applicable).

State means the State of Queensland.

Stowage has the meaning given in the Access Undertaking.

Supplier has the meaning given in **clause ~~33-3~~[35.3](#)**.

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

Suspension Event means any event or circumstance specified as such in schedule 9.

Suspension Notice has the meaning given under ~~clause 30.1, 30.2, 30.3~~[32.1, 32.2, 32.3](#) or ~~30.4~~[32.4](#).

System Operating Parameters has the meaning given in the Access Undertaking.

System Rules has the meaning given in the Access Undertaking.

System Wide Requirements means the Possession Protocols, the Interface Coordination Arrangements, the Rollingstock Interface Standards, the Safeworking Procedures, the Safety Standards, the Emergency Procedures and the Investigation Procedures.

Tare Weight means the tare weight for a Wagon or other Rollingstock as specified in **Schedule 5**.

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

Termination Event means any event or circumstance specified as such in **schedule 9**.

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

Third Party Land has the meaning given in ~~clause 37.17~~[39.17\(a\)](#).

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

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

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

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

[TOD Dispute Provisions has the meaning given in clause 37\(a\)\(ii\).](#)

[\[AN note: See clause 37.\]](#)

Track has the meaning given in the Access Undertaking.

Train has the meaning given in the Access Undertaking.

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

- (a) recording Train running times on Train diagrams and in Aurizon Network's information systems;

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

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

Train Controller means the person nominated by Aurizon Network from time to time as the supervisor of Train Movements on the relevant part of the Nominated Network, and whose details are initially specified in **item 1.1 of schedule 10**.

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

Train List means the information required to be supplied by the Operator in accordance with **item 1.2(b) of schedule 10** in respect of each individual Train Service to be operated on the Nominated Network.

Train Movement has the meaning given in the Access Undertaking.

Train Operator has the meaning given in the Access Undertaking.

Train Route Acceptance means an authorisation issued by Aurizon Network which authorises the Operator to operate Train Services for a Train Service Type on the Nominated Network using specified Authorised Rollingstock Configurations for that Train Service Type.

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

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

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

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

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

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

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

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

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

Unreasonable in respect of an IRMP, or any aspect of or amendment to an IRMP, determined by Aurizon Network under clause ~~43.4~~**15.1(c)(iii)** means no reasonable person in the position of Aurizon Network could have made that determination.

Urgent Possession has the meaning given in the Access Undertaking.

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

Website has the meaning given in the Access Undertaking.

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

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

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

1.2 Interpretation

In this Deed, unless expressed to the contrary:

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

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

1.3 References to descriptors of Train Service Types

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

1.4 Material published on the Website

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

1.5 Headings

Headings do not affect the interpretation of this Deed.

1.6 Words and expressions defined in Access Undertaking

(a) Subject to **clause 1.6(b)**, if a word or expression is defined in this Deed to have the meaning given in the Access Undertaking, then it will have the meaning given in the Access Undertaking in force as at the date of this Deed.

(b) If a word or expression used in the Interface Risk Provisions which form part of this Deed under **clause 3** is defined in the Access Undertaking, then, it will have the meaning given in the Access Undertaking in force on the date the relevant Interface Risk Provisions commenced to form part of this Deed under **clause 3.1 or 3.2** (as applicable).

[AN note: As many words and expressions in this Deed are defined by reference to the Access Undertaking (eg definitions of Train and Track), Aurizon Network would like to make clear that those words or expressions have the meaning given in the Access Undertaking at the date of this Deed. Aurizon Network would also like to clarify that words and expressions used in the Interface Risk Provisions have the meaning given in the Access Undertaking at the time the Incorporated Provisions were incorporated into this Deed under **clause 3.1 or 3.2**.]

1.7 ~~4.6~~ Inconsistency

- (a) If there is any inconsistency between the substantive terms of this Deed (comprising **clauses 1 to 3739**) and the schedules of this Deed, the substantive terms of this Deed prevail to the extent of the inconsistency.
- (b) If there is any inconsistency between matters contained in the Access Undertaking (as amended by any Change in Access Undertaking) and this Deed, the provisions of this Deed prevail to the extent of the inconsistency unless expressly provided to the contrary in this Deed.

2 Term

2.1 Term

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

3 Access Undertaking

[AN note: See Aurizon Network notes in relation to clause 3 of the Access Agreement which are equally applicable to clause 3 of this Deed. Because Aurizon Network has included the force majeure provisions into this Deed, the only incorporated provisions are the Interface Risk Provisions.]

3.1 Incorporation

- (a) The Parties agree that, for the purposes of the Access Undertaking, the Operator is considered a Train Operator or a Railway Operator (as applicable).
- ~~(b) Aurizon Network and the Operator must comply with the following under the Access Undertaking:~~

- (b) ~~(i) Subject to clause 3.2, the~~ Interface Risk Provisions; and (as in force as at the Commencement Date) form part of this Deed as if they were set out in full in this Deed.
- ~~(ii) Force Majeure Provisions.~~
- (c) For the avoidance of doubt, ~~the provisions set out in clause 3.1(b) form part of this Deed as if they were set out in full in this Deed and,~~ despite any other provision in the Access Undertaking:
- (i) ~~clause 26~~clause 28 applies to any ~~claim~~Claim in respect of a breach of ~~such provision~~the Interface Risk Provisions which form part of this Deed under this clause 3; and
- (ii) ~~clause 28~~clause 30 applies in respect of any Dispute between the Parties in respect of any right or obligation (or in respect of the enforcement) of any ~~such provision~~Interface Risk Provisions which form part of this Deed under this clause 3.

3.2 Changes in Access Undertaking

- (a) If there is a Change in Access Undertaking at any time relating to the ~~provisions set out in clause 3.1(b)~~Interface Risk Provisions, then this **clause 3.2** applies.
- (b) A Party (**Notifying Party**) may, within 20 Business Days from the date of the Change in the Access Undertaking (or such longer period as the Parties may agree) notify (**Amendment Notice**) the other Party (**Receiving Party**) ~~of:~~
- (i) that it elects to amend this Deed to replace the Interface Risk Provisions which form part of this Deed under clause 3.1(b) or this clause 3.2 (Former Interface Risk Provisions) with the Interface Risk Provisions as changed by the Change In Access Undertaking (New Interface Risk Provisions); and
- (ii) ~~(i) the~~of any other changes to the other terms of this Deed (if any) which the Notifying Party requires as a consequence of, or to give full effect to, ~~any Change in Access Undertaking relating to the provisions set out in clause 3.1(b); and~~the replacement of the Former Interface Risk Provisions with the New Interface Risk Provisions under this clause 3.2.
- ~~(ii) the date from which the changes become effective (and if any changes become effective from different dates, the dates applicable to each change) which must be on or after the date on which the Change in Access Undertaking became effective (Change Date(s)).~~
- (c) An Amendment Notice must include an amended version of this Deed, with the changes referred to in **clause 3.2(b)(iii)** clearly identified.
- (d) Promptly following receipt of an Amendment Notice, the Receiving Party must notify the Notifying Party the extent to which the Receiving Party accepts or does not accept the drafting of the amendments to the terms of this Agreement~~Deed~~ proposed in the Amendment Notice ~~(but the Receiving Party must not refuse to accept the incorporation into this Agreement of the Changes in the Undertaking outlined in the Amendment Notice.~~

- (e) If the Receiving Party does not accept the drafting of the amendments to the terms of this ~~Agreement Deed~~, then the Parties must promptly meet to negotiate and attempt to agree the changes to the terms of this ~~Agreement Deed (if any)~~ which are necessary as a consequence of, or to give full effect to, the ~~Changes in the Undertaking specified in the Amendment Notice~~, replacement of the Former Interface Risk Provisions with the New Interface Risk Provisions under this clause 3.2.
- (f) If the Parties do not agree the amendments in respect of the matters outstanding under ~~clause 3.2(f) by the Change Date(s)~~ (if any) within 20 Business Days after the Notifying Party gives the Amendment Notice, the matter must be referred to the QCA for determination in accordance with the ~~Dispute Provisions~~ provisions of the Access Undertaking which provide for the determination of disputes by the QCA.
- (g) With effect on and from the date the relevant Change in Access Undertaking takes effect (or such other time as the Parties agree in writing):
- (i) the New Interface Risk Provisions will form part of this Deed as if set out in full in this Deed;
- (ii) the Former Interface Risk Provisions will cease to form part of this Deed; and
- (iii) ~~(g) Amendments to if applicable~~, the terms of this Deed will be amended as:
- (A) ~~(i)~~ accepted under clause 3.2(d);
- (B) ~~(ii)~~ agreed under clause 3.2(e); or
- (C) ~~(iii)~~ determined by the QCA under clause 3.2(f);
- ~~become effective from the Change Date(s) (or such other time as the QCA may determine).~~
- ~~(h) Within 10 Business Days from the date:~~
- ~~(i) of the notice given under clause 3.2(d);~~
- ~~(ii) agreed under clause 3.2(e); or~~
- ~~(iii) the QCA determines such amendments;~~
- (h) Within 10 Business Days from the date that the amendments to the terms of this Deed are accepted, agreed and/or determined (as applicable) under this clause 3.2, Aurizon Network must prepare and send to the Operator a copy of this Deed as modified.

4 Operational Rights

4.1 Grant of Operational Rights

On and from the Train Service Commitment Date for each Train Service Type until the Train Service Expiry Date for that Train Service Type, Aurizon Network grants, and must provide, to the Operator the Operational Rights for that Train Service Type in accordance with the Train Description on the terms and conditions of this Deed.

4.2 Nature and scope of Operational Rights

- (a) The Operational Rights granted under **clause 4.1** are non-exclusive contractual rights and do not give the Operator any right, title or interest of any proprietary nature in the Nominated Network.
- (b) The Operator must only:
 - (i) operate on, or use any part of, the Infrastructure that is specifically included in the Nominated Network as expressly:
 - (A) permitted or required to do so under this Deed;
 - (B) directed to do so by Aurizon Network in accordance with this Deed; and
 - (C) permitted under another agreement with Aurizon Network; and
 - (ii) use the Nominated Network for:
 - (A) carrying out any provisioning, inspection, testing or maintenance of Rollingstock;
 - (B) any marshalling, shunting or other relocation of Rollingstock;
 - (C) storage of Rollingstock; and
 - (D) the operation of Train Services,as expressly permitted or required to do so under this Deed.

4.3 Operation of Ad Hoc Train Service

- (a) If:
 - (i) the Access Holder (or the Operator at the request of the Access Holder) notifies Aurizon Network under the Access Agreement that it wishes to have the Operator operate an Ad Hoc Train Service; and
 - (ii) the Operator notifies Aurizon Network that it is willing and able to operate an Ad Hoc Train Service for a Train Service Type at the request of the Access Holder,
then, to the extent permitted by the Network Management Principles, Aurizon Network:
 - (iii) must if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking; or
 - (iv) then, to the extent permitted by the Network Management Principles, Aurizon Network must (if required in accordance with clause 5.4(c) of Schedule G of the Access Undertaking but must otherwise must use reasonable endeavours to) schedule the Ad Hoc Train Service for the Train Service Type in the Daily Train Plan.
- (b) On and from the time that the Ad Hoc Train Service is scheduled in the Daily Train Plan, the terms and conditions of this Deed apply to the Ad Hoc Train Service as if the Ad Hoc Train Service is a Train Service for the Train Service Type which the Operator is entitled to operate under this Deed.

5 Ancillary Services

In consideration of the Operator paying the Ancillary Services Charge, Aurizon Network must provide the Operator with the Ancillary Services (if any) in accordance with **schedule 11**.

6 Nomination of the Operator

6.1 Nomination

If at any time after the Commencement Date the Access Holder nominates the Operator in respect of all or part of the Access Holder's Access Rights, in accordance with the Access Agreement, then Aurizon Network must promptly provide to the Operator:

- (a) if not already provided by the Access Holder, a copy of the Access Agreement;
- (b) replacement Schedules (as relevant) amended to be consistent with the Access Holder's nomination of the Operator; and
- (c) details of the date on which those replacement Schedules take effect being the date Aurizon Network notifies the Access Holder under the Access Agreement that it accepts the Operator's nomination,

and this Deed is varied in accordance with those replacement Schedules with effect on and from the date referred to under **clause 6.1(c)**.

6.2 Multiple Access Agreements

The Operator may not be nominated under more than one Access Agreement for the purposes of this Deed.

6.3 Variation of nomination of the Operator

- (a) If at any time:
 - (i) the Access Holder notifies, or is deemed to have notified, Aurizon Network of a variation to the nomination of the Operator by the Access Holder in accordance with the Access Agreement; or
 - (ii) the Access Holder withdraws, or is deemed to have withdrawn, the Access Holder's nomination of the Operator under the Access Agreement (or this Deed),then:
 - (iii) Aurizon Network must promptly provide to the Operator:
 - (A) a copy of the Access Holder's notice or withdrawal or, if no such notice or withdrawal has been given, details of the circumstances supporting the deeming of the notice or withdrawal;
 - (B) replacement Schedules (as relevant) amended consistent with the Access Holder's notice or withdrawal or deemed notice or withdrawal; and
 - (C) the date on which those replacement Schedules take effect; and

- (iv) this Deed is varied in accordance with those replacement Schedules with effect on and from the date referred to under **clause 6.3(a)(iii)(C)**.
- (b) The Access Holder is deemed to have withdrawn its nomination of the Operator if the Access Agreement is terminated or expires.

7 Interaction of rights

- (a) The Parties acknowledge and agree that:
 - (i) the Access Holder has contracted directly with Aurizon Network under the Access Agreement for the Access Rights:
 - (A) on the basis that the Access Rights will be used by one or more persons (such as the Operator) under agreements (such as this Deed) for the benefit of the ~~Access~~ Access Holder; and
 - (B) as such, the Access Holder has no direct above rail operational responsibilities in relation to Train Services for the Access Holder (unless it is also an “Operator” as defined in the Access Agreement); and
 - (ii) the Operator will have above rail operational obligations in respect of the Train Services that will be operated by it for the Access Holder.
- (b) The Operator has no right to renew, transfer (subject to **clauses 32-234.2** and **32-334.3**), vary or relinquish to Aurizon Network any part of the Operational Rights, whether under this Deed or the Access Undertaking. The right to seek a renewal, transfer, variation or relinquishment of Access Rights is solely a right of the Access Holder.

8 Billing and payments

8.1 Charges

The Operator must pay to Aurizon Network the Ancillary Services Charges and any other charges (if any) as calculated in accordance with this Deed.

8.2 Invoicing

- (a) As soon as reasonably practicable after the end of each Billing Period, Aurizon Network must give to the Operator an invoice for:
 - (i) the Ancillary Services Charges for that Billing Period; plus
 - (ii) any amounts payable but unpaid by the Operator to Aurizon Network under this Deed, and which have not previously been invoiced, as at the end of the Billing Period.
- (b) Aurizon Network ~~must~~ is not required to give the Operator an invoice under **clause 8.2(a)** after the end of a Billing Period ~~even~~ if no amount is required to be invoiced under **clause 8.2(a)** for that Billing Period.

[AN note: Aurizon Network does not understand why it should be obliged to provide an invoice to the Operator when no amount is payable. This imposes an unnecessary administrative burden for which there is no reasonable justification.]

- (c) Each invoice given under this **clause 8.2** must be accompanied by reasonable details of Aurizon Network's calculation of the amounts claimed in the invoice, including an itemised description of any other amounts (for ~~the~~ amounts ~~in~~ deducted under clause 8.6, particulars must include the amounts against which the ~~set-off~~ deduction is applied).

8.3 Payment

Subject to **clause 8.4**, the Operator must:

- (a) pay to Aurizon Network the amount claimed in an invoice given under **clause 8.2** within 10 Business Days after the invoice is given to the Operator; and
- (b) pay all amounts payable to Aurizon Network under this Deed:
- (i) in Australian currency; and
 - (ii) by:
 - (A) direct deposit into the one or more bank account notified by Aurizon Network to the Operator in the invoice for this purpose (whether or not those bank accounts are in the name of Aurizon Network); or
 - (B) such other payment method as Aurizon Network specifies in the invoice (acting reasonably).
- (c) Any payment by the Operator of an amount payable under this Deed in accordance with this **clause 8.3** is taken to be a payment of such amount to Aurizon Network for the purpose of this Deed (whether or not such amount is paid into a bank account in the name of Aurizon Network).

8.4 Disputes

- (a) Any Disputes in connection with an amount claimed in an invoice ~~must be resolved in accordance with clause 28;~~
- (i) must be resolved in accordance with clause 30; and
 - (ii) which is not resolved in accordance with clause 30.2, may be referred by either Party to an Expert for determination in accordance with clause 30.3.
- [AN note: Unless a party has an express right to refer such a dispute to an expert, it cannot do so without the agreement of the other party.]
- (b) Despite **clause 8.4(a)**, if an amount claimed in an invoice given by Aurizon Network is Disputed, ~~then unless the amount claimed is nil due to the operation of clause 8.6,~~ the Operator must pay to Aurizon Network:
- (i) the portion of the amount claimed in the invoice that is not in Dispute; and
 - (ii) 50% of the portion of the amount claimed in the invoice that is in Dispute,
- within the time specified in **clause 8.3(a)**.
- (c) Upon resolution of any Dispute about an amount claimed in an invoice given by Aurizon Network, if the total amount which Aurizon Network was entitled to claim in the invoice (as resolved) is:

- (i) more than the amount paid by the Operator, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 8.5** (from the date when the amount in Dispute would have been due and payable under **clause 8.3(a)** but for **clause 8.4(b)**, until the date on which the difference, together with any interest, has been paid in full), must be paid by the Operator to Aurizon Network within 20 Business Days after the resolution of the Dispute; or
- (ii) less than the amount paid by the Operator, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 8.5** (from the date when the amount in Dispute was paid by the Operator until the date on which the credit is applied or the amount is paid (as applicable) under this **clause 8.4(c)(ii)**), must be:
 - (A) applied by Aurizon Network as credit in favour of the Operator against the amount claimed in the next invoice to be issued by Aurizon Network to the Operator after the resolution of the Dispute (and, if necessary, to subsequent invoices issued by Aurizon Network until the amount of the difference (including any interest) has been fully credited in favour of the Operator against amounts payable under invoices issued by Aurizon Network to the Operator under **clause 8.2**); or
 - (B) if there will be no further invoices issued by Aurizon Network to the Operator after the resolution of the Dispute or the last credit referred to in **clause 8.4(c)(ii)(A)**, paid by Aurizon Network to the Operator within 20 Business Days after resolution of the Dispute or the last credit referred to in **clause 8.4(c)(ii)(A)** (as applicable).

8.5 Interest on overdue payments and Disputed amounts

- (a) Without prejudice to the rights, powers and remedies of a Party under this Deed or otherwise at Law, if for any reason a Party does not pay an amount payable under or in connection with this Deed on or before the due date for payment, then that Party must pay interest on the outstanding amount calculated in accordance with this **clause 8.5**.
- (b) Interest accrues on outstanding amounts from the due date for payment until that amount, together with the interest on that amount, has been paid in full.
- (c) Interest under **clauses 8.4(c)(i), 8.4(c)(ii)** and **8.5(b)** is calculated at the Default Rate. Any interest accrued but unpaid at the end of each Month is capitalised and, once capitalised, will itself bear interest.

8.6 Right of set-off

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

9 Accreditation

- (a) The Operator must, before the commencement of the first Train Services under this Deed, provide to Aurizon Network evidence of the Operator's Accreditation (including all conditions and/or variations).
- (b) Each Party must have and maintain Accreditation to the extent required to perform its obligations and exercise its rights under this Deed and, if requested to do so in writing by the other Party, provide to the other Party copies of documentation evidencing currency, renewal or amendment of its Accreditation within five Business Days after such request.
- (c) Each Party must notify the other as soon as possible of any notice from an Authority affecting, or likely to affect, its Accreditation, and must provide a copy of that notice to the other Party on request.

(d) If:

- (i) **schedule 2** is varied to include an additional Train Service Type; or
- (ii) the Train Description for an existing Train Service Type is varied, then before the Operator commences or continues (as applicable) to operate any Train Services for such Train Service Type, the Operator must:
- (iii) if the Operator's Accreditation is required to be varied to address the operation of Train Services for such additional Train Service Type or the operation of Train Services in accordance with such varied Train Description (as applicable), provide Aurizon Network evidence of the Operator's Accreditation as varied; or
- (iv) if the Operator reasonably determines that no variations to the Operator's Accreditation are required to address the operation of such Train Services, notify Aurizon Network of that determination and the reasons for that determination.

[AN note: This clause is required because an Operator's Accreditation may only permit it to operate Train Services for specific Origin / Destination hauls and it may need to be amended to operate new or varied Train Services.]

- (e) Despite any other provision of this Deed, Aurizon Network will not be in breach of this Deed with respect to any act or omission to the extent that the act or omission is reasonably required in order for Aurizon Network to:
 - (i) comply with its Accreditation; or
 - (ii) ensure that its Accreditation is not at risk of:
 - (A) amendment such that it cannot perform its role as Rail Infrastructure Manager (as defined in the Access Undertaking) for the Infrastructure; or
 - (B) suspension, cancellation or revocation.

[AN note: Aurizon Network's obligation to comply with its Accreditation is a paramount obligation. Aurizon Network considers that it should be liable for breach of this Deed for an act or omission if the act or omission is required for the above reasons. Aurizon Network should not be required to do anything under this Deed that would put its Accreditation at risk.]

10 Operation of Train Services

10.1 Operation of Train Services

The Operator must not operate Train Services ~~or Ad Hoc Train Services~~:

- (a) which do not comply with the applicable Train Description and this Deed, unless:
- (i) acting under a Train Control Direction; or
 - (ii) with the prior written approval of Aurizon Network (which approval may specify terms in addition to or varying the terms of this Deed in respect of the Train Services ~~or Ad Hoc Train Services~~ to which the approval relates); ~~and~~

(b) if clause ~~4.4~~ of the Access Agreement applies to those Train Services, unless an Access Interface Deed (as defined under the Access Agreement) has not been executed by the relevant Customer and Aurizon Network; and

(c) ~~(b)~~ if the Access Holder does not hold, or does not have the benefit of, Supply Chain Rights for those Train Services ~~or Ad Hoc Train Services~~.

[AN note: An Ad Hoc Train Service is taken to be a Train Service for this Deed once scheduled in the Daily Train Plan. It is therefore unnecessary to separately refer to Ad Hoc Train Services in the above clause. The reference to Ad Hoc Train Services in the above clause may give rise to interpretational issues in other clauses in which Ad Hoc Train Services are not separately referred to. For that reason, the references to Ad Hoc Train Services have been deleted.]

10.2 Commencement of Train Services

- (a) Without limiting any other provision of this Deed, the Operator must only operate any Train Service if:

Category 1- Requirements for Train Services generally

- (i) an Operating Plan has been approved by Aurizon Network under ~~clause 13.115.1~~;
- (ii) the Operator has submitted an Emergency Response Plan to Aurizon Network which complies with, or is taken to comply with, the requirements of ~~clause 13.115.1(a)(i)(B)~~;
- (iii) the Operator has provided evidence to Aurizon Network of the Operator's Accreditation as required by ~~clause 09(a)~~;
- (iv) an IRMP has been agreed or determined under ~~Item 2 of Schedule C of the Access Undertaking~~ the Interface Risk Provisions which form part of this Deed under clause 3;
- (v) the Operator has developed:
 - (A) the Operator's Safety Management System under ~~clause 22.424.4~~;
 - (B) the Environmental Management Plan under ~~clause 13.115.1(gh)~~;
- (vi) the Operator has taken out the insurances, and provided evidence of those insurances to Aurizon Network, as required under ~~clause 24.326.3~~;

- (vii) the Operator has complied with, or implemented any aspects of, the Operating Plan, Emergency Response Plan, the Operator's Accreditation, the IRMP, the Operator's Safety Management System and the Environmental Management Plan that are required to be complied with or implemented before the commencement of Train Services;

Category 2 – Requirement for specific Train Service Types

- (viii) the Operator has provided a Certificate of Compliance to Aurizon Network for all of the Rollingstock and/or Rollingstock Configurations which the Operator proposes to use in the operation of Train Services, and such Rollingstock and/or Rollingstock Configurations is Authorised Rollingstock and/or Authorised Rollingstock Configurations for each Train Service Type; and
- (ix) Aurizon Network has given the Operator an Authority to Travel or a Train Route Acceptance.
- (b) Aurizon Network must use reasonable endeavours to cooperate with the Operator and ~~act promptly to facilitate~~ [seek to resolve with the Operator](#) the Operator's compliance with **clause 10.2(a)**.
- (c) If the Operator has not complied with each of the requirements of **clause 10.2(a)** by:
 - (i) the Compliance Date and Aurizon Network has a reasonable expectation that the Operator cannot commence the operation of Train Services by the Commitment Date; or
 - (ii) the Commitment Date,

then, provided that the Operator's failure to comply with **clause 10.2(a)** was not due to Aurizon Network's breach of **clause 10.2(b)** Aurizon Network may give a notice to the Operator and the Access Holder requiring the Operator to comply with **clause 10.2(a)** within 20 Business Days after the date the notice is given to the Operator and specifying that it is a notice given under this **clause 10.2(c)**. For clarity, the Operator is not obliged to, and Aurizon Network may not require the Operator to, comply with **clause 10.2(a)** prior to the Commitment Date.

- (d) If Aurizon Network notifies the Operator and the Access Holder under **clause 10.2(c)** and the Operator fails to comply with the requirements set out in the notice then, subject to **clause 10.2(e)**, Aurizon Network may:
 - (i) by notice to the Operator and the Access Holder reduce (as applicable):
 - (A) all of the Operational Rights (**Category 1 Reduced Operational Rights**); and
 - (B) the Operational Rights in respect of the affected Train Service Types only (**Category 2 Reduced Operational Rights**); or
 - (ii) if, as a result of such reduction, there will be no remaining Operational Rights, terminate this Deed.
- (e) Aurizon Network must allow the Access Holder to nominate an alternative "Operator" (as defined in the Access Agreement) to utilise the Category 1

Reduced Operational Rights and/or the Category 2 Reduced Operational Rights (as applicable).

10.3 Commencement of Train Services for Train Service Type

- (a) Without limiting any other provision of this Deed, if:
- (i) **schedule 2** is varied or deemed to be varied to include an additional Train Service Type; or
 - (ii) the Train Description for an existing Train Service Type is varied or deemed to be varied (including under **clause 12.214.2**),

then the Operator must only operate or continue to operate (as applicable) any such additional or varied Train Services for that Train Service Type if:

- (iii) the Operator:

~~(A) — has demonstrated, to the reasonable satisfaction of Aurizon Network, the matters which the Operator is required to demonstrate under clause 10.2(a) in respect of that Train Service Type; [AN note: The deleted words relate to Supply Chain Rights. They are no longer required because the QCA has deleted the requirement for an Operator to demonstrate that it holds or has the benefit of Supply Chain Rights.]~~

(A) ~~(B)~~ if required under **clause 15.5, 17.5**, has provided a Certificate of Compliance to Aurizon Network for all of the Rollingstock or Rollingstock Configurations which the Operator proposes to use in the operation of Train Services for that Train Service Type, and such Rollingstock is Authorised Rollingstock or such Rollingstock Configurations are Authorised Rollingstock Configurations for that Train Service Type;

(B) ~~(C)~~ has amended the Emergency Response Plan to address the operation of those Train Services, or notified Aurizon Network of its determination that no such amendments are required, under **clause 13.215.2(a)**;

(C) ~~(D)~~ has provided evidence to Aurizon Network of the Operator's Accreditation as varied to address the operation of those Train Services, or notified Aurizon Network of its determination that no such variations are required, under **clause 09(d)**;

(D) ~~(E)~~ and Aurizon Network have jointly conducted a further Interface Risk Assessment, and amendments to the IRMP, to the extent required, have been agreed or determined, under **clause 13.215.2(e)**;

(E) ~~(F)~~ if required under **clause 22.4, 24.4**, has amended the Operator's Safety Management System to address any amendments to the IRMP and the operation of those Train Services; and

(F) ~~(G)~~ if required under **clause 13.2, 15.2**, has amended the Environmental Management Plan to address any amendments to the IRMP and the operation of those Train Services; and

- (G) ~~(H)~~ has complied with or implemented any aspects of the Operating Plan, Emergency Response Plan, the Operator's Accreditation, the IRMP, the Operator's Safety Management System and the Environmental Management Plan that are required to be complied with or implemented before the commencement of those Train Services;
- (iv) amendments to the Operating Plan to address the operation of those Train Services have been approved by Aurizon Network, or the Operator notified Aurizon Network of its determination that no such amendments are required, under **clause 13.215.2(a)**; and
- (v) Aurizon Network has given the Operator an Authority to Travel or a Train Route Acceptance authorising the Operator to operate Train Services for that Train Service Type using the Authorised Rollingstock Configurations for that Train Service Type.
- (b) Aurizon Network must use reasonable endeavours to cooperate with the Operator and ~~act promptly to facilitate~~ seek to resolve with the Operator the Operator's compliance with **clause 10.3(a)**.
- (c) If **clause 10.3(a)** applies and the Operator has not complied with **clause 10.3(a)** in respect of the Train Services for a Train Service Type by:
- (i) if **clause 10.3(a)(i)** applies:
- (A) the Train Service Compliance Date for that Train Service Type and Aurizon Network has a reasonable expectation that the Operator cannot commence the operation of those Train Services by the Train Service Commitment Date for that Train Service Type; or
- (B) the Train Service Commitment Date for that Train Service Type; or
- (ii) if **clause 10.3(a)(ii)** applies, the date the variation to the Train Description for the Train Service Type takes effect,

then, provided that the Operator's failure to comply with **clause 10.3(a)** was not due to Aurizon Network's breach of **clause 10.3(b)** and subject to **clause 10.3(d)**:

- (iii) Aurizon Network may give a notice to the Operator and the Access Holder requiring the Operator to comply with **clause 10.3(a)** within 20 Business Days after the date the notice is given to the Operator and the Access Holder; and
- (iv) if Aurizon Network gives a notice to the Operator and the Access Holder under **clause 10.3(c)(iii)** and the Operator fails to comply with **clause 10.3(a)** within 20 Business Days after the date that the notice is given to the Operator and the Access Holder, then:
- (A) if **clause 10.3(a)(i)** applies:
- (1) Aurizon Network may, by notice to the Operator and the Access Holder, reduce the Operational Rights by the Train Services for that Train Service Type by removing the variation (**Reduced Operational Rights**);

- (2) if the Operational Rights of the Operator are reduced in accordance with **clause 10.3(c)(iv)(A)(1)**, Aurizon Network may allow the Access Holder to nominate an alternative “Operator” (as defined in the Access Agreement) to utilise the Reduced Operational Rights in accordance with the terms of the Access Agreement;
 - (3) Aurizon Network must provide to the Operator replacement Schedules amended consistent with any notice under **clause 10.3(c)(iv)(A)(1)** and this Deed is varied in accordance with those replacement Schedules with effect on and from the date that the notice referred to in **clause 10.3(c)(iv)(A)(1)** is given to the Operator and the Access Holder; and
 - (4) if there are no Operational Rights remaining following the issuance of a notice under **clause 10.3(c)(iv)(A)(1)**, Aurizon Network may terminate this Deed (without prejudice to those provisions which are stated to survive this Deed); or
- (B) if **clause 10.3(a)(ii)** applies:
- (1) Aurizon Network may give the Operator and the Access Holder a notice specifying that the variation to the Train Description for the Train Service Type will cease to be of any effect; and
 - (2) if Aurizon Network gives the Operator and the Access Holder a notice referred to in **clause 10.3(c)(iv)(B)(1)**, the Train Description for the Train Service Type will be taken not to have been varied (even if the relevant variation has taken effect) and the Train Description for the Train Service Type will be taken to be the Train Description for the Train Service Type in force immediately before the variation took effect.
- (d) For clarity, the Operator is not obliged to, and Aurizon Network may not require the Operator to, comply with **clause 10.3(a)** prior to the Commitment Date.

10.4 Power

- (a) If the operation of a Train Service consumes electricity supplied by Aurizon Network, in operating Train Services the Operator must not cause Aurizon Network to breach any reasonable and lawful requirements imposed on Aurizon Network by any supplier of electricity to Aurizon Network and which are notified by Aurizon Network to the Operator.
- (b) Aurizon Network must apply the same terms in respect of the consumption of electricity to all Train Operators.

10.5 Use of Regenerative Brakes

The Operator must ensure that it does not use Regenerative Brakes on any Rollingstock operated on the Nominated Network unless the Operator has obtained the prior written consent of Aurizon Network (which may be given subject to conditions) to such use.

11 Reduction of Nominated Monthly Train Services if Maximum Payload exceeded

[AN note: Clause 11 has been reinstated as a consequence of the reinstatement of clauses 10 and 11 in the Access Agreement.]

11.1 Reduction of Nominated Monthly Train Services under Access Agreement

- (a) The Operator acknowledges that under the Access Agreement:
- (i) Aurizon Network has the right under clause [10] of the Access Agreement to reduce the Nominated Monthly Train Services of the Access Holder for a Train Service Type if, at a point in time, the Average Annual Payload for that Train Service Type operated by the Operator exceeds the Maximum Payload for that Train Service Type; and
 - (ii) upon the reduction of the Nominated Monthly Train Services in accordance with the Access Agreement as a result of Average Annual Payload for a Train Service Type operated by the Operator exceeding the Maximum Payload for that Train Service Type, the Access Holder will be deemed to have given notice to Aurizon Network to reduce the number of Nominated Monthly Operational Rights the Operator has the right to operate for that Train Service Type utilising the Access Rights in accordance with that notice.
- (b) Aurizon Network will notify the Operator if the Nominated Monthly Train Services are reduced under clause [10] of the Access Agreement and this Deed will be varied in accordance with the notice which the Access Holder is deemed to have given to Aurizon Network as contemplated under **clause 11.1(a)(ii).**

11.2 Request for increased Maximum Payload

- (a) The Operator acknowledges that the Access Holder may, under clause [11] of the Access Agreement, request that Aurizon Network consider increasing the Maximum Payload for a Train Service Type.
- (b) If the Maximum Payload for a Train Service Type is increased under clause [11] of the Access Agreement, Aurizon Network will notify the Operator of any changes to:
- (i) the Nominated Monthly Operational Rights;
 - (ii) the Maximum Payload for the relevant Train Service Type; and
 - (iii) the Nominal Payload for the relevant Train Service Type.
- as a result of the increase under clause [11] of the Access Agreement and this Deed will be varied in accordance with that notice.

11.3 No prejudice to other rights

This **clause 11** does not prejudice Aurizon Network's other rights and remedies in respect of any non-compliance by the Operator with the Train Description for a Train Service Type.

12 Reduction of Nominated Monthly Train Services if

Nominal Payload increased

[AN note: Clause 12 has been reinstated as a consequence of the reinstatement of clause 12 in the Access Agreement.]

12.1 Notice of Intention to Increase Nominal Payload

- (a) The Operator acknowledges that Aurizon Network may give the Access Holder a notice of Aurizon Network's intention to increase the Nominal Payload for a Train Service Type under the Access Agreement (**Notice of Intention to Increase Nominal Payload**).
- (b) Aurizon Network will provide to the Operator a copy of any Notice of Intention to Increase Nominal Payload it gives to the Access Holder.

12.2 Estimate of Net Financial Effect

- (a) Within:
 - (i) 20 Business Days after Aurizon Network gives the Operator a copy of the Notice of Intention to Increase Nominal Payload; or
 - (ii) if the Access Holder gives Aurizon Network a Dispute Notice under clause **[12.4(a)]** of the Access Agreement, 20 Business Days after Aurizon Network has notified the Operator of the resolution of the dispute under the Access Agreement.

the Operator must give Aurizon Network a notice specifying the Operator's reasonable estimate of the Net Financial Effect (if any) on the Operator of the intended variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under this **clause 12** (including reasonable details of all matters taken into account in determining such estimate).

- (b) The Operator warrants in favour of Aurizon Network that any estimate given by the Operator in a notice under **clause 12.2(a)** is accurate on the basis of the information reasonably available to it and sufficiently detailed to enable Aurizon Network to reasonably assess the estimate.
- (c) Within 10 Business Days after the Operator gives Aurizon Network a notice under **clause 12.2(a)**, Aurizon Network may give the Operator a notice requesting the Operator to provide to Aurizon Network any further information and documentation Aurizon Network reasonably requires for the purposes of assessing an estimate given by the Operator in a notice under **clause 12.2(a)**.
- (d) Within 10 Business Days after Aurizon Network gives the Operator a notice under **clause 12.2(c)**, the Operator must:
 - (i) provide to Aurizon Network the information and documentation requested in the notice; and
 - (ii) if required by Aurizon Network, meet with Aurizon Network to discuss the estimate given by the Operator in a notice under **clause 12.2(a)**.

12.3 Withdrawal of Notice of Intention to Increase Nominal Payload

- (a) The Operator acknowledges that, under the Access Agreement, Aurizon Network may, in its absolute discretion, withdraw a Notice of Intention to

Increase Nominal Payload at any time before the date which is 10 months before the Effective Date.

- (b) If Aurizon Network withdraws a Notice of Intention to Increase Nominal Payload:
- (i) Aurizon Network will notify the Operator of any such withdrawal; and
 - (ii) the variations to the Nominal Payload, Maximum Payload and Monthly Nominal Train Services for the Train Service Type set out in the Notice of Intention to Increase Nominal Payload will not take effect.
- (c) If Aurizon Network gives the Access Holder a Notice of Intention to Increase Nominal Payload in respect of a Train Service Type, then, unless the Notice of Intention to Increase Nominal Payload is withdrawn as contemplated in **clause 12.3(b)**, Aurizon Network will notify the Operator of any changes to:
- (i) the Nominal Payload for the Train Service Type;
 - (ii) the Maximum Payload for the Train Service Type;
 - (iii) the Nominated Monthly Train Services for the Train Service Type.
- in each case, as a result of the Notice of Intention to Increase Nominal Payload in respect of that Train Service Type.

12.4 Further estimate of Net Financial Effect

- (a) No less than six months, but not more than seven months, after the Effective Date, the Operator must give Aurizon Network a notice specifying reasonable details of the Operator's reasonable estimate of the Net Financial Effect (excluding any Foreseeable Costs and Detriments) on the Operator of the variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under the Access Agreement as contemplated in this **clause 12**, including:
- (i) reasonable details of:
 - (A) any increased costs and other detriments actually incurred by the Operator; and
 - (B) any savings and other benefits and advantages actually received by the Operator;
 - (ii) reasonable details of the Operator's reasonable estimate of:
 - (A) any increased costs and other detriments to be incurred by the Operator; and
 - (B) any savings and other benefits and advantages to be received by the Operator; and
 - (iii) any Foreseeable Costs and Detriments.
- (b) A notice given by the Operator under **clause 12.4(a)** must not include any increased costs and other detriments actually, or estimated to be, incurred by the Operator which were not included in the notice given under **clause 12.2(a)** to the extent that, at the time of giving the notice under **clause 12.2(a)**, the Operator ought to have reasonably anticipated that those costs

and other detriments would, or would likely, be incurred (**Foreseeable Costs and Detriments**).

- (c) The Operator warrants in favour of Aurizon Network that any estimate given by the Operator in a notice under **clause 12.4(a)** is accurate on the basis of the information reasonably available to it and sufficiently detailed to enable Aurizon Network to reasonably assess the estimate.
- (d) Within 10 Business Days after the Operator gives Aurizon Network a notice under **clause 12.4(a)**, Aurizon Network may give the Operator a notice requesting the Operator to provide to Aurizon Network any further information and documentation Aurizon Network reasonably requires for the purposes of assessing an estimate given by the Operator in a notice under **clause 12.4(a)**.
- (e) Within 10 Business Days after Aurizon Network gives the Operator a notice under **clause 12.4(d)**, the Operator must:
 - (i) provide to Aurizon Network the information and documentation requested in the notice; and
 - (ii) if required by Aurizon Network, meet with Aurizon Network to discuss the estimate given by the Operator in a notice under **clause 12.4(a)**.

12.5 Dispute

- (a) Within 10 Business Days after the later of the date that:
 - (i) the Operator gives Aurizon Network a notice under **clause 12.4(a)**;
 - (ii) if Aurizon Network requests the Operator to provide any information and documentation under **clause 12.4(d)**, the Operator provides Aurizon Network the requested information and documentation; and
 - (iii) if Aurizon Network requires the Operator to meet with it under **clause 12.4(e)(ii)**, the Operator meets Aurizon Network,

Aurizon Network must, if Aurizon Network Disputes the amount of the estimate of the Net Financial Effect (excluding any Foreseeable Costs and Detriments) on the Operator specified in the notice given by the Operator under **clause 12.4(a)**, give the Operator a Dispute Notice which disputes that estimate in accordance with **clause 30**.

- (b) If a Dispute referred to in **clause 12.5(a)** is not resolved in accordance with **clause 30.2**, then the Parties must refer the Dispute to an Expert to determine the Net Financial Effect (excluding any Foreseeable Costs and Detriments) on the Operator of the variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under this **clause 12**.

12.6 Payment of compensation

- (a) Within 20 Business Days after the later of:
 - (i) the dates referred to in **clauses 12.5(a)(i)**, **12.5(a)(ii)** and **12.5(a)(iii)**; and
 - (ii) if Aurizon Network gives the Operator a Dispute Notice referred to in **clause 12.5(a)**, the date that the Dispute is resolved under **clause 30**.

Aurizon Network must pay to the Operator:

(iii) if **clause 12.6(a)(ii)** applies, the amount which is agreed or determined under the Dispute resolution process to be the Net Financial Effect (excluding any Foreseeable Costs and Detriments) on the Operator of the variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under this **clause 12**; or

(iv) otherwise, the amount which is the Operator's estimate of the Net Financial Effect (excluding any Foreseeable Costs and Detriments) on the Operator of the variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under this **clause 12** specified in the notice given by the Operator under **clause 12.4(a)**.

(b) The Parties agree that the amount payable by Aurizon Network to the Operator under **clause 12.6(a)** fully compensates the Operator for the Net Financial Effect on the Operator of the variations to the Train Description for the relevant Train Service Type under this **clause 12**, and, except for the payment of that amount, the Operator must not make any Claim against Aurizon Network in respect of the variations to the Nominal Payload, Maximum Payload and Nominated Monthly Operational Rights for the relevant Train Service Type under this **clause 12**.

13 ~~11~~ Day to day Train Movements

13.1 ~~11.1~~ Exclusive responsibility for Train Control

Aurizon Network must provide, and has exclusive responsibility for, Train Control in respect of the Nominated Network.

13.2 ~~11.2~~ Train Control rights and obligations - Aurizon Network

- (a) Aurizon Network must exercise Train Control by the issue of Train Control Directions to the Operator and the Operator's Staff consistent with the Network Management Principles.
- (b) In exercising Train Control, Aurizon Network must act reasonably and have regard to the safe conduct of rail operations on the Infrastructure and may, acting reasonably:
 - (i) delay, alter or add a Train Service or other Network Train Services;
 - (ii) cancel, re-route or re-schedule a Train Service or other Network Train Services;
 - (iii) alter the Scheduled Times for Train Services or other Network Train Services in the Train Schedule; and
 - (iv) impose any Operational Constraint on the Nominated Network consistent with **clause 19.2-21.2**.

13.3 ~~11.3~~ Train Control rights and obligations - Operator

Without limiting the rights of the Operator, the Operator must:

- (a) comply with Train Control Directions;
- (b) ensure the Operator's Staff comply with Train Control Directions;

- (c) ensure that its Train drivers are contactable by the Train Controller to receive Train Control Directions;
- (d) notify the Train Controller as soon as reasonably possible after the Operator becomes aware that:
 - (i) it is not possible for the Operator or the Operator's Staff to comply with a Train Control Direction; or
 - (ii) the Operator or the Operator's Staff have not complied with a Train Control Direction; and
- (e) notify the Train Controller as soon as reasonably possible after the Operator becomes aware of:
 - (i) any changes or delays in Train Services; or
 - (ii) any circumstances which have affected or may affect Train Control including the ability of any Train Service to conform to its Scheduled Times.

13.4 ~~11.4~~ **Train Control communications**

The Operator must ensure all Trains are equipped with or have available means of communication to permit the Operator's Staff to comply with this Deed (including the Rollingstock Interface Standards and the Applicable Safeworking Procedures).

13.5 ~~11.5~~ **Removal at the end of Authorised Parking**

- (a) To the extent that Aurizon Network has allowed any Train to be Stowed or directed or otherwise allowed any items of Rollingstock to be temporarily parked on the Nominated Network (in either case, **Authorised Parking**):
 - (i) the Operator must ensure that it ceases the Stowage or the temporary parking of the relevant Rollingstock on the Nominated Network on:
 - (A) the expiry of any permitted period specified by Aurizon Network in respect of such Authorised Parking; or
 - (B) if no such permitted period has been specified by Aurizon Network in respect of any such Authorised Parking, within 12 hours (or such longer period as may be specified by Aurizon Network) of notice from Aurizon Network requiring the cessation of Stowage or end to temporary parking of the relevant Rollingstock; and
 - (ii) without limiting any other rights which Aurizon Network may have, Aurizon Network may, subject to Aurizon Network using reasonable efforts to first consult with the Operator:
 - (A) take such action as Aurizon Network (acting reasonably) considers necessary in relation to the cessation of Stowage or end to temporary parking of the relevant Rollingstock (including removing the Train or relevant Rollingstock) following the expiry of the relevant period referred to in **clause ~~11.5~~13.5(a)(i)**; and

[AN note: The QCA deleted references to "removal" in the

above clause. The above clause should make clear that Aurizon Network's rights under the clause extend to removing rollingstock.]

- (B) recover such reasonable costs incurred by Aurizon Network in doing so and, subject to **clause 8.4**, the Operator must, within 10 Business Days after receiving such demand, pay to Aurizon Network such reasonable costs incurred by Aurizon Network.
- (iii) Aurizon Network will not be liable for any damage to or loss of freight, Train or Rollingstock caused by any action referred to in **clause 44.513.5(a)(ii)** and the Operator is solely liable for, and releases, indemnifies and will keep indemnified Aurizon Network and its directors and Aurizon Network's Staff against all Claims of any nature suffered or incurred by, or made or brought against, Aurizon Network, its directors or Aurizon Network's Staff in respect of any exercise of Aurizon Network's rights under **clause 44.513.5(a)(ii)**.

14 ~~12~~ Compliance

14.1 ~~12.1~~ General requirements

- (a) To the extent relevant to the performance of its obligations under this Deed:
 - (i) each Party must observe and comply with:
 - (A) all applicable Laws;
 - (B) the conditions of its own Accreditation;
 - (C) the lawful requirements of relevant Authorities;
 - ~~(D) Train Control Directions;~~
 - (D) ~~(E)~~ the Applicable Safeworking Procedures and Applicable Safety Standards;
 - (E) ~~(F)~~ the Network Management Principles;
 - (F) ~~(G)~~ the Interface Coordination Arrangements;
 - (G) ~~(H)~~ to the extent applicable, the Emergency Procedures;
 - ~~(I) the Emergency Response Plan;~~
 - (H) ~~(J)~~ the IRMP; and
 - (I) ~~(K)~~ the Access Undertaking (including, in Aurizon Network's case, its obligations in Part 3 of the Access Undertaking);
 - (ii) the Operator must observe and comply with:
 - (A) the Train Description for each Train Service Type (subject to the Network Management Principles);
 - (B) the description of the relevant Reference Train Service except as otherwise permitted by this Deed;
 - (C) the Emergency Response Plan;

[AN note: Only the Operator is required to comply with an Emergency Response Plan.]

(D) Train Control Directions:

[AN note: As Aurizon Network issues Train Control Directions to Operators, it does not make sense for Aurizon Network to be obliged to comply with them.]

- (E) ~~(E)~~ the Operating Plan;
 - (F) ~~(D)~~ the Environmental Management Plan;
 - (G) ~~(E)~~ subject to the provision of reasonable notice from Aurizon Network specifying:
 - (1) the relevant requirements of the Environmental Authorities held by Aurizon Network from time to time and the permits, approvals and licences in respect of facilities to which access is provided by Aurizon Network to the Operator, those relevant requirements;
 - (2) relevant Approvals affecting the operations of Aurizon Network and their applicability to the Operator, those Approvals;
 - (H) ~~(F)~~ the applicable requirements under the Noise Code; and
- (iii) Aurizon Network must observe and comply with:
- (A) the conditions of its Accreditation;
 - (B) all licences and permits affecting its operations, including any licences, permits and approvals in respect of facilities relevant to this Deed; and
 - (C) any Environmental Authorities it holds from time to time.

14.2 ~~12.2~~ Non-compliance by Operator with Train Description

- (a) If:
- (i) Train Services operated by the Operator do not comply, in any material respect, with the Train Description for the Train Service Type, except where such non-compliance is attributable to another Railway Operator or Aurizon Network; and
 - (ii) the Operator fails to demonstrate to the reasonable satisfaction of Aurizon Network, within 20 Business Days of being requested to do so, that those Train Services will consistently comply with the applicable Train Description for the remainder of the Term,
- then, if following satisfaction by Aurizon Network of the requirements of clauses ~~15.3~~[18.3(a)] and ~~15.3~~[18.3(b)] of the Access Agreement, Aurizon Network continues to not be reasonably satisfied that the Operator will consistently comply with the Train Description for the remainder of the Term, Aurizon Network may, by giving the Operator and the Access Holder 20 Business Days' notice:
- (iii) vary the applicable Train Description to a level it reasonably expects to be achievable by the Operator for the remainder of the Term, having regard to the extent of previous compliance with the applicable Train Description (ignoring, for the purpose of assessing previous compliance, any non-compliance to the extent that the

non-compliance was attributable to another Railway Operator or to Aurizon Network); and

- (iv) reasonably vary any other provisions of this Deed to reflect the impact of the change in the applicable Train Description.
- (b) The Operator is entitled to dispute any variation by Aurizon Network under **clause 12.214.2(a)** and such dispute must be referred to an Expert for resolution in accordance with **clause 28.3.30.3**.
- (c) This **clause 12.214.2** does not prejudice Aurizon Network's other rights and remedies in respect of any non-compliance by the Operator with the Train Description for a Train Service Type.
- (d) If any variations under this **clause 12.214.2** affect the Train Description, then the commencement of those variations is subject to and conditional upon the Operator being notified by Aurizon Network that all necessary amendments (if any) to the Access Agreements have been made in respect of such matters and any relevant nomination of the Operator by the Access Holder in accordance with the Access Agreement has, if necessary, been varied.

14.3 ~~12.3~~ Certain matters to apply consistently to all Railway Operators

Aurizon Network must ensure that as far as reasonably practicable:

- (a) the Network Management Principles;
- (b) the System Operating Parameters;
- (c) the System Rules;
- (d) the Safeworking Procedures and Safety Standards;
- (e) the Emergency Procedures; and
- (f) the Investigation Procedures,

will be applied consistently for all Railway Operators operating Network Train Services to destinations located in the same Coal System.

[AN note: The reinstated qualification is required because there are circumstances in which it is not practicable to apply the above requirements consistently. Aurizon Network should only be obliged to do so as far as reasonably practicable to do so. See Aurizon Network's submission for further details.]

14.4 ~~12.4~~ Provision of information

- (a) Aurizon Network must provide the Operator with:
 - (i) information relevant to the Operator's operation of Train Services if and when required to do so under the Network Management Principles; and
 - (ii) a copy of each Operating Document (which may be via publication on the Website).

15 ~~13~~ Plans

15.1 ~~13.1~~ Approval of Plans

[AN note: Aurizon Network has amended clauses 15.1 and 15.2 to include common processes in relation to Operating Plans and Emergency Response Plans and to address drafting issues.]

- (a) Before the commencement of any Train Services:
- (i) the Operator must develop and submit to Aurizon Network for approval the following documents which must be, at all times during the Term, consistent with the terms of this Deed:
 - (A) a plan (**Operating Plan**) which:
 - (1) specifies reasonable details of the Operator's planned operations of Train Services; and
 - (2) without limiting **clause 13.1(15.1(a)(i)(A))**, addresses the matters required under Schedule C of the Access Undertaking;
 - (B) a plan (**Emergency Response Plan**) which:
 - (1) contains the set procedures adequate for dealing with an Incident, including all actions to be taken to minimise or alleviate any threat or danger to any person or property or the environment;
 - (2) is compatible with the Emergency Procedures; and
 - (ii) the Parties must in accordance with the Interface Risk Provisions which form part of this Deed under clause 3:
 - (A) jointly with the Access Holder conduct an Interface Risk Assessment; and
 - (B) as soon as reasonably practicable after the completion of the Interface Risk Assessment (and in any event by not later than 20 Business Days after the completion), negotiate diligently and in good faith an IRMP, including any amendment to it.
- (b) As soon as possible and in any event by no later than 20 Business Days from the date of receipt of the Operating Plan or the Emergency Response Plan (as applicable), Aurizon Network must:
- (i) notify the Operator whether or not it approves the Plan; and
 - (ii) if not, provide reasonable details of its reasons for withholding its approval.
- (c) Aurizon Network:
- (i) may withhold its approval of ~~the Operating~~a Plan if it is not reasonably satisfied that the ~~Operating~~ Plan complies with **clause 13.1(15.1(a)(i)(A))**;
 - ~~(ii) must notify the Operator if it is not reasonably satisfied that the Emergency Response Plan complies with clause 13.1(a)(i)(B) and the parties must meet to agree on a mutually acceptable course of action to address Aurizon Network's concerns within 10 Business~~

Days after the notice is given;

~~(ii)~~ ~~(iii)~~ must promptly determine, acting reasonably, the IRMP (including any amendment to it) and notify the Operator of its determination if the Parties are unable to agree an IRMP or any amendments to it under **clause 13.115.1(a)(ii)**.

(d) If a dispute arises as a result of:

(i) Aurizon Network withholding its approval of ~~the Operating a~~ Plan under **clause 13.115.1(c)(i)**;

~~(ii) the Parties failing to comply with the timeframe in clause 13.1(c)(ii); or~~

~~(ii)~~ ~~(iii) the IRMP, or any aspect of or amendment to the IRMP, determined by Aurizon Network under clause 13.1(c)(iii) (Disputed Aspect)~~ being Unreasonable,

it must be resolved under **clause 28.2,30.2**, failing which **clause 28.330.3** applies.

(e) If a dispute is referred to an Expert, then:

(i) if applicable, the Expert is required to determine whether or not the Operating Plan or the Emergency Response Plan (as applicable) complies with the **clause 13.115.1(a)(i)**; and

(ii) if the Expert determines (as applicable):

(A) the Operating Plan or the Emergency Response Plan (as applicable) does not comply with **clause 13.115.1(a)(i)(A)**; or

~~(B) the Emergency Response Plan is not compatible with the Emergency Procedures and otherwise complies with clause 13.1(a)(i)(B); or~~

~~(B)~~ ~~(C)~~ that the Disputed Aspect of the IRMP is Unreasonable, then the Expert must determine (and specify in its report of its determination of the Dispute):

~~(C)~~ ~~(D)~~ if **clause 13.115.1(e)(ii)(A)** or **13.1(e)(ii)(B)** applies, how the non-compliance should be rectified and the Operator must rectify the Operating Plan or the Emergency Response Plan (as applicable) accordingly; or

~~(D)~~ ~~(E)~~ in the report of its determination of the Dispute, specify if clause 15.1(e)(ii)(B) applies, the amendments to the IRMP which the Expert reasonably considers, if made, would result in the Disputed Aspect ceasing to be Unreasonable.

(f) A Plan is effective only from the date:

(i) in respect of an Operating Plan or Emergency Response Plan:

~~(A)~~ ~~(i)~~ Aurizon Network notifies the Operator that it approves the Operating Plan or the Emergency Response Plan (as applicable); or

~~(B)~~ ~~(ii)~~ if clause **13.1(a)(ii)** applies: 15.1(e)(ii)(A) applies, it is agreed or determined that the Operating Plan or the

Emergency Response Plan (as applicable) complies with the relevant requirements under **clause 15.1(a)(i)** (as applicable); and

(ii) in respect of an IRMP (including any amendments to it):

- (A) the Parties agree in writing on the terms of the IRMP ~~(including any or the~~ amendments to it); or
- (B) if the Parties cannot agree, Aurizon Network determines the IRMP or the amendment to it and notifies the Operator;

~~(iii) if **clause 13.1(d)** applies, it is agreed or determined that the Plan complies with the relevant requirements under **clause 13.1(a)(i)** (as applicable).~~

(g) If it is agreed or determined through the Dispute resolution process that the Disputed Aspect of the IRMP is Unreasonable, then (unless otherwise agreed between the Parties through the Dispute resolution process):

- (i) despite the Dispute, the IRMP, or the aspect of it or amendment to it, determined by Aurizon Network under **clause 13.115.1(c)(iii)** or **13.115.1(g)(ii)** (as applicable) is taken to be valid and binding; but
- (ii) as soon as reasonably practicable (and in any event within 20 Business Days) after such agreement or determination, Aurizon Network must:

- (A) determine, acting reasonably, the amendments to the IRMP (in the case of an Expert determination, having regard to the reasons for the Expert's determination and the amendments to the IRMP specified in the Expert's report of the determination of the Dispute) which result in the Disputed Aspect ceasing to be Unreasonable; and
- (B) notify the Operator of the amendments to the IRMP determined by Aurizon Network;
- (C) the amendments to the IRMP, as determined by Aurizon Network, will take effect on the date notified to the Operator under **clause 13.115.1(g)(ii)(B)**; and
- (D) if Aurizon Network does not notify the Operator of amendments to the IRMP by the time referred to in **clause 13.115.1(g)(ii)**, then the IRMP will be taken to be amended as specified in the Expert's report of the determination of the Dispute with effect immediately after the end of the time referred to in **clause 13.115.1(g)(ii)**.

(h) The Operator must develop, implement and maintain a plan to address Environmental Risks (**Environmental Management Plan**) in accordance with the Interface Risk Provisions: which form part of this Deed under **clause 3**.

15.2 ~~13.2~~ Amendments to Plans

- (a) The Operator:
 - (i) may amend the Operating Plan or the Emergency Response Plan (as applicable) from time to time provided it complies with this **clause**

~~13.2~~15.2;

- (ii) must, to the extent reasonably required, amend:
- (A) the Operating Plan and the Emergency Response Plan if:
- (1) ~~(A) the Operating Plan and the Emergency Response Plan if~~ **Schedule 2** is varied to include an additional Train Service Type or the Train Description for an existing Train Service Type is varied, to address the operation of the Train Services before the Operator commences or continues (as applicable) to operate the Train Services for that Train Service Type; or
- ~~(B) the Operating Plan if at any time:~~
- (2) it ceases to be consistent with the terms of this Deed or any document that the Operator is required under this Deed to comply with, to address the inconsistency;
- (B) ~~(1) the Operating Plan if at any time~~ clause ~~15.2~~17.2(a)(ii) applies, to address the proposal under the Authorisation Request Notice (assuming that the Rollingstock Configurations become Authorised Rollingstock Configurations for the Train Service Type); and
- ~~(2) the Operating Plan ceases to be consistent with the terms of this Deed or any document that the Operator is required under this Deed to comply with, to address the inconsistency;~~
- (iii) must notify Aurizon Network if it reasonably determines that no amendments to the Operating Plan and the Emergency Response Plan are required as a result of a variation to **Schedule 2**, including the reasons for that determination.
- (b) If Aurizon Network becomes aware of an inconsistency between the Operating Plan or Emergency Response Plan and this Deed or any document that the Operator is required under this Deed to comply with, Aurizon Network must notify the Operator.
- (c) If the Operator intends or is required to amend the Operating Plan or the Emergency Response Plan (as applicable), it must submit to Aurizon Network for approval full details of each proposed amendment, including its reasons for the amendment.
- (d) **Clauses ~~13.4~~15.1(b) to ~~13.4~~15.1(e)** apply to any amendments to a Plan the Operator submits to Aurizon Network for approval.
- (e) If, at any time during the Term:
- (i) a Party notifies the other Party that it believes that:
- (A) the IRMP is no longer effective in managing an Interface Risk or Environmental Risk addressed in the IRMP; or
- (B) an additional or varied Interface Risk or Environmental Risk exists, or is likely to exist, that is not addressed in the IRMP;
- (ii) **Schedule 2** is varied to include an additional Train Service Type or

- the Train Description for a Train Service Type is varied; or
- (iii) Aurizon Network notifies the Operator that the Rollingstock Interface Standards are varied and Aurizon Network considers that a further Interface Risk Assessment is required; or
 - (iv) a Certifier gives Aurizon Network a Compliance Statement,
- then:
- (v) as soon as reasonably practicable after:
 - (A) a Party notifies the other Party under **clause ~~13.2~~15.2(e)(i)(A)** or **~~13.2~~15.2(e)(i)(B)**; or
 - (B) Aurizon Network notifies the Operator under **clause ~~13.2~~15.2(e)(iii)**; or
 - (C) the Certifier gives Aurizon Network the Compliance Statement; or
 - (vi) before the Operator commences or continues (as applicable) to operate any Train Services for a Train Service Type referred to in **clause ~~13.2~~15.2(e)(ii)**;

the Parties must undertake a further Interface Risk Assessment and negotiate in good faith to endeavour to agree on amendments to the IRMP in accordance with **clauses ~~13.1(a)(ii)~~ and ~~13.1(c)(iii)~~15.1(a)(ii)** and, if the Parties are unable to agree amendments to the IRMP, then clause15.1(c)(ii) will apply.

16 ~~14~~ Train operations

16.1 ~~14.1~~ Compliance with Scheduled Time

- (a) The Operator must use reasonable endeavours to:
 - (i) operate Train Services in accordance with the relevant Daily Train Plan unless:
 - (A) otherwise permitted by the Network Management Principles;
 - (B) varied in the circumstances specified in this Deed;
 - (C) otherwise directed in a Train Control Direction; or
 - (D) otherwise agreed between the Parties (such agreement not to be unreasonably withheld); and
 - (ii) otherwise comply with all other Scheduled Times.
- (b) A Train Service is deemed to operate in accordance with its Scheduled Time if it ~~does not vary more than~~ is operated within three minutes ~~from before or after~~ the Scheduled Time.

[AN note: The above clause has been amended to clarify the intent of the clause and to be consistent with clause 16.4(a)(i).]

16.2 ~~14.2~~ Alterations to Train Services

- (a) Without limiting the rights of the Operator, Aurizon Network must give the Operator a Train Control Direction as soon as reasonably practicable after

it becomes aware that it is unable to make the Infrastructure available for the operation of a Train Service which is scheduled in the Daily Train Plan.

- (b) Unless Aurizon Network has already given the Operator a Train Control Direction under **clause 14.216.2(a)**, the Operator must notify Aurizon Network as soon as reasonably practicable after it decides not to, or becomes aware that it will be unable to, operate a Train Service which is scheduled in the Daily Train Plan and specify the Access Holder for that Train Service.
- (c) If clause **14.216.2(a)** or **14.216.2(b)** applies, Aurizon ~~Nework~~Network must reschedule the relevant Train Service to the extent permitted in accordance with the Network Management Principles.

[AN note: Consistent with Aurizon Network's obligation to reschedule Train Services under the Access Agreement, Aurizon Network should only be required to reschedule a Train Service to the extent permitted in accordance with the Network Management Principles.]

16.3 ~~14.3~~ Authorisation of other Train Movements

If:

- (a) the Operator gives Aurizon Network a notice in accordance with **clause 14.216.2(b)**;
- (b) Aurizon Network gives the Operator a Train Control Direction in accordance with **clause 14.216.2(a)**; or
- (c) for any reason, the Operator does not operate a Train Service at its Scheduled Time in the Train Schedule (including a revised Scheduled Time for that Train Service),

then Aurizon Network may authorise the operation of another Train Movement at that Scheduled Time.

16.4 ~~14.4~~ Notification

- (a) Aurizon Network must notify the Operator's Controller (such notification to include, where relevant, the anticipated effect on the relevant Train Service) as soon as reasonably practicable after Aurizon Network becomes aware of any circumstances (including Obstructions) which:
 - (i) have materially affected, or could potentially materially affect, the ability of the Operator to operate any Train Service in accordance with its Scheduled Time; or
- [AN note: The QCA amended the above clause by deleting the word "materially" so that the clause ceased to be subject to a materiality threshold. That amendment would result in Aurizon Network being required to give a very large number of notifications under the above clause for immaterial departures from Scheduled Times.]
- (ii) have affected, or could potentially affect, the security or safety of a Train Service or the Operator's Staff.
- (b) Aurizon Network must, as soon as reasonably practicable after becoming aware of the relevant changes, advise the Operator's Controller from time to time of changes to notices previously provided under **clause 14.416.4(a)**.

- (c) A Party must inform the other Party if it becomes aware of any failure by the Operator to comply with:
 - (i) any requirement specified in ~~clause 12.4~~[14.1](#); or
 - (ii) the Authorised Rollingstock and Authorised Rollingstock Configurations for each Train Service Type.

[16.5](#) ~~14.5~~ **Operator to supply information**

- (a) The Operator must provide to Aurizon Network:
 - (i) and at all times maintain operable software, hardware and associated communication links to establish (to Aurizon Network's reasonable satisfaction) an interface with Aurizon Network's information systems; and
 - (ii) information in relation to each Train Service in accordance with **item 1.2 of Schedule 10** before the operation of that Train Service.
- (b) The Operator's interface with Aurizon Network's information systems are subject to any reasonable controls specified by Aurizon Network to protect the integrity and confidentiality of Aurizon Network's information systems and the information contained in them.
- (c) Aurizon Network must cooperate with the Operator to establish the Operator's interface with Aurizon Network's information systems.

[16.6](#) ~~14.6~~ **Operation of Trains and Rollingstock**

The Operator is responsible for the safe operation of its Rollingstock and must ensure that at all times the operation of such Rollingstock (including all loading and unloading of such Rollingstock) is undertaken in a manner that:

- (a) is consistent with the Rollingstock Interface Standards (subject to any Approved Derogations);
- (b) does not affect the safe operation of the Rollingstock or any other Train Movements; and
- (c) ensures that all items on or in the Operator's Rollingstock remain secured in position during transit.

[17](#) ~~15~~ **Authorisation of Rollingstock and Rollingstock Configurations**

[17.1](#) ~~15.1~~ **Use of Rollingstock and Rollingstock Configuration**

- (a) The Operator must only operate Train Services using Rollingstock or Rollingstock Configurations which:
 - (i) comply with the Rollingstock Interface Standards (subject to any Approved Derogations);
 - (ii) are Authorised Rollingstock; ~~or~~
 - (iii) are Authorised Rollingstock Configuration for that Train Service Type; ~~and~~
 - (iv) [comply with all applicable Laws.](#)

[\[AN note: Aurizon Network considers that this important obligation should](#)

be reinstated.]

17.2 ~~15.2~~ **Authorisation Request Notice**

- (a) Subject to **clause 15.217.2(b)**, if, at any time during the Term, the Operator proposes to operate:
- (i) Train Services using Rollingstock which are not Authorised Rollingstock; or
 - (ii) Train Services for a Train Service Type using Rollingstock Configurations which are not Authorised Rollingstock Configurations for that Train Service Type,

then the Operator may give Aurizon Network a notice (**Authorisation Request Notice**) of its proposal, specifying reasonable details of the proposed Rollingstock or Rollingstock Configurations (as applicable).

- (b) The Operator must not give Aurizon Network an Authorisation Request Notice in respect of a proposal to operate Train Services using Rollingstock Configurations which are not Authorised Rollingstock Configurations for the Train Service Type unless the proposed Rollingstock Configurations are only comprised of Rollingstock which, at the time of the notice, are Authorised Rollingstock.

17.3 ~~15.3~~ **Compliance Statement**

If the Operator gives Aurizon Network an Authorisation Request Notice, then the Operator must procure a Certifier to:

- (a) assess whether or not the proposed Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) specified in the Authorisation Request Notice comply with the Rollingstock Interface Standards; and
- (b) provide a statement (**Compliance Statement**) to Aurizon Network which specifies whether or not the proposed Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) comply with the Rollingstock Interface Standards and, if not, reasonable details of each non-compliance.

17.4 ~~15.4~~ **Rollingstock Interface Standards Risk Assessment**

If the Operator gives Aurizon Network an Authorisation Request Notice, the Interface Risk Assessment required to be conducted under **clause 13.215.2(e)** will, unless otherwise required by Aurizon Network, be limited to a Rollingstock Interface Standards Risk Assessment in respect of the proposed Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) specified in the Authorisation Request Notice.

17.5 ~~15.5~~ **Certificate of Compliance**

- (a) If:
- (i) the Operator gives Aurizon Network an Authorisation Request Notice; and
 - (ii) a Certifier provides Aurizon Network with a Compliance Statement in respect of the proposed Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) specified in the Authorisation Request Notice,

then promptly after:

- (iii) the Parties have conducted an Interface Risk Assessment under **clause 15.417.4** in respect of such Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable); and
- (iv) any amendments to the IRMP have been agreed or determined in accordance with **clause 2215** following such Interface Risk Assessment,

the Operator must procure a Certifier to:

- (v) assess whether or not the proposed Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) comply with the Rollingstock Interface Standards (subject to any Approved Derogations); and
- (vi) if the assessment is positive, certify that such Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) comply with the Rollingstock Interface Standards (subject to any Approved Derogations).

~~(b) If a Certifier provides a Certificate of Compliance under clause 15.5:~~

(b) ~~(i)~~ If a Certifier provides a Certificate of Compliance under clause 17.5, the Operator must promptly (and in any event, within 10 Business Days) after being requested to do so by Aurizon Network provide (or procure the Certifier to provide) to Aurizon Network:

- (i) ~~(A)~~ the Certificate of Compliance; and
- (ii) ~~(B)~~ any information or documentation (including reports on trials and/or commissioning tests) in relation to the Rollingstock or Rollingstock Configurations for a Train Service Type (as applicable) specified in that Certificate of Compliance;

~~(ii) the Certificate of Compliance is final and binding on the Parties absent fraud or manifest error;~~

(c) If the Operator complies with clause 17.5(b), then 20 Business Days after the date the Operator complies with clause 17.5(b):

- (i) ~~(iii)~~ the Rollingstock specified in the Certificate of Compliance is taken to be Authorised Rollingstock; and/or
- (ii) ~~(iv)~~ the Rollingstock Configurations for the Train Service Type specified in the Certificate of Compliance is taken to be Authorised Rollingstock Configurations for that Train Service Type,

unless ~~Aurizon Network~~, within 20 Business Days ~~of~~after the date ~~it is provided with the Certificate of Compliance and any information or documentation in accordance~~the Operator complied with **clause 15.517.5(b)(i)**, Aurizon Network notifies the Operator that it is not satisfied that the Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) specified in the Certificate of Compliance complies with the Rollingstock Interface Standards (subject to any Approved Derogations), and provide reasonable details of any non-compliance.

[AN note: Aurizon Network is responsible for ensuring the rail safety on its Network and does not accept that it will be bound by a Certificate of

Compliance issued by a Certifier. Aurizon Network always reserves the right to consider whether proposed new Rollingstock or Rollingstock Configurations comply with the Rollingstock Interface Standards (even if a Certificate of Compliance has been issued). The QCA's drafting of the above clause introduces a timing issue because it provides for proposed Rollingstock or Rollingstock Configurations to be authorised, despite Aurizon Network having 20 Business Days to notify the Operator that the proposed Rollingstock or Rollingstock Configurations do not comply with the Rollingstock Interface Standards. The Rollingstock or Rollingstock Configurations should only be authorised after the time for giving a notice under the above clause has expired.]

17.6 ~~15.6~~ Disputes

- (a) If Aurizon Network gives the Operator a notice under **clause ~~15.5(b)~~17.5(c)** and the Operator disputes that notice, then the Operator may give a Dispute Notice to Aurizon Network under **clause ~~28.1~~30.1**.
- (b) If a Dispute referred to in **clause ~~15.6~~17.6(a)** is not resolved in accordance with **clause ~~28.2~~30.2**, then the Operator may refer the Dispute to an Expert under **clause ~~28.3~~30.3** to determine whether or not the Rollingstock or Rollingstock Configurations for the Train Service Type (as applicable) specified in the Certificate of Compliance comply with the Rollingstock Interface Standards (subject to any Approved Derogations).

17.7 ~~15.7~~ Update of schedule 5 as a consequence of New Authorisations

If, at any time during the Term, any Rollingstock is taken to be Authorised Rollingstock ~~or any Rollingstock Configuration is taken to be Authorised Rollingstock Configuration~~ (New Authorisation), then **item 1 of Schedule 5** is deemed to be amended to include:

- (a) the ~~Maximum Gross Mass~~ maximum gross mass for any Wagon or other Rollingstock for that New Authorisation; and
- (b) the ~~Tare Weight~~ tare weight for any Wagon or other Rollingstock for that New Authorisation,

at the time the Rollingstock is taken to be Authorised Rollingstock ~~or the Rollingstock Configuration is taken to be Authorised Rollingstock Configuration~~.

[AN note: Schedule 5 includes the Maximum Gross Mass and Tare Weight of Rollingstock (rather than Rollingstock Configurations).]

17.8 ~~15.8~~ Issue of Train Route Acceptance or Authority to Travel

Within five Business Days after ~~a New Authorisation for a Rollingstock Configurations for a Train Service Type become Authorised Rollingstock Configurations for the~~ Train Service Type, Aurizon Network must give the Operator a Train Route Acceptance or Authority to Travel (as applicable) authorising the Operator to operate Train Services for that Train Service Type using the Authorised Rollingstock Configurations for the Train Service Type.

[AN note: Aurizon Network only issues RTAs and ATTs in respect of Authorised Rollingstock Configurations (not Authorised Rollingstock).]

18 ~~16~~ Amendments to System Wide Requirements

18.1 ~~16.1~~ Amendment Notice

- (a) Aurizon Network may, acting reasonably, amend a System Wide Requirement by the issue of a notice (**Amendment Notice**) to the Operator:
 - (i) at any time to ensure the ongoing safe operation of the Nominated Network, provided it consults with the Operator before its implementation;
 - (ii) if required pursuant to a Material Change; or
 - (iii) in any other circumstance (**Discretionary System Amendment**), subject to:
 - (A) the Operator's agreement to such proposed amendment (such agreement not to be unreasonably withheld or delayed); or
 - (B) the other provisions of this **clause ~~16.18~~**.
- (b) An Amendment Notice must be given at least 20 Business Days prior to the proposed implementation date for the proposed amendments and specify:
 - (i) such details of the proposed amendments as reasonably necessary to:
 - (A) properly inform the Operator of the terms of the proposed amendments; and
 - (B) enable the Operator to assess the consequences for the Operator of the proposed amendments;
 - (ii) whether the Amendment Notice is issued on the ground referred to in **clause ~~16.18.1(a)(i)~~, ~~16.18.1(a)(ii)~~ or ~~16.18.1(a)(iii)~~**; and
 - (iii) details of the proposed implementation date for the proposed amendments.

18.2 ~~16.2~~ Response to a Discretionary System Amendment

- (a) Within 20 Business Days (or such longer period as may be agreed between the Parties, such agreement not to be unreasonably withheld or delayed) after receiving an Amendment Notice in accordance with **clause ~~16.18.1(b)~~** which proposes a Discretionary System Amendment, the Operator must notify Aurizon Network whether:
 - (i) irrespective of any financial arrangements agreed or determined under **clause ~~16.418.4(c)~~**, the proposed amendments will materially impact the Operator's operations to such an extent as to fundamentally frustrate the Operator's operation of Train Services under this Deed over a sustained period of time; and/or
 - (ii) the Net Financial Effect on the Operator of the Discretionary System Amendment is equivalent to one percent or greater of the annual Access Charges payable by the Access Holder under the Access Agreement.

18.3 ~~16.3~~ **Discretionary System Amendment which frustrate operations**

- (a) If the Operator notifies Aurizon Network under **clause ~~16.2~~18.2(a)(i)**, Aurizon Network must, acting reasonably, assess the Operator's response and notify the Operator if it agrees or disagrees with the Operator's notice within 20 Business Days after receipt of that notice (or such longer period as may be agreed between the Parties).
- (b) If Aurizon Network agrees with the Operator's notice under **clause ~~16.2~~18.2(a)(i)**, then Aurizon Network must:
 - (i) amend the proposed amendments to ensure that such amendments will not materially impact the Operator's operations to such an extent as to fundamentally frustrate the Operator's operation of Train Services under this Deed over a sustained period of time; and
 - (ii) within 5 Business Days of making the amendments under **clause ~~16.3~~18.3(b)(i)** give the Operator a copy of its amendments to the proposed amendments.
- (c) If Aurizon Network disagrees with the Operator's notice under ~~16.2~~**clause 18.2(a)(i)**, Aurizon Network may implement the proposed amendments from the later of:
 - (i) the date Aurizon Network notifies the Operator of its determination; and
 - (ii) if the Operator has notified Aurizon Network within the required timeframe ~~that under clause ~~16.2~~18.2(a)(ii) applies~~, the date that the Parties comply with **clause ~~16.4~~18.4**.
- (d) If the Operator disputes Aurizon Network's determination under **clause ~~16.3~~18.3(b)**, then either Party may refer the dispute for determination by an Expert in accordance with **clause ~~28.3~~30.3** and Aurizon Network must not implement the proposed amendments pending the Expert's determination.

18.4 ~~16.4~~ **Discretionary System Amendment with negative financial impact**

- (a) If the Operator notifies Aurizon Network under **clause ~~16.2~~18.2(a)(ii)**, the Operator must, within 20 Business Days after providing such notice (or such longer period as may be agreed between the Parties), provide to Aurizon Network details of such Net Financial Effect reasonably required by Aurizon Network to assess such Net Financial Effect, including estimates of any additional costs, savings, benefits or detriments to be obtained or suffered, or reasonably expected to be obtained or suffered, by the Operator as a direct result of Aurizon Network implementing the proposed amendments.
- (b) The Operator warrants that any estimates given by it under **clause ~~16.4~~18.4(a)** are to its knowledge accurate on the basis of the information reasonably available to it.
- (c) Promptly after ~~the~~ the Operator complies with **clause ~~16.4~~18.4(a)**, the Parties must negotiate in good faith to seek to agree appropriate financial arrangements between them with respect to such Net Financial Effect and, failing agreement within a further 20 Business Days after the Operator

provides the relevant details under **clause 16.418.4(a)**, either Party may refer the matter to an Expert to determine an appropriate financial arrangement to compensate the Operator for the Net Financial Effect on the Operator of the Discretionary System Amendment in accordance. Aurizon Network must not implement the proposed amendments pending the Expert's determination.

[AN note: The role of the Expert should be clearly specified.]

18.5 ~~16.5~~ Expert must have regard to certain matters

In making a determination referred to in **clause 16.318.3(d)** or **16.418.4(c)**, the Expert must have regard to, except in circumstances where consequences are otherwise provided under this Deed, the reasonable costs and benefits accruing to the Operator.

18.6 ~~16.6~~ Costs of implementing amendments to a System Wide Requirement

- (a) The Operator must use all reasonable endeavours to minimise the Net Financial Effect on the Operator of any proposed amendments to a System Wide Requirement.
- (b) Despite **clause 16.4,18.4**, where any System Wide Requirement is varied to ensure the ongoing safe operation of the Network, each Party must fund its own costs of implementing the proposed amendments including the equipping of Rollingstock with new or additional equipment such as Signalling and Telecommunications Equipment or making any other modification to Rollingstock.
- (c) At any time before Aurizon Network implements any proposed amendments, Aurizon Network may elect not to proceed with the proposed amendments provided it notifies the Operator within **42** Business Day of making such election.
- (d) The Parties must account to each other in respect of the contributions agreed or determined under **clause 16.418.4(c)** after completion of the implementation of the proposed amendments and subsequent modifications to the Operator's systems, equipment or Rollingstock as required by the amendments.

18.7 ~~16.7~~ Implementation of amendments to System Wide Requirements

- (a) Where Aurizon Network implements the proposed amendments in accordance with this **clause 16,18**, the relevant System Wide Requirement will be altered as contemplated in the Amendment Notice following completion of the implementation of the proposed amendments.
- (b) The Parties must take all necessary action and make all necessary amendments to the IRMP, Environmental Management Plan, the Operating Plan and/or the Emergency Response Plan in response to the relevant amendments to the System Wide Requirements (including providing Aurizon Network with a further Certificate of Compliance where the Authorised Rollingstock or Rollingstock Configurations require modification as a result of a change to a System Wide Requirement).

- (c) Aurizon Network must allow a reasonable period for the Operator to amend its procedures and plans to comply with any such amended System Wide Requirement, except in the case of emergency circumstances for safety reasons where Aurizon Network may require immediate compliance.

19 ~~17~~ Weighbridges and Overload Detectors

19.1 **General**

- (a) Where a Weighbridge or Overload Detector is located en route between an Origin and Destination for a Train Service Type:
- (i) the Party responsible for that Weighbridge or Overload Detector (as specified in item 5 of schedule 3) must use reasonable endeavours to ensure that such Weighbridge or Overload Detector is operational, calibrated and available to weigh Trains operated over such Weighbridge or Overload Detector; and
 - (ii) the Operator must use reasonable endeavours to operate its Trains over such Weighbridge or Overload Detector in a manner so that the Weighbridge or Overload Detector weighs the Operator's Trains.
- (b) Aurizon Network may vary at any time the numbers and locations of Weighbridges and Overload Detectors, subject to providing reasonable notice to the Operator.

[AN note: The above general provisions in relation to Weighbridges and Overload Detectors impose important operational obligations.]

19.2 ~~17.1~~ **Exceeding Maximum Allowable Gross Tonnage**

- (a) The Operator must ~~use reasonable endeavours to~~ ensure that the gross mass of any Wagon or Train operated by it under this Deed does not exceed the relevant Maximum Allowable Gross Tonnage.
- [AN note: The requirement not to exceed the Maximum Allowable Gross Tonnage is an important safety requirement. The above obligation should be an absolute (rather than reasonable endeavours) obligation.]
- (b) If any Wagon or Train operated by the Operator is determined by a Weighbridge or Overload Detector to be in excess of the relevant Maximum Allowable Gross Tonnage, then the Operator must reduce the gross mass to a level below the relevant Maximum Allowable Gross Tonnage:
- (i) unless otherwise directed by Aurizon Network, if the Train has not entered the mainline, before the Train enters the mainline; and
 - (ii) if directed by Aurizon Network, at a specific siding or location directed by Aurizon Network.

19.3 ~~17.2~~ **Exceeding Maximum Desirable Gross Tonnage**

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

19.4 ~~17.3~~ **Record keeping**

Where the Operator's Trains or Wagons are weighed by a Weighbridge or

Overload Detector, the Party responsible for the Weighbridge or Overload Detector as specified in **item 5 of Schedule 3** must use reasonable endeavours to ensure that:

- (a) if it is not the owner or operator of the Weighbridge or Overload Detector, it obtains all relevant records from the Weighbridge or Overload Detector including records of the gross mass of each loaded Wagon and Train;
- (b) whether or not it is the owner or operator of the Weighbridge or Overload Detector, it keeps a record of the gross mass of each loaded Wagon and Train;
- (c) the records referred to in **clauses 17.319.4(a)** and **17.319.4(b)** (as applicable) are provided to:
 - (i) the Party or other person loading the Trains; and
 - (ii) the other Party within 10 Business Days after the end of each Month.

19.5 ~~17.4~~ Verification

- (a) If the Party that is not responsible for the Weighbridge or Overload Detector reasonably believes that any Weighbridge or Overload Detector may be inaccurate, that Party may by notice to the other Party require the other Party to procure the testing of the accuracy of such Weighbridge or Overload Detector.
- (b) As soon as reasonably practicable after being given a notice under **clause 17.419.5(a)**, the Party responsible for the Weighbridge or Overload Detector must use reasonable endeavours to procure a suitably qualified person to:
 - (i) test the calibration of the relevant Weighbridge or Overload Detector (as applicable); and
 - (ii) make any adjustments required to correct the calibration of the Weighbridge or Overload Detector (as applicable).
- (c) Subject to **clause 17.419.5(e)**, the relevant Weighbridge or Overload Detector (as applicable) is deemed to have malfunctioned from the date the notice is given under **clause 17.419.5(a)** until the testing referred to in **clause 17.419.5(b)** has been carried out and, if required, the Weighbridge or Overload Detector has been recalibrated. Until such testing has been carried out and the Weighbridge or Overload Detector has been recalibrated, the mass of the relevant Train or Wagon which would otherwise have been measured by that Weighbridge or Overload Detector is the Maximum Desirable Gross Tonnage for the Train or Wagon, as applicable.
- (d) Except in the case of manifest error or fraud, the determination of the person conducting the test in accordance with **clause 17.419.5(b)** is final and binding on the Parties.
- (e) Where the person conducting the test in accordance with **clause 17.419.5(b)** determines that the Weighbridge or the Overload Detector is measuring within the tolerances specified in **item 5 of Schedule 3**, the Weighbridge or the Overload Detector (as applicable) will be treated as having been measuring accurately from the date on which the relevant notice was given under **clause 17.419.5(a)**.

- (f) The cost of conducting the test and making adjustments in accordance with **clause 17.419.5(b)** must be borne by:
- (i) the Party responsible for the Weighbridge or Overload Detector as specified in **item 5 of Schedule 3** if the Weighbridge or Overload Detector is determined to be not measuring within the tolerances specified in **item 5 of Schedule 3**; or
 - (ii) the Party giving notice under **clause 17.419.5(a)** if the Weighbridge or Overload Detector is determined to be measuring within the tolerances specified in **item 5 of Schedule 3** (and, to the extent that the Party responsible for the Weighbridge or Overload Detector has paid any costs of conducting the test, subject to **clause 8.4**, the Party giving the notice must reimburse the Party responsible for the Weighbridge or Overload Detector such reasonable costs of conducting the test).

19.6 ~~17.5~~ **No Claim**

- (a) Despite any other provision in this Deed, neither Party (**first Party**) is liable to the other Party for any damage, loss, cost or expense that the other Party may suffer or incur as a result of the first Party, in good faith, acting on the basis of any mass determined in accordance with this Deed.
- (b) Despite any other provision in this Deed, neither Party has any Claim against the other Party as a result of, or arising from, any delay to or cancellation of Train Services as a result of the operation of this **clause 17.19**.

20 ~~18~~ **Performance Levels**

20.1 ~~18.1~~ **Consequences of failure to comply with Performance Levels**

- ~~(a)~~ — A failure by either Party to achieve the relevant Performance Level does not constitute a breach of this Deed and the only consequences of such failure as between the Parties are the consequences set out in this **clause 18.20**.

20.2 ~~18.2~~ **Review of Performance Levels**

- (a) The Parties must, if requested by either Party, meet to review the Performance Levels subject to such review not occurring within six Months after the Commitment Date or any previous review of the Performance Levels.
- (b) If either Party notifies the other that it considers that the Performance Levels are no longer appropriate, the Parties must use reasonable endeavours to agree, but only with the written consent of the Access Holder, on varied Performance Levels and any associated variations to this Deed (including the applicable Train Descriptions).
- (c) If the Parties and the Access Holder are unable to agree to such variations then the existing Performance Levels will continue to apply unless varied by Aurizon Network in accordance with clause ~~12.2~~ **14.2(a)(iv)**.

21 ~~19~~-Infrastructure management

21.1 ~~19.1~~-Management and control of the Nominated Network

Aurizon Network is responsible for the management of the Nominated Network and retains control over all activities on the Nominated Network.

21.2 ~~19.2~~-Maintenance of the Nominated Network

- (a) Aurizon Network must carry out Maintenance Work on the Nominated Network such that, subject to any criteria or derogations for the Nominated Network specified in the IRMP and the Network Management Principles:
 - (i) the Infrastructure is consistent with the Rollingstock Interface Standards; and
 - (ii) the Operator can operate Train Services in accordance with their Scheduled Times.
- (b) Aurizon Network may impose (either temporarily or permanently) such Operational Constraints as it considers necessary, acting reasonably, for the protection of any person or any property (including the Infrastructure) or to facilitate the carrying out of Maintenance Work or Infrastructure Enhancements provided that, in exercising its rights under this **clause ~~19.2~~21.2(b)**, Aurizon Network must:
 - (i) use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing alternative Scheduled Times having regard to the reasonable requirements of the Operator); and
 - (ii) comply with the relevant procedures specified in the Interface Coordination Arrangements.
- (c) The Operator must notify Aurizon Network as soon as is reasonably practicable of any damage to, or disrepair or failure in operation or function of, any part of the Infrastructure of which the Operator becomes aware.
- (d) The Operator must provide reasonable cooperation to Aurizon Network in relation to the timetabling of Planned Possessions provided that any such Planned Possessions are consistent with the Network Management Principles and implemented in accordance with the Possession Protocols.
- (e) Subject to the Possession Protocols, Aurizon Network must use its reasonable endeavours to carry out:
 - (i) Emergency Possessions within seven days after the detection of the fault giving rise to the need for the Emergency Possession; and
 - (ii) Urgent Possessions within between seven days and three Months after the detection of the fault giving rise to the need for the Urgent Possession.

22 ~~20~~-Incident management

22.1 ~~20.1~~-Compliance

- (a) If requested by Aurizon Network from time to time, the Operator must demonstrate to Aurizon Network's reasonable satisfaction that:

- (i) procedures are in place which ensure compliance by the Operator with any reporting requirements in the Emergency Response Plan and, to the extent relevant, the Emergency Procedures; and
 - (ii) the Operator is complying with such procedures and reporting requirements.
- (b) The Operator must ensure that, at all times:
- (i) sufficient members of the Operator's Staff are appropriately qualified to participate in Investigations; and
 - (ii) the names and positions of those members of the Operator's Staff are maintained in the Emergency Response Plan.

22.2 ~~20.2~~ Obstructions

- (a) Unless permitted under this Deed or authorised by Aurizon Network, the Operator must not cause any Obstruction or permit any Obstruction caused by the Operator to continue.

22.3 ~~20.3~~ Notification

- (a) The Operator must notify the Train Controller as soon as reasonably practicable after the Operator or the Operator's Staff discover or become aware of:
- (i) any Obstruction (including all Incidents) or any breach or suspected breach of Safeworking Procedures; or
 - (ii) anything which the Operator or the Operator's Staff observe which may reasonably be considered to cause or contribute to the occurrence of an Incident or Obstruction; or

(iii) any harm to the Environment on, or within the vicinity of, the Nominated Network.

[AN note: Aurizon Network should be advised of any harm to the Environment which the Operator is aware of on, or in the vicinity of, the Nominated Network so that Aurizon Network can investigate and address the relevant incident.]

- (b) Aurizon Network must notify the Operator of all Incidents involving the Operator's Rollingstock.

22.4 ~~20.4~~ Management of Incident response

- (a) Aurizon Network is responsible for the overall coordination and management of the response to an Incident (including notifying all relevant emergency services) so that Restoration and Recovery are effected as soon as practicable.
- (b) If an Incident occurs
- (i) the Operator:
 - (A) is, subject to **clause 20.4**22.4(c), responsible for effecting Recovery and Retrieval;
 - (B) must:
 - (1) make arrangements to effect Recovery and Retrieval within three hours after the Incident occurred;

- (2) cooperate with and assist Aurizon Network in Restoration;
 - (3) effect timely Recovery and Retrieval within 12 hours after the Incident occurred (or within such other period as the Parties may agree) in accordance with the Emergency Response Plan;
 - (4) as soon as reasonably practicable, notify Aurizon Network;
 - (5) take action as soon as reasonably practicable in respect of an Incident to prevent or minimise injury to any person or damage to any property (including harm to the Environment) where there is an imminent risk of such injury or damage, but otherwise take no action without the prior approval of Aurizon Network (not to be unreasonably withheld); and
 - (6) comply with the directions of Aurizon Network in respect of the coordination and management of Recovery, Retrieval and Restoration.
- (c) If an Incident occurs and Aurizon Network reasonably believes that it will be able to effect Recovery more quickly than the Operator, then Aurizon Network may, subject to using reasonable efforts to consult with the Operator:
- (i) take such action as is reasonably necessary (including the use of a Railway Operator's Rollingstock to clear the Operator's Rollingstock) to effect Recovery; and
 - (ii) recover such reasonable costs incurred by Aurizon Network in doing so. Subject to **clause 8.4**, the Operator must, within 10 Business Days after receiving such demand, pay to Aurizon Network such reasonable costs incurred by Aurizon Network.
- (d) Subject to **clause 20.422.4(e)**, each Party must use all reasonable endeavours to ensure that any property damage, actual or potential harm to the Environment or delays to the recommencement of Train Movements arising from Restoration or Recovery are minimised.
- (e) Aurizon Network may, subject to Aurizon Network using its best efforts to first consult with the Operator about such action, take such action (including to give directions to the Operator and the Operator's Staff and to remove or require the Operator to remove any of its Rollingstock from the Nominated Network) as Aurizon Network considers reasonably necessary to recommence Train Movements as soon as practicable and, subject to **clause 20.422.4(k)(i)**, Aurizon Network will not be liable for any damage to or loss of freight or Rollingstock caused by such action.
- (f) Where:
- (i) Aurizon Network seeks to remove, or require the Operator to remove, any Relevant Rollingstock from the Nominated Network under **clause 20.422.4(e)**; and
 - (ii) such removal would reasonably be expected to cause material

damage to or materially increase the damage to the Relevant Rollingstock,

then Aurizon Network and the Operator must:

- (iii) [use reasonable endeavours to](#) consult and agree on the removal of the Relevant Rollingstock as soon as reasonably practicable and, in any event, within six hours after the occurrence of the Incident or such longer period as the Parties may agree; and
 - (iv) if the Parties do not consult or reach agreement within the period referred to in **clause 20.422.4(f)(iii)**, then the Parties must refer the decision to their representatives with authority to make the necessary decisions who must in good faith seek to agree a course of action within two hours of the referral to them or such longer period as the Parties may agree.
- (g) If Aurizon Network's and the Operator's representatives with authority to make the necessary decisions do not consult or do not agree within the specified period in **clause 20.422.4(f)(iv)**, then Aurizon Network must refer its proposed course of action with respect to the removal of the Relevant Rollingstock to an Expert who must determine in accordance with **clause 28.330.3** whether or not, having regard to:
- (i) the potential to further damage the Relevant Rollingstock or cause damage to any property (including harm to the Environment);
 - (ii) the impact on Aurizon Network's ability to effect Restoration; and
 - (iii) the time critical nature of the decision,
- the course of action proposed by Aurizon Network is reasonable.
- (h) Following completion of the process set out in **clauses 20.422.4(f)** and **20.422.4(g)** (as applicable), Aurizon Network may progress with the proposed course of action unless the Expert determines that Aurizon Network's proposed course of action is not reasonable.
- (i) Aurizon Network may, where it is reasonable and practicable in the circumstances to do so, issue a Train Control Direction to the Operator to provide assistance with clearing any Network Incident including providing Rollingstock, where appropriate, for use by or under the direction of Aurizon Network and undertaking any variation in the operation of a Train Service (including coupling its Rollingstock with Rollingstock of Aurizon Network or another Railway Operator). The Operator must comply with any such Train Control Direction. The Operator may recover from Aurizon Network such reasonable costs incurred in complying with this **clause 20.422.4(i)** as agreed or, failing agreement within 20 Business Days after notice by the Operator to Aurizon Network, as determined by an Expert in accordance with **clause 28.3.30.3**.
- (j) The assessment of the costs to be recovered under **clause 20.422.4(c)** or **clause 20.422.4(i)** for the use of Rollingstock must have regard to any industry or other agreement covering such costs and any payments facilitated by such agreement.

- (k) Except as otherwise provided in this Deed, Aurizon Network is not liable to the Operator and the Operator must not make any Claim against Aurizon Network, Aurizon Network's director and/or Aurizon Network's Staff for:
- (i) any damage to or loss of freight or Rollingstock caused by a course of action permitted in accordance with **clause 20.4(e)22.4(h)**, except to the extent:
 - (A) such damage or loss is caused by the ~~deliberate or~~ negligent act or omission or wilful default or misconduct of Aurizon Network or Aurizon Network's Staff; or

[AN note: The removal of Rollingstock will be a deliberate permitted act by Aurizon Network which could cause relevant damage or loss. The above carve-out should be amended so that it does not extend to deliberate acts of Aurizon Network.]
 - (B) the Expert determines that Aurizon Network's course of action is not reasonable; and
 - (ii) any delays, cancellation of Train Services or Claims suffered or incurred by, or made or brought by or against, the Operator as a result of complying with a request by Aurizon Network pursuant to **clause 20.422.4(i)**.

(l) The Operator is solely liable for, and releases, indemnifies and will keep indemnified Aurizon Network and its directors and Aurizon Network's Staff against all Claims of any nature suffered or incurred by, or made or brought against, Aurizon Network, its directors or Aurizon Network's Staff in respect of any course of action permitted in accordance with clause 22.4(h).

[AN note: In addition to the limitation of liability above, Aurizon Network should also have the benefit of an indemnity from the Operator.]

22.5 ~~20.5~~ Investigations

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

22.6 ~~20.6~~ Management of Environmental Incidents

- (a) If:
 - (i) the Operator's Activities in connection with this Deed have caused or contributed to an actual or potential Environmental Incident and Aurizon Network reasonably considers that action is required to prevent, mitigate or remedy that Environmental Incident; or
 - (ii) Aurizon Network is given a direction, notice or order by an Environmental Regulator that some action is required to prevent,

mitigate or remedy any actual or potential Environmental Incident caused or contributed to, or likely to be caused or contributed to, by the Operator's Activities in connection with this Deed,

then:

- (iii) Aurizon Network may notify the Operator of the actions which are required; and
 - (iv) the Operator must, at its cost and as soon as reasonably practicable after receiving such notice from Aurizon Network, ensure such actions are implemented.
- (b) If **clause 20.622.6(a)(ii)** applies, a notice given under **clause 20.622.6(a)(iii)** must be accompanied by a copy of the direction, notice or order given by the Environmental Regulator (if given in writing) provided that Aurizon Network can redact from the copy of the document any information which relates to the Activities of a person other than the Operator or Aurizon Network.
- (c) If any actions which Aurizon Network could require the Operator to implement under **clause 20.622.6(a)** ought best be undertaken by Aurizon Network, then Aurizon Network may elect to undertake such actions and the Operator must pay to Aurizon Network the reasonable costs and expenses incurred by Aurizon Network in doing so.
- (d) If the Operator disputes any actions taken by Aurizon Network under this **clause 20.6,22.6**, either Party may refer the dispute to an Expert in accordance with **clause 28.330.3** and if the Expert determines the dispute in favour of the Operator, then Aurizon Network must reimburse the Operator for the costs incurred by the Operator as a result of the actions implemented by the Operator at Aurizon Network's request (or, if applicable, Aurizon Network must bear the costs and expenses incurred by Aurizon Network in accordance with **clause 20.622.6(b)** and is not entitled to recover those costs from the Operator) to the extent determined by the Expert.

22.7 ~~20.7~~ Environmental Incident reporting

- (a) The Operator must notify:
 - (i) Aurizon Network as soon as reasonably practicable after becoming aware of the occurrence of an Environmental Incident occurring on, or in the vicinity of, the Nominated Network caused, or contributed to, by the Operator.
 - (ii) all relevant Environmental Regulators of the occurrence of any Environmental Incident which is caused, or contributed to, by the Operator in accordance with the Operator's obligations under Environmental Laws.
- (b) Aurizon Network may report the occurrence of the Environmental Incident to any relevant Environmental Regulator provided it first consults with the Operator about the proposed content of any such report.
- (c) In the event that an Environment Regulator requires information, or undertakes an investigation, in relation to an Environmental Incident, the Operator and Aurizon Network must cooperate with the Environmental

Regulator and provide appropriate resources to comply with any lawful requirements of the Environmental Regulator in relation to the Environmental Incident.

23 ~~21~~ Operator's staff

23.1 ~~21.1~~ Safety of Operator's Staff

The Operator is fully responsible and liable for the health and safety of the Operator's Staff and the personal property of the Operator's Staff, and, subject to **clause ~~25.27~~**, indemnifies and releases Aurizon Network to the extent permitted by Law from any liability in relation to the Operator's Staff except to the extent that such liability is caused or contributed to by the breach of this Deed by Aurizon Network or any negligent act or omission of Aurizon Network or Aurizon Network's Staff.

23.2 ~~21.2~~ Qualifications of Operator's Staff

The Operator must:

- (a) ensure that:
 - (i) all risks associated with Safety Related Work (including the competence of all Operator's Staff to safely and properly discharge their duties related to the exercise of the Operator's rights or performance of its obligations under this Deed) are addressed in the Interface Risk Assessment;
 - (ii) all Operator's Staff:
 - (A) hold and keep current all qualifications and accreditations required under any Law and as specified in the IRMP; and
 - (B) undertake any additional training from time to time in order to keep current such qualifications and accreditations;
- (b) meet all costs of any training and/or testing required to meet the requirements of this **clause ~~21.2~~23.2**; and
- (c) keep Aurizon Network advised of any Required Information in relation to all of the Operator's Staff engaged in Safety Related Work on the Nominated Network and ensure that all Safety Related Work is performed only by those Operator's Staff whose details have been provided to Aurizon Network in accordance with this **clause ~~21.2~~23.2** and who satisfy the requirements of this **clause ~~21.2~~23.2**.

23.3 ~~21.3~~ Entry onto Aurizon Network Land

The Operator must ensure that the Operator's Staff do not enter upon the Aurizon Network Land in a manner inconsistent with the Interface Coordination Arrangements, the IRMP or the Emergency Response Plan without the prior written approval of Aurizon Network and that, in the event such approval is given, the relevant Operator's Staff comply with all conditions of the approval and hold the necessary qualifications and accreditations.

24 ~~22~~ Interface and environmental risk management

24.1 ~~22.1~~ Compliance with Interface Risk Management Plan

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

24.2 ~~22.2~~ Environmental consultant

The Parties must, at the Operator's cost (unless otherwise agreed between the Parties), engage suitably qualified persons (reasonably acceptable to both Parties) to undertake any specialist assessments required for the purpose of identifying and assessing Environmental Risks as part of an Interface Risk Assessment.

24.3 ~~22.3~~ Interface representative

- (a) Prior to the commencement of any Train Services, each Party must nominate one or more appropriately qualified representatives (by identifying the name, title, experience (including length of experience) and qualifications of each representative) (**Interface Representative**) who is or are (as applicable) to be responsible for:
- (i) making decisions in relation to interface and environmental issues that arise in connection with this Deed;
 - (ii) liaising and cooperating with representatives of the other Party on those interface and environmental issues; and
 - (iii) meeting with representatives of the other Party at locations, times and by means (including in person) specified by Aurizon Network from time to time.
- (b) Each Party must ensure that any representative it nominates under this **clause ~~22.3~~24.3** is available to efficiently and effectively perform the responsibilities of the Interface Representative specified in **clause ~~22.3(a)~~24.3(a)** and that it has nominated an Interface Representative under **this clause 24.3 at all times during the Term.**

[AN note: Each party should be obliged to ensure that an Interface Representative is nominated at all times during the Term.]

24.4 ~~22.4~~ Operator's Safety Management System

The Operator must develop, implement and maintain a safety management system (**Operator's Safety Management System**) which must specify (as a minimum):

- (a) the Interface Risks identified in the IRMP from time to time and the measures for managing those Interface Risks specified in the IRMP from time to time which the Operator is responsible for implementing, complying with, ensuring compliance with and/or ensuring the ongoing effectiveness of; and
- (b) processes for ensuring that the Operator, its Rollingstock, Rollingstock Configurations and Train Services at all times comply with the requirements of this Deed, including the IRMP from time to time.

24.5 ~~22.5~~ **Aurizon Network's Safety Management System**

Before the commencement of any Train Services, Aurizon Network must incorporate into its safety management system any measures for managing Interface Risks specified in the IRMP from time to time which Aurizon Network is responsible for implementing, complying with, ensuring compliance with and/or ensuring the ongoing effectiveness of.

24.6 ~~22.6~~ **Aurizon Network's environmental management system**

Before the commencement of any Train Services, Aurizon Network must incorporate into its environmental management system any measures for managing Environmental Risks specified in the IRMP from time to time which Aurizon Network is responsible for implementing, complying with, ensuring compliance with and/or ensuring the ongoing effectiveness of.

24.7 ~~22.7~~ **Carriage of Dangerous Goods on Train Services**

- (a) If Dangerous Goods are to be carried on a Train Service, the Operator must ensure that:
- (i) all requirements of the Dangerous Goods Code in relation to the Train Service are fully complied with (including placement of relevant, accurate and current documentation on Trains);
 - (ii) Aurizon Network is advised of the details of the Dangerous Goods (including a description of them and the applicable Dangerous Goods United Nations (UN) Number) as part of the Train List before the operation of the Train Service; and
 - (iii) any authorisation or prior approvals required under the Dangerous Goods Code in relation to the Train Service have been obtained and are available for inspection by Aurizon Network (if requested).
- (b) Before any Dangerous Goods can be carried on a Train Service, the Operator must ensure that the Emergency Response Plan prepared in accordance with **clause 43-415.1(a)(i)(B)** includes procedures for responding to an Incident involving Dangerous Goods of the type to be carried on the Train Service.

24.8 ~~22.8~~ **Noise management during Train Services**

- (a) In addition to any noise attenuation or noise management measures which may form part of or be identified in the IRMP or the Environmental Management Plan, the Operator must contribute to the reasonable costs, as reasonably determined by Aurizon Network, incurred by Aurizon Network in undertaking reasonable noise abatement measures on or adjacent to the Nominated Network where the Noise Levels are (or, but for the taking of these measures by Aurizon Network, would be) exceeded during the Term.
- (b) If, during the Term, the Noise Levels are varied (reduced) such that noise from the Nominated Network exceeds the reduced Noise Levels, then Aurizon Network may elect, acting reasonably, to implement reasonable noise abatement measures on the Nominated Network to ensure compliance with the reduced Noise Levels. The Operator must contribute to Aurizon Network's reasonable costs of those noise abatement measures as reasonably determined by Aurizon Network.

- (c) If the Operator disputes any determination made by Aurizon Network under this ~~clause 22.8~~[24.8](#) regarding the contribution of costs, then the Operator may refer that dispute to an Expert for determination in accordance with ~~clause 28.3-30.3~~.

24.9 ~~22.9~~ **Community liaison and environmental complaint procedures**

- (a) Before the commencement of any Train Services the Operator must take all steps necessary to comply with all relevant community liaison requirements required by Law, any Authority or reasonably required by Aurizon Network.
- (b) The Operator must invite Aurizon Network to be represented at any community meetings related to the operation of the Train Services under this Deed organised by the Operator.
- (c) If Aurizon Network or the Operator receives noise complaints or other complaints dealing with Environmental issues in relation to the Nominated Network, then both Aurizon Network and the Operator must:
 - (i) inform each other of those complaints as soon as reasonably practicable; and
 - (ii) cooperate in investigating and responding to those complaints.

24.10 ~~22.10~~ **Audit and review**

- (a) The Operator must, if requested by Aurizon Network, promptly provide to Aurizon Network copies of those parts of any environmental audits undertaken by or on behalf of the Operator in respect of its Train Services operated on the Nominated Network.
- (b) Aurizon Network must provide the Operator with copies of those parts of Aurizon Network's environmental audits that are relevant to the operation of the Operator's Train Services operated on the Nominated Network.
- (c) Without limiting ~~clause 13.2~~[15.2](#), if Aurizon Network becomes aware of any inadequacy of the IRMP or the Operator's Environmental Management Plan due to:
 - (i) any change in Environmental Laws of relevance to the operation of Train Services on the Nominated Network; or
 - (ii) any Activities of the Operator in connection with this Deed which cause or contribute to, or are to likely cause or contribute to, an Environmental Incident,

then Aurizon Network can give the Operator a notice under ~~clause 13.2~~[15.2](#) notifying the Operator that it requests that the IRMP be reviewed.

24.11 ~~22.11~~ **Notification**

- (a) The Operator must notify Aurizon Network of any failure by the Operator to comply with the Environmental Management Plan or its obligations under any Safety Law or Environmental Law which are directly relevant to the Operator's Activities under this Deed as soon as reasonably practicable after the Operator becomes aware of such failure and provide details of how it intends to address the non-compliance.
- (b) Without limiting any other provisions of this Deed, the Operator must remedy such non-compliance as soon as reasonably practicable having

regard to, without limitation, the nature of the non-compliance and any action required by any Safety Regulator or any Environmental Regulator.

- (c) The Operator must comply with all notices given by Aurizon Network requiring the Operator to cease conduct which is causing or threatening to cause:
 - (i) a risk to the safety of persons or property; or
 - (ii) harm to the Environment.
- (d) ~~A Party~~The Operator must promptly provide to ~~the other Party~~Aurizon Network any notices, directions or orders relating to the operation of Train Services under this Deed that it receives from any Safety Regulator or Environmental Regulator.

[AN Note: The purpose of this clause is to provide Aurizon Network with the information and assurance necessary for it to discharge its obligations as Rail Infrastructure Manager, particularly in relation to potential safety or environmental risks to the network arising from the actions of rail operators. Aurizon Network requires this information in order to manage matters that are not directly within its control. For example, a Regulator may provide a notice to the Operator in relation to wheel maintenance which Aurizon Network, as Railway Infrastructure Manager, needs to know about given the safety implications for the network. A mutual obligation is not required in these circumstances, as Aurizon Network is obliged through its safety management system to respond to notices of this kind by implementing operational restrictions and notifying operators.]

- (e) Aurizon Network must notify the Operator of any changes to any Environmental Authorities held by Aurizon Network or variations to any other environmental information provided by Aurizon Network to the Operator relevant to the operation of Train Services.

25 ~~23~~ Inspection and audit rights

25.1 ~~23.1~~ Right of inspection by Operator

- (a) Subject to ~~clause 23.1~~25.1(b), the Operator may, before the initial commencement of Train Services for any Train Service Type, at its cost and risk, inspect the Infrastructure comprising the Nominated Network, including fencing and level crossing protection, in order to satisfy itself as to the standard of the Infrastructure and assess the operational, environmental and safety risks associated with the operation of Train Services on the Nominated Network.
- (b) Any inspection by the Operator under ~~clause 23.1~~25.1(a):
 - (i) is subject to:
 - (A) the Operator providing reasonable notice to Aurizon Network of its requirement to inspect the Infrastructure and conducting that inspection at reasonable times;
 - (B) any such inspection being conducted in the presence of a representative of Aurizon Network; and
 - (C) such other reasonable conditions as may be imposed by

Aurizon Network on such inspection, including compliance with any Safeworking Procedures and Safety Standards; and

- (ii) must be conducted by the Operator in a manner which does not cause any disruption to any Train Movements or to the carrying out of Maintenance Work or Infrastructure Enhancements.

25.2 ~~23.2~~ **Right of inspection of Trains and Rollingstock by Aurizon Network**

- (a) If Aurizon Network reasonably believes that Rollingstock or Rollingstock Configurations for a Train Service Type used in the operation of Train Services do not comply with:
 - (i) the Authorised Rollingstock or the Authorised Rollingstock Configurations for the Train Service Type;
 - (ii) the Rollingstock Interface Standards (subject to any Approved Derogations);
 - (iii) the IRMP; or
 - (iv) any applicable Laws relevant to the Operator's Train Services,and Aurizon Network cannot otherwise reasonably determine whether this is the case, then Aurizon Network may inspect any Trains or Rollingstock which is utilised, or intended to be utilised, in the operation of Train Services, or require the Operator to have an inspection conducted, and for this purpose Aurizon Network or Aurizon Network's Staff will be entitled at any time to enter and ride on the Operator's Trains or Rollingstock.
 - (b) Subject to Aurizon Network giving notice to the Operator, if required, under clause 25.2(a), Aurizon Network may require any of the Operator's Rollingstock (either loaded or empty) to be available at such location as Aurizon Network may reasonably require, including locations on the Infrastructure but not on the Nominated Network, for weighing, measurement or other inspection at any reasonable time specified by Aurizon Network. The Operator must comply with any of Aurizon Network's requirements under this **clause 23.2**25.2(b).
 - ~~(c) Subject to clause 26, Aurizon Network is liable for, and indemnifies the Operator against all Claims of any nature suffered or incurred by, or made or brought against, the Operator relating to the Operator's compliance with the requirements under clause 23.2(b), including Claims by the Access Holder against the Operator for a failure to comply with its obligations under the relevant rail haulage agreement as a result of the application of clause 23.2(b).~~
- [AN note: Aurizon Network should only exercise its right under clause 25.2(b) if clause 25.2(a) applies. In those circumstances, Aurizon Network should not be required to indemnify the Operator for its compliance with clause 25.2(b).]
- (c) ~~(d)~~ Despite **clause 47,19**, if any of the Operator's Rollingstock is loaded in excess of the limits specified in an Authority to Travel or a Train Route Acceptance or reasonably considered by Aurizon Network to be loaded in an unsafe or insecure manner, then Aurizon Network may at any time:
 - (i) require the Operator to discontinue the Train Service until such time

that the Rollingstock is loaded in accordance with this Deed and Aurizon Network gives the Operator a Train Control Direction authorising it to recommence the operation of the Train Service; and/or

- (ii) after notifying the Operator, require the Operator to remove the excess or adjust the load at the Operator's expense.

(d) ~~(e)~~ If the Operator fails to remove the excess or adjust the load as soon as reasonably practicable after Aurizon Network notifies the Operator under **clause 23.2(d)**~~**25.2(c)**~~(ii), then Aurizon Network may arrange for its removal or adjustment and the Operator must, within 10 Business Days after receiving such demand, reimburse to Aurizon Network all reasonable costs incurred by Aurizon Network. The Operator must comply with any of Aurizon Network's requirements under this **clause 23.2(e)**~~**25.2(d)**~~.

25.3 ~~23.3~~ Parties' obligations

An inspection or audit by a Party under this Deed does not relieve the other Party of its obligations under this Deed or at Law.

26 ~~24~~ Insurance by Operator

26.1 ~~24.1~~ Maintain insurance policies

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

26.2 ~~24.2~~ Required insurance policies

The Operator must effect and maintain insurance for the risks and on the terms specified in **schedule 8**.

26.3 ~~24.3~~ Disclosure of insurance policies

The Operator must provide to Aurizon Network evidence of the insurance policies effected and maintained pursuant to this **clause 24.26** (including evidence that the cover provided under those insurance policies complies with this **clause 24.26** and of the currency of those insurance policies) to Aurizon Network's reasonable satisfaction:

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

26.4 ~~24.4~~ Failure to disclose insurance policies

Without prejudice to Aurizon Network's other rights and remedies in respect of such default, if the Operator, whenever required to do so under this Deed, fails to produce to Aurizon Network evidence to the reasonable satisfaction of Aurizon Network of insurances that have been effected or maintained by it and does not remedy that default within 10 Business Days after Aurizon Network gives notice

to the Operator requiring that default to be remedied, Aurizon Network may effect and maintain the insurance and pay the premiums and any amount so paid will be a debt due from the Operator to Aurizon Network.

26.5 ~~24.5~~ Minimum terms of policies

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

- (a) note the interests of the Operator, any contractor of the Operator engaged by the Operator in relation to the performance of the Operator's obligations under this Deed and Aurizon Network;
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amends the cover provided without the written consent of Aurizon Network (not to be unreasonably withheld or delayed); and
- (c) include the terms and be for the amounts referred to in **schedule 8**.

26.6 ~~24.6~~ Operator not to render policy void

The Operator must not render any of the insurances effected in accordance with this **clause ~~24~~26** void or voidable or liable to refusal of any claim.

26.7 ~~24.7~~ Compliance

The Operator must at all times comply with the terms and conditions of all insurance policies effected pursuant to this **clause ~~24~~26**.

26.8 ~~24.8~~ Notice of potential claims

In addition to any other obligation on the Operator under this Deed, the Operator must:

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

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

26.9 ~~24.9~~ Operator to pay all excess/eductibles

- (a) The Operator must in respect of any Claims by it or any other insured for which it is responsible, pay and bear all excesses/eductibles provided for in any insurances effected in accordance with this **clause ~~24~~26**.
- (b) If the Operator fails to pay any excesses/eductibles provided for in any insurances effected in accordance with this **clause ~~24~~26**, Aurizon Network may pay the relevant excesses/eductibles and any amount so paid will be a debt due from the Operator to Aurizon Network.

26.10 ~~24.10~~ Settlement of claims

If:

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

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

27 ~~25~~ Indemnities

27.1 ~~25.1~~ Indemnity for personal injury and property damage

Subject to **clause ~~26,27.2~~ and clause 28**, each Party is solely liable for, and releases, indemnifies and will keep indemnified the other Party, its directors and Staff against, all Claims of any nature suffered or incurred by, or made or brought against, the other Party, its directors or Staff in respect of:

(a) any loss of, damage to or destruction of real or personal property (including property of the other Party); or

(b) personal injury to or death of any person,

in each case caused by or contributed to (to the extent of the contribution) by:

(c) any breach of this Deed by the Party; or

(d) any negligent act or omission of, the Party or the Party's Staff in connection with this Deed.

27.2 ~~25.2~~ Indemnity by Operator for certain liabilities to Third Parties

~~Subject~~ Despite clause 27.1 but subject to **clause ~~26,28~~**, the Operator is solely liable for, and releases, indemnifies and must keep indemnified Aurizon Network, Aurizon Network's directors and Aurizon Network's Staff against, all Claims of any nature suffered or incurred by, or made or brought against, Aurizon Network, Aurizon Network's directors or Aurizon Network's Staff by a Third Party in respect of:

(a) any loss of, damage to or destruction of real or personal property; or

(b) personal injury to or death of any person,

where such person or property is being transported on a Train Service except to the extent that such damage, loss, injury or death is caused by or contributed to (to the extent of the contribution) by:

(c) any breach of this Deed by Aurizon Network; or

(d) any negligent act or omission of Aurizon Network or Aurizon Network's Staff.

27.3 ~~25.3~~ Duty to mitigate

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

[AN note: Aurizon Network has amended the above provision because the amendments proposed by the QCA were not appropriate for a mitigation provision of this type.]

27.4 ~~25.4~~ **General provisions regarding indemnities**

- (a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the Parties and survives the expiry or termination of this Deed.
- (b) It is not necessary for a Party to incur expense or make a payment before enforcing any indemnity in this Deed.

28 ~~26~~ **Limitations and exclusions of liability**

28.1 ~~26.1~~ **Exclusion of Consequential Loss**

Except as expressly provided otherwise in [clause 27.2](#) and [clause 30.6](#)~~32.6~~(c), neither Party is liable to the other under or in connection with this Deed (including under an indemnity) for any Consequential Loss however caused (including any breach of this Deed or negligent act or omission of a Party).

[AN note: The above amendment ensures that the Consequential Loss exclusion does not cut across the indemnity for Third Party Claims in clause 27.2.]

28.2 ~~26.2~~ **Time limit and minimum threshold on Claims**

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

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

28.3 ~~26.3~~ **Claims and exclusions in respect of Infrastructure standard**

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

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

arising out of or in connection with the standard of the Infrastructure or any failure of or defect in the Infrastructure, except to the extent that such loss, damage, injury or death, cost or expense results directly from the failure of Aurizon Network to perform its obligations under [clause 19.2](#)~~21.2~~(a) or Aurizon Network's negligence in performing those obligations.

28.4 ~~26.4~~ **Claims and exclusions in respect of non-provision of Operational Rights**

- (a) Subject to [clause 26.4](#)~~28.4~~(b)(i) only and despite any other provision of this Deed, Aurizon Network, its directors and Aurizon Network's Staff are

not liable to the Operator for any Claim, and the Operator must not make any Claim against Aurizon Network, Aurizon Network's directors and/or Aurizon Network's Staff, in respect of any failure by Aurizon Network to ~~provide the Operational Rights by making~~ make the Infrastructure available for the Operator to operate a Train Service at the Scheduled Time in the Train Schedule.

(b) Aurizon Network is liable to the Operator in respect of any failure by Aurizon Network to ~~provide the Operational Rights by making~~ make the Infrastructure available ~~to enable~~ for the Operator to operate a Train Service at the Scheduled Time in the Train Schedule if (and then only to the extent that):

(i) Aurizon Network did not reschedule the relevant Train Service in accordance with ~~clause 14.2 or 14.3~~ 16.2 if required to do so under ~~clause 14.2 or 14.3~~ 16.2; and

(ii) the failure by Aurizon Network to make the Infrastructure available was caused by or the result of an Operational Constraint, that Operational Constraint resulted from a breach of this Deed by Aurizon Network or the negligence of Aurizon Network;

(iii) ~~(ii)~~ the failure by Aurizon Network to make the Infrastructure available was not permitted under the Access Agreement or this Deed or was attributable to a breach of this Deed by, or negligent act or omission of, Aurizon Network; and

(iv) ~~(iii)~~ the failure by Aurizon Network to make the Infrastructure available was not attributable to:

- (A) the Operator or the Operator's Staff;
- (B) the Access Holder or the Access Holder's Staff;
- (C) another Railway Operator (other than Aurizon Network) or any employees, contractors, volunteers or agents of another Railway Operator (other than Aurizon Network);
- (D) a Force Majeure Event;
- (E) Major Periodic Maintenance of, or Infrastructure Enhancements to, the Infrastructure scheduled in a manner consistent with the Network Management Principles;
- (F) the circumstances described in clause ~~21.4~~ 24.4(iv)(F) of the Access Agreement existing; ~~or~~

(G) a breach of an Infrastructure Lease by an Infrastructure Lessor or any negligent act or omission of an Infrastructure Lessor; or

(H) ~~(G)~~ any action taken by Aurizon Network, acting reasonably, in response to an emergency or a genuine safety risk; and

(v) ~~(iv)~~ either:

- (A) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of ~~clause 18~~ 20 and the total number of Train Services (expressed as a percentage) cancelled in a Billing Period as a result of a failure by Aurizon Network to make the Infrastructure

available (other than any failure by Aurizon Network to make the Infrastructure available which is attributable to an event or circumstance specified in **clauses 26.428.4(b)(iiiiv)(A) to 26.428.4(b)(iiiiv)(G)**) exceeds ~~five~~ten percent of the total number of Train Services scheduled in the Daily Train Plan for that Billing Period; or

[AN note: See Aurizon Network's submission in relation to this amendment.]

- (B) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of **clause 18.20**, but the failure to make the Infrastructure available is of a magnitude which is beyond the scope of that performance and adjustment regime.

28.5 ~~26.5~~ Claims and exclusions in respect of delays to Train Movements

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

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

- (d) either:
 - (i) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of **clause 18.20**; or
 - (ii) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of **clause 18.20**, but the delays are of a magnitude which is beyond the scope of that performance and adjustment regime.

28.6 ~~26.6~~ **Defence of Claims by Third Parties**

- (a) Each Party must provide such reasonable assistance as requested by the other Party in the defence of any Claim made against the other Party by a Third Party arising out of any Incident or other event giving rise to the Claim.
- (b) The Party that requested assistance under **clause 26.6**~~28.6~~**(a)** must, within five Business Days after a demand is made, pay to the other Party any costs and expenses reasonably incurred by the other Party in providing the assistance requested under **clause 26.6**~~28.6~~**(a)**.

29 ~~27~~ **Determination of liability and loss adjustment**

29.1 ~~27.1~~ **Determination of liability**

In the event of an Incident involving the Operator or any other event which results or could result in a Claim by or against the Operator or Aurizon Network, liability as between the Operator and Aurizon Network is determined, for the purposes of **clauses 25.27** and ~~26.3~~**28.3**:

- (a) as agreed between the Parties;
- (b) subject to **clause 27.4**~~29.1~~**(c)**, failing such agreement within one Month of either Party giving notice to the other requiring agreement on liability, by a loss adjuster appointed under **clause 27.2**~~29.2~~; or
- (c) where the amount of the Claim exceeds \$200,000 and either Party is dissatisfied with the report of the loss adjuster, by a court of competent jurisdiction.

29.2 ~~27.2~~ **Loss Adjuster**

Subject to **clause 35.37**, where a matter is to be referred to a loss adjuster in accordance with **clause 27.4**~~29.1~~:

- (a) the loss adjuster:
 - (i) must be appointed by the Parties; or
 - (ii) in default of such appointment within 10 Business Days after the need to appoint a loss adjuster, is to be nominated at either Party's request by the President of The Australasian Institute of Chartered Loss Adjusters;
- (b) if the loss adjuster is to be nominated under **clause 27.2**~~29.2~~**(a)(ii)** and the President of The Australasian Institute of Chartered Loss Adjusters declines to nominate a person as the loss adjuster but provides a list of people that could be appointed as the loss adjuster, then:
 - (i) the first person specified in that list will be taken to be nominated as

- the loss adjuster;
- (ii) if the first person specified in that list does not accept the appointment as the loss adjuster, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the loss adjuster; and
 - (iii) the process specified in **clause 27.229.2(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the loss adjuster accepts the appointment as the loss adjuster;
- (c) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated loss adjuster (including providing relevant indemnities and paying any charges or fees (which charges or fees must be borne equally by the Parties)) that must be satisfied or complied with as a condition of the President of The Australasian Institute of Chartered Loss Adjusters agreeing to nominate a loss adjuster;
- (d) the loss adjuster must:
- (i) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (ii) have no interest or duty which conflicts or may conflict with the loss adjuster's function as a loss adjuster (the loss adjuster being required to fully disclose any such interest or duty before their appointment); and
 - (iii) not be, or have been in the last five years, an employee of the Access Holder, the Operator, any other contracted operator of the Access Holder utilising the Access Rights or Aurizon Network or of a Related Body Corporate of any of them;
- (e) the loss adjuster appointed under this **clause 27.229.2**:
- (i) is not permitted to act until the loss adjuster has given written notice of the acceptance of the appointment to both Parties;
 - (ii) is required to undertake to keep confidential all matters coming to the loss adjuster's knowledge by reason of their appointment and the performance of their duties; and
 - (iii) is deemed to be and act as an expert and not an arbitrator, and the Law relating to arbitration, including the *Commercial Arbitration Act 2013* (Qld), does not apply to the loss adjuster or their determination or the procedures by which they may reach a determination.

29.3 ~~27.3~~ Parties to assist loss adjuster

- (a) Each Party must ensure to the best of its ability that the loss adjuster appointed under **clause 27.229.2** is given the opportunity to interview any employee, agent or contractor involved in, or with knowledge of, the Incident or event giving rise to the Claim or with any other relevant information that may be of use to the loss adjuster.
- (b) Each Party must make available to the loss adjuster appointed under **clause 27.229.2** any files, documents, data, recordings or other

information in the possession or control of the Party that may be of use to, or is requested by, the loss adjuster for the purposes of their investigation.

29.4 ~~27.4~~ **Decision of the loss adjuster**

- (a) The loss adjuster appointed under **clause ~~27.2~~29.2** must determine the quantum of the relevant Claim and the liability of the Operator and/or Aurizon Network in respect of such Claim and must provide a copy of their report on such matters to each of the Parties within a reasonable time after their appointment.
- (b) In the absence of manifest error, the decision of the loss adjuster is final and binding upon the Parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than \$200,000.

29.5 ~~27.5~~ **Costs of the loss adjuster**

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

30 ~~28~~ **Disputes**

30.1 ~~28.1~~ **Method**

If any claim, dispute or question (**Dispute**) arises under this Deed, then unless otherwise expressly provided to the contrary in this Deed, such Dispute must be resolved in accordance with this **clause ~~28~~30** and either Party may give to the other Party a notice in writing (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in accordance with this **clause ~~28~~30**.

30.2 ~~28.2~~ **Authorised representative resolution**

- (a) Except as otherwise provided in this Deed, within five Business Days after a Dispute Notice is given, the Dispute must be referred for resolution to an authorised representative of each of the Parties with authority to settle the Dispute on behalf of the relevant Party.
- (b) Within 10 Business Days after a Dispute Notice is given, the officers referred to in **clause ~~28~~30.2(a)** must meet to resolve the Dispute.
- (c) Meetings referred to in **clause ~~28~~30.2(b)** may be held in person or by telephone, video conference or other means of instantaneous communication.
- (d) If the Dispute is not resolved within 10 Business Days after:
 - (i) the date that authorised representatives first meet to resolve the Dispute in accordance with **clause ~~28~~30.2(b)**; or
 - (ii) if the authorised representatives do not meet within the time required under **clause ~~28~~30.2(b)**, the date the Dispute Notice is given,

then the relevant Dispute may, by agreement between the Parties within ~~five~~15 Business Days of expiration of the 10 Business Day period referred to in **clause ~~28~~30.2(d)**, be referred for resolution by an Expert in accordance with **clause ~~28~~30.3** or by arbitration in accordance with **clause ~~28.4~~30.4**, failing which either Party may refer the Dispute to the courts of the State in accordance with **clause ~~28.6~~30.6**.

30.3 ~~28.3~~ Expert

Subject to **clause 35,37**, where any matter may be referred to an expert (**Expert**) pursuant to **clause 28-230.2(d)**, or is expressly required by this Deed to be referred to an Expert, then except as otherwise provided for in this Deed:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within 10 Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
 - (i) if the Parties agree the Dispute is purely of:
 - (A) a financial or accounting nature; or
 - (B) a technical nature,the President (for the time being) of the Resolution Institute in Australia; or
 - (ii) in any other case, the President (for the time being) of the Queensland Law Society Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 28-330.3(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert, then:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, then the next person specified in that list will be taken to be nominated as the Expert; and
 - (iii) the process specified in **clause 28-330.3(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 28-330.3(b)**, if the Expert is to be nominated by a person referred to in **clause 28-330.3(a)** and the person nominated as the Expert does not accept appointment as the Expert, then an alternative person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 28-330.3(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 28-330.3(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 must 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 must be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert;

- (f) the Expert must:
- (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with their function as Expert, the Expert being required to fully disclose any such interest or duty by notice to the Parties before their appointment;
 - (iii) not be, or have been in the last five years, an employee of the Operator, any other contracted operator of the Access Holder utilising the Access Rights or the Access Holder in respect of the Access Rights which are the subject matter of the Dispute, or Aurizon Network or of a Related Body Corporate of any of them;
 - (iv) not be permitted to act until the Expert has given notice to the Parties that the Expert is willing and able to accept the appointment;
 - (v) have regard to the provisions of this Deed and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter provided to the Expert by the Parties;
 - (vi) provide both Parties with a copy of the Expert's determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after their appointment; and
 - (vii) be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties);
- (g) the Expert is deemed to be and must act as an expert and not an arbitrator and the Law relating to arbitration (including the *Commercial Arbitration Act 2013* (Qld)) will not apply to the Expert or the determination or the procedures by which the Expert may reach a determination;
- (h) in the absence of manifest error, the decision of the Expert is final and binding upon the Parties;
- (i) the costs of the Expert (and the costs of any advisers to the Expert) must be borne, severally (and not jointly and severally), by the Parties in equal shares, with each Party bearing its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties);
- (j) the expert determination must be conducted in accordance with the expert determination rules adopted by the Resolution Institute from time to time, except that to the extent of any inconsistency between those rules and this Deed, the terms of this Deed prevail;

[AN note: The Resolution Institute does not appear to have formally adopted policies and procedures that its predecessor organisations had adopted.]

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

30.4 ~~28.4~~ Arbitration

- (a) Subject to **clause 35.37**, the Parties may agree to refer any Dispute to arbitration by a single arbitrator sitting in Brisbane agreed upon between the Parties and, failing agreement upon such arbitrator within 10 Business Days after the date of notice from one Party to the other requiring the appointment of an arbitrator, by an arbitrator appointed by the President of the Resolution Institute. Every such reference will be an arbitration within the meaning of the *Commercial Arbitration Act 2013* (Qld), and subject to the provisions relating to arbitration contained in that Act.
- (b) If the Resolution Institute declines to nominate a person as the arbitrator but provides a list of people that could be appointed as the arbitrator, then:
 - (i) the first person specified in that list will be taken to be nominated as the arbitrator;
 - (ii) if the first person specified in that list does not accept the appointment as the arbitrator, then the next person specified in that list will be taken to be nominated as the arbitrator; and
 - (iii) the process specified in **clause 28.430.4(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the arbitrator accepts the appointment as the arbitrator;
- (c) subject to **clause 28.430.4(b)**, if the person nominated as the arbitrator under **clause 28.430.4(a)** does not accept appointment as the arbitrator, then either Party may request that the Resolution Institute appoints an alternative person as the arbitrator.

30.5 ~~28.5~~ Queensland Competition Authority (QCA)

Subject to **clause 35.37** the Parties may agree to refer, and where required by this Deed must refer, any Dispute to the QCA.

30.6 ~~28.6~~ Determination by Court

If any Dispute is not:

- (a) ~~(a)~~ resolved in accordance with **clause 28.230.2**;
- (b) ~~(b)~~ referred to an Expert in accordance with **clause 28.330.3**; nor
- (c) ~~(c)~~ referred to arbitration in accordance with **clause 30.4**; nor

(d) ~~(e)~~ referred to the QCA in accordance with **clause 28.5, 30.5.**

then either Party may refer the Dispute to the courts of the State.

31 ~~29~~ Force Majeure

[AN note: See Aurizon Network's comment in relation to clause 3. Also see Aurizon Network's submission.]

31.1 ~~29.1~~ Suspension of obligations

~~(a)~~ — If, by reason of a Force Majeure Event affecting a Party, that Party (**Affected Party**) is prevented or hindered (or likely to be prevented or hindered) from carrying out, whether wholly or in part, its obligations under this Deed (other than an obligation to pay money), then: the obligations of the Affected Party will be suspended during that time to the extent that the performance of such obligations is prevented or hindered by the Force Majeure Event.

31.2 Notice of Force Majeure Event

(a) ~~(i)~~ if the Affected Party is Aurizon Network and the Force Majeure Event also ~~affects~~ prevents or hinders Aurizon Network from carrying out, whether wholly or in part, its obligations under the Access Agreement, then Aurizon Network must provide a copy of each notice it gives to the Access Holder under the Access Agreement in respect of that Force Majeure Event to the Operator; ~~and.~~

(b) ~~(ii)~~ if **clause 29.1** ~~31.2~~ (a) does not apply, ~~that~~ the Affected Party must, as soon as reasonably practicable (and, in any event, within 5 Business Days) after it becomes aware of ~~the~~ an event or circumstance which Aurizon Network considers is a Force Majeure Event, give to the other Party and the Access Holder ~~prompt (and in any event within 48 hours after the event or circumstance causing the Force Majeure Event)~~ notice (which may be provided in electronic form) of the Force Majeure Event including:

- (i) ~~(A)~~ details of the Force Majeure Event and (if applicable) that part of the Nominated Network affected or likely to be affected; and
- (ii) ~~(B)~~ details of the obligations affected or likely to be affected.

(c) ~~(b)~~ If the notice provided in **clause 29.1** ~~(a)~~ is either in electronic form or ~~31.2~~ (b) does not include the following information, the Affected Party must, as soon as reasonably practicable, provide to the other Party further written Notice ~~in accordance with clause 36~~ which contains ~~full particulars of all relevant matters including~~ (in addition to the ~~matters~~ information set out in **clause 29.1** ~~(a)~~ 31.2 ~~(b)~~):

- (i) details of the action that the Affected Party has taken to remedy the situation and details of the action that the Affected Party proposes to take to remedy the situation ~~(to the extent they are known)~~; and
- (ii) ~~an~~ a reasonable estimate of the time during which the Affected Party will be (or is likely to be) prevented or hindered from carrying out, whether wholly or in part, its obligations under this Deed due to the Force Majeure Event;

~~within 2 Business Days of the notice provided under clause 29.1(a).~~

~~(d)~~ ~~(e)~~ Without prejudice to its rights under ~~this clause 29.1 and the Force Majeure Provisions, 31.1~~, the Affected Party may issue further notices in respect of the Force Majeure Event as the Affected Party considers reasonably necessary to update the other Party and the Access Holder as to each of the matters set out in ~~this clause 29.1, clauses 31.2(b) and 31.2(c)~~.

~~(d)~~ — If a Party notifies notifies the other in accordance with this clause 29.1:

~~(i)~~ — the Force Majeure Provisions apply; and

~~(ii)~~ — to the extent applicable to that Party, each Party must comply with the Force Majeure Provisions.

~~(e)~~ — Despite clause 1.6(b), if the terms of this clause 29 are inconsistent, ambiguous or conflict with the Force Majeure Provisions, the Force Majeure Provisions prevail to the extent of the inconsistency, ambiguity or conflict.

~~29.2~~ — **Suspension of obligations**

~~(a)~~ — Subject to compliance with the requirements of clause 29.1, the obligations of the Affected Party are suspended during the time and to the extent that the Affected Party's performance of its obligations is prevented or hindered by the Force Majeure Event.

~~(b)~~ — If the notice is not provided in accordance with clause 29.1(a) or 29.1(b), then the obligations of the Affected Party under this Deed will be suspended on and from the later of the time the notice requirements of clauses 29.1(a) and 29.1(b) are satisfied.

31.3 ~~29.3~~ **Duty to mitigate**

(a) Subject to clause 29.3, 31.3(b), ~~at the Affected~~ Party must use all reasonable endeavours to remedy or overcome the effect of the Force Majeure Event affecting the Party's obligations under this Deed as soon as possible and must attempt to:

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

(ii) in the case of a Force Majeure Event affecting Aurizon Network, identify alternative viable means of providing the Operational Rights affected (if applicable).

(b) ~~No~~ The Affected Party is not obliged to settle any strike, lockout or other labour dispute other than on terms acceptable to it.

31.4 ~~29.4~~ **End of period of Force Majeure**

Subject to clauses ~~29.5~~ 31.5 and ~~29.6~~ 31.6, the suspension of the obligations of ~~the Parties~~ an Affected Party due to a Force Majeure Event ends when, but only to the extent that, the Affected Party ~~that issued the notice of the Force Majeure Event~~ is able to resume performance of its obligations under this Deed, at which time it must promptly:

(a) notify the other Party and the Access Holder advising the extent to which it is recommencing the performance of its obligations; and

(b) recommence the performance of its obligations to the extent outlined in such notice.

~~29.5 — Effect of Nominated Network FM Reduction Notice on Operator nomination~~

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

(a) If:

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

then Aurizon Network may by notice advise the Operator, the Access Holder (and its Customer, if applicable), other affected Access Holders, each affected Railway Operator and the QCA of:

- (iii) the estimated cost of effecting the necessary repairs or replacement;
- (iv) the level of insurance available to effect the necessary repairs and replacement;
- (v) a detailed explanation as to why the cost of repairing or replacing is not economic; and
- (vi) Aurizon Network's intention to not repair or replace the relevant part of the Nominated Network unless the Access Holder and other Access Holders (or their Customers or Railway Operators, as applicable) using that part of the Nominated Network pay the difference between the amount of insurance available to effect the necessary repairs or replacement and the actual anticipated cost to effect those repairs or replacements.

(b) If the Operator (or the Access Holder or its Customer, as applicable) notifies Aurizon Network that:

- (i) it agrees to bear the whole incremental cost of necessary repairs or replacement (after the amount of insurance available has been applied); or
- (ii) it agrees to bear that part requested by Aurizon Network of the incremental cost of necessary repairs or replacement (and subject to Aurizon Network being satisfied that all other relevant Access Holders (or their Customers or Railway Operators, as applicable) have also agreed to bear their respective part of such costs).

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

- (iii) if **clause 31.5(b)(i)** applies, receipt by Aurizon Network from the Operator (or the Access Holder or its Customer) of payment of the relevant amount; and
- (iv) if **clause 31.5(b)(ii)** applies, receipt by Aurizon Network from the Operator (or the Access Holder or its Customer) of the last payment of the relevant amount.

(c) If the Operator (or the Access Holder or its Customer, as applicable) pays to Aurizon Network any of the costs under **clause 31.5(b)**, on completion of the necessary repairs or replacement:

(i) Aurizon Network must, within a reasonable time, refund to the party that made such payment any amount by which the amount paid by that party exceeds the actual cost; or

(ii) the Operator (or the Access Holder or its Customer, if applicable) must, within a reasonable time, pay to Aurizon Network the amount by which the actual cost exceeds the amount paid by that party,

(as applicable).

(d) If Aurizon Network gives the Access Holder a Nominated Network FM Reduction Notice under the Access Agreement, then:

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

(ii) ~~(b) As~~ soon as practicable after ~~the expiry of the period set out in clause 25.4(a) of the Access Agreement~~ Aurizon Network gives the Access Holder an Nominated Network FM Reduction Notice, Aurizon Network must issue a notice to the Operator summarising, in respect of each Train Service Type affected by the FM Access Rights, the changes to the “Nominated Monthly Operational Rights (for a 30 day Month)” in **Schedule 2**.

31.6 ~~29.6~~ **Termination after extended Force Majeure Event**

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

- (a) the Parties must meet to endeavour to identify any alternative viable means to perform the suspended obligations; and
- (b) failing any alternative means being agreed within one Month after the end of the three Month period, the other Party may terminate this Deed by 20 Business Days notice to the affected Party and the Access Holder and **clauses 29.4 and 29.5 and the relevant Force Majeure Provisions 31.4 and 31.5** apply without prejudice to any of the rights of the Parties which accrued before the date of such termination.

32 ~~30~~ **Suspension**

32.1 ~~30.1~~ **Suspension of Train Services for a Train Service Type**

If a Suspension Event specified in **part A of schedule 9** occurs in respect of a Train Service Type, Aurizon Network may, by notice in writing to the Operator and the Access Holder (which must be given before or immediately after the suspension) (**Suspension Notice**), suspend the right of the Operator to operate some or all of the Train Services for that Train Service Type on the Nominated Network.

32.2 ~~30.2~~ **Suspension of Train Services generally**

If a Suspension Event specified in **part B** of **schedule 9** occurs, Aurizon Network may, by notice in writing to the Operator and the Access Holder (which must be given before or immediately after the suspension) (also a **Suspension Notice**), suspend the right of the Operator to operate some or all of the Train Services (for any one or more Train Service Types) on the Nominated Network.

32.3 ~~30.3~~ **Suspension of certain Rollingstock or Rollingstock Configurations**

- (a) If:
- (i) Rollingstock or Rollingstock Configurations used by the Operator in the operation of Train Services:
 - (A) are not Authorised Rollingstock or Authorised Rollingstock Configurations for that Train Service Type; or
 - (B) do not comply with:
 - (1) applicable Laws; or
 - (2) the Rollingstock Interface Standards (subject to any Approved Derogations); or
 - (ii) the Operator otherwise fails to comply with the Rollingstock Interface Standards,
- and
- (iii) the Operator fails to rectify such non-compliance within a reasonable period of time (being at least 20 Business Days) notified by Aurizon Network to the Operator; or
 - (iv) such non-compliance creates a risk to the safety of any person or a material risk to property,

then Aurizon Network may, by notice in writing to the Operator and the Access Holder (which must be given before or immediately after the suspension) (also a **Suspension Notice**), suspend the right of the Operator to operate Train Services using such Rollingstock or Rollingstock Configurations.

32.4 ~~30.4~~ **Suspension due to suspension under Access Agreement**

If any of the Access Holder's rights under the Access Agreement are suspended under the Access Agreement for any reason, then Aurizon Network may, by notice in writing to the Operator (which must be given before or immediately after the suspension) (also a **Suspension Notice**), suspend the right of the Operator to operate Train Services for a Train Service Type, which would otherwise be operated utilising the Access Holder's Access Rights which have been suspended.

32.5 ~~30.5~~ **Details of suspension**

A Suspension Notice given by Aurizon Network to the Operator and the Access Holder under **clause ~~30.1, 30.2, 30.3~~32.1, 32.2, 32.3 or ~~30.4~~32.4** must set out:

- (a) the rights of the Operator which are affected by the suspension; and
- (b) the reason for the suspension; and

- (c) except for a suspension under **clause 30.4, 32.4**, the actions the Operator must take to have the suspension lifted.

32.6 ~~30.6~~ **Effect of suspension**

- (a) If Aurizon Network exercises a right of suspension under this **clause 30.32**, then the Operator and the relevant Operator's Staff must immediately cease to operate:
 - (i) the relevant Train Services; or
 - (ii) the Train Services using the relevant Rollingstock or Rollingstock Configurations,as applicable, until such time as the suspension is lifted by Aurizon Network.
- (b) The suspension of any rights under this **clause 30.32** does not affect or suspend any other obligation of the Operator under this Deed, and is without prejudice to Aurizon Network's other rights and remedies in respect of that or any other default.
- (c) Where Aurizon Network suspends the Operator's right to operate some or all of the Train Services:
 - (i) Aurizon Network will only be liable to the Operator in respect of loss or damage (including damages for Consequential Loss) arising from the suspension if, and only if, no reasonable person in Aurizon Network's position could have formed the view that the stated grounds for the suspension existed, provided that the Operator must use all reasonable endeavours to mitigate the loss or damage arising from the suspension; and
 - (ii) Aurizon Network bears the burden of establishing that a reasonable person in Aurizon Network's position could have formed that view.
- (d) Notwithstanding **clause 30.6, 32.6(c)**, Aurizon Network will not be liable to the Operator for any third party claim (including a claim for Consequential Loss), made against the Operator in relation to a suspension where the third party is the Access Holder and the Access Holder has a direct contractual relationship with Aurizon Network in respect to the Access Rights to which the suspension relates.

32.7 ~~30.7~~ **Duration of suspension**

- (a) The suspension of any rights under **clause 30.1, 30.2, 32.1, 32.2** or **30.3, 32.3** continues until such time as the Operator has remedied the relevant default or non-compliance notified in the Suspension Notice.
- (b) The suspension of any rights under **clause 30.4, 32.4** continues until such time as the relevant suspension of the Access Holder's rights under the Access Agreement is lifted.

33 ~~31~~ **Termination**

33.1 ~~31.1~~ **Termination of Train Services for a Train Service Type by Aurizon Network**

- (a) Subject to **clause 31.4, 33.1(b)** and without limiting any rights of termination contained elsewhere in this Deed, Aurizon Network may, by notice in

writing to the Operator and the Access Holder, reduce the Operational Rights by the Train Services for a Train Service Type if a Termination Event specified in **part A** of **schedule 9** occurs in relation to that Train Service Type.

- (b) If there is a Corresponding Suspension Event in respect of the Termination Event referred to in **clause 31.433.1(a)**, then Aurizon Network may only exercise its rights under **clause 31.4(a) if: 33.1(a) if it has first exercised its right of suspension in respect of the Corresponding Suspension Event under clause 32.**

~~(i) — it has first exercised its right of suspension; and~~

~~(ii) — 20 Business Days have lapsed since the day it issued a Suspension Notice,~~

~~in respect of the Corresponding Suspension Event under clause 30.~~

[AN note: The above paragraph (deleted) is inconsistent with the timing for the giving of notices for Termination Events specified in schedule 9.]

33.2 31.2 Termination of Agreement

- (a) Subject to **clause 31.233.2(b)** and without limiting any rights of termination contained elsewhere in this Deed, Aurizon Network may, by notice in writing to the Operator and the Access Holder, terminate this Deed if a Termination Event specified in **part B** of **schedule 9** occurs.

- (b) If there is a Corresponding Suspension Event in respect of the Termination Event referred to in **clause 31.233.2(a)**, then Aurizon Network may only exercise its rights under **clause 31.2(a) if:**

~~(i) 33.2(a) if it has first exercised its right of suspension; and~~

~~(ii) — 20 Business Days have lapsed since the day it issued a Suspension Notice, in respect of the Corresponding Suspension Event under clause 30.32.~~

33.3 31.3 Termination by the Operator

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

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

33.4 ~~31.4~~ **Grounds for termination to be specified**

A notice given under **clause 31.1, 31.2, 33.1, 33.2 or ~~31.3~~33.3** must set out the grounds for the termination.

33.5 ~~31.5~~ **Obligations and other rights upon termination or expiry**

- (a) Neither termination of this Deed by a Party under this **clause 31.3** nor expiry of this Deed prejudices:
 - (i) a Party's right to make a Claim, recover damages or avail itself of other remedies under this Deed or at law; or
 - (ii) either Party's rights to recover money due to it under this Deed.
- (b) On termination of this Deed, Aurizon Network and the Operator are released from all further obligations or liabilities under this Deed, except for:
 - (i) rights which accrued on or before termination, including for any breach of this Deed which occurred before termination. Any liability in respect of such prior breach will be limited in the manner provided in this Deed; or
 - (ii) any provisions which are expressed as surviving the expiry or termination of this Deed.

33.6 ~~31.6~~ **Removal of Rollingstock following termination**

- (a) Immediately on expiry of the Term, and within 12 hours (or such other period as the Parties may agree) after termination of this Deed for any other reason, the Operator must, at the Operator's cost, remove all of the Operator's Rollingstock operated under this Deed from the Nominated Network.
- (b) If the Operator fails to remove the Operator's Rollingstock from the Nominated Network, then Aurizon Network may give a notice to the Operator demanding the removal of the Rollingstock within a further 12 hours (or such longer period as the Parties may agree).
- (c) If the Operator fails to remove any of the Operator's Rollingstock from the Nominated Network the subject of the notice under **clause 31.633.6(b)** within the time required under **clause 31.633.6(b)**, then Aurizon Network is entitled to remove the Rollingstock and recover the reasonable costs of removal from the Operator, provided it notifies the Operator reasonably in advance of its intention to exercise the rights under this clause.
- (d) Subject to **clause 26.4, 28.1**, the Operator is liable for, and indemnifies Aurizon Network against, any costs reasonably incurred by Aurizon Network in relation to any damage or obstruction caused to the Infrastructure or the Nominated Network by the Operator in removing any Rollingstock in accordance with this **clause 31.6-33.6**.
- (e) The Operator must comply with all reasonable directions issued by Aurizon Network in relation to the removal of the Rollingstock in accordance with this **clause 31.6-33.6**.

34 ~~32~~ Assignment

34.1 ~~32.1~~ Assignment by Aurizon Network

- (a) Aurizon Network may Assign the whole or any part of its rights or obligations under this Deed without the prior consent of the Operator, provided that:
 - (i) the Assignee is Accredited; and
 - (ii) Aurizon Network procures that the Assignee covenants with the Operator by deed to be bound by and to perform the obligations of Aurizon Network under this Deed to the extent of the rights and obligations Assigned to the Assignee.
- (b) On the Assignee entering into the deed referred to in **clause ~~32.1~~34.1(a)**, Aurizon Network is released and discharged from further liability under this Deed in respect of the obligations which the Assignee has undertaken under that deed to be bound by and to perform.

34.2 ~~32.2~~ Assignment by the Operator

- (a) The Operator may not Assign its rights or obligations under this Deed other than in accordance with this **clause ~~32.2~~34.2**.
- (b) The Operator may, provided it is not in default in the performance or observance of any of its obligations under this Deed, Assign the whole of its rights and obligations under this Deed to:
 - (i) a Related Body Corporate of the Operator which is Accredited to operate the Train Services under this Deed and is otherwise capable of performing the obligations of the Operator under this Deed, provided that:
 - (A) the Operator remains liable for the performance of the duties, responsibilities and obligations assumed by the Assignee; and
 - (B) the performance by the Assignee will (to the extent of such performance) discharge the Operator's liability for the performance of the duties, responsibilities and obligations Assigned; or
 - (ii) a person other than a Related Body Corporate of the Operator with the prior written consent of Aurizon Network which must not be unreasonably withheld if Aurizon Network is satisfied that such person is:
 - (A) financially sound;
 - (B) Accredited to operate the Train Services under this Deed; and
 - (C) otherwise capable of performing the obligations of the Operator under this Deed.
- (c) Any Assignment by the Operator of its rights and obligations under this Deed is conditional on and will not take effect until:
 - (i) Aurizon Network has been provided with written evidence of the Access Holder's consent to the Assignment;
 - (ii) the Assignee covenants with Aurizon Network by deed, in such terms

as Aurizon Network may reasonably require, to be bound by and to perform the obligations of the Operator under this Deed.

- (d) Subject to **clause ~~32.2~~34.2(e)**, if a Change in Control of the Operator occurs without Aurizon Network's prior written consent, the occurrence of the Change in Control will be taken to be an Assignment of the Operator's rights and obligations under this Deed which is not permitted under this **clause ~~32.2~~34.2**.
- (e) **Clause ~~32.2~~34.2(d)** does not apply to a Change in Control where:
 - (i) the Operator or its Ultimate Holding Company is listed on a recognised stock exchange;
 - (ii) the Change in Control is a result of a Change in Control of that listed entity; and
 - (iii) that listed entity remains listed on that recognised stock exchange both before and after that Change in Control.

34.3 ~~32.3~~ **Charging**

A Party (**Chargor**) may create a Charge over all of its rights under this Deed in favour of a recognised financial institution (**Chargee**) to secure financial accommodation provided to the Chargor in relation to its obligations under this Deed, provided that the Chargee must first covenant in writing in favour of the other Party (**Non-Charging Party**), pursuant to a deed in such terms as the Non-Charging Party may reasonably require, that in relation to the exercise of any power of sale or other right or remedy under the Charge granted to the Chargee, the Chargee and any person (including any receiver or receiver and manager or agent) claiming through the Chargee must comply with the provisions of this **clause ~~32.3~~34.3** as if it were originally a party to this Deed, and must not exercise any power of sale of the rights and/or obligations of the Chargor under this Deed except in accordance with this **clause ~~32.3~~34.3**.

35 ~~33~~ **GST**

35.1 ~~33.1~~ **Construction**

In this **clause ~~33~~35**:

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

35.2 ~~33.2~~ **Consideration GST exclusive**

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

35.3 ~~33.3~~ **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 Deed, the recipient must

pay to the Supplier an amount equal to the GST payable on the supply.

35.4 ~~33.4~~ **Timing of GST payment**

The recipient must pay the amount referred to in **clause ~~33.3~~35.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Deed.

35.5 ~~33.5~~ **Tax invoice**

The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under **clause ~~33.3~~35.3**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

35.6 ~~33.6~~ **Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Deed, the amount payable by the recipient under **clause ~~33.3~~35.3** must be recalculated to reflect the adjustment event and a payment must be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

35.7 ~~33.7~~ **Reimbursements**

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

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

36 ~~34~~ **Confidentiality**

36.1 ~~34.1~~ **Confidentiality**

Subject to **clause ~~34.2~~36.2**, the Recipient must:

- (a) keep confidential, and must not disclose to any Third Party, any Confidential Information disclosed to the Recipient by the Discloser; and
- (b) not use the Confidential Information for any purpose other than for the purposes of this Deed or, if Aurizon Network is the Recipient, for the purposes of:

(i) Capacity Assessment (as defined in the Access Undertaking);

(ii) ~~(i)~~ investigation and planning of Maintenance Work;

(iii) planning Infrastructure Enhancements; and

(iv) ~~(ii)~~ complying with its obligations under the Access Undertaking.

[AN note: This provision should be consistent with clause 34.1(b) of the Access Agreement.]

36.2 ~~34.2~~ **Permitted disclosures**

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

- (a) the Recipient has obtained the prior written approval of the Discloser to such disclosure. The Discloser must not unreasonably withhold such approval if the Recipient has procured a confidentiality undertaking in respect of the information from such Third Party in favour of both Parties on terms and conditions satisfactory to both Parties, acting reasonably; or
- (b) disclosure is:
 - (i) required or compelled by any order of a court of competent jurisdiction;
 - (ii) required or compelled by any Law;
 - (iii) required or compelled by notice validly issued by any Authority;
 - (iv) necessary for the conduct of any legal proceedings, including any dispute resolution process under this Deed;
 - (v) reasonably required for the performance of Train Control functions;
 - (vi) required under any stock exchange listing requirement or rule;
 - (vii) required by the Rail Safety Regulator or an Environmental Regulator;
 - (viii) to the Access Holder provided that:
 - (A) the Disclosure is:
 - (1) required by the terms of this Deed;
 - (2) reasonably necessary for the performance of obligations or the exercise of rights under this Deed or the Access Agreement; or
 - (3) reasonably necessary in connection with the safe operation of the Nominated Network; and
 - (B) the Discloser must ensure that the Access Holder keeps the Confidential Information confidential on terms no less onerous than this **clause 3436**;
 - (ix) to the Recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the Discloser;
 - (x) to an expert for the purposes of a dispute resolution process, or an auditor for the purposes of an audit, under a "User Funding Agreement" (as defined in the Access Undertaking), if such expert or auditor has executed a legally enforceable confidentiality deed in favour of the Discloser;
 - (xi) to legal practitioners and accountants of the Recipient or a Related Body Corporate of it:
 - (A) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (B) who are under a duty of confidentiality to the Recipient; and
 - (C) who have been advised of the confidential nature of the

Confidential Information; or

- (xii) otherwise permitted or required in accordance with this Deed or the Access Undertaking (as amended by any Change in Access Undertaking).

36.3 ~~34.3~~ **Discloser may give certain directions**

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

- (a) subject to the lawful requirements of the Recipient to retain copies of Confidential Information for business records and document control registers, to immediately deliver to the Discloser the Confidential Information specified by the Discloser;
- (b) to immediately destroy the Confidential Information specified by the Discloser; and
- (c) where the Recipient has disclosed the Confidential Information to any Third Party, to procure the compliance by that Third Party with the requirements of this **clause 34.336.3** as if that Third Party were the Recipient.

36.4 ~~34.4~~ **PPS Act**

In addition to the obligations imposed under this **clause 34.36**, each Party agrees to not disclose any information of the kind described in section 275(1) of the PPS Act, including:

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

36.5 ~~34.5~~ **Survival**

Without limiting **clause 37.139.1**, this **clause 3436** survives the destruction or return of Confidential Information in accordance with this Deed.

36.6 ~~34.6~~ **Injunctive relief**

The Recipient acknowledges and agrees that a breach of this **clause 3436** would be harmful to the business interests of the Discloser and that, as a result, the Discloser may seek urgent injunctive relief, specific performance or a similar remedy to prevent the occurrence or continuance of any breach or suspected breach of this **clause 3436** in addition to any other remedies available at law or in equity under or independently of this Deed.

37 ~~35~~ **Relationship with Access Agreements**

- (a) Prior to any referral of a matter to a loss adjuster, expert, arbitrator or the QCA (**Adjudicator**) in accordance with **clause 27.129.1** or **28.30**, either Party may notify the other Party that the Access Holder should be a party to that referral and, if such a notice is given, then the Party which has given the notice must:

- (i) notify the Access Holder of the matter to be referred to the Adjudicator; and
 - (ii) provide the Access Holder with a copy of the provisions of this Deed governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, the Adjudicator (**TOD Dispute Provisions**).
- (b) If the Access Holder is given a notice under **clause 3537(a)**, then:
- (i) where the Adjudicator is to be a loss adjuster, expert or arbitrator, the Parties are deemed not to have agreed the appointment of the loss adjuster, expert or arbitrator unless the Access Holder has also agreed to the appointment of that loss adjuster, expert or arbitrator;
 - (ii) the Parties must comply with the TOD Dispute Provisions in respect of the Access Holder as though the Access Holder was a Party to this Deed for the purposes of the matter referred to the Adjudicator; and
 - (iii) the Adjudicator in addition to determining the matter between the Parties must also determine any claim, dispute, question or liability involving the Access Holder and the Access Agreement arising in connection with any of the events or facts the subject of the matter referred to the Adjudicator (unless that claim, dispute, question or liability has already been agreed by Aurizon Network and the Access Holder or otherwise determined).
- (c) If the Operator is notified of a matter to be referred to an Adjudicator in accordance with the Access Agreement, then the Operator:
- (i) must comply with the provisions of that agreement governing the referral of a matter to, the determination of a matter by, and the payment of the costs of, an Adjudicator;
 - (ii) must provide the Adjudicator with a copy of this Deed;
 - (iii) agrees that the TOD Dispute Provisions do not apply to any claim, dispute, question or liability involving the Operator and this Deed arising in connection with the matter referred to the Adjudicator; and
 - (iv) agrees that, for the avoidance of doubt, the decision of the Adjudicator, in the absence of manifest error, shall be final and binding upon the Operator.

38 ~~36~~-Notices

38.1 ~~36.1~~ Form of Notice

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

38.2 ~~36.2~~ **Method of service**

Subject to **clause ~~36.5~~, 38.5**, a Notice may be given by being:

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

38.3 ~~36.3~~ **Deemed Notice**

Subject to **clause ~~36.5~~, 38.5**, a Notice given in accordance with this **clause ~~36.3~~ 38.3** is deemed to be given if:

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

38.4 ~~36.4~~ **Addresses for notices**

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

38.5 ~~36.5~~ **Train Control Direction or Incident Commander's direction**

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

39 ~~37~~ **General**

39.1 ~~37.1~~ **Survival**

This **clause ~~37.3~~ 39.1** and **clauses 7, ~~17.5, 24, 19.6, 26, 27, 28, 31, 29, 30, 33, 34, 35, 36~~ and ~~36.3~~ 39.1** survive the expiration or termination of this Deed.

39.2 ~~37.2~~ **Amendment**

- (a) Except as otherwise provided in this Deed, any variation or amendment to this Deed must be in writing signed by:
 - (i) both Parties; and
 - (ii) except where the amendment solely relates to operational matters that do not have consequential impacts on the Access Holder's

Access Rights, the utilisation of the Access Holder's Access Rights or Access Agreement, the Access Holder.

- (b) The Operator must provide the Access Holder with a copy of any written agreement to variations or amendments to this Deed.

39.3 ~~37.3~~ **Entire agreement**

- (a) This Deed, the Schedules and other documents referred to in the Schedules constitute the entire understanding and agreement between the Parties as to the subject matter of this Deed.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Deed are merged in and superseded by this Deed and are of no force or effect whatever, and no Party is liable to any other Party in respect of those matters.
- (c) Neither Party has relied on any representations made by the other Party relating to the subject matter of this Deed or otherwise.
- (d) No oral explanation or information provided by any Party to another:
 - (i) affects the meaning or interpretation of this Deed; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

39.4 ~~37.4~~ **Counterparts**

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

39.5 ~~37.5~~ **Non-merger**

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

39.6 ~~37.6~~ **Authority to enter into agreement**

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

39.7 ~~37.7~~ **Consents and approvals**

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

39.8 ~~37.8~~ **Relationship**

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

39.9 ~~37.9~~ **Certificate**

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

39.10 ~~37.10~~ **Costs**

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

39.11 ~~37.11~~ **Duty**

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

39.12 ~~37.12~~ **Waiver and exercise of rights**

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

39.13 ~~37.13~~ **Computation of time**

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

39.14 ~~37.14~~ **Severance of invalid or illegal terms**

- (a) If any term of this Deed, or its application to any Party, person or circumstance, is or becomes invalid, void, voidable or otherwise unenforceable for any reason whatever, then:
 - (i) that term, or its application to such Party, person or circumstance, is severed from this Deed;
 - (ii) the remainder of this Deed, excluding the severed part, remains in force, and any term which includes the severed part applies to such Party, person or circumstance without reliance on the part severed; and
 - (iii) to the extent permissible by Law, the Parties must agree to replace the severed term, effective from the date of severance, with a valid

and enforceable term which so far as possible achieves the same purpose, object or effect as the invalid, void, voidable or otherwise unenforceable term was intended to achieve and does not cause any substantial reduction in the benefits of either Party or material re-allocation of risks between the Parties.

- (b) The Parties must act reasonably and in good faith in seeking an agreement under this ~~clause 37.14~~39.14 as to a replacement term.
- (c) If the Parties cannot agree upon a replacement term, this Deed is continued in accordance with ~~clauses 37.14~~39.14(a)(i) and ~~37.14~~39.14(a)(ii).

39.15 ~~37.15~~ **Rights cumulative**

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

39.16 ~~37.16~~ **Approvals and consents**

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

39.17 ~~37.17~~ **Third Party Land**

The Operator acknowledges that:

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

and agrees that in respect of that Third Party Land:

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

39.18 ~~37.18~~ **Implementation of agreement**

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

39.19 ~~37.19~~ Governing law and jurisdiction

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

39.20 ~~37.20~~ PPS Act

- (a) If a Party (**first party**) reasonably determines that this Deed contains a "Security Interest" for the purposes of the PPS Act (**Security Interest**), the other Party (**second party**) agrees to do anything (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the first party (after consultation with the second party) reasonably asks and considers necessary for the purposes of:
 - (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
 - (ii) enabling the first party to apply for any registration, or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the first party; or
 - (iii) enabling the first party to exercise rights in connection with the Security Interest.
- (b) A Party is not required to give any notice under the PPS Act to the other Party or any other person and each Party waives the right to receive any such notice (including a notice of Verification Statement) unless the notice is required by the PPS Act and that obligation cannot be excluded.
- (c) To the extent that this Deed gives rise to a Security Interest, the Parties agree that for the purposes of section 115 of the PPS Act, the following sections of the PPS Act will not apply to any Relevant Collateral:
 - (i) section 95 (notice by Secured Party of removal of Accession);
 - (ii) section 121(4) (notice by Secured Party of enforcement of Security Interest in liquid assets);
 - (iii) section 125 (obligation of Secured Party to dispose of or retain Collateral after seizure);
 - (iv) section 130, to the extent that it requires a party to give any notice to the other party (notice by Secured Party of disposal of Collateral);
 - (v) section 132(3)(d) (obligation of Secured Party to show amounts paid to other Secured Parties in statement of account);
 - (vi) section 132(4) (statement of account by Secured Party if it does not dispose of Collateral within prescribed period);
 - (vii) section 135 (notice by Secured Party of retention of Collateral);
 - (viii) section 142 (redemption of Collateral); and
 - (ix) section 143 (reinstatement of Security Agreement).

Execution

Executed as a deed and delivered on the date shown on the first page.

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Executed by [the Operator] ABN)
[insert]:)
)

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date

Schedule 1

Reference schedule

Item	Description	Details
Operator details		
1	Operator	Name: [insert] ABN: [insert]
Particulars for Notices		
2	Address for Notices	Aurizon Network Address: [insert] Facsimile: [insert] Email: [insert] Attention: [insert] Operator Address: [insert] Facsimile: [insert] Email: [insert] Attention: [insert]
Access Agreement		
3	Access Holder	Name: [insert] ABN: [insert]
4	Date of Access Agreement	[insert]

Schedule 2

Train Descriptions

Part A – Matters applicable to specific Train Service Types

1 Train Service Type #1

1.1 Key characteristics of Train Service Type

Details of dates

Train Service Compliance Date [insert]

Train Service Commitment Date [insert]

Train Service Expiry Date [insert]

General details

Commodity Coal

Coal System [insert]

Reference Train Service [yes /no]

Details of route and facilities

Origin [insert]

Destination [insert]

Loaded distance from Origin to Destination (km) [insert]

Empty distance from Destination to Origin (km) [insert]

Loading Facility [insert]

Unloading Facility [insert]

Depot [insert]

Though-Running Train Service Type [yes /no]

Details of maximum dwell times

Maximum Time at Loading Facility (hours) [insert]

Maximum Time at Unloading Facility (hours) [insert]

Maximum Time at Depot (hours) [insert]

Maximum Other Dwell Times (hours) [insert]

Maximum Sectional Running Times

Maximum Sectional Running Times The Maximum Sectional Running Time for a Section for the Train Service Type are set out in **appendix A** to this **schedule 2**.

Nominated Monthly Operational Rights

Nominated Monthly Operational Rights The Nominated Monthly Operational Rights for the Train Service Type is set out in **appendix B** to this **schedule 2**.

Maximum Payload

Maximum Payload The Maximum Payload for the Train Service Type is set out in **appendix B** to this **schedule 2**.

1.2 Special operating restrictions

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

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

1.3 Cycle description

Subject to:

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

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

Item	Exceptions
1	[insert]
2	[insert]

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

1.4 Permitted Train Movements on the Nominated Network

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

Part B – Matters applicable to all Train Service Types

1 Matters applicable to all Train Service Types

1.1 Overview

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

1.2 Special operating restrictions

Without limiting the special operating restrictions for a Train Service Type which are specified in **item 1.2** of **Part A** of **schedule 2** (if any), in scheduling Train Services in accordance with the Network Management Principles, Aurizon Network must comply with the following special operating restrictions:

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

1.3 Cycle description

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

Item	Exceptions
1	[insert]
2	[insert]

1.4 Stowage

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

Appendix A to Schedule 2

Sectional Running Times

1 Train Services that are Reference Train Services

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

Maximum Sectional Running Times: Reference Train Services

		Empty (mins)	Loaded (mins)

Standard Sectional Running Times: Reference Train Services

		Empty (mins)		Loaded (mins)			
		Pass to Stop	Start to Pass	S t a r t t o o S t o p	P a s s	S t o p	S t o p

2 Train Services that are not Reference Train Services

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

Maximum Sectional Running Times: Non- Reference Train Services

		Empty (mins)	Loaded (mins)

Standard Sectional Running Times: Non-Reference Train Services

		Empty (mins)		Loaded (mins)			
		Pass to Stop	Start to Pass	S t a r t t o S t o p	P a s s r t t o S t o p	S t a r t t o S t o p	S t a r t t o S t o p

Appendix B to Schedule 2

Nominated Monthly Operational Rights

1 Train Service Type #1

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

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

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

where:

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

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

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

AAP = the Nominal Payload for the Train Service Type as specified in the relevant Notice of Intention to Increase Nominal Payload

Schedule 3

Nominated Network

1 Nominated Network

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

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

2 Parts of Nominated Network subject to ~~Force Majeure Provisions and~~ clause ~~29.5~~[31.5](#)

For the purpose of ~~the Force Majeure Provisions and~~ clause ~~29.5~~[31.5](#), the specified parts of the Nominated Network are those parts of the Nominated Network described by reference the diagrams and/or tables set out below:

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

[Drafting note: Aurizon Network may specify parts of the Nominated Network for the purpose of clause ~~29.5~~[31.5](#) which are life expired, obsolete and/or only used by a single user.]

3 Train Control centres and signal cabins

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

4 Third Party Land

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

5 Weighbridges and Overload Detectors

5.1 Weighbridges

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

5.2 Overload Detectors

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

Schedule 5

Rollingstock and Rollingstock Configurations

[Operator to include all of its Rollingstock]

1 Maximum Gross Mass and Tare Weight

Rollingstock	Maximum Gross Mass (tonnes)	Tare Weight (tonnes)
Wagons		
[Wagon type]	[insert]	[insert]
Other Rollingstock		
[Rollingstock type]	[insert]	[insert]

2 Relevant Rollingstock

[To be inserted as applicable]

Schedule 6

Performance Levels

1 Development of Performance Levels

- 1.1 The Parties must meet as soon as practicable after the Commencement Date to negotiate in good faith to endeavour to agree the Aurizon Network Performance Level (other than the Aurizon Network Performance Levels set out in **item 2.1** of this **schedule 6** which are already agreed between the Parties) and the Operator Performance Level within twelve (12) Months (or such longer period as the Parties may agree) after the Commencement Date.
- 1.2 The Performance Levels may involve financially based incentives and sanctions and, unless otherwise agreed, will be applicable for the Term.
- 1.3 A failure to agree the Performance Levels is not a Dispute for the purposes of **clause 28-30**.
- 1.4 On and from the date the Performance Levels are implemented by the Parties, the Parties must monitor, record and assess the performance of their respective obligations under this Deed against the Performance Levels. Each Party must comply with the reporting and assessment requirements (if any) set out in this **schedule 6**.

2 Aurizon Network Performance Levels

2.1 Average Below Rail Transit Time Threshold

The Average Below Rail Transit Time Factor for a Train Service Type for a Year must not exceed the Average Below Rail Transit Time Threshold for that Train Service Type specified in the table below:

Train Service Type	Average Below Rail Transit Time Threshold (%)
[insert]	[insert]
[insert]	[insert]

3 Operator Performance Levels

[To be inserted when agreed]

Appendix to Schedule 6

Calculation of Below Rail Transit Time

The **Below Rail Transit Time** (as defined in the Access Undertaking) for a Train Service for Train Service Type which has been operated is calculated in accordance with the following formula:

BRTT = SRT – Non BR Start Stop Time + BR Delays

where:

SRT = The lesser of Actual SRT and Standard SRT for the relevant Train Service

Actual SRT = The actual time it takes the relevant Train Service to traverse all relevant Sections for the relevant Train Service

Standard SRT = The sum of:

- (a) the Maximum SRT for all relevant Sections for the relevant Train Service Type; and
- (b) where a movement of the relevant Train Service over a relevant Section requires time to start or stop for a dwell, stop at the Destination or start at the Origin, the sum, for each relevant Section, of the additional time, taken to start or stop (as specified in **appendix A of schedule 2** for the relevant Train Service Type)

Non BR Start Stop Time = The time it takes the relevant Train Service to start after a non-below rail dwell or stop for a non-below rail dwell for all non-below rail delays incurred for all relevant Sections for that Train Service

BR Delay

Delays to the relevant Train Service from its scheduled time in the Daily Train Plan, where that delay can be attributed directly to Aurizon Network including:

- (a) the time taken in crossing other Trains (to the extent that such time is not contributed to by a Railway Operator or a Force Majeure Event and is not otherwise included in the Maximum Sectional Running Times for all relevant Section for the relevant Train Service Type); and
- (b) delays due to Operational Constraints caused or contributed to by Aurizon Network (to the extent of such contribution) or due to a fault or deficiency in the Infrastructure provided such delays are not contributed to by a Railway Operator or Force Majeure Events and are not otherwise included in paragraphs (d), (e) or (f) specified below,

but excluding:

- (c) cancellations;
- (d) delays resulting from compliance with a Passenger Priority Obligation;
- (e) delays due to a Possession and Major Periodic Maintenance where, the Possession Protocols have been followed;
- (f) delays resulting from a Force Majeure Event; and
- (g) delays to the relevant Train Service from its scheduled time in the Daily Train Plan, where that delay can be attributed the Access Holder (including delays attributable to a failure to load the Train at the Loading Facility for the relevant Train Service Type within the Maximum Time at Loading Facility, or to unload the Train at the Unloading Facility for the relevant Train Service Type within the Maximum Time at Unloading Facility, as specified in the Train Description for the relevant Train Service Type).

Schedule 7

High visibility clothing and Emergency Procedures

1 High visibility clothing

1.1 High visibility clothing

- (a) The Operator may specify the form of high visibility clothing that the Operator's Staff and the Operator's visitors may adopt, having regard to the requirements of Aurizon Network's safety standard for High Visibility Clothing (SAF/STD/0032/SWK/NET) as amended from time to time and provided to the Operator in the manner specified in **item 5 of schedule 10**.
- (b) The colour and materials for the high visibility clothing referred to in **item 1.1(a)** of this **schedule 7** must conform to the requirements of AS/NZS 1906.4:2010 *Retroreflective materials and devices for road traffic control purposes: Part 4: High-visibility material for safety garments and AS/NZS4602:2011 High Visibility Safety Garments* (as amended from time to time).

1.2 Compliance

Without limiting the Operator's obligations under this Deed, the Operator must ensure that the Operator's Staff and the Operator's visitors are instructed in relation to, and comply with, the provisions of this **item 1 of schedule 7**, the Applicable Safeworking Procedures and Aurizon Network's safety management system.

2 Emergency Procedures

Aurizon Network must provide the Operator with a copy of the Emergency Procedures from time to time in the manner specified in **item 5 of schedule 10**.

Schedule 8

Insurance

1 Public liability insurance

The Operator must effect and maintain public liability insurance:

- (a) to cover the legal liability of the insured arising out of or in connection with the activities of the Operator under this Deed whether in respect of injury to or death of any person other than the insured or an employee of the insured or loss of or damage to any property other than property owned by the insured in a sum insured of not less than THREE HUNDRED AND FIFTY MILLION DOLLARS (\$350,000,000) for any one occurrence;
- (b) to include cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs on a definitely identifiable date; and
- (c) to cover the Operator's rail operations and associated activities on the Nominated Network.

2 Workers compensation insurance

The Operator must effect and maintain insurance covering such liability as may arise at common law or by virtue of any relevant Workers Compensation legislation in respect of any Operator's Staff.

3 Carrier liability insurance

The Operator must effect and maintain carrier liability insurance in relation to the legal liability of the insured arising out of the transport of goods by Train Services to a sum insured of not less than TEN MILLION DOLLARS (\$10,000,000).

4 Motor Vehicle (non-Act) insurance

The Operator must effect and maintain motor vehicle (non-Act) insurance to cover the legal liability of the insured arising out of or in connection with the use of all vehicles in the performance of this Deed by the Operator or Operator's Staff and must include:

- (a) third party liability to a sum insured of not less than TWENTY MILLION DOLLARS (\$20,000,000); and
- (b) a Dangerous Goods extension with a maximum sum insured as required by statute.

5 Motor Vehicle insurance

The Operator must effect and maintain motor vehicle insurance to cover the statutory liability in respect of personal injury arising out of or in connection with the use by the Operator or the Operator's Staff of all vehicles in the performance of their obligations under this Deed.

6 Required terms

Insurances effected pursuant to **items 1 and 4** of this **schedule 8** must:

- (a) include a principal's indemnity endorsement specifically noting Aurizon Network as an interested party in respect of its interest arising out of or under this Deed;
- (b) include a cross liability clause;
- (c) provide that a notice of claim given to the insurer by one insured party will be accepted by the insurer as a notice of claim given by each of the insured parties; and
- (d) provide that a breach of or failure to observe and fulfil the terms of the policy by any party comprising the insured must not prejudice the rights of the remaining parties comprising the insured.

Schedule 9

Part A – Suspension Events and Termination Events applicable to specific Train Service Types

Item	Suspension Event	Termination Event
1	<p>The Operator materially fails to provide, before the operation of a Train Service for a Train Service Type in a material respect, information that is required to be provided to Aurizon Network in relation to the Train Service under clause 14.5-16.5.</p> <p><u>[AN note: AN requires all of the information listed in clause 1.2(b) of schedule 10.]</u></p>	
2	<p>(a) The Operator operates Train Services for a Train Service Type which materially do not comply, in a material respect, with the Train Description for that Train Service Type; and</p> <p>(b) such default:</p> <p>(i) <u>adversely affects, or is likely to adversely affect,</u> the entitlements of any Access Holder (other than the Access Holder under the Access Agreement) or other users of the Infrastructure (including Infrastructure Service Providers) of the Infrastructure, provided that:</p> <p>(A) Aurizon Network has sought to minimise the impact of such default by applying the Network Management Principles; and</p> <p>(B) Aurizon Network is not obliged to take any such action that</p>	

Item	Suspension Event	Termination Event
	<p>may cause any additional cost or risk to Aurizon Network or an adverse impact on any Access Holder (other than the Access Holder under the Access Agreement); or</p> <p>(ii) has caused, <u>or is likely to cause</u>, an increased risk to the safety of any person or material risk to property,</p> <p>unless the Operator operated the Train Service in accordance with Train Control Directions in which case the default will not be considered a Suspension Event.</p>	
<p><u>3</u></p>	<p><u>The Operator:</u></p> <p>(a) <u>operates Train Services for a Train Service Type which do not comply in some material respect with the Train Description for that Train Service Type; and</u></p> <p>(b) <u>fails to demonstrate to the reasonable satisfaction of Aurizon Network within 20 Business Days after being requested to do so, that Train Services for that Train Type operated by the Operator will consistently comply with the applicable Train Description for the remainder of the Term.</u></p>	<p>(a) <u>Aurizon Network gives the Operator a Suspension Notice in respect of the Corresponding Suspension Event;</u></p> <p>(b) <u>the suspension in respect of the Corresponding Suspension Event has not been lifted;</u></p> <p>(c) <u>the Operator fails to demonstrate to the reasonable satisfaction of Aurizon Network within 20 Business Days after Aurizon Network gives the Operator the Suspension Notice that Train Services for that Train Service Type operated by the Operator will consistently comply with the applicable Train Description for the remainder of the Term; and</u></p> <p>(d) <u>Aurizon Network, acting reasonably, has determined not to vary the Train Description for the Train Service Type under clause 14.2 due to such default.</u></p>
<p><u>4</u></p>	<p>The Operator fails, in a material respect, to comply with any obligation under this Deed which is specific to a Train Service Type (other than any</p>	<p>The Operator fails, in a material respect, to comply with any obligation under this Deed which is specific to a Train Service Type (other than any</p>

Item	Suspension Event	Termination Event
	<p>obligation which, if not complied with by the Operator, may (either of itself or if other requirements are satisfied) result in any other Suspension Event referred to in part A of this schedule 9 occurring) and such default continues for at least 20 Business Days after Aurizon Network gives the Operator notice of the default.</p>	<p>obligation which, if not complied with by the Operator, may (either of itself or if other requirements are satisfied) result in any other Termination Event referred to in part A of this schedule 9 occurring) and such default continues for at least 40 Business Days after Aurizon Network gives the Operator notice of the default.</p>

Part B – Suspension Events and Termination Events applicable to all Train Services Types

Item	Suspension Event	Termination Event
1	<p>The Operator fails to pay by the due date any amount payable under this Deed, and such default continues for at least 10 Business Days after Aurizon Network gives the Operator notice of the default (and always subject to clause 8.4).</p>	<p>The Operator fails to pay by the due date any amount payable under this Deed, and such default continues for at least 20 Business Days after Aurizon Network gives the Operator notice of the default (and always subject to clause 8.4).</p>
2	<p>The Operator fails, in a material respect, to comply with any of its obligations under clause 12, 20 or 14, 22 or 24 (other than clauses 20.3, 22.3 or 22.9, 24.9) and Aurizon Network is of the reasonable opinion that such failure:</p> <p>(a) adversely affects, <u>or is likely to adversely affect</u>, the entitlements of any Access Holder (other than the Operator under this Deed) or other users of the Infrastructure (including Infrastructure Service Providers); or</p> <p>(b) has caused, <u>or is likely to cause</u>, an increased risk to the safety of any person or material risk to property.</p> <p><u>[AN note: Aurizon Network should have the ability to suspend having regard to the likely impact of events. It should not be required to wait until the impact occurs before it can suspend.]</u></p>	<p><u>The Operator fails, in a material respect, to comply with any obligations under clause 14, 22 or 24 (other than clause 22.3 or 24.9) and such default continues for, or the Operator has failed to take reasonable action to prevent recurrence of the default, within 20 Business Days after Aurizon Network gives the Operator a Suspension Notice in respect of the Corresponding Suspension Event.</u></p>
3	<p>The Operator fails to comply in any material respect with:</p> <p>(a) —</p> <p><u>(a)</u> (b) any Train Control Direction given to the Operator; or</p> <p><u>(b)</u> (c) any Applicable Safeworking Procedures or Applicable Safety Standard.</p>	<p>The Operator fails to comply in any material respect with:</p> <p>(a) — any obligations under clause 12, 20 or 22 (other than clause 20.3 or 22.9);</p> <p><u>(a)</u> (b) any Train Control Direction given to the Operator; or</p> <p><u>(b)</u> (c) any Applicable Safeworking Procedures or Applicable Safety Standard,</p> <p><u>1.1</u> and such default continues</p>

Item	Suspension Event	Termination Event
		for, or the Operator has failed to take reasonable action to prevent recurrence of the default, within 20 Business Days after Aurizon Network gives the Operator a Suspension Notice in respect of the Corresponding Suspension Event.
4	An Insolvency Event occurs in respect of the Operator.	An Insolvency Event occurs in respect of the Operator and continues for a period of at least 40 Business Days.
5	The Operator's Accreditation is suspended, cancelled or amended so that it cannot lawfully operate the Train Services or otherwise perform its obligations generally under this Deed.	The Operator's Accreditation is suspended, cancelled or amended so that it cannot lawfully operate the Train Services or otherwise perform its obligations generally under this Deed, and such default continues for at least 20 Business Days after Aurizon Network gives the Operator notice of the default.
6	The Operator fails to comply in a material respect with clause 22.11<u>24.11</u>(c) .	The Operator fails to comply with clause 22.11<u>24.11</u>(c) which in the reasonable opinion of Aurizon Network is causing or threatening <u>threatening</u> to cause: (a) a) a serious or material risk to the safety of persons or property; or (b) b) serious or material harm to the Environment, and such failure continues for at least 10 Business Days after Aurizon Network gives the Operator a Suspension Notice in respect of the Corresponding Suspension Event.
7	(a) If an Environmental Regulator gives Aurizon Network or the Operator a direction, notice or order about the conduct of the Operator in relation to the operation of Train Services which causes or threatens to cause serious environmental harm and ; (b) (a) <u>if the direction, notice or order is given to Aurizon Network,</u>	(a) If a Environmental Regulator gives Aurizon Network or the Operator a direction, notice or order about the conduct of the Operator in relation to the operation of Train Services which causes or threatens to cause serious environmental harm; and (a) <u>if the direction, notice or order is given to Aurizon Network,</u> Aurizon Network promptly

Item	Suspension Event	Termination Event
	<p>Aurizon Network promptly notifies the Operator of such direction, notice or order; and</p> <p><u>(c)</u> (b) the Operator fails, within the time:</p> <p>(i) specified in the relevant direction, notice or order, or in any stay or other court order made in relation to such direction, notice or order; or</p> <p>(ii) otherwise agreed to by the Environmental Regulator,</p> <p>to</p> <p><u>(d)</u> (e) comply with the direction, notice or order, as modified by any court order (if applicable); or</p> <p><u>(e)</u> (d) take other measures (including, for example, agreeing to implement an environmental management program) acceptable to the Environmental Regulator in relation to the requirements of the direction, notice or order.</p>	<p>notifies the Operator of such direction, notice or order; and</p> <p>(b) the Operator fails, within the time:</p> <p>(i) specified in the relevant direction, notice or order, or in any stay or other court order made in relation to such direction, notice or order; or</p> <p>(ii) otherwise agreed to by the Environmental Regulator,</p> <p>to</p> <p>(c) comply with the direction, notice or order, as modified by any court order (if applicable); or</p> <p>(d) take other measures (including, for example, agreeing to implement an environmental management program) acceptable to the Environmental Regulator in relation to the requirements of the direction, notice or order,</p> <p>and such failure continues for at least 20 Business Days after Aurizon Network gives the Operator notice of the failure.</p>
8	<p>The Operator fails to comply with the requirements of a notice given by Aurizon Network (within the reasonable time specified in the notice) requiring the Operator to cease an <u>An</u> Activity of the Operator in connection with this Deed which causes, or threatens to cause, serious environmental harm.</p>	<p><u>An Activity of the Operator in connection with this Deed causes serious environmental harm.</u></p>
9	<p>The Operator fails to:</p> <p>(a) effect or maintain the insurances required under clause 24.226.2; or</p> <p>(b) provide evidence of the insurances required under clause 24.226.2 having been effected and maintained,</p> <p>and such default continues for at least</p>	<p>The Operator fails to:</p> <p>(a) effect or maintain the insurances required under clause 24.226.2; or</p> <p>(b) provide evidence of the insurances required under clause 24.226.2 having been effected and maintained,</p> <p>and such default continues for at least</p>

Item	Suspension Event	Termination Event
	five Business Days after Aurizon Network gives the Operator notice of the default.	20 Business Days after Aurizon Network gives the Operator notice of the default.
10	The Operator purports to Assign any of its rights or interests in this Deed other than as permitted in this Deed.	The Operator purports to Assign any of its rights or interests in this Deed other than as permitted by this Deed.
11	<p>The Operator fails to comply with:</p> <ul style="list-style-type: none"> (a) any Laws relating to rail safety relevant to the operation of Train Services; (b) Train Control Directions; (c) Safeworking Procedures; or <u>(d) Safety Standards.</u> <p>(d) [AN note: The Operator is required to comply with all Safety Standards (which includes the Applicable Safety Standards;)]</p> <p>and Aurizon Network is of the reasonable opinion that such default has caused an increased risk to the safety of any person or a material risk to property.</p>	<ul style="list-style-type: none"> (a) Subject to paragraph (b), Aurizon Network gives the Operator a Suspension Notice in respect of the Corresponding Suspension Event on three or more occasions in any 12 month period. (b) If a Dispute arises as to the validity of a Suspension Notice and it is determined under clause 2830 that the Suspension Notice was invalid, the Suspension Notice must not be taken into account for the purposes of this provision.
12	The Operator fails to comply with any <u>material</u> obligation under this Deed (other than any obligation which, if not complied with by the Operator, is reasonably likely to (either of itself or if other requirements are satisfied) result in any other Suspension Event occurring), and such default continues for at least 20 Business Days after Aurizon Network gives the Operator notice of the default.	<u>The Operator fails to comply with a material obligation under this Deed (other than any obligation which, if not complied with by the Operator, is reasonably likely to (either of itself or if other requirements are satisfied) result in any other Suspension Event occurring), and such default continues for at least 40 Business Days after Aurizon Network gives the Operator notice of the default.</u>
13		The Access Agreement is terminated.

Schedule 10

Interface Coordination Arrangements

1 Train Control Procedures

1.1 Train Controllers' contact details

- (a) For the benefit of the Operator's Staff who are responsible for the operation of Rollingstock used in the operation of a Train Service for a Train Service Type (**Traincrew**), contact details for the Train Controllers relevant to the Nominated Network are set out below:

Line Sections:	[insert]
Control Board:	[insert]
Phone:	[insert]
Fax:	[insert]

- (b) For the benefit of the Operator's Controller, contact details for the Train Controllers relevant to the Nominated Network are set out below:

Line Sections:	[insert]
Control Board:	[insert]
Phone:	[insert]
Fax:	[insert]

1.2 Operator's advice to Train Controller

- (a) The Operator's Controller and the Traincrew of the relevant Train must:
- (i) immediately upon becoming aware of an emergency that may affect the performance of the Operator's Train; and
 - (ii) as soon as reasonably practicable after becoming aware of any other event or circumstances that may affect the performance of the Operator's Train,

provide the Train Controller with such information as the Train Controller may reasonably require, including:

- (iii) the Train number;
- (iv) the nature of the event or circumstances; and
- (v) the likely impact on the performance of Network Train Services (including any Train Service operated by the Operator),

regardless of whether or not the Operator's Train has entered the Nominated Network.

- (b) At least fifteen (15) minutes before the departure of a Train Service, the Operator's Controller must provide the Train Controller with the following

information in relation to that Train Service:

- (i) information with respect to the Traincrew for that Train Service including the names of the Traincrew personnel and details of any mandatory Traincrew breaks;
 - (ii) if the initial Traincrew for that Train Service is rostered to be replaced by a new Traincrew before that Train Service reaches its Destination, details of the relevant rosters;
 - (iii) the location of nominated depots as specified in the Operating Plan, where Activities in relation to that Train Service such as provisioning, shunting and marshalling, will be carried out;
 - (iv) any en route locomotive provisioning requirements;
 - (v) if the Train is in "Train Order Territory" (as defined in Aurizon Network's safety management system (as amended from time to time)) or "Direct Traffic Control Territory" (as defined in Aurizon Network's safety management system (as amended from time to time)), the number of the leading locomotive; and
 - (vi) a document in the form required by Aurizon Network (**Train List**) which contains the following information in relation to that Train Service:
 - (A) the Train number;
 - (B) the Origin of the Train;
 - (C) the length of the Train in metres (including the locomotives);
 - (D) the number of vehicles in the Train;
 - (E) the gross mass of the Train;
 - (F) the gross trailing load of the Train in tonnes;
 - (G) the motive power employed by the Train;
 - (H) for each vehicle in the Train, in the order in which they will be placed, leading end first, the following information:
 - (1) vehicle classification;
 - (2) vehicle number;
 - (3) vehicle type;
 - (4) gross weight of the vehicle;
 - (5) a description of the goods carried in the vehicle (including details of all Dangerous Goods) by class and location on the Train;
 - (6) the destination of each vehicle; and
 - (7) any known defects, eg brakes cut out; and
 - (I) any other relevant information in relation to the operation of that Train Service.
- (c) Subject to the Traincrew complying with **item 1.2(b)(ii)** of this **schedule 10**, the Train Controller must notify the Traincrew of the most probable location

for the rostered change of Traincrew as soon as reasonably practicable after the Train Controller determines such location.

- (d) The Operator must enter the Train List into Aurizon Network’s nominated information system in accordance with the procedures specified by Aurizon Network.
- (e) The Operator must, as soon as reasonably practicable after it becomes aware of any changes to the information it has provided to Aurizon Network in relation to the Train List, update Aurizon Network’s nominated information system with respect to such changes in accordance with the procedures specified by Aurizon Network.
- (f) The Operator must, at all times, ensure that the Train List for a Train Service is accurate and includes all relevant information in relation to that Train Service.
- (g) If the weight and/or length of a Train operated by the Operator alters during the operation of a Train Service utilising that Train, the Operator’s Controller must advise the Train Controller of the new weight and/or length (as applicable) of the Train.
- (h) The Operator must provide to Aurizon Network (and keep current at all times during the Term) the contact details (including a mobile phone number and after hours contact details) for the Operator’s Controller. As at the date of this Deed, the contact details for the Operator’s Controller are set out below:

Name:	[insert]
Position:	[insert]
Phone (during business hours):	[insert]
Phone (outside business hours):	[insert]
Mobile phone number:	[insert]
Fax:	[insert]

- (i) The Operator’s Controller must be contactable by the Train Controller at all times while any of the Operator’s Train Services are operating on the Nominated Network.
- (j) The Operator must provide to Aurizon Network (and keep current at all times during the Term):
 - (i) the hours during which the Operator’s Controller will not be contactable while the Operator’s Train Services are not operating on the Nominated Network; and
 - (ii) the after hours contact procedures for the Operator’s Controller.
- (k) When a Train Service is operating on a section of Track which is not within “Track Circulated Territory” (as defined in Aurizon Network’s safety management system (as amended from time to time)), the Traincrew must, when reasonably requested by the Train Controller, advise the Train Controller of the arrival and departure times, or the departure times if the Train did not stop, for each “Crossing Location” (as defined in Aurizon Network’s safety management system (as amended from time to time)) that

the Train passed through on the Nominated Network.

- (l) The Train Controller must enter the arrival and departure times referred to in **item 1.2(k)** of this **schedule 10** into Aurizon Network's nominated information system as soon as reasonably practicable after the advice is received from the Traincrew.

1.3 Train Controller's advice to the Operator

- (a) As soon as reasonably practicable after becoming aware of any event or circumstances that may affect the performance of the Operator's Train, the Train Controller must provide to the Operator's Controller such information as the Operator's Controller may reasonably require, including:
 - (i) the Train number;
 - (ii) the nature of the event or circumstances; and
 - (iii) the likely impact on the performance of Network Train Services (including any Train Service operated by the Operator).
- (b) When reasonably requested by the Operator's Controller, the Train Controller will provide to the Operator's Controller an estimated time of arrival at any location on the Nominated Network for the Operator's Train.
- (c) When reasonably requested by the Traincrew, the Train Controller will provide information to the Traincrew regarding events or circumstances that may impact on the performance of the Operator's Train.

1.4 Consultation between Train Controller and the Operator

- (a) The Operator's Controller is responsible for determining whether the initial Traincrew for a Train Service will need to be replaced by a new Traincrew before the relevant Train Service reaches its Destination where such change of Traincrew is not included in the roster provided by the Operator's Controller to the Train Controller under **item 1.2(b)(ii)** of this **schedule 10** (if any) (**Relief**).
- (b) Subject to **item 1.4(c)** of this **schedule 10**, the Traincrew will contact the Operator's Controller to request meal breaks and personal needs breaks (**Traincrew Breaks**) and Relief.
- (c) If the Traincrew cannot establish contact with the Operator's Controller to request a Traincrew Break or Relief, the Traincrew may contact the Train Controller directly to request the relevant Traincrew Break or Relief.
- (d) If the Traincrew submits a request for a Traincrew Break or Relief directly to the Train Controller, the Train Controller must:
 - (i) record the Traincrew's request for a Traincrew Break or Relief (as applicable); and
 - (ii) advise the Operator's Controller that it has received a request for a Traincrew Break or Relief (as applicable) from the Traincrew.
- (e) Upon receiving advice from the Train Controller in accordance with **item 1.4(d)** of this **schedule 10**, the Operator's Controller must verbally acknowledge receipt of that advice from the Train Controller.
- (f) If the Operator's Train Controller or the Traincrew submits a request for a Traincrew Break or Relief to the Train Controller, then:

- (i) the Train Controller and the Operator's Controller must consult with each other as to the most appropriate time and location for the Traincrew Break or Relief (as applicable); and
 - (ii) the Train Controller must not unreasonably refuse to agree to the time and location for the Traincrew Break or Relief (as applicable).
- (g) If the Train Controller and the Operator's Controller agree the time and location for the requested Traincrew Break or Relief (as applicable), then:
- (i) the Operator's Controller must:
 - (A) make all the necessary arrangements for the Traincrew Break or Relief (as applicable) and, subject to **item 1.4(h)** of this **schedule 10**, advise the Traincrew of such arrangements; and
 - (B) inform the Train Controller of any changes to the Traincrew's requirements for that Traincrew Break or Relief (as applicable) including any changes to the Traincrew's requirements with respect to the time for that Traincrew Break or Relief (as applicable); and
 - (ii) the Train Controller must advise the Operator's Controller if the estimated time of arrival of the Train at the location for the Traincrew Break or Relief (as applicable) varies by more than 15 minutes from the agreed time for the Traincrew Break or Relief (as applicable).
- (h) If the Operator's Controller is unable to contact the Traincrew directly to provide advice in relation to the arrangements for the Traincrew Break or Relief (as applicable) referred to in **item 1.4(g)** of this **schedule 10**, then the Train Controller may, subject to receiving a request from the Operator's Controller, advise the Traincrew of the arrangements for that Traincrew Break or Relief (as applicable).
- (i) If the Operator's Train Controller informs the Train Controller in accordance with **item 1.4(g)(i)(B)** of this **schedule 10** that the Traincrew's requirements for a Traincrew Break or Relief have changed, then the Train Controller and the Operator's Controller must consult with each other with respect to the relevant changes.

1.5 Radio procedures

- (a) The Operator's Staff must follow the general radio procedures contained in the "Observance of Signals Manual STD/0037/SWK" (as amended from time to time) when using the Train Control radio system.
- (b) The details for access to the Train Control radio system for each of the line sections that comprise the Nominated Network are set out below:

Line Section:	[insert]
Channel Number:	[insert]
Line Section:	[insert]
Channel Number:	[insert]

1.6 Procedures for entering the Nominated Network

- (a) The Operator must comply with the yard procedures at the Origin for a Train Service (if any) as advised by Aurizon Network.

- (b) The Operator will only enter the Nominated Network upon receipt of the appropriate "Proceed Authority" (as defined in Aurizon Network's safety management system (as amended from time to time)) as advised by Aurizon Network.
- (c) The Operator's Controller must advise the Train Controller of the anticipated departure time of the Operator's Train at least two (2) hours before the Scheduled Time for the departure of the Train or when reasonably requested by the Train Controller. If the anticipated departure time alter from that previously advised to the Train Controller, then the Operator's Controller must advise the Train Controller of the new anticipated departure time as soon as reasonably practicable after it becomes aware of the change.
- (d) The Traincrew for a Train Service must advise the Train Controller when the Train for that Train Service is ready to depart the Origin.
- (e) Prior to the departure of the Train, the Operator must supply the Train driver with the Scheduled Times for that particular Train Service for that particular day.

1.7 Procedures for shunting/entering and exiting yards

Aurizon Network will advise the Operator of the appropriate procedures for shunting, entering yards and leaving yards en-route.

1.8 Procedures for leaving the Nominated Network

The Operator must comply with yard procedures at the Destination for a Train Service (if any) as advised by Aurizon Network.

1.9 Contact details for party responsible for loading Trains – clause ~~17.3~~19.4(c)

- (a) The Operator must provide to Aurizon Network (and keep current at all times during the Term) the contact details for any party responsible for loading the Operator's Trains.
- (b) As at the date of this Deed, the parties responsible for loading the Operator's Trains are set out below:

Name	Phone	Fax
[insert]	[insert]	[insert]
[insert]	[insert]	[insert]
[insert]	[insert]	[insert]

2 Train Operations Procedures

2.1 Safety Alerts and Safety Notices

(a) Safety Alerts

- (i) In this **item 2** of **schedule 10**, **Safety Alert** means a document specified as a "Safety Alert" which notifies the recipient that a serious safety incident that has affected or could affect Aurizon Network, the Operator or any other user of the Infrastructure has occurred. A Safety Alert may include:

- (A) details in relation to the serious safety incident (for information purposes); and/or
 - (B) information in relation to any immediate actions to be taken in relation to the serious safety incident.
- (ii) Aurizon Network must give a Safety Alert as soon as reasonably practicable after the occurrence of a serious safety incident.
 - (iii) Aurizon Network may give the Operator a Safety Alert using the Operator's address for notices specified in **item 2 of schedule 1**. Without limiting the method of delivery, Aurizon Network may give the Operator a Safety Alert by electronic means.
 - (iv) As soon as possible after the receipt of a Safety Alert from Aurizon Network, the Operator must make the Operator's Staff aware of the contents of such Safety Alert.

(b) Safety Notices

- (i) In this **item 2 of schedule 10**:
 - (A) **Safety Change** means a temporary or permanent change to Aurizon Network's safety management system.
 - (B) **Safety Notice** means a document specified as a "Safety Notice" which is published by Aurizon Network on a weekly basis for distribution to Aurizon Network's employees and the Operator (if it contains safety information relevant to the Operator) and includes safety information about a Safety Change.
- (ii) Subject to **item 2.1(b)(iii)** of this **schedule 10**, Aurizon Network will include safety information about a Safety Change in a Safety Notice published at least seven (7) days before the date that the Safety Change becomes effective.
- (iii) If:
 - (A) Aurizon Network considers it necessary to communicate certain safety information about a Safety Change; and
 - (B) that safety information has not been published in a Safety Notice at least seven (7) days before the date that the relevant Safety Change will become effective;then, Aurizon Network must:
 - (C) publish that safety information in a Train Notice or a Safety Alert; and
 - (D) as soon as reasonably practicable after publication of that Train Notice or Safety Alert, publish that safety information in a Safety Notice.
- (iv) The Operator must ensure that members of the Operator's Staff who perform Safety Related Work have access to a copy of, or are notified of, any safety information in the Safety Notices relevant to their area of work.
- (v) Aurizon Network may give the Operator a Safety Notice using the

Operator’s address for notices specified in **item 2 of schedule 1**. Without limiting the method of delivery, Aurizon Network may give the Operator a Safety Notice by electronic means.

(c) Train Notices

- (i) In this **item 2 of schedule 10, Train Notice** means a document specified as a “Train Notice” which is published by Aurizon Network on a daily basis (or as otherwise determined by Aurizon Network) for distribution to the Operator and conveys operational instructions, information and messages about Activities on the Rail Infrastructure.
- (ii) The Operator must ensure that all Train Notices are given to members of the Operator’s Staff who:
 - (A) are responsible for the operation of Rollingstock used in the operation of a Train Service for a Train Service Type; or
 - (B) work on or near any Track.
- (iii) Aurizon Network may give the Operator a Train Notice using the Operator’s address for notices specified in **item 2 of schedule 1**. Without limiting the method of delivery, Aurizon Network may give the Operator a Train Notice by email.

(d) Safeworking Forms

- (i) Aurizon Network will make available to the Operator access to electronic copies of administrative forms included in Aurizon Network’s safety management system which are necessary for the Operator to operate Train Services on the Nominated Network (**Safeworking Forms**).
- (ii) The Operator may obtain a reasonable quantity of Safeworking Forms by submitting a request to the following contact at Aurizon Network:

Position:	[insert]
Phone:	[insert]
Email address:	[insert]
Fax:	[insert]

2.2 Operational meetings

- (a) The contact details for the Operator’s Representative who will attend operational meetings are set out below:

Position:	[insert]
Phone:	[insert]
Mobile phone:	[insert]
Email address:	[insert]
Fax:	[insert]

- (b) The contact details for the Aurizon Network Representative are set out

below:

Position:	[insert]
Phone:	[insert]
Mobile phone:	[insert]
Email address:	[insert]
Fax:	[insert]

- (c) The Operator's Representative and the Aurizon Network Representative (or their nominees) shall meet on a monthly basis or as agreed by the Parties for the purpose of:
- (i) reviewing the achievement of Performance Levels (as that term is defined in the Access Agreement) and other matters affecting the performance of Train Services so as to identify remedial action in relation to recurring problems and to plan action to address potential or known problems;
 - (ii) reviewing requests or proposals by the Operator or Aurizon Network to vary the procedures contained in this **schedule 10**;
 - (iii) reviewing the reliability of the Operator's Rollingstock;
 - (iv) reviewing Operational Constraints;
 - (v) investigating or reviewing breaches or suspected breaches of the Applicable Safeworking Procedures, Applicable Safety Standards or Train Control Directions by the Operator's Staff; and
 - (vi) reviewing any other matters relevant to the performance of this Deed.
- (d) The Operator's Representative shall attend other operational meetings relevant to the operation of Train Movements on the Nominated Network as required by Aurizon Network from time to time.

3 Nominated Persons

3.1 Operator's Incident Response Coordinator

The contact details for the Operator's Incident Response Coordinator are as follows:

Name:	[insert]
Position:	[insert]
Phone (during business hours):	[insert]
Phone (outside business hours):	[insert]
Mobile:	[insert]
Email:	[insert]
Fax:	[insert]

3.2 Operator's Recovery Team Leader

The contact details for the Operator's Recovery Team Leader are as follows:

Name:	[insert]
Position:	[insert]
Phone (during business hours):	[insert]
Phone (outside business hours):	[insert]
Mobile:	[insert]
Email:	[insert]
Fax:	[insert]

4 Possession Protocols

Aurizon Network must publish ~~the~~ the Possession Protocols (as amended from time to time) on its Website which detail the rules governing the management and scheduling of Planned Possessions and Emergency Possession on the Infrastructure.

5 Document Control Procedures

- (a) The contact details for the Operator's Document Controller are set out below:

Name:	[insert]
Position:	[insert]
Phone:	[insert]
Postal Address:	[insert]
Email Address:	[insert]

- (b) Upon execution of this Deed, Aurizon Network will give the Operator one electronic copy of each of the Applicable Safeworking Procedures and Applicable Safety Standards.
- (c) Aurizon Network will manage updates and revisions of the documents referred to in **item 5(b)** of this **schedule 10**, the Emergency Procedures and the Investigations Procedures in accordance with the provisions of the relevant Australian Standards that apply to document control at that time.
- (d) The Operator is responsible for ongoing distribution of all documents provided to it by or on behalf of Aurizon Network in respect of Aurizon Network's safety management system (including the documents referred to in **item 5(b)** of this **schedule 10**) to the relevant members of the Operator's Staff.

Schedule 11

Ancillary Services and Ancillary Services Charges

1 Ancillary Services

[Drafting note: Arrangements for the provision of Ancillary Services (if any) by Aurizon Network to the Operator will be agreed on a transaction-by-transaction basis and documented in this **schedule 11**.]

1.1 Provision of Wayside Equipment

In this **item 1.1** of **schedule 11**:

Wayside Equipment means equipment owned by Aurizon Network that is located on or adjacent to the Infrastructure which records data which, if made available to the Operator, could be used by the Operator to monitor the condition of the Operator's Rollingstock, but excludes Weighbridges and Overload Detectors.

[Drafting note: Arrangements for the provision of Wayside Equipment by Aurizon Network to the Operator will be an Ancillary Service to be agreed on a transaction-by-transaction basis and documented in this **schedule 11**.]

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Description	QCA - UT4 - Standard Train Operations Deed - CDD (16.12.15)(29027921_1)
Document 2 ID	PowerDocs://CORRSDMS/15187227/4
Description	CORRSDMS-#15187227-v4-[AN/UT4_Standard_Agreements]_Standard_Train_Operations_Deed_-_Coal
Rendering set	standard

Legend:	
Insertion	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
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Moved to	22
Style change	0
Format changed	0
Total changes	2569

Appendix 4

Incorporated Provisions

(these are provisions which are incorporated in and form part of the AA or TOD (as applicable) by operation of clause 3.1 of the AA or TOD (as applicable))

Aurizon Network's mark-up to relevant parts of Part 7 (Available Capacity) and Schedule C of the QCA Consolidated Draft Decision (16.12.15)

Part 7: Available Capacity allocation and management

7.1 Application

- (a) This **Part 7** addresses the allocation and management of Capacity, including in circumstances where there is insufficient Available Capacity to satisfy all of the Access Applications submitted to Aurizon Network. In particular, under its provisions:
- (i) Aurizon Network may refuse to grant Access Rights if the relevant Access Seeker has not demonstrated to Aurizon Network's satisfaction (acting reasonably and in good faith) that it can utilise those Access Rights (**clause 7.2.1**).
 - (ii) Aurizon Network must maintain a Capacity Notification Register and a Committed Capacity Register (**clause 7.2.2** and **clause 7.2.3**).
 - (iii) Aurizon Network will be obliged to give priority to the granting of Access Rights to a Renewing Access Seeker in respect of a Renewal in certain circumstances (**clause 7.3**).
 - (iv) Standard Access Agreements permit an Access Holder or an Access Holder's Customer to Transfer Access Rights in accordance with this Undertaking. Aurizon Network has obligations in relation to the allocation of Capacity to facilitate a Transfer (**clause 7.4.2**).
 - (v) Short Term Transfers under Short Term Transfer Provisions will be required to meet specified requirements (clause 7.5).
 - ~~(v)~~(vi) Standard Access Agreements permit an Access Holder to relinquish Access Rights in accordance with this Undertaking. Aurizon Network has obligations in relation to the management of that relinquishment (**clause 7.4.3**).
 - ~~(vi)~~(vii) Aurizon Network will notify Access Seekers if their Access Applications are Mutually Exclusive Access Applications and assist them to modify their Access Applications to seek to avoid them being Mutually Exclusive Access Applications (**clause 7.65.1**).
 - ~~(vii)~~(viii) Where Aurizon Network has received Mutually Exclusive Access Applications, Aurizon Network will form a queue to determine which Access Seeker will be allocated those Access Rights (**clause 7.65.2**).
- However, these provisions for Mutually Exclusive Access Applications do not apply where the allocation occurs under **Part 8 (clause 7.65.2(a))**.
- (b) A diagrammatic representation of the Capacity allocation process for Mutually Exclusive Access Applications is set out in **Schedule H**.

- (c) For the purposes of the Act, the treatment of Access Seekers differently as a result of, or in accordance with, **clause 7.3, 7.4.2 or 7.65.2** is permitted and to that extent does not offend the Act.
- (d) Except where otherwise expressly provided in this **Part 7** and without limitation to **clause 7.1(c)**, in the performance of its obligations and the exercise of its rights under this **Part 7**, Aurizon Network must not unfairly differentiate between Access Seekers (or, as applicable, Customers) on the basis of the identity of a funder of a Pre-feasibility Study, a Feasibility Study or an Expansion. For example, Aurizon Network will not provide an Access Seeker (or, as applicable, a Customer) with priority in the allocation of Capacity in respect of an Expansion on the basis that Aurizon Network is providing funding for the Expansion, over another Access Seeker (or, as applicable, a Customer) with a different source of funding.
- (e) Nothing in **clauses 7.3, 7.4.2, 7.5 or 7.65.2** obliges Aurizon Network to grant Access Rights if there is insufficient Available Capacity to provide those Access Rights.
- (f) Nothing in **clauses 7.4.2 (Transfers), 7.4.3 (Relinquishments), 7.5 (Short Term Transfers) and 7.77.6 (Capacity resumption) and 1.4 (Force majeure)** affects the terms of an Access Agreement or Train Operations Deed executed before the Approval Date, unless the parties to the relevant document expressly agree to vary that document and adopt **clauses 7.4.2, 7.4.3 or 7.77.6 or 1.1**.

7.2 Capacity allocation and registers

[AN note: Clause 7.2 not included in this extract.]

7.3 Renewals

- (a) This **clause 7.3** sets out provisions that apply where all or any part of an Access Holder's existing Access Rights (ignoring the effect of any Short Term Transfers) will expire and:
 - (i) that Access Holder (where the Access Holder has no Customer); or
 - (ii) the person nominated by the Access Holder's Customer in writing to Aurizon Network (and, for clarity, that Customer may nominate itself),

(**Renewing Access Seeker**) wishes to hold or to continue to hold (as applicable) equivalent Access Rights (based on the Access Holder's Access Rights immediately prior to that expiry), subject to **clause 7.3(b)**, for a further term commencing immediately after those existing Access Rights will expire (that is, a **Renewal**).

[AN note: Balance of clause 7.3 not included in this extract.]

7.4 Dealing with Access Rights

7.4.1 Assignments

[AN note: Clause 7.4.1 not included in this extract.]

7.4.2 Transfers

(a) If:

(i) an Access Holder (**Transferor**) wishes to Transfer all or part of its Access Rights under an Access Agreement; or

(ii) if an Access Holder utilises Access Rights under an Access Agreement to provide Train Services for a Train Service Type for or on behalf of a Customer, that Customer (also a **Transferor**) wishes to Transfer all or part of those Access Rights,

to itself or a third party (each a **Transferee**), the Transferor must give Aurizon Network reasonable notice of its intention to do so (**Notice of Intention to Transfer**).

(b) A Notice of Intention to Transfer must:

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

(A) the Access Rights which the Transferor proposes to Transfer (**Nominated Access Rights**);

(B) the details of any changes to any nominations of a Train Operator previously given to take into account the proposed Transfer of the Nominated Access Rights;

(C) the date (**Transfer Date**) on which, and the period for which (**Transfer Period**), the Nominated Access Rights are proposed to be Transferred (provided that the Transfer Date must not be more than two years, after the date on which the Transferor gives the Notice of Intention to Transfer to Aurizon Network);

(D) the identity of the Transferee; and

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

(F) if the Transferor is not a Customer referred to in **clause 7.4.2(a)(ii)**, specify any Ancillary Access

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

- (ii) if the Transferee is not the Access Holder, be accompanied by evidence that the Transferee consents to the Transfer of the Transferred Access Rights and the grant of the Ancillary Access Rights (if any) proposed to be granted to the Transferee;
- (iii) if the Transferor is not the Access Holder, be given the Access Holder at the same time it is given to Aurizon Network.

~~(a)~~(c) A Transferee must complete and submit an Access Application for the Transferred Access Rights and the Requested Ancillary Access Rights (if any) and, subject to this **Part 7** (which shall prevail to the extent of any inconsistency), the negotiation process for those Transferred Access Rights and the Requested Ancillary Access Rights (if any) will be conducted in accordance with **Part 4**. For clarity and without limiting the provisions of **Part 4** that apply to the Access Application, nothing in this **clause 7.4.2** affects the application of **clauses [4.3(f)] and [4.12(a)(ii)]** to the Access Application.

[AN note: The above clause references to be updated.]

- (d) If a Transferor gives a Notice of Intention to Transfer, then:
 - (i) the Access Holder will be taken to have relinquished the Nominated Access Rights under its Access Agreement; and
 - (ii) the Transferred Access Rights and the Requested Ancillary Access Rights (if any) will be granted to the Transferee for the Transfer Period under the Transferee Access Agreement,

with effect on the date referred to in **clause 7.4.2(h)** if:

- (iii) the Transferred Access Rights and the Requested Ancillary Access Rights (if any) are for Cyclic Traffic;
- (iv) if the Transferor is the Access Holder, Aurizon Network and the Access Holder have entered into an agreement, in a form reasonably acceptable to the Access Holder and Aurizon Network, to vary the terms of the Access Holder's Access Agreement to address the relinquishment of the Nominated Access Rights (including any variations to the Access Charge Rates);
- (v) the Transferred Access Rights and the Requested Ancillary Access Rights (if any) are granted under a new or varied

Access Agreement between Aurizon Network and the Transferee (**Transferee Access Agreement**) that:

- (A) _____ has been negotiated and agreed in accordance with the requirements of this Undertaking; and
 - (B) _____ except for a condition in relation to the grant of the Transferred Access Rights and the Requested Ancillary Access Rights (if any) taking effect under **this clause 7.4.2**, is unconditional and binding upon the Transferee.
- (vi) _____ the Transferee has demonstrated to the reasonable satisfaction of Aurizon Network that the Transferee:
- (A) _____ will hold, or will have the benefit of, Supply Chain Rights from the Transfer Date utilising the Transferred Access Rights and the Requested Ancillary Access Rights (if any); and
 - (B) _____ is reasonably likely to continue to hold, or have the benefit of, those Supply Chain Rights for the whole of the Transfer Period (including as a result of a right to renew or extend the Supply Chain Rights); and
- (vii) _____ the Rail Infrastructure has sufficient Capacity to support the grant of the Transferred Access Rights and the Requested Ancillary Access Rights (if any) to the Transferee without another Access Holder being adversely affected;
- (viii) _____ if the Transferor is a Customer referred to in **clause 7.4.2(a)(ii)**:
- (A) _____ the origin and destination of, and commodity for, the Transferred Access Rights under the Transferee Access Agreement are the same as the Origin and Destination of, and commodity for, the Nominated Access Rights;
 - (B) _____ the Transferee Access Agreement includes a provision, on terms and conditions satisfactory to Aurizon Network, under which the Transferee agrees to pay all Adjustment Charges (**Transferred Adjustment Charges**) that, but for the Transfer of the Nominated Access Rights under **this clause 7.4.2**, are, or would have become, payable by the Access Holder in relation to Train Services operated for Access Holder utilising the Nominated Access Rights prior to the commencement of the Transferee Access Agreement (whether or not those Adjustment Charges are approved by the

QCA before or after the commencement of the Transferee Access Agreement);

- (C) the Customer (including for the avoidance of doubt, if the Customer is comprised of more than one entity, each entity comprised in the Customer) has warranted, in writing, to Aurizon Network that it is the sole end Customer of the Train Services utilising the Nominated Access Rights;
- (D) if the Customer is comprised of more than one entity, each entity comprised in the Customer has warranted, in writing, to Aurizon Network that it agreed to the giving of the Notice of Intention to Transfer;
- (E) the rail haulage agreement (or if there is more than one such agreement, each agreement) between the Access Holder (where the Access Holder is the Customer's Railway Operator) and Customer under which the Train Services utilising the Nominated Access Rights were operated prior to the Transfer taking effect:

 - (1) was signed after 1 March 2002; or
 - (2) if signed on or before 1 March 2002, the particulars of the agreement (such as the parties and term) were notified to the QCA prior to 30 June 2006 and the agreement was varied after 1 March 2002 to extend the term of the agreement and the period that is the extension of that term has commenced;
- (F) the Customer has provided Aurizon Network with a legally enforceable written undertaking (including security, if required by Aurizon Network, for the due and proper performance of that undertaking) indemnifying Aurizon Network for all Claims (including Consequential Loss) of any nature suffered or incurred by, or made or brought against, Aurizon Network in connection with:

 - (1) the Transfer (including any costs arising in respect of any Claim by the Access Holder); and
 - (2) any failure by the Transferee to pay all Transferred Adjustment Charges when due;

- (G) the Access Holder did not give Aurizon Network a notice under **clause 7.4.2(e)** within the time required under **clause 7.4.2(e)**; and
- (ix) the Access Holder and the Customer (if the Transferor is the Customer) have complied with the requirements of this Undertaking in relation to the Transfer of the Transferred Access Rights and the grant of the Requested Ancillary Access Rights (if any);.
- (e) If a Transferor that is a Customer referred to in **clause 7.4.2(a)(ii)** gives a Notice of Intention to Transfer, the relevant Access Holder may, within 15 Business Days after being given a Notice of Intention to Transfer by the Customer, notify Aurizon Network that it considers that one or more of the following is not satisfied:
- (i) the Customer (and for the avoidance of doubt, if the Customer is comprised of more than one entity, each entity comprised in the Customer) is the sole end Customer of the Train Services utilising the Nominated Access Rights;
- (ii) if the Customer is comprised of more than one entity, each entity comprised in the Customer has agreed to the giving of the Notice of Intention to Transfer; and
- (iii) the requirements specified in **clause 7.4.2(d)(viii)(E)**.
- (f) A notice given by the Access Holder under **clause 7.4.2(e)** must:
- (i) specify reasonable details of the Access Holder's reasons for considering that each applicable matter specified in **clause 7.4.2(e)** is not satisfied; and
- (ii) be accompanied by reasonable supporting evidence.
- (g) If a Transferor that is a Customer referred to in **clause 7.4.2(a)(ii)** gives a Notice of Intention to Transfer, then the relevant Access Holder must, at its cost, promptly after being requested to do so by Aurizon Network enter into an agreement, in a form reasonably required by Aurizon Network, to vary the terms of the relevant Access Agreement to address the relinquishment of the Nominated Access Rights (including, for the avoidance of doubt, variations to the Access Charge Rates).
- (h) The Transfer of the Transferred Access Rights and the grant of the Requested Ancillary Access Rights (if any) commences on the later of:
- (i) the date upon which the Transferor pays the Transfer Fee to Aurizon Network; and
- (ii) the Transfer Date.

- (i) Aurizon Network must:
- (i) calculate the Transfer Fee; and
 - (ii) notify the Transferor of the amount of the Transfer Fee and how the Transfer Fee was calculated,
- at the following times:
- (iii) if a Transferor is considering Transferring some or all of the Access Rights but has not given Aurizon Network a Notice of Intention to Transfer in respect of those Access Rights, promptly following a request by the Transferor; and
 - (iv) if the Transferor has given Aurizon Network a Notice of Intention to Transfer, not less than five Business Days before the Transfer Date.
- (j) The **Transfer Fee** is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges for the relevant Train Service Types that would have been payable for the Transfer Period assuming:
- (i) the Nominated Access Rights were not transferred;
 - (ii) the Train Services were not operated for the Access Holder for a reason other than Aurizon Network Cause; and
 - (iii) a Take or Pay liability will exist for each applicable year,
- [AN note: The above clause has been included to avoid any doubt that Aurizon Network is entitled to assume that TOP Charges will be payable in every applicable year.]
- (PV Amount) less the amount which is the product of the PV Amount and the Reduction Factor.
- (k) Despite any other provision in this **clause 7.4.2**, if:
- (i) the Transfer Fee is calculated to be an amount that is less than zero; or
 - (ii) if the Transferor is an Access Holder, the Nominated Access Rights to be Transferred are to be Transferred for a period which, when aggregated with the sum of the periods of all previous Transfers of Access Rights for Train Services for Train Service Types by the Access Holder with the same origin and destination and with a Transfer Period (for each such Transfer) within the three year period ending on the last day of the Transfer Period, is less than two years,
- then the Transfer Fee will be zero.
- [AN note: We have qualified this clause so that it just for the benefit of the Access Holder because when the Transferor is a Customer

under the Customer initiated transfer provisions, the calculation of the Reduction Factor will result in a Transfer Fee of zero.]

- (l) If the Transferor has not paid (or commenced a dispute in respect of the calculation of) the Transfer Fee within 20 Business Days after the latest of:
 - (i) the Transfer Date;
 - (ii) the date Aurizon Network gives the Transferor a notice under **clause 7.4.2(i)(ii)**;
 - (iii) the date that Aurizon Network gives the Transferor a valid tax invoice in respect of the Transfer Fee; and
 - (iv) in respect of payment only, the date any dispute regarding the calculation of the Transfer Fee is determined,
then Aurizon Network may give the Transferor a notice (**Transfer Cancellation Notice**) with respect to Nominated Access Rights specified in the Notice of Intention to Transfer in which case:
 - (v) the Notice of Intention to Transfer is deemed to have never been given by the Transferor; and
 - (vi) the Nominated Access Rights that were the subject of the Notice of Intention to Transfer will not be Transferred to the Transferee.
- (m) The giving of a Transfer Cancellation Notice in respect of the Transfer of Nominated Access Rights does not prevent the Transferor from subsequently giving Aurizon Network a new Notice of Intention to Transfer in respect of the same Nominated Access Rights.
- ~~(b)~~(n) For clarity, a change in the nomination of a Train Operator by an Access Holder does not constitute a Transfer.
- (o) Aurizon Network is under no obligation under this Undertaking to amend the transfer provisions of Access Agreements entered into under the 2001 Undertaking, the 2005 Undertaking, the 2008 Undertaking or the 2010 Undertaking in a manner which is not consistent with **clause 7.4.2** and **7.5** of this Undertaking.

~~7.4.2~~

- ~~(a)~~ If an Access Holder intends to undertake a Transfer of all or part of the Access Rights to itself or a third party (each a **Transferee**), the Access Holder must give Aurizon Network reasonable notice of its intention to do so (**Notice of Intention to Transfer**).

- ~~(b)~~ — A Notice of Intention to Transfer must:
- ~~(i)~~ — specify full details of the proposed Transfer including:
 - ~~(A)~~ — the Access Rights which the Access Holder proposes to Transfer (**Nominated Access Rights**) by describing:
 - ~~(1)~~ — the number and type of Train Services to be transferred; and
 - ~~(2)~~ — the existing origin and destination of the Nominated Access Rights;
 - ~~(B)~~ — the details of any changes to any nominations of a Train Operator previously given to take into account the proposed Transfer of the Nominated Access Rights;
 - ~~(C)~~ — the date (which is at least two (2) Business Days after the date Aurizon Network receives the Notice of Intention to Transfer) on which the transfer of the Nominated Access Rights is to take effect (**Transfer Date**);
 - ~~(D)~~ — the date on which the transfer of the Nominated Access Rights is to terminate (if any); and
 - ~~(E)~~ — all Access Agreements the Access Holder (or its Customer or Train Operator, as applicable) may have relating to the origin and destination of the Nominated Access Rights; and
 - ~~(ii)~~ — be accompanied by an Access Application completed by the Transferee which must, as a minimum, contain:
 - ~~(A)~~ — the Access Rights the Transferee proposes to acquire from the Access Holder (**Transferred Access Rights**) by describing:
 - ~~(1)~~ — the number and type of Train Services the Transferee proposes to acquire;
 - ~~(2)~~ — the origin and destination for the Transferred Access Rights;
 - ~~(3)~~ — if the Transferred Access Rights require Capacity in addition to the Available Capacity that will be created by the relinquishment of the Nominated Access Rights as part of the proposed Transfer;
 - ~~(B)~~ — evidence that the Transferee (or its Customer, if any) has secured, or is reasonably likely to secure, Supply Chain Rights for the Transferred Access Rights from the Transfer Date;

- ~~(C) either:~~
 - ~~(1) evidence that the Transferee has secured or is reasonably likely to secure a rail haulage agreement for the Transferred Access Rights from the Transfer Date; or~~
 - ~~(2) the details of any changes to any nominations of a Train Operator previously given to take into account the proposed Transfer of the Transferred Access Rights; and~~
- ~~(D) all Access Agreements the Transferee (or its Customer or Train Operator, as applicable) may have to which the Transferred Access Rights could be added (if any).~~
- ~~(c) The Access Application to be completed and submitted by the Transferee under **clause 7.4.2(b)(ii)**:~~
 - ~~(i) must be an Access Application in the form required to satisfy **Part 4** for the Transferred Access Rights if the Transferee (or its Customer or Train Operator) does not have an existing Access Agreement to which the Transferred Access Rights could be added; or~~
 - ~~(ii) may be a short form Access Application that provides the information required in **clause 7.4.2(b)(ii)** if the Transferee (or its Customer or Train Operator) does have an existing Access Agreement to which the Transferred Access Rights could be added.~~
- ~~(d) If either:~~
 - ~~(i) the Transferee does not have an existing Access Agreement to which the Transferred Access Rights could be added; or~~
 - ~~(ii) **clause 7.4.2(e)** or **clause 7.4.2(f)** does not apply;~~

~~then, subject to this **Part 7** (which prevails to the extent of any inconsistency), the negotiation process for those Transferred Access Rights will be conducted in accordance with **Part 4**. For clarity and without limiting the provisions of **Part 4** that apply to the Access Application, nothing in this **clause 7.4.2** affects the application of **clauses 4.3(f)** and **4.12(a)(ii)** to the Access Application.~~
- ~~(e) Aurizon Network must, within two (2) Business Days after receipt of the Notice of Intention to Transfer, effect the transfer of the Nominated Access Rights to the Transferee in accordance with **clause 7.4.2(h)** if:~~
 - ~~(i) the Transferee (or its Customer or Train Operator) has an existing Access Agreement in respect of the nominated origin and destination for the Transferred Access Rights;~~

- ~~(ii) — the Transferee has provided evidence reasonably establishing it (or its Customer) will have Supply Chain Rights;~~
- ~~(iii) — the Transferee has provided the details of any changes to any nominations of a Train Operator previously given to take into account the Transferred Access Rights on and from the Transfer Date;~~
- ~~(iv) — the origin for the Transferred Access Rights is on the same Mainline Path as the Nominated Access Rights and is either the same origin as the Nominated Access Rights or closer to the destination for the Nominated Access Rights;~~
- ~~(v) — the destination for the Transferred Access Rights is the same as the destination for the Nominated Access Rights; and~~
- ~~(vi) — the Train Services for the Transferred Access Rights is the same as the nature or type of Train Services for the Nominated Access Rights.~~
- ~~(f) — Aurizon Network must, within two (2) Business Days after receipt of the Notice of Intention to Transfer, notify the Access Holder and the Transferee that a Rapid Capacity Assessment is required and commence that Rapid Capacity Assessment if:

 - ~~(i) — the Transferee (or its Customer or Train Operator) has an existing Access Agreement in respect of the nominated origin and destination for the Transferred Access Rights;~~
 - ~~(ii) — the Transferee has provided evidence reasonably establishing it (or its Customer) will have Supply Chain Rights;~~
 - ~~(iii) — the Transferee has provided the details of any changes to any nominations of a Train Operator previously given to take into account the Transferred Access Rights on and from the Transfer Date;~~
 - ~~(iv) — the Transferred Access Rights use the same Mainline Path as the Nominated Access Rights;~~
 - ~~(v) — the origin for the Transferred Access Rights requires Access Rights in addition to the Nominated Access Rights;~~
 - ~~(vi) — the destination for the Transferred Access Rights is in the same port precinct as the destination for the Nominated Access Rights; and~~
 - ~~(vii) — the Train Services for the Transferred Access Rights is the same as the nature or type of Train Services for the Nominated Access Rights,~~~~

~~and on completion of the Rapid Capacity Assessment (which must be completed within two (2) Business Days from the commencement of the Rapid Capacity Assessment):~~

~~(viii) — Aurizon Network must promptly notify the Access Holder and the Transferee of the result of the Rapid Capacity Assessment;~~

~~(ix) — if the Rapid Capacity Assessment indicates there is sufficient Available Capacity (if the Nominated Access Rights is deemed to be Available Capacity for the purposes of the Rapid Capacity Assessment) for the Transferred Access Rights, Aurizon Network must effect the transfer of the Nominated Access Rights to the Transferee in accordance with **clause 7.4.2(e)**; and~~

~~(x) — if the Rapid Capacity Assessment indicates there is insufficient Available Capacity (if the Nominated Access Rights is deemed to be Available Capacity for the purposes of the Rapid Capacity Assessment) for the Transferred Access Rights, the Access Holder may request Aurizon Network to conduct a detailed assessment of the Notice of Intention to Transfer, in which case, **clause 7.4.2(h)** (excluding **clause 7.4.2(h)(iv)**) will apply.~~

~~(g) — If **clauses 7.4.2(e)** or **7.4.2(f)** do not apply, Aurizon Network must:~~

~~(i) — within two (2) Business Days after receipt of the Notice of Intention to Transfer, notify the Access Holder and the Transferee that a detailed assessment of the Notice of Intention to Transfer must be undertaken and the date it anticipates that assessment will be completed;~~

~~(ii) — provide its final review and either consent to or not consent to the proposed Transfer within three (3) Months after receipt of the Notice of Intention to Transfer; and~~

~~(iii) — effect the Transfer of the Nominated Access Rights to the Transferee in accordance with **clause 7.4.2(e)** if:~~

~~(A) — the Transferred Access Rights are granted under a new or varied Access Agreement between Aurizon Network and the Transferee that:~~

~~(1) — has been negotiated and agreed in accordance with the requirements of this Undertaking; and~~

~~(2) — (except for a condition in relation to the grant of the Transferred Access Rights taking effect under this **clause 7.4.2**) is unconditional and binding upon the Transferee;~~

- ~~(B)~~ the Transferee has demonstrated to the reasonable satisfaction of Aurizon Network that the Transferee:
 - ~~(1)~~ will hold, or will have the benefit of, Supply Chain Rights from the Transfer Date utilising the Transferred Access Rights; and
 - ~~(2)~~ is reasonably likely to continue to hold, or have the benefit of, those Supply Chain Rights for the whole of the Transfer Period (including as a result of a right to renew or extend the Supply Chain Rights); and
- ~~(C)~~ the Rail Infrastructure has sufficient Available Capacity (if the Nominated Access Rights is deemed to be Available Capacity) for the Transferred Access Rights without another Access Holder being adversely affected.
- ~~(h)~~ If Aurizon Network effects the Transfer of the Nominated Access Rights to the Transferee under any of **clauses 7.4.2(e), (f) or (g)**, then on and from the later of:
 - ~~(i)~~ the Transfer Date;
 - ~~(ii)~~ if **clause 7.4.2(f)** applies, two (2) Business Days after completion of the Rapid Capacity Assessment; and
 - ~~(iii)~~ the date the last of the conditions set out in **clause 7.4.2(i)** is satisfied,
(or such later date agreed by the Access Holder, the Transferee and Aurizon Network):
 - ~~(iv)~~ the Nominated Access Rights are removed from the Access Holder's (or its Customer's or Train Operator's, as applicable) Access Agreement which:
 - ~~(A)~~ relates to Train Services in respect of the origin and destination of the Nominated Access Rights; and
 - ~~(B)~~ was entered into first in time as determined on the following basis:
 - ~~(1)~~ a Pre 30 June 2006 Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement;
 - ~~(2)~~ a Pre 1 October 2010 Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement excluding a Pre 30 June 2006 Coal Access Agreement; and

- ~~(3) a Pre-Approval Date Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement excluding a Pre-30 June 2006 Coal Access Agreement or a Pre-1 October 2010 Coal Access Agreement; and~~
- ~~(v) the Transferred Access Rights are granted to the Transferee for the Transfer Period under the Access Agreement nominated by or entered into by the Transferee except if the Transferee has more than one existing Access Agreement to which the Transferred Access Rights could be added, the Transferred Access Rights must be added to the Access Agreement that was entered into last in time as determined on the following basis:
 - ~~(A) a Pre-30 June 2006 Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement;~~
 - ~~(B) a Pre-1 October 2010 Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement excluding a Pre-30 June 2006 Coal Access Agreement;~~
 - ~~(C) a Pre-Approval Date Coal Access Agreement is deemed to have been entered into prior to any other Access Agreement excluding a Pre-30 June 2006 Coal Access Agreement or a Pre-1 October 2010 Coal Access Agreement.~~~~
- ~~(i) Transfer of the Nominated Access Rights under any of **clauses 7.4.2(e), (f) or (g)**, is conditional on the following being satisfied:
 - ~~(i) Aurizon Network and the Access Holder entering into an agreement, in a form reasonably acceptable to the Access Holder and Aurizon Network, to vary the terms of the Access Holder's Access Agreement to address the relinquishment of the Nominated Access Rights (including any variations to the Access Charge Rates);~~
 - ~~(ii) if the Transferred Access Rights are being granted under an existing Access Agreement between Aurizon Network and the Transferee, Aurizon Network and the Transferee entering into an agreement, in a form reasonably acceptable to the Transferee and Aurizon Network, to vary the terms of that Access Agreement to accommodate the Transferred Access Rights including:
 - ~~(A) any variations to the Access Charge Rates; and~~~~~~

- ~~(B) — the provision of security or additional security in respect of the Transferred Access Rights as a result of the transfer of the Transferred Access Rights, to the extent that Aurizon Network, acting reasonably, requires that security or additional security;~~
- ~~(iii) — if the Transferred Access Rights are being granted under a new Access Agreement between Aurizon Network and the Transferee, that Access Agreement:

 - ~~(A) — has been negotiated and agreed in accordance with the requirements of this Undertaking; and~~
 - ~~(B) — (except for a condition in relation to the grant of the Transferred Access Rights taking effect under this **clause 7.4.2**) is unconditional and binding upon the Transferee; and~~~~
- ~~(iv) — the Transferee providing Aurizon Network with security in respect of the Transferred Access Rights to the extent that Aurizon Network, acting reasonably, requires that security or additional security.~~
- ~~(j) — If Aurizon Network determines it cannot effect the proposed Transfer under any of **clauses 7.4.2(e), (f) or (g)**, it must provide reasons with its notice to the Access Holder and the Transferee to explain its decision.~~
- ~~(k) — If an Access Holder requests Aurizon Network to amend an Access Agreement to permit the Transfer of its Access Rights in accordance with this **clause 7.4.2** and Aurizon Network agrees, within three (3) Months of that request, Aurizon Network and the Access Holder must enter into an agreement, in a form reasonably acceptable to Aurizon Network and the Access Holder, to vary the terms of the Access Agreement to incorporate the terms of this **clause 7.4.2** (including a right to require security or additional security in respect of Transferred Access Rights if the Access Holder's Access Rights are increased as a result of a transfer of Access Rights).~~
- ~~(l) — Within three (3) Months of the anniversary of the Commencing Date, Aurizon Network must:

 - ~~(i) — undertake a review of the operation of this **clause 7.4.2**;~~
 - ~~(ii) — consult with Access Holders and Train Operators about the workability of this **clause 7.4.2**; and~~
 - ~~(iii) — submit to the QCA either:

 - ~~(A) — proposed amendments to this **clause 7.4.2** that Aurizon Network (acting reasonably) considers necessary to improve the workability of the transfer of Access Rights; or~~~~~~

~~(B) — detailed written reasons for not making amendments to this **clause 7.4.2**,~~

~~in which event:~~

~~(iv) — the QCA must assess Aurizon Network's submission and, if deemed appropriate, seek submissions from stakeholders in respect of Aurizon Network's submission;~~

~~(v) — if the QCA approves the amendments proposed by Aurizon Network, it must give notice to Aurizon Network of its approval, specifying a date upon which the proposed amendments will take effect; and~~

~~(vi) — if either:~~

~~(A) — the QCA does not approve the amendments proposed by Aurizon Network;~~

~~(B) — Aurizon Network does not make any submission under **clause 7.4.2(l)(iii)** within the applicable timeframe; or~~

~~(C) — the QCA disagrees with Aurizon Network's reasons provided under **7.4.2(l)(iii)(B)**,~~

~~then the QCA may develop amendments to this **clause 7.4.2** to improve the workability of the transfer of Access Rights.~~

~~(m) — Nothing in **clause 7.4.2(l)** prevents Aurizon Network from seeking amendments to this **clause 7.4.2** to improve its workability, even if the QCA has previously refused to approve proposed amendments to this clause.~~

~~(n) — Subject to **clause 7.4.2(q)**, an Access Holder must pay a Transfer Fee to Aurizon Network if:~~

~~(i) — a Transfer is for a period of more than three (3) Months in length;~~

~~(ii) — both the Nominated Access Rights and the Transferred Access Rights are not for coal-carrying services; or~~

~~(iii) — the Reference Tariff used to calculate the Access Charge for the Nominated Access Rights is not the same as that used to calculate the Access Charge for the Transferred Access Rights.~~

~~(o) — Aurizon Network must:~~

~~(i) — calculate the Transfer Fee; and~~

~~(ii) — notify the Access Holder of the amount of the Transfer Fee and how the Transfer Fee was calculated, including details of any assumptions made when calculating the Transfer Fee and reasons for those assumptions;~~

at the following times:

~~(iii) — if the Access Holder is considering Transferring some or all of the Access Rights but has not given Aurizon Network a Notice of Intention to Transfer in respect of those Access Rights, promptly following a request by the Access Holder; and~~

~~(iv) — if the Access Holder has given Aurizon Network a Notice of Intention to Transfer, not less than five (5) Business Days before the Transfer Date.~~

~~(p) — The Transfer Fee is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges for the relevant Train Service Types that would have been payable for the remainder of the term of the relevant Access Agreement assuming:~~

~~(i) — the Nominated Access Rights were not transferred; and~~

~~(ii) — the Train Services were not operated for the Access Holder for a reason other than Aurizon Network Cause;~~

~~(PV Amount) less the amount which is the product of the PV Amount and the Reduction Factor.~~

~~(q) — Despite any other provision in this **clause 7.4.2**, if the Transfer Fee is calculated to be an amount that is less than zero, then the Transfer Fee will be zero.~~

~~(r) — If the Access Holder has not paid (or commenced a dispute in respect of the calculation of) the Transfer Fee within twenty (20) Business Days after the latest of:~~

~~(i) — the Transfer Date;~~

~~(ii) — the date Aurizon Network gives the Access Holder a notice under **clause 7.4.2(o)(ii)**;~~

~~(iii) — the date that Aurizon Network gives the Access Holder a valid tax invoice in respect of the Transfer Fee; and~~

~~(iv) — in respect of payment only, the date any dispute regarding the calculation of the Transfer Fee is determined;~~

~~then Aurizon Network may give the Access Holder a notice (**Transfer Cancellation Notice**) with respect to Nominated Access Rights specified in the Notice of Intention to Transfer in which case:~~

~~(v) — the Notice of Intention to Transfer is deemed to have never been given by the Access Holder; and~~

~~(vi) — the Nominated Access Rights that were the subject of the Notice of Intention to Transfer will not be Transferred to the Transferee.~~

~~(s) The giving of a Transfer Cancellation Notice in respect of the Transfer of Nominated Access Rights does not prevent the Access Holder from subsequently giving Aurizon Network a new Notice of Intention to Transfer in respect of the same Nominated Access Rights.~~

~~(t) For clarity, a change in the nomination of a Train Operator by an Access Holder does not constitute a Transfer.~~

7.4.3 *Relinquishments*

- (a) If an Access Holder wishes to relinquish any of its Access Rights it must give Aurizon Network reasonable notice of its intention (**Notice of Intention to Relinquish**).
- (b) A Notice of Intention to Relinquish must specify:
 - (i) the Access Rights, by reference to each Train Service Type, which the Access Holder intends to relinquish (**Nominated Access Rights**); and
 - (ii) the date (**Relinquishment Date**) on which the Nominated Access Rights are to be relinquished (provided that such Relinquishment Date must not be more than two (2) Years after the date on which the Access Holder gives the Notice of Intention to Relinquish to Aurizon Network).
- (c) Nominated Access Rights the subject of a Notice of Intention to Relinquish will not be relinquished until the later of:
 - (i) the date upon which the Access Holder pays the Relinquishment Fee to Aurizon Network; and
 - (ii) the Relinquishment Date.
- (d) Aurizon Network must:
 - (i) calculate the Relinquishment Fee; and
 - (ii) notify the Access Holder of the amount of the Relinquishment Fee and how the Relinquishment Fee was calculated, including details of any assumptions made when calculating the Relinquishment Fee and reasons for those assumptions ([provided that Aurizon Network is not required to breach any duty of confidentiality owed to a third party](#)),at the following times:
 - (iii) if the Access Holder is considering relinquishing some or all of the Access Rights but has not given Aurizon Network a Notice of Intention to Relinquish in respect of those Access Rights, promptly following a request by the Access Holder; and
 - (iv) if the Access Holder has given Aurizon Network a Notice of Intention to Relinquish, not less than five (5) Business Days before the Relinquishment Date.

- ~~(e)~~ The Relinquishment Fee is the amount ~~calculated as follows:~~
- ~~(i)~~ for coal carrying Train Services included in Pre 30 June 2006 Coal Access Agreements 40%, of the Access Charges that would be payable if the Access Holder operated the Train Services permitted by the Nominated Access Rights over the following two (2) year period less the product of that amount and the Reduction Factor; or
- ~~(ii)~~~~(e)~~ in all other cases, the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate TOP Charges for the relevant Train Service Types that would have been payable for the remainder of the term of the relevant Access Agreement assuming:
- ~~(A)~~~~(i)~~ the Nominated Access Rights were not relinquished; ~~and~~
- ~~(ii)~~ the relevant Train Services were not operated for the Access Holder for a reason other than Aurizon Network Cause; ~~and~~
- ~~(B)~~~~(iii)~~ a Take or Pay liability will exist for each applicable year,
- [AN note: The clause which referred to Pre-30 June 2006 Coal Access Agreements has been deleted because it is not relevant to the calculation of the Relinquishment Fee under UT4 Access Agreements.]
- [AN note: The above clause has been included to avoid any doubt that Aurizon Network is entitled to assume that TOP Charges will be payable in every applicable year.]
- (PV Amount) less the amount which is the product of the PV Amount and the greater of:
- ~~(C)~~~~(A)~~ 0.5; and
- ~~(D)~~~~(B)~~ the Reduction Factor.
- (f) Despite any other provision in this ~~clause 7.4.3~~~~7.4.3~~, if the Relinquishment Fee is calculated to be an amount that is less than zero, then the Relinquishment Fee will be zero.

7.4.4 *General provisions*

- (a) Aurizon Network must act in a diligent and timely manner in dealing with a proposed Transfer requested under clause 7.4.2 or relinquishment requested under 7.4.3.
- (b) If the calculation of the Transfer Fee or Relinquishment Fee changes after the date of the notice under ~~clause 1.1.1(a)(i)~~~~7.4.2(o)(ii)~~ or 7.4.3(d)(ii)~~7.4.3(d)(ii)~~, but before the Transferor or Access Holder (as applicable) (Payor) has paid the amount in the notice, then:
- (i) Aurizon Network must advise the Payor~~Access Holder~~ of the revised amount and full reasons for the change in the calculation; and

- (ii) the ~~Payor Access Holder~~ must pay the revised amount, unless the Payor has already paid the amount in the notice and:
 - (A) the amount paid by the Payor is less than the revised amount, in which case, the Payor ~~it has already paid~~ must pay the difference between the amount in the notice and the revised amount; or
 - (B) the amount paid by the ~~Access Holder~~ Payor is in excess of the revised amount, in which case, Aurizon Network must refund the excess amount to the ~~Access Holder~~ Payor.

(c) In calculating the Transfer Fee, ~~or~~ Relinquishment Fee or Reduction Factor, Aurizon Network:

- (i) may make reasonable assumptions about those future events so as to calculate the maximum amount of aggregate TOP Charges for the relevant Train Service Types that could potentially be payable, provided that:
 - (A) if an Access Charge Rate is based on a Reference Tariff, Aurizon Network must not make assumptions about the amount of future Reference Tariffs applicable to that Access Charge Rate; and
 - (B) if an Access Charge Rate has been determined in accordance with the pricing principles in Part 6 of the Undertaking, where there is not yet a Reference Tariff for the Access Charge Rate but it is reasonably anticipated by Aurizon Network that a Reference Tariff applicable to that Access Charge Rate will be made or approved, Aurizon Network may make reasonable assumptions about the amount of the anticipated Reference Tariff and the variation that Aurizon Network could make to that Access Charge Rate to apply in the future in accordance with **schedule 4** of the relevant Access Agreement (if applicable) when the anticipated Reference Tariff is made or approved;

~~(e)(ii) may assume Aurizon Network may assume~~ that each of the Access Charge Rates (as at the Transfer Date or Relinquishment Date, as applicable) will escalate, on each 1 July, at the rate of 2.5% per annum for the remainder of the term of the relevant Access Agreement.

(d) The Reduction Factor is the amount calculated as follows:

- (i) if:
 - (A) an Access Holder (or, in the case of a Transfer, the Customer of an Access Holder) (**Existing Access**

Holder) has requested to Transfer or relinquish Nominated Access Rights under clause 7.4.2 or 7.4.3;

~~(A)~~(B) an ~~new~~ Access Holder or a Transferee (New Access Holder) has executed an Access Agreement (or a variation to an existing Access Agreement) in respect of Access Rights that Aurizon Network could not have provided without using the whole or part of the Nominated Access Rights; and

~~(B)~~(C) Aurizon Network's provision of the Access Rights under that Access Agreement commenced, for a ~~new~~ New Access Holder:

- (1) who is not a Transferee, ~~after Aurizon Network was given the Notice of Intention to Relinquish, but prior to the payment to it of the Relinquishment Fee on and from the date the Nominated Access Rights are relinquished under clause 7.4.3(c)~~; or
- (2) who is a Transferee, on and from the date Nominated Access Rights are Transferred under clause 7.4.2(h) Transfer Date,

then:

~~(C)~~(D) for the purposes of **clauses 1.1.1(a)**~~7.4.2(p)~~ and 7.4.3(e)~~7.4.3(e)(ii)~~, if:

- (1) the relevant Train Services of the Eexisting Access Holder and of the New Access Holder ~~or Transferee~~ are coal carrying Train Services; and
- (2) the ~~Transferee's or n~~ New Access Holder's Train Services that will use the Nominated Access Rights will operate predominantly in and have a Nominated Unloading Facility in the same Coal System as the Train Services of the ~~existing~~ Existing Access Holder that used those Nominated Access Rights,

an amount calculated as follows:

TOPB / TOPA

where:

TOPA is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate Take or Pay amounts that would

have been payable for the remainder of the term of the Access Agreement (***Remainder of the Original Term***) if the Nominated Access Rights were not relinquished but the ~~E~~existing Access Holder did not operate the relevant Train Services for a reason other than Aurizon Network Cause; and

TOPB is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the aggregate Take or Pay amounts that would be payable in accordance with the ~~new-New Access Holder's or Transferee's~~ Access Agreement (in relation to the ~~whole or part of the Nominated Access Rights~~) referred to in clause 7.4.4(d)(i)(B) if the ~~new-New Access Holder's or Transferee's~~ Train Services using ~~the Nominated those~~ Access Rights were not operated by or for the ~~N~~ew Access Holder ~~or Transferee~~ during the same period as the Remainder of the Original Term for a reason other than Aurizon Network Cause; or

~~(D)~~(E) for the purposes of clauses 7.4.2(j) and 7.4.3(e), if ~~clause 7.4.4(d)(i)(D)~~~~7.4.4(d)(i)(C)~~ does not apply, an amount calculated as follows:

A / B

where:

A is the annual train kilometres over the Common Corridor attributable to the ~~new~~ New Access Holder's ~~or Transferee's~~ Train Services in respect of which Access Rights could not have been provided without using the ~~whole or part of the Nominated~~ Access Rights referred to in clause 7.4.4(d)(i)(B); and

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

provided that to the extent that the ~~new~~ New Access Holder's average contribution to Common Costs per train kilometre for its relevant Train Services is less than the ~~existing~~ Existing Access Holder's average contribution to Common Costs per train kilometre for its relevant Train Services, the Reduction Factor will be decreased in proportion to that relative contribution; and

- (ii) if **clause 7.4.4(d)(i)**~~7.4.4(d)(i)~~ does not apply, zero (0).
- (e) If the Reduction Factor is calculated in accordance with ~~this Undertaking~~ **clause 7.4.4(d)(i)(E)** and the Reference Tariff in relation to the Nominated Access Rights includes a System Discount or System Premium, then the Transfer Fee or Relinquishment Fee, as applicable, must be further adjusted by Aurizon Network to account for any consequential decrease or increase (as applicable) in the System Discount or System Premium (as applicable) that would otherwise result in Aurizon Network under-recovering or over-recovering (as applicable) amounts as part of the Transfer Fee or Relinquishment Fee (as applicable) from the Access Holder due to the application of the System Discount or System Premium (as applicable).
- (f) Aurizon Network must maintain, on its Website, worked examples of the calculation of a Relinquishment Fee.
- (g) The Access Holder may dispute in accordance with the dispute resolution provisions under the Access Agreement the calculation of the Transfer Fee or Relinquishment Fee notified by Aurizon Network to the Transferor or Access Holder (as applicable) under **clause 1.1.1(a)(i)**~~7.4.2(e)(ii)~~ or **7.4.3(d)(ii)**~~7.4.3(d)(iii)~~ (including any assumptions made by Aurizon Network) and if the dispute is not resolved by authorised representative resolution under those dispute resolution provisions, then:
 - (i) either party may refer the dispute to an expert for determination under those dispute resolution provisions; and
 - ~~(g)~~(ii) in determining the Transfer Fee, Relinquishment Fee and Reduction Factor, the expert must make reasonable assumptions that Aurizon Network was entitled to make in calculating the Transfer Fee, Relinquishment Fee and Reduction Factor under **clause 7.4.4(c)**.

7.5 **Short Term Transfers**

7.5.1 Application

- (a) Short Term Transfers will take effect under the Short Term Transfer Provisions. This **clause 7.5** operates in conjunction with the Short Term Transfer Provisions and is intended to provide transparency, certainty and consistency for Access Holders in respect of key aspects of the process and requirements to be satisfied for a proposed Short Term Transfer to occur. This **clause 7.5** has no effect in relation to an Access Agreement that does not contain a Short Term Transfer Provision.
- (b) For the purposes of this Access Undertaking:
 - (i) a Short Term Transferee is not an Access Seeker in relation to the relevant Short Term Transfer;

- (ii) a Short Term Transfer Notice is not an Access Application; and
- (iii) a Short Term Transfer is only available for coal carrying Train Services.
- (c) **Part 4, Part 5** and this **Part 7** (other than this **clause 7.5**) do not apply in respect of the process for giving effect to a Short Term Transfer.
- (d) Short Term Transfers must not result in Aurizon Network being adversely affected in relation to any Access Conditions that apply in connection with the proposed Nominated Access Rights.

7.5.2 Transfer Notice requirements

- (a) A Short Term Transfer Notice given under Short Term Transfer Short Term Provisions must comply with the requirements in this **clause 7.5.2**.

Timing for giving notice

- (b) A Short Term Transfer Notice must only be given:
 - (i) not less than 48 hours, and not more than 7 Business Days prior to the close of Train Orders for the first day of the proposed Short Term Transfer Period (**Pre-Ordering Short Term Transfer Notice**); or
 - (ii) any time after Train Services for a Relevant Period have been scheduled in the ITP until the end of that Relevant Period (**Post-Scheduling Short Term Transfer Notice**) if it appears that there is capacity in the ITP to accommodate the proposed Short Term Transfer.

Form of notice

- (c) A Short Term Transfer Notice must be in the form required by Aurizon Network as published on the Website. The form will cover the matters to be addressed in accordance with this **clause 7.5.2**.

Specifying the Short Term Transferee

- (d) A Short Term Transfer Notice must specify the Access Holder to whom it is proposed to Short Term Transfer the Nominated Access Rights (**Short Term Transferee**).

Specifying the Nominated Access Rights

- (e) Subject to **clauses 7.5.2(f) to (g)**, a Short Term Transfer Notice must specify the Nominated Access Rights, including:
 - (i) the existing origin and destination for the Nominated Access Rights;
 - (ii) the date on which the Nominated Access Rights are proposed to be Short Term Transferred (**Short Term Transfer Date**) which must be:

- (A) for a Pre-Ordering Short Term Transfer Notice, the first day of the first Relevant Period relating to the Short Term Transfer; and
- (B) for a Post-Scheduling Short Term Transfer Notice, a day during the Relevant Period referred to in **clause 7.5.2(b)(ii)**;
- (iii) the Relevant Periods for which the Nominated Access Rights are proposed to be Short Term Transferred (**Short Term Transfer Period**), which must:
 - (A) for a Pre-Ordering Short Term Transfer Notice relating to more than one Relevant Period, be comprised of consecutive Relevant Periods;
 - (B) for a Post-Scheduling Short Term Transfer Notice, end on the last day of the Relevant Period referred to in **clause 7.5.2(b)(ii)**; and
- (iv) the Train Service Entitlements for the Nominated Access Rights for each Relevant Period, which must:
 - (A) be an even number of whole Train Services (each Train Service being a one way Train Service); and
 - (B) for each Relevant Period during the proposed Short Term Transfer Period, not exceed the Notional Relevant Period Train Services for the Relevant Period.
- (f) The Nominated Access Rights for a Post-Scheduling Short Term Transfer Notice must not relate to a Train Service that has already been scheduled in the relevant ITP.
- (g) Where an Access Holder has Train Service Entitlements (under one or more Access Agreements) with the same origin but having different dates of grant (being the dates on which the Access Agreements granting those Train Service Entitlements were signed – each being a **Date of Grant**), then:
 - (i) the Train Service Entitlements will be grouped into separate tranches based on the Date of Grant (each being a **TSE Tranche**); and
 - (ii) the Nominated Access Rights for a proposed Short Term Transfer by that Access Holder will firstly be drawn from the TSE Tranche with the earliest Date of Grant until there are no remaining applicable Train Service Entitlements in that TSE Tranche and then from the TSE Tranche with the next earliest Date of Grant in the sequence and so on.

Using a range for Nominated Access Rights

(h) A Short Term Transfer Notice may, if applicable, describe the number of Train Services for the Nominated Access Rights as a range with a maximum and a minimum (**Nominated Range**).

(i) Where:

(i) the Short Term Transfer Notice includes a Nominated Range; and

(ii) Aurizon Network:

(A) would give a Short Term Transfer Refusal Notice based on the maximum Nominated Access Rights; but

(B) would not give a Short Term Transfer Refusal Notice if the Short Term Transfer related to less than the maximum number of Train Services in the Nominated Range.

then:

(iii) Aurizon Network must give the Access Holder and proposed Short Term Transferee a notice (**Nominated Access Rights Notice**) specifying the number of Train Services referred to in **clause 7.5.2(i)(ii)(B)**;

(iv) Aurizon Network must ensure that the number of Train Services specified in a Nominated Access Rights Notice is as high as possible; and

(v) a Nominated Access Rights Notice to be given under **clause 7.5.2(i)(iii)** must be given no later than the date by which a Short Term Transfer Refusal Notice would have been given.

(j) Where a Nominated Access Rights Notice is given, the proposed Short Term Transfer will take effect based on the Nominated Access Rights specified in that Nominated Access Rights Notice as though the Short Term Transfer Notice was specifically for those Nominated Access Rights.

(k) Where:

(i) the Short Term Transfer Notice includes a Nominated Range; and

(ii) neither a Nominated Access Rights Notice nor a Short Term Transfer Refusal Notice has been given,

the proposed Short Term Transfer will take effect based on the maximum Nominated Access Rights specified in the relevant Nominated Range.

Specifying the Short Term Origin and Short Term Destination

(l) A Short Term Transfer Notice must specify the origin of the Short Term Access Rights (**Short Term Origin**) and the destination (which must be the same, or located at the same port, as the destination for the Nominated Access Rights) for the Short Term Access Rights (**Short Term Destination**). For the purpose of this **clause 7.5.2(l)**, each of the following is a port:

- (i) Port of Abbot Point;
- (ii) Port of Hay Point;
- (iii) Port of Gladstone (the RG Tanna Coal Terminal and Barney Point Coal Terminal but excluding the Wiggins Island Coal Export Terminal); and
- (iv) Port of Gladstone (the Wiggins Island Coal Export Terminal only).

[AN note: This clause may require amendment if the Reference Tariff for all terminals Port of Gladstone are the same.]

Specifying the Short Term Transferee's Access Agreement

(m) Subject to **clause 7.5.2(n)**, a Short Term Transfer Notice must specify the relevant Access Agreement under which the Short Term Access Rights are proposed to be granted (**Short Term Transferee's Access Agreement**).

(n) The Short Term Transferee's Access Agreement:

- (i) must have existing Train Service Entitlements from the Short Term Origin and Short Term Destination; and
- (ii) where there is more than one relevant Access Agreement, must be the most recently executed of those Access Agreements.

Pre-compliance with operational requirements

(o) A Short Term Transfer can only occur where:

- (i) the Short Term Transferee has satisfied all of the requirements of the Short Term Transferee's Access Agreement and, if applicable, the Short Term Transferee Train Operations Deed that are required to be satisfied prior to the operation of a Train Service utilising the Short Term Access Rights if the Short Term Transfer occurs;
- (ii) by reference to the loading facility capability that has been agreed between Aurizon Network and access holders prior to the relevant Short Term Transfer Notice being provided to Aurizon Network, the loading facility will, if the Short Term Transfer occurs, have sufficient available capacity to load Train Services utilising the Short Term Access Rights within

the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that loading facility; and

- (iii) by reference to the unloading facility capability that has been agreed between Aurizon Network and access holders prior to the relevant Short Term Transfer Notice being provided to Aurizon Network, the unloading facility will, if the Short Term Transfer occurs, have sufficient available capacity to unload Train Services utilising the Short Term Access Rights within the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that unloading facility.

Reference Tariff

- (p) The Short Term Access Rights for a proposed Short Term Transfer must be subject to Access Charges that are set by reference to the same Reference Tariff as the relevant Nominated Access Rights.
- (q) Nothing in **clause 7.5.2(p)** permits Aurizon Network to set Access Charges relating to proposed Short Term Access Rights by reference to a Reference Tariff other than the Reference Tariff that would be applicable in accordance with **Part 6** and **Schedule F**.

Specifying the new operator

- (r) The Short Term Transfer Notice must specify the Train Operations Deed under which the Short Term Access Rights are proposed to be utilised (**Short Term Transferee Train Operations Deed**).
- (s) The Short Term Transfer Notice must specify the nominated Railway Operator who is proposed to operate Train Services utilising the Short Term Access Rights.

Accompanying consents

- (t) A Short Term Transfer Notice must be accompanied by:
- (i) except where the Short Term Transferee is also the person who gave the relevant Short Term Transfer Notice, the written consent of the Short Term Transferee to the grant of the Short Term Access Rights to it under the Short Term Transfer Provisions of the Short Term Transferee's Access Agreement;
- (ii) where the Short Term Transferee Operator is not the Short Term Transferee, written confirmation from the Short Term Transferee Operator that:
- (A) if the Short Term Transfer takes effect, it has sufficient available capacity to operate Trains that comply with the Short Term Access Rights within

the timeframes and in the manner contemplated in the Short Term Transferee's Access Agreement or Short Term Transferee Train Operations Deed (as applicable), assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services which it operates; and

(B) it has agreed with the Short Term Transferee that it will, if requested by the Short Term Transferee, operate Train Services utilising 100% of the Short Term Access Rights; and

(iii) in relation to the loading facility that will load Train Services utilising the Short Term Access Rights, written confirmation from the loading facility's operator (**Loading Facility Confirmation**) that:

(A) if the Short Term Transfer takes effect, the loading facility will have sufficient available capacity to load those Train Services within the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that loading facility; and

(B) where that operator is not the Short Term Transferee, it has agreed with the Short Term Transferee that it will, if requested, load the relevant Train Services; and

(iv) in relation to the unloading facility that will unload Train Services utilising the Short Term Access Rights, written confirmation from the unloading facility's operator (**Unloading Facility Confirmation**) that:

(A) if the Short Term Transfer takes effect, the unloading facility will have sufficient available capacity to unload those Train Services within the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that unloading facility; and

(B) where that operator is not the Short Term Transferee, it has agreed with the Short Term Transferee that it will, if requested, unload the relevant Train Services.

7.5.3 Short Term Transfer Refusal Notice

- (a) If an Access Holder gives Aurizon Network a Short Term Transfer Notice, then Aurizon Network may:
- (i) for a Pre-Ordering Short Term Transfer Notice, prior to the close of Train Orders for the first day of the proposed Short Term Transfer Period; and
 - (ii) for a Post-Scheduling Short Term Transfer Notice, prior to the Short Term Transfer Date specified in the Short Term Transfer Notice,
- give the Access Holder and proposed Short Term Transferee a notice refusing a proposed Short Term Transfer (**Short Term Transfer Refusal Notice**).
- (b) Aurizon Network may only give a Short Term Transfer Refusal Notice in respect of a proposed Short Term Transfer if:
- (i) the Short Term Transfer or the Short Term Transfer Notice does not comply with one or more of the requirements under **clause 7.5.2** or the relevant Short Term Access Provisions;
 - (ii) the destination for the proposed Short Term Access Rights is different to the destination for the Nominated Access Rights;
 - (iii) Aurizon Network is not satisfied, acting reasonably, by reference to the load out capability that the loading facility for the Train Services that are to utilise the proposed Short Term Access Rights will have sufficient available capacity to load those Train Services within the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that loading facility;
 - (iv) Aurizon Network is not satisfied, acting reasonably, by reference to the unloading capability that the unloading facility for the Train Services that are to utilise the proposed Short Term Access Rights will have sufficient available capacity to unload those Train Services within the timeframes and in the manner contemplated in the relevant Access Agreements, assuming 100% utilisation of the Short Term Access Rights and all other Access Rights for Train Services using that unloading facility;
 - (v) the Short Term Access Rights include Short Term Ancillary Access Rights and Aurizon Network is not satisfied, acting reasonably, that the Available Capacity of any part of the relevant Rail Infrastructure during the Short Term Transfer Period will be sufficient to enable:

- (A) the grant of the Short Term Ancillary Access Rights; and
- (B) the utilisation of the Short Term Access Rights,
- (C) without adversely affecting the Train Service Entitlements of all other Access Holders;
- (vi) Aurizon Network is not satisfied, acting reasonably, that the proposed Short Term Transferee for the proposed Short Term Transfer has a genuine intention or ability to utilise the Short Term Access Rights; or
- (vii) Aurizon Network is not satisfied, acting reasonably, that the Short Term Transfer will not adversely affect Aurizon Network in relation to any Access Conditions that apply in connection with the proposed Nominated Access Rights.

7.5.4 Mutually Exclusive Short Term Transfers

Where:

- (a) Aurizon Network has received more than one Short Term Transfer Notice that require Short Term Ancillary Access Rights; and
- (b) there is insufficient Available Capacity to permit all of those proposed Short Term Transfers,

then for the purpose of Aurizon Network considering which of those proposed Short Term Transfers should be given a Short Term Transfer Refusal Notice under **clause 7.5.3**, subject to the requirements under this **clause 7.5**, those Short Term Transfer Notices received earlier in time will be given priority for the Available Capacity. For clarity, Short Term Transfers that do not require Short Term Ancillary Access Rights will not be affected by this **clause 7.5.4** as those Short Term Transfers do not give rise to a contest for Available Capacity.

7.5.5 Past Access Agreements

- (a) Aurizon Network will notify all Access Holders with existing Access Agreements that provisions for Short Term Transfers have been included in Standard Access Agreements and that Aurizon Network has undertaken under **clause 7.5.5(b)** to agree to amend existing Access Agreements to include equivalent provisions.
- (b) Where, after receiving a notice under **clause 7.5.5(a)**, an Access Holder notifies Aurizon Network that it wishes to amend its Access Agreement to include a provision that is in all material respects equivalent to clause [40] of the Standard Access Agreement, Aurizon Network will prepare, and provide to the Access Holder, an appropriate variation agreement and, if executed by the Access Holder, execute that variation agreement.

7.5.6 Compliance

Aurizon Network is taken to have complied with this **clause 7.5** and is not liable under the Act or otherwise to any person provided Aurizon Network has made

[a good faith and reasonable attempt to comply with the relevant provisions of this clause 7.5.](#)

7.6 Mutually Exclusive Access Applications

[AN note: Clause 7.6 not included in this extract.]

7.7 Capacity resumption

(a) _____ If:

(a)(i) _____ ~~an Access Holder~~ for any reason other than ~~the occurrence of a Force Majeure Event or an Aurizon Network Cause~~ [the failure of Aurizon Network to make the Access Rights for the Train Services available](#) ~~does not~~:

(i)(A) _____ for Cyclic Traffic, ~~cause the operation of~~ at least eighty five percent (85%) of the Train Services [granted under an Access Holder's Access Agreement are not operated](#) ~~allowed under the Access Holder's Train Service Entitlement~~ during each Quarter, for four (4) consecutive Quarters; or

(B) _____ for Timetabled Traffic, cause the operation of a Train Service on a Scheduled Train Path seven (7) or more (not necessarily consecutive) times out of any twelve (12) consecutive occasions on which that particular Scheduled Train Path exists; [or](#)

(ii) [an Underutilisation Event occurs in respect of a Train Service Type,](#)

[AN note: See Aurizon Network's submission in relation to the [resumption of Access Rights due to the occurrence of an Underutilisation Event.](#)]

(each a **Resumption Trigger Event**), Aurizon Network may, ~~within forty (40) Business Days after the Resumption Trigger Event,~~ [give](#) that Access Holder notice (**Information Request Notice**) of:

- (iii) reasonable details of the Resumption Trigger Event;
- (iv) the Access Rights for the Train Service Type which Aurizon Network considers to be ~~underutilised~~ [Underutilised](#) Access Rights for the Train Service Type in respect of the Resumption Trigger Event;
- (v) that Aurizon Network is considering resuming the whole or part of the [U](#)nderutilised Access Rights for the Train Service Type ~~to the extent of that underutilisation;~~
- (vi) requesting the Access Holder to demonstrate a sustained requirement for the ~~underutilised~~ [Underutilised](#) Access Rights; and

- (vii) reasonable details of Aurizon Network's reasonable expectation of a sustained alternative demand for the Capacity used by ~~the whole or part of the Underutilised~~ Access Rights ~~in question~~.

For clarity:

- (viii) nothing in this **clause 7.7(a)7-6(a)** requires Aurizon Network to disclose any information that is not relevant to the Information Request Notice in respect of the Resumption Trigger Event or information that is commercially sensitive to the Aurizon Group; and
 - (ix) Aurizon Network will not be in breach of its obligations under **Part 3Part 3** when making a disclosure under this **clause 7.7(a)7-6(a)** provided that the information disclosed is relevant to the resumption in question.
- (b) Aurizon Network must not give an Information Request Notice in respect of a Resumption Trigger Event for a Train Service Type specified in **clause 7.7(a)(i)(A)7-6(a)** more than forty (40) Business Days after the end of the applicable four (4) consecutive Quarters referred to in **clause 7.7(a)(i)(A)7-6(a)**.
 - (c) If Aurizon Network gives an Access Holder an Information Request Notice within the timeframe set out in **clause 7.7(a)7-6(a)**, the Access Holder must:
 - (i) within fifteen (15) Business Days after Aurizon Network gives the Information Request Notice to the Access Holder, provide to Aurizon Network the information requested in the Information Request Notice; and
 - (ii) if required by Aurizon Network, meet with Aurizon Network to discuss the suspected Resumption Trigger Event for the applicable Train Service Type.
 - (d) If an Information Request Notice is given to an Access Holder and:
 - (i) the Access Holder has not demonstrated, to Aurizon Network's reasonable satisfaction, a sustained requirement ~~for to utilise~~ the whole or part of the Underutilised Access Rights for the operation of Train Services ~~that were not utilised~~; and
 - (ii) Aurizon Network has demonstrated that it has a reasonable expectation of a sustained alternative demand for the whole or part of the Capacity used by whole or part of the Resumable Access Rights ~~in question~~,

then Aurizon Network may give a further notice (**Resumption Notice**) confirming the Resumption Date and that it will reduce that Access Holder's Access Rights from the Resumption Date by:

- (iii) for Cyclic Traffic, reducing the Access Holder's Access Rights to the extent ~~that the Access Holder's Train Service Entitlement was underutilised~~ of the Resumable Access Rights for which Aurizon Network has a reasonable expectation of a sustained alternative demand; or
 - (iv) for Timetabled Traffic, deleting the Scheduled Train Path referred to in **clause 7.7(a)(i)(B)7.6(a)(ii)** from the Access Holder's Train Service Entitlement.
- (e) A Resumption Notice must:
- (i) not be given before the end and not more than twenty (20) Business Days after the end of the fifteen (15) Business Day period in **clause 7.7(c)(i)7.6(c)(i)**; and
 - (ii) specify:
 - (A) full details of the Access Rights for the Train Service Type to be resumed (**Resumed Access Rights**); and
 - (B) the date on which the resumption will take effect (which must be at least ten (10) Business Days after the Resumption Notice is given to the Access Holder) (**Resumption Date**).
- (f) If a valid Resumption Notice is given under this **clause 7.7-6**, the ~~underutilised Access Rights~~ Resumed Access Rights for the Train Service Type will cease to form part of the Access Rights for the Train Service Type on and from the Resumption Date (other than for the purpose of calculating any TOP Charges that are payable as a result of the non-utilisation of any of the Resumed Access Rights prior to the Resumption Date).
- (g) Aurizon Network may withdraw a Resumption Notice prior to the later of the Resumption Date and fourteen (14) days after the determination of any dispute in relation to the Resumption Notice.
- ~~(h) If Aurizon Network resumes an Access Holder's Access Rights in accordance with this **clause 7.6**, then the Access Charge payable by the Access Holder will be varied in accordance with the terms of the relevant Access Agreement and the Access Agreement will be varied accordingly.~~
- [AN note: The above clause was deleted because resumption should trigger a variation of Access Charges.]
- ~~(h)~~ (h) The Access Holder may dispute in accordance with the dispute resolution provisions under the Access Agreement a ~~if there is a dispute in connection with a~~ decision by Aurizon Network to:
- (i) issue an Information Request Notice ~~and if~~ the Access Holder considers that Aurizon Network had insufficient grounds to do so under **clause 7.7(a)7.6(a)**; and

- (ii) resume an Access Holder's Access Rights in accordance with this **clause 7.7.6**,

~~then~~ and:

- (iii) if the dispute is not resolved by authorised representative resolution under those dispute resolution provisions, either party may refer the dispute to an expert for determination under those dispute resolution provisions; and
- (iv) Aurizon Network must not implement the resumption until the dispute resolution process under the Access Agreement has been concluded, and then only to the extent that such resumption is consistent with the outcomes of the dispute resolution process.

~~7.7 Force majeure~~

~~7.7.1 Suspension of obligations~~

- ~~(a) If, by reason of a Force Majeure Event, Aurizon Network is prevented or hindered from providing, whether wholly or in part, Access Rights under an Access Agreement, then for the purposes of that Access Agreement, the obligations of Aurizon Network to provide Access Rights will be suspended during that time to the extent that the performance of such obligations is prevented or hindered by the Force Majeure Event if Aurizon Network notifies (by electronic means or in accordance with **clause 12.3**) the Access Holder as soon as reasonably practicable after Aurizon Network becomes aware of the Force Majeure Event (and, in any event, within forty eight (48) hours after the event or circumstance causing the Force Majeure Event) of the Force Majeure Event including:
 - ~~(i) details of the Force Majeure Event and (if applicable) that part of the Nominated Network affected or likely to be affected; and~~
 - ~~(ii) the details of the obligations affected or likely to be affected.~~~~
- ~~(b) If the notice provided in **clause 7.7.1(a)** is either in electronic form or does not include the following information, Aurizon Network must provide the Access Holder with a further notice which contains full particulars of all relevant matters including (in addition to the information in **clause 7.7.1(a)**):
 - ~~(i) details of the action Aurizon Network has taken to remedy the situation and details of the action that Aurizon Network proposes to take to remedy the situation (to the extent that they are known); and~~
 - ~~(ii) a reasonable estimate of the time during which Aurizon Network will be (or is likely to be) prevented or hindered from carrying out, whether wholly or in part, its obligations under the Access Agreement due to the Force Majeure Event,~~~~

~~within two (2) Business Days of the notice provided under **clause 7.7.1(a)**.~~

- ~~(c) — if the notice is not provided in accordance with **clause 7.7.1(a)** or **7.7.1(b)**, then for the purposes of the relevant Access Agreement, the obligations of Aurizon Network to provide Access Rights under the Access Agreement will be suspended on and from the later of the time the notice requirements of **clause 7.7.1(a)** and **7.7.1(b)** are satisfied.~~
- ~~(d) — Aurizon Network must:
 - ~~(i) — include the affected Access Holder (and its Customer, if any) and its Train Operator, if any, in any meeting which Aurizon Network may have in respect of the Force Majeure Event; and~~
 - ~~(ii) — provide a copy of any notice given to the Access Holder to that Access Holder's Customer, if any, and Train Operator, if any.~~~~

~~**7.7.2 — Duty to mitigate**~~

- ~~(a) — Subject to **clause 7.7.2(b)**, Aurizon Network must use all reasonable endeavours to remedy or overcome the effect of the Force Majeure Event affecting its obligations to provide Access Rights under an Access Agreement as soon as possible and must attempt to:
 - ~~(i) — mitigate the effect of the Force Majeure Event; and~~
 - ~~(ii) — identify alternative viable means of providing the Access Rights affected (if applicable).~~~~
- ~~(b) — Aurizon Network is not obliged to settle any strike, lockout or other labour dispute other than on terms acceptable to it.~~

~~**7.7.3 — End of period of Force Majeure Event**~~

~~The suspension of the obligations of Aurizon Network due to a Force Majeure Event ends when, but only to the extent that, Aurizon Network is no longer prevented or hindered from providing, whether wholly or in part, Access Rights under an Access Agreement by reason of the relevant Force Majeure Event, at which time Aurizon Network must as soon as reasonably practicable:~~

- ~~(a) — issue a notice to each affected Access Holder advising the extent to which it is recommencing the performance of its obligations; and~~
- ~~(b) — recommence the performance of its obligations to the extent outlined in such notice.~~

~~**7.7.4 — Reduction of Access Rights due to loss or damage to Nominated Network**~~

- ~~(a) — If:
 - ~~(i) — any part of the Nominated Network is damaged or destroyed by a Force Majeure Event; and~~~~

~~(ii) — in Aurizon Network’s reasonable opinion the cost of repairing such damage or destruction or replacing that part of the Nominated Network is not economic on the basis of the then and committed future utilisation of that part of the Nominated Network;~~

~~then Aurizon Network may, by notice, advise each affected Access Holder (and its Customer, if applicable), each affected Train Operator and the QCA of:~~

~~(iii) — the estimated cost of effecting the necessary repairs or replacement;~~

~~(iv) — the level of insurance available to effect the necessary repairs and replacement;~~

~~(v) — a detailed explanation as to why the cost of repairing or replacing is not economic; and~~

~~(vi) — Aurizon Network’s intention to not repair or replace the relevant part of the Nominated Network unless the Access Holders (or their Customers or Train Operators, as applicable) using that part of the Nominated Network pay the difference between the amount of insurance available to effect the necessary repairs or replacement and the actual anticipated cost to effect those repairs or replacements.~~

~~(b) — If the Access Holder (or its Customer or Train Operator, as applicable) notifies Aurizon Network that:~~

~~(i) — it agrees to bear the whole incremental cost of necessary repairs or replacement (after the amount of insurance available has been applied); or~~

~~(ii) — it agrees to bear that part requested by Aurizon Network of the incremental cost of necessary repairs or replacement (and subject to Aurizon Network being satisfied that all other relevant Access Holders (or their Customers or Train Operators, as applicable) have also agreed to bear their respective part of such costs) (after the amount of insurance available has been applied);~~

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

~~(iii) — if **clause 7.7.4(b)(i)** applies, receipt by Aurizon Network from the Access Holder (or its Customer) of payment of the relevant amount; and~~

~~(iv) — if **clause 7.7.4(b)(ii)** applies, receipt by Aurizon Network from the Access Holder (or its Customer) of the last payment of the relevant amount.~~

~~(c) If an Access Holder (or its Customer or Train Operator, as applicable) pays to Aurizon Network any of the costs under **clause 7.7.4(b)**, on completion of the necessary repairs or replacement:~~

~~(i) Aurizon Network must, within a reasonable time, refund to the party who made such payment any amount by which the amount paid that party exceeds the actual cost; or~~

~~(ii) the Access Holder (or its Customer or Train Operator, if applicable) must, within a reasonable time, pay to Aurizon Network the amount by which the actual cost exceeds proportionately the amount agreed to be paid by that party,~~

~~(as applicable).~~

~~(d) If, within forty (40) Business Days after receipt of a notice from Aurizon Network under **clause 7.7.4(a)**, the Access Holder (or its Customer or Train Operator, as applicable) has not given notice to Aurizon Network under **clause 7.7.4(b)**, then Aurizon Network may, by giving not less than twenty (20) Business Days' notice to the Access Holder (**Nominated Network FM Reduction Notice**), reduce the Access Rights by the Access Rights affected by the Force Majeure Event, in which case, those Access Rights will cease to form part of the Access Rights of the Access Holder on and from the date specified in the notice (which must be at least twenty (20) Business Days from the date of the notice).~~

Part 8: Network development and Expansions

- 8.1 Overview
- 8.2 General principles
- 8.3 Undertaking Concept Studies, Pre-feasibility Studies and Feasibility Studies
- 8.4 Funding Concept Studies, Pre-feasibility Studies and Feasibility Studies
- 8.5 Provisional Capacity Allocation
- 8.6 Step-in where Aurizon Network fails to enter into Studies Funding Agreement or delay doing so
- 8.7 Funding an Expansion
- 8.8 User Funded Expansions
- 8.9 Contracting for Capacity

8.9.1 Application

- (a) This clause 8.9 only applies in respect of a Train Service Type if the Train Description for that Train Service Type under the Access Agreement specifies that this clause 8.9 applies in respect of that Train Service Type.
- (b) If this clause 8.9 applies in respect of a Train Service Type, this clause 8.9 only applies to the extent that it:
 - (i) is not inconsistent with the Access Undertaking; and
 - (ii) does not oblige Aurizon Network to do or not do anything that would cause Aurizon Network to breach the Access Undertaking.

~~8.9.18.9.2~~ Access Agreements conditional on an Expansion

[AN note: This clause should not be included as a Conditional Access Provision under the Access Agreement as it is not relevant to the operation of the Access Agreement. It is not included in this extract.]

~~8.9.28.9.3~~ Capacity analysis

- (a) ~~If Aurizon Network grants Access Rights (**Conditional Access Rights**) to Access Seekers (**Conditional Access Holders**) that are conditional on an Expansion being completed and commissioned, then~~ Aurizon Network will, no more than six (6) Months following commissioning of the Expansion, undertake an assessment of the change in Existing Capacity for each Segment of the Expansion arising as a result of that Expansion (**Capacity Change**) after the Expansion is commissioned by calculating the Capacity Change as:

- (a)(i) the Existing Capacity of the Segment at the time; less
- (b)(ii) the Existing Capacity of ~~the system~~ the Segment in the absence of the Expansion,

using consistent System Operating Parameters.

[AN note: The preliminary words in the above clause have been deleted because clause 8.9.1 governs the application of clause 8.9 (including this clause). The capacity assessment should be on a Segment-by-Segment basis.]

- (b) Aurizon Network may defer an assessment under clause 8.9.3(a) in respect of an Expansion until such time as Aurizon Network reasonably considers that the Expansion is fully operational and the demand conditions are such that a reasonable assessment can be undertaken.
- (c) Aurizon Network must notify all of the relevant Conditional Access Holders and the QCA of the conclusions of that assessment and the basis for those conclusions.

8.9.38.9.4 Capacity shortfall

[AN note: This clause should not be included as a Conditional Access Provision under the Access Agreement as it is not relevant to the operation of the Access Agreement. It is not included in this extract.]

8.9.48.9.5 Funding a Shortfall Expansion

[AN note: This clause should not be included as a Conditional Access Provision under the Access Agreement as it is not relevant to the operation of the Access Agreement. It is not included in this extract.]

8.9.58.9.6 Reduction of Conditional Access Rights due to Capacity Shortfall

- (a) ~~If clause 8.9 only applies in respect of a Train Service Type~~if an Access Agreement nominates a Train Service Type as being conditional on completion and commissioning of an Expansion, then:
- (i) the Access Rights for that Train Service Type under the Access Agreement are Conditional Access Rights for that Train Service Type; and
- (ii) despite the Train Service Commitment Date specified in the Train Description for the Conditional Access Rights, the Train Service Commitment Date for the Conditional Access Rights will be taken to be the later of:
- (A) the Train Service Commitment Date for the Conditional Access Rights specified in the Train Description for the Conditional Access Rights; and
- (B) the date upon which all Segments are completed and commissioned.

(b) If Aurizon Network’s assessment under **clause 8.9.3** indicates that there is a Capacity Shortfall in relation to a Segment of an Expansion, then:

~~(b)(i)~~ ~~Where clause 8.9.3(a)(i) applies,~~ the Reduced Conditional Access Rights for a Segment which has a Capacity Shortfall will be calculated in accordance with the following formula:

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

where:

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

EAR = the lesser of:
(a) the sum of CC and IAC; and
(b) $\sum \text{CAR}_{(\text{Original})}$,
(expressed as a number of Train Services)

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

IAC = the amount (expressed as a number of Train Services) specified as the “Initial Available Capacity” for the Segment in the Train Description for the Conditional Access Rights in the relevant Access Agreement

$\text{CAR}_{(\text{Original})}$ = the Conditional Access Rights (expressed as a number of Train Services) in the relevant Access Agreement

$\sum \text{CAR}_{(\text{Original})}$ = the sum of:
(i) the Conditional Access Rights (expressed as a number of Train Services) in the relevant Access Agreements; and
(ii) for each other Conditional Access Holder for the Segment of the Expansion, the other Conditional Access Holder’s other Conditional Access Rights for the Expansion (expressed as a number of Train Services) in each of their Access Agreements.

~~(i)(ii)~~ within thirty (30) days after the completion of Aurizon Network’s assessment under **clause 8.9.3-8.9.2**, Aurizon Network must give each Affected Access Holder a notice (**Capacity Assessment Notice**) which specifies:

(A) the Conditional Access Rights;

- (B) the amount of the Capacity Change for each Segment of the Expansion;
 - (C) whether or not there is a Capacity Shortfall in respect of any Segment of the Expansion; and
 - (D) if there is a Capacity Shortfall in respect of any Segment of the Expansion, the Reduced Conditional Access Rights for each such Segment of the Expansion (calculated in accordance with the formula in **clause 8.9.6(b)8.9-5(b)**), including reasonable details of the calculation of the Reduced Conditional Access Rights for each Segment.
- (c) The Conditional Access Rights in the relevant Access Agreement will be taken to be varied to the lowest of the Reduced Conditional Access Rights for ~~a~~the Segments of the Expansion as:
- (i) specified in the Capacity Assessment Notice; or
 - (ii) as agreed or determined through the dispute resolution process under the Access Agreement,
- with effect on the later of:
- (iii) twenty (20) Business Days from receipt by the Access Holders of the Capacity Assessment Notice; and
 - (iv) [if the Capacity Assessment Notice has been referred to the QCA for resolution of a Dispute, ten (10) Business Days after the Dispute is agreed or determined.]
- [AN note: This provision remains subject to the final UT4 position in relation to the scope of disputes which are governed by Part 11 (Dispute resolution and decision making).]

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Part 12 Definitions and Interpretation

12.1 Definitions

[AN note: We have included definitions which should be amended or deleted as a consequence of other amendments in this extract of the Access Undertaking. We have not included definitions which are required to be amended to update clause references in the definition.]

In this Undertaking these terms have the following meanings:

Access Application	A written request for Access: (a) using the application form for such requests published on the Website from time to time; and (b) which satisfies: (i) the information requirements set out in Schedule B and Part 4 ; and (ii) any additional information or clarification requested by Aurizon Network in accordance with Part 4 , <u>excluding a Short Term Transfer Notice.</u>
Access Seeker	Subject to clause 4.8(a) and unless expressed to the contrary, the entity that provides Aurizon Network with a properly completed Access Application (<u>which, for the avoidance of doubt, does not include a Short Term Transferee</u>).
Affected Access Holder	An Access Holder whose <u>Conditional</u> Access Rights are affected <u>reduced under clause 8.9.6</u> by a Capacity Shortfall .
<u>AN Initiated Proposal</u>	<u>The meaning given to that term in clause 5.4(c).</u>
<u>Ancillary Access Rights</u>	<u>Access Rights (that will use Available Capacity without the need for an Expansion or Customer Specific Branch Line) that are ancillary to Transferred Access Rights to the extent required by a Transferee, in addition to Transferred Access Rights, to provide complete Train Paths using the Transferred Access Rights for the Transferee's origin to destination.</u>
Aurizon Network Cause	Where Aurizon Network is unable to make Rail Infrastructure available for the operation of Train Services in accordance with any Access Holder's Train Service Entitlement, as a result of: (a) Planned Possessions, Emergency Possessions

or Urgent Possessions; or

~~(b)~~ ~~an Operational Constraint; or~~

~~(e)~~(b) any other action by Aurizon Network which directly resulted in the Rail Infrastructure not being so available,

where such inability by Aurizon Network is not attributable:

(c) to an Access Holder, a Railway Operator or a Railway Operator's customer (including a Customer);

~~(a)~~(d) to Aurizon Network complying with its Passenger Priority Obligations;

~~(b)~~(e) to the unavailability of the relevant Access Holder's loading facility or an unloading facility;

~~(e)~~(f) to the failure to load a Train at the relevant Access Holder's loading facility within the maximum time at loading facility (as specified in the relevant Access Agreement) for that Train Service, or unload a Train at the relevant Access Holder's unloading facility within the maximum time at unloading facility (as specified in the relevant Access Agreement) for that Train Service; or

~~(d)~~(g) in respect of a Train Service that will operate on Private Infrastructure prior to entering and/or after exiting the Rail Infrastructure as part of its journey, to the unavailability of, or cancellation of train services on, that Private Infrastructure.

**Common
Corridor**

That part of the Rail Infrastructure that:

(a) either:

- (i) would be utilised by a Railway Operator to operate Train Services for the Existing Access Holder utilising the Nominated Access Rights if not Transferred or relinquished under clauses 7.4.2 or 7.4.3; or
- (ii) if the Existing Access Holder has not nominated a Railway Operator to operate Train Services utilising the Nominated Access Rights, would have been utilised by a Railway Operator had the Existing Access Holder nominated a Railway Operator to operate the relevant Train Services utilising the

Nominated Access Rights if not Transferred or relinquished under clauses 7.4.2 or 7.4.3;
and

~~(A)~~(b) will also be utilised by the ~~Transferee's~~ New Access Holder's Train Services.

Conditional Access Holders

~~The meaning given to that term in clause 8.9.2.~~ Access Holders that have been granted Access Rights under Access Agreements that are conditional upon an Expansion being completed and commissioned.

Conditional Access Rights

~~The meaning given to that term in clause 8.9.2.~~ Access Rights granted to Conditional Access Holders under an Access Agreement which are conditional upon the Expansion being completed and commissioned.

Date of Grant

The meaning given to that term in clause 7.5.2(g).

Environmental Risks

All risks to the environment (as defined under the EP Act) arising or potentially arising from the Access Seeker's or Access Holder's or Train Operator's proposed operations (including risks associated with the matters identified in clause 2.2 of Schedule C~~item 3 of schedule 7 of the Train Operations Deed~~).

Existing Access Holder

The meaning given to that term in clause 7.4.4(d)(i)(A).

~~Force Majeure Provisions~~

~~The provisions outlined in clause 7.7.~~

Inspecting Party

The meaning given to that term in clause 4.1 of Schedule C.

Loading Facility Confirmation

The meaning given to that term in clause 7.5.2(t)(iii).

New Access Holder

The meaning given to that term in clause 7.4.4(d)(i)(B).

Nominated Access Rights

As applicable:

(a) in **clause 7.4.2** (Transfers), the meaning given to that term in **clause 7.4.2(b)(i)(A)**; ~~and~~

(b) in **clause 7.4.3** (Relinquishments), the meaning given to that term in **clause 7.4.3(b)(i)**; ~~and~~

~~(b)~~(c) for a Short Term Transfer, the Access Rights that the relevant Access Holder proposes to Short Term Transfer excluding any Short Term Access Rights from a prior Short Term Transfer.

Nominated Access Rights

The meaning given to that term in clause 7.5.2(i)(iii).

Notice

~~Nominated
Network FM
Reduction Notice~~

~~The meaning given to that term in **clause 7.7.4(d)**.~~

Nominated
Range

The meaning given to that term in **clause 7.5.2(h)**.

Notional
Relevant Period
Train Services

For Train Service Entitlements for the Nominated Access Rights for a Relevant Period, the number of Train Services calculated as the sum of $NRPTS_{M1} + NRPTS_{M2}$, where:

(a) $NRPTS_{M1}$ equals:

$$\frac{Days_{RPM1} \times NMTS_{M1}}{Days_{M1}}$$

rounded down to the nearest even number of whole Train Services;

(b) $NRPTS_{M2}$ equals:

$$\frac{Days_{RPM2} \times NMTS_{M2}}{Days_{M2}}$$

rounded down to the nearest even number of whole Train Services (provided that if the Relevant Period is wholly within Month 1, $NRPTS_{M2}$ will be zero);

(c) $Days_{RPM1}$ is the number of days of the relevant Relevant Period within a Month (**Month 1**) (provided that where the Relevant Period is not wholly within one Month, Month 1 will be the earliest Month within which the Relevant Period occurs);

(d) $NMTS_{M1}$ is the Nominated Monthly Train Services for Month 1;

(e) $Days_{M1}$ is the number of days in Month 1;

(f) $Days_{RPM2}$ is the number of days of the relevant Relevant Period within the Month after Month 1 (**Month 2**);

(g) $NMTS_{M2}$ is where the Relevant Period is not wholly within one Month, the Nominated Monthly Train Services for Month 2; and

(h) $Days_{M2}$ is where the Relevant Period is not wholly within one Month, the number of days in

Month 2.

<u>Payor</u>	The meaning given to that term in <u>clause 7.4.4(b).</u>
<u>Post-Scheduling Short Term Transfer Notice</u>	The meaning given to that term in <u>clause 7.5.2(b)(ii).</u>
<u>Pre-Ordering Short Term Transfer Notice</u>	The meaning given to that term in <u>clause 7.5.2(b)(i).</u>
<u>QCA Request</u>	The meaning given to that term in <u>clause 5.4(b).</u>
Reduction Factor Provisions	The provisions set out in <u>clause 7.4.4(d).</u>
Relinquishment Provisions	The provisions set out in <u>clause 7.4.3.</u>
<u>Requested Ancillary Access Rights</u>	The meaning given to that term in <u>clause 7.4.2(b)(i)(F).</u>
<u>Resumable Access Rights</u>	Any part of the Underutilised Access Rights specified in an Information Request Notice which the Access Holder does not demonstrate, to Aurizon Network's reasonable satisfaction within the time period required under <u>clause 7.7(c)(i), that the Access Holder has a sustained requirement to utilise for the operation of Train Services.</u>
Resumption Provisions	The provisions set out in <u>clause 7.6.</u>
<u>Short Term Access Rights</u>	The Nominated Access Rights and the Short Term Ancillary Access Rights (if any) for the relevant Short Term Transfer.
<u>Short Term Ancillary Access Rights</u>	Access Rights (that will use Available Capacity without the need for an Expansion or Customer Specific Branch Line) that are ancillary to the Nominated Access Rights to the extent required by the Short Term Transferee, in addition to the Nominated Access Rights, to operate Train Services from the Short Term Origin to the Short Term Destination (and vice versa) using the Nominated Access Rights.
<u>Short Term Destination</u>	The meaning given to that term in <u>clause 7.5.2(l).</u>
<u>Short Term Transfer</u>	A variation of Access Rights in accordance with relevant Short Term Transfer Provisions and to the extent applicable <u>clause 7.5.</u>

<u>Short Term Transfer Date</u>	<u>The meaning given to that term in clause 7.5.2(e)(ii).</u>
<u>Short Term Transfer Refusal Notice</u>	<u>The meaning given to that term in clause 7.5.3(a).</u>
<u>Short Term Transfer Notice</u>	<u>A notice for a proposed Short Term Transfer given by an Access Holder to Aurizon Network in accordance with clause 7.5 and the Short Term Transfer Provisions in that Access Holder's Access Agreement.</u>
<u>Short Term Origin</u>	<u>The meaning given to that term in clause 7.5.2(l).</u>
<u>Short Term Transfer Period</u>	<u>The meaning given to that term in clause 7.5.2(e)(iii).</u>
<u>Short Term Transfer Provisions</u>	<u>The provisions of a relevant Access Agreement that are expressly acknowledged and agreed in that Access Agreement by the relevant Access Holder and Aurizon Network to be 'Short Term Transfer Provisions'.</u>
<u>Short Term Transferee</u>	<u>The meaning given to that term in clause 7.5.2(d).</u>
<u>Short Term Transferee's Access Agreement</u>	<u>The meaning given to that term in clause 7.5.2(m).</u>
<u>Short Term Transferee Train Operations Deed</u>	<u>The meaning given to that term in clause 7.5.2(r).</u>
<u>Short Term Transferee Operator</u>	<u>The Railway Operator that is proposed to operate Train Services utilising the Short Term Access Rights.</u>
Transfer	The transfer by an Access Holder of all or part of its Access Rights (<u>excluding any Short Term Access Rights</u>) to another party, <u>but does not include a Short Term Transfer.</u>
Transfer Period	<u>The meaning given to that term in clause 7.4.2(b)(i)(C).The period commencing on the Transfer Date and ending on the date on which the transfer of the Nominated Access Rights is terminated (if any).</u>
<u>Transferee Access Agreement</u>	<u>The meaning given to that term in clause 7.4.2(d)(v).</u>

Transfer Provisions

~~The provisions outlined in clauses 7.4.3 and 7.4.4.~~

Transferor

The meaning given to that term in **clause 7.4.2(a)(i) and 7.4.2(a)(ii)**.

Transferred Adjustment Charges

The meaning given to that term in **clause 7.4.2(d)(viii)(B)**.

TSE Tranche

The meaning given to that term in **clause 7.5.2(g)(i)**.

Underutilisation Event

for a Train Service Type means any cause, event or circumstance, or combination of causes, events or circumstances, other than the failure by Aurizon Network to make the Access Rights for the Train Service Type available, which will, or will likely, have a sustained or permanent and material adverse impact on the Access Holders ability to utilise, or need to utilise, the Access Rights for that Train Service Type.

Underutilised Access Rights

means:

- (a) in respect of a Resumption Trigger Event in respect of a Train Service Type referred to in **clause 7.7(a)(i)(A)**, the portion of future Access Rights (rounded to the nearest even number of whole Train Services for that Train Service Type) which is equal to the average of the portions of the Access Rights for that Train Service Type which the Access Holder was entitled to nominate a Railway Operator to operate under its Access Agreement but which were not operated (including because no Railway Operator was nominated by the Access Holder to operate those Access Rights) in the applicable four consecutive Quarters referred to in **clause 7.7(a)**; and
- (b) in respect of a Resumption Trigger Event for a Train Service Type specified in **clause 7.7(a)(ii)**, the Access Rights for the Train Service Type which Aurizon Network considers, acting reasonably, were entitled to be utilised for the Access Holder but the Operator (or if there is more than one Operator, the Operators collectively) will be unable to utilise, or will not need to utilise, (including because no Operator has been nominated by the Access Holder to utilise those Access Rights) for the operation of Train Services for the Train Service Type for the

Access Holder as a consequence (whether direct or indirect) of the Underutilisation Event for the Train Service Type.

Unloading
Facility
Confirmation

The meaning given to that term in **clause 7.5.2(t)(iv).**

Schedule C

Operating and other plan requirements

1 Operating Plan

- (a) The following matters must, amongst others, be included in an Operating Plan.
- (b) An Operating Plan will adopt a three tiered presentation of information with information for the following categories:
 - (i) whole of network information that applies generally to the Train Services of the Access Seeker or the Access Holder (see **clause 1.1 below**);
 - (ii) Coal System specific information that applies to the Train Services of the Access Seeker or the Access Holder operating in that Coal System (see **clause 1.2 below**) but was not provided under **clause 1.3**; and
 - (iii) origin/destination pair specific information that applies to the Train Services of the Access Seeker or Access Holder for that origin/destination pair (**clause 1.3 below**) but was not provided under **clauses 1.1 or 1.2**.

1.1 Umbrella Central Queensland Coal Network information

The following information must be provided in an Operating Plan on a whole of network basis.

Area of Operation	<ul style="list-style-type: none">• Depot locations
Operation	<ul style="list-style-type: none">• Type of service (passenger, freight) or commodity• Dangerous goods details• Overload management system• Stowage locations held by the operator• Timing of scheduled servicing/provisioning activities• The maximum Rollingstock operational speed separately for loaded and empty Trains
Train Information	<ul style="list-style-type: none">• Safety systems• Communication systems
Information in compliance with	<ul style="list-style-type: none">• Rollingstock Interface Standard• Rollingstock and Rollingstock configuration details (number

standards and protocols	<ul style="list-style-type: none"> • of wagons, locomotives, carriages/self-propelled units) • Overload management standard • Load tables (including loads for Train Services and all relevant requirements and information in relation to the specification of those loads)
Crewing Plan	<ul style="list-style-type: none"> • Train Service crew requirements: • Location of crew depots • Crew change points • Dwell times at change points (minimum and maximum)
Recovery Methods	<ul style="list-style-type: none"> • Recovery of marked off Rollingstock at loading/unloading locations/en route • Recovery of derailments • Recovery of failed locomotive
Environmental impacts	<ul style="list-style-type: none"> • Profiling and veneering

1.2 Coal System specific information

- (a) The requirement for the information under this **clause 1.2** is in addition to **clause 1.1**.
- (b) The following information must be provided in an Operating Plan on Coal System basis, so that the information is provided separately for each relevant Coal System (as applicable).
- (c) For clarity, it is not necessary to repeat information already provided under **clause 1.1**.

Area of operation	<ul style="list-style-type: none"> • Origin and destination • Cycle description (including nominated stops en route) • Entry and exit points onto or off of Rail Infrastructure • Details regarding repositioning of Rollingstock (prior to, during and after operation of the Train Service) • Authority from Private Infrastructure manager to enter and/or exit the Private Infrastructure to enable use of Access Rights (where applicable)
Operation	<ul style="list-style-type: none"> • Description of any activities that may negatively impact main line running (e.g. shunting and reversing) • Dwell times at loading facility (minimum and maximum) • Dwell times at unloading facility (minimum and maximum)

- Dwell times en route and operational requirements (minimum and maximum)
- Indicative timetable requirements or sectional running times
- Train information**
- Type, class and number of locomotives per Train
- Maximum and average gross tonnage of loaded Train (including locomotives)
- Tare of empty Train
- Method of operation
- Traction type
- Train length
- Rollingstock and Rollingstock Configuration details (number of wagons/locomotives/carriages/self-propelled units)

1.3 Origin/destination pair specific information

- (a) The requirement for the information under this **clause 1.3** is in addition to **clauses 1.1** and **1.2**.
- (b) The following information must be provided in an Operating Plan on an origin/destination pair basis, so that the information is provided separately for each origin/destination pair of the relevant Train Services (as applicable).
- (c) For clarity, it is not necessary to repeat information already provided under **clauses 1.1** or **1.2**.

- Area of operation**
- Authority from Private Infrastructure manager to enter and/or exit the Private Infrastructure to enable use of Access Rights (where applicable)

- Operation**
- Special operating parameters (e.g. key arrival and departure windows)
- Any critical timings at specified locations
- Description of any activities that may negatively impact main line running (e.g. shunting and reversing)
- Load tables (including the loads for Train Services and all relevant requirements and information in relation to the specification of those loads)
- Additional information applying to the requested Train Service which differs from other Train Services on the same Coal System

2 Interface Risk Management Plan

2.1 General

- (a) As a Railway Manager, Aurizon Network is responsible for ensuring that the Interface Risks associated with the operation of Train Services on the Rail Infrastructure are managed appropriately.
- (b) For the purpose of identifying the Interface Risks posed by the operation of a particular Train Service on the Rail Infrastructure, and agreeing an IRMP for managing those Interface Risks, Aurizon Network, the Access Holder and the Train Operator must participate in a process that commences with an Interface Risk Assessment and culminates in an IRMP (**Interface Risk Management Process**).
- (c) In progressing the Interface Risk Management Process, Aurizon Network, the Access Holder and the Train Operator must:
 - (i) ensure that their representatives involved in the process have the appropriate competence to conduct the process in a diligent manner;
 - (ii) ensure that all relevant information, that is reasonably available, is provided to the other party on a timely basis to facilitate the process; and
 - (iii) ensure that all information provided is accurate.
- (d) The Interface Risk Management Process must be conducted for all new Train Services and for any variation to Train Services (including changes in the Operating Plan or Rollingstock specification). For the avoidance of doubt, a variation to an existing Train Services will not require a new IRMP and varying the existing IRMP for those Train Services will be satisfy the Interface Risk Management Process.
- (e) The IRMP must reflect the outcome of the Interface Risk Assessment. In particular, the IRMP will detail the controls agreed between Aurizon Network, the Access Holder and the Train Operator for the Interface Risks identified and assessed during the Interface Risk Assessment.
- (f) The IRMP must incorporate the audit, inspection and review regime set out below and must specify:
 - (i) the Safeworking Procedures and Safety Standards are applicable to the proposed operation;
 - (ii) the additional controls, including Rollingstock Interface Standards, ~~agreed between the parties~~ for the proposed operation; and
 - (iii) the particular party responsible for ensuring that the various elements of the IRMP are implemented and that the IRMP remains effective in addressing the Interface Risks it was developed to address.

- (g) The IRMP must be a schedule to the Train Operator's Train Operations Deed. If a Train Operations Deed has been negotiated before the finalisation of the IRMP, the implementation of the IRMP may require changes to the terms and conditions of the Train Operations Deed, and the parties must agree those changes.
- (h) If Aurizon Network and an Access Holder or a Train Operator agree that training of the Access Holder's or Train Operator's personnel (as applicable) is required as a control, or part of a control, ~~to~~ for a particular Interface Risk identified in the Interface Risk Assessment, and the Access Holder or Train Operator (as applicable) can only obtain that training from Aurizon Network, Aurizon Network must provide the Access Holder or Train Operator (as applicable) with that training (and Aurizon Network may recover ~~its~~ a reasonable ~~costs~~ commercial charge for providing such training).

[AN note: Aurizon Network has reinstated the drafting in clause 25.9 of its 2014 draft of the Train Operations Deed.]

2.2 Environmental matters

[AN note: These matters are referred to in the definition of "Environmental Risks" under the Access Undertaking by reference to item 3 of schedule 7 of the Train Operations Deed, however, that item has been deleted from the Standard Train Operations Deed. We have reinstated those obligations in the clause below and have amended the definition of "Environmental Risks" to refer to the clause below.]

(a) General

The matters identified in this **clause 2.2** are the minimum environmental matters that must be addressed by the parties in an Interface Risk Assessment. The parties' assessment of Environmental Risks in an Interface Risk Assessment should not be restricted to an assessment of the matters referred to in this **clause 2.2**.

(b) Water Quality Management

- (i) The Train Operator must comply with all relevant water quality standards when carrying out activities under or in connection with the Train Operations Deed.
- (ii) The Interface Risk Assessment must include an assessment of the impact of the Train Operator's proposed activities under or in connection with the Train Operations Deed on stormwater systems and natural waterways.

(c) Air Pollution Management

The Train Operator must consider the impact of its operations on air quality. In doing so, all relevant air quality standards and regulations should be met.

The Train Operator must undertake an Interface Risk Assessment which must consider the impact of the proposed operations on air quality. In doing so, all relevant air quality standards and regulations (including all requirements for coal train operators in Aurizon Network's 'Coal Dust Management Plan' (as defined in the Access Undertaking and as published on the Website from time to time) must be met.

The Interface Risk Assessment must assess the likelihood:

- (i) for dust and/or exhaust emissions from the proposed operations (including by reference to the type and chemical composition of the commodity being transported); and
 - (ii) of those dust and/or exhaust emissions causing nuisance at any dwelling or home, library, childcare centre, kindergarten, school, college, university or other educational institution and hospital, surgery or other medical institution.
- (d) Management of land contamination
- (i) The Train Operator must comply with all relevant Laws, standards and guidelines in relation to land contamination when carrying out activities under or in connection with the Train Operations Deed.
 - (ii) The Interface Risk Assessment must include an assessment of the likelihood that the Train Operator's proposed activities under or in connection with the Train Operations Deed (including the Train Operator's activities during accidents, incidents and emergencies) will cause or contribute to land contamination¹.
 - (iii) The Interface Risk Assessment must include all practicable control measures to prevent and manage land contamination.
- (e) Nature conservation
- The Interface Risk Assessment must include an assessment of:
- (i) the impact of the Train Operator's proposed activities under or in connection with the Train Operations Deed on flora and fauna including sensitive receptors in the vicinity of the Train Operator's proposed activities; and
 - (ii) the risks and controls associated with wildfires being caused by exhaust or sparks from the Train Operator's Rollingstock.
- (f) Management of Dangerous Goods
- (i) The Train Operator must comply with Aurizon Network's requirements for the management of hazardous contaminants (as defined in the EP Act) and Dangerous Goods.
 - (ii) The Interface Risk Assessment must include an assessment of the

¹ Land contamination is a reference to the 'contamination' of land by a 'hazardous contaminant' as those terms are defined under the Environmental Protection Act.

risks associated with the management of “Dangerous Goods” (as defined in the Standard Train Operations Deed) by the Train Operator.

(iii) The Interface Risk Assessment must address any risks associated with the management of Dangerous Goods that are not specifically addressed by the requirements of **clause [24.7]** of the Standard Train Operations Deed.

(g) Waste management

(i) The Train Operator must comply with all relevant Laws and the requirements of any Authority in relation to the collection, removal, transport and disposal of any waste generated by the activities of the Train Operator under or in connection with the Train Operations Deed.

(ii) The Interface Risk Assessment must include an assessment of the impact of any waste produced by the Train Operator’s proposed activities under or in connection with the Train Operations Deed.

(h) Environmental noise management

The Interface Risk Assessment must include an assessment of:

(i) the likely noise impacts attributable to the Train Operator’s proposed activities under or in connection with the Train Operations Deed; and

(ii) whether the Train Operator’s proposed activities under or in connection with the Train Operations Deed will comply with the “Noise Code” (as defined in the Train Operations Deed) or cause or contribute to any non-compliance with the Noise Code and detail all measures that will be taken to ensure that the Train Operator’s proposed activities under or in connection with the Train Operations Deed do not cause or contribute to any non-compliance with the Noise Code.

(i) Complaint Management

The Interface Risk Assessment must detail the Train Operator’s procedure for handling complaints that are received by the Train Operator as per the requirements of **clause [24.9]** of the Standard Train Operations Deed.

(i) Refuelling

The Interface Risk Assessment must include an assessment of the impacts associated with refuelling activities (including mobile refuelling) undertaken in connection with the Train Operator’s proposed activities under or in connection with the Train Operation Deed.

3 Environmental Management Plan

The Environmental Management Plan must specify (as a minimum):

- (a) the Environmental Risks identified in the IRMP from time to time and the measures in respect of those Environmental Risks specified in the IRMP from time to time of which the Train Operator is responsible for implementing, complying with, ensuring compliance with and/or ensuring the ongoing effectiveness;
- (b) processes for ensuring that the Train Operator at all times complies with all requirements imposed on it under Environmental Laws from time to time;
- (c) processes for ensuring that the Train Operator at all times complies with any requirements of the Environmental Authorities held by Aurizon Network from time to time that are relevant to the Train Operator's Train Services;
- (d) processes for ensuring that the Train Operator, its Rollingstock, Rollingstock Configurations and Train Services at all times comply with the requirements of this Agreement, including the IRMP and the Emergency Response Plan;
- (e) systems (including audit systems) and procedures to address and monitor all relevant Environmental Risks identified in the IRMP and to ensure compliance with all Environmental Laws;
- (f) the relevant roles, responsibilities and training of the [Train operator's-Operator's](#) staff involved in the implementation of the Environmental Management Plan; and
- (g) the following sections:

Introduction

- (i) Description of Operational Activities
- (ii) Purpose and Objectives of the Environmental Management Plan
- (iii) Description of Environmental Management Plan
- (iv) Operator's Environmental Policy

Environmental Management

- (v) Environmental Risks identified in the Interface Risk Assessment
- (vi) Legislation and Other Requirements
- (vii) Target/s

Implementation and Operation

- (viii) Responsibilities, Accountabilities & Authorities

- (ix) Competence, Training and Awareness
- (x) Internal and External Communication (including liaison with regulatory agencies)
- (xi) Document Control and Information / Record Management
- (xii) Emergency Preparedness and Management
- (xiii) Specific Procedures for identified environmental risks

Operational Activities Review Process

- (xiv) Monitoring And Measurement
- (xv) Evaluation Of Compliance / Audit
- (xvi) Management Review

Environmental Complaints & Incidents

- (xvii) Managing Environmental Incidents
- (xviii) Notification Of Environmental Incidents
- (xix) Managing Environmental Complaints

4 Inspection and Audit Provisions

4.1 Rights of inspection and audit

- (a) The IRMP must include a right for ~~either a~~ party ([Inspecting Party](#)) to conduct, or require the conduct of, an inspection or audit in accordance with this **clause 4** to assess the other party's compliance with the IRMP, the ~~applicable~~ "[Applicable Safeworking Procedures](#)" and ~~applicable~~ "[Applicable Safety Standards](#)" ([each as defined in the Train Operations Deed](#)) periodically as specified in the IRMP.
- (b) If a party ([also an Inspecting Party](#)) reasonably believes that the other party has not complied, or is not complying, with any aspect of the IRMP, then ~~that party~~ [the Inspecting Party](#) may conduct, or require the conduct of, an inspection or audit in accordance with this **clause 4** and the process in the IRMP to assess the other party's compliance with the IRMP.
- (c) The ~~party conducting, or requiring the conduct of, an inspection or audit~~ [Inspecting Party](#) must give the other party at least five (5) Business Days prior notice of such inspection or audit ([except that such notice is not required in the case of emergencies or if an event or circumstance giving the Inspecting Party the right to suspend or terminate the Train Operations Deed has occurred](#)) and that notice must include:
 - (i) details of the inspection or audit to be carried out;

- (ii) the name of the person conducting the inspection or audit;
- (iii) the timing and expected duration of the inspection or audit;
- (iv) the location of the inspection or audit;
- (v) the grounds upon which the party requires the inspection or audit; and
- (vi) the party's requirements of the other party in relation to the inspection or audit.

4.2 Conduct of inspection or audit

- (a) Any inspection or audit may be conducted by the ~~relevant party~~ Inspecting Party, its appointed representative or by a suitably qualified person reasonably acceptable to both parties, but if the inspection or audit requires access to commercially sensitive information, then:
 - (i) person conducting the inspecting or audit must be independent of both parties; and
 - (ii) that person must, prior to ~~carrying out the relevant inspection or audit of the commercially sensitive information~~ being given access to the commercially sensitive information by the party the subject of the inspection or audit, execute a confidentiality deed ~~on terms similar to the document in Schedule I~~ in favour of the party the subject of the inspection or audit on terms reasonably acceptable to that party.
- (b) Aurizon Network, the Access Holder and/or the Train Operator (as applicable) must use reasonable endeavours to ensure that the ~~other party~~ Inspecting Party, its appointed representative or the person appointed to conduct an inspection or audit are entitled to enter and be upon its land and premises (whether or not owned or leased) for the purposes of carrying out any inspection or audit.
- (c) In exercising any inspection or audit, ~~Aurizon Network, the Access Holder and/or the Train Operator~~ the Inspecting Party ~~(as applicable)~~:
 - (i) must not interfere unreasonably with the Rail Infrastructure and the other party's Trains and Rollingstock or Train Movements on the Nominated Network; and
 - (ii) must use its reasonable endeavours to avoid damage or injury and to minimise any disruption to the other party's business activities.

- (d) Subject to clause 4.2(e), the ~~A party conducting, or requiring the conduct of, an inspection or audit~~ (Inspecting Party) is not liable for any delays or cancellation of Train Services or Claims suffered or incurred by or made or brought by or against the other party as a result of conducting the inspection or audit provided the Inspecting Party complies with this **clause 4.2**.
- (e) If the Access Holder or a Train Operator is the Inspecting Party, the Inspecting Party is liable for and indemnifies Aurizon Network in respect of any Claim made against Aurizon Network by a Third Party as a result of a delay or cancellation of a Network Train Service of that Third Party as a result of the exercise by the Inspecting Party of its inspection or audit rights, provided that the Inspecting Party is not liable for, and is not required to indemnify Aurizon Network in respect of, any such Claim where:
- (i) the Inspecting Party has complied with clause 4.2(c) in exercising its inspection or audit rights; and
- (ii) the inspection or audit reveals that Aurizon Network is in breach of its obligations under the Train Operations Deed.
- ~~(e)~~(f) Aurizon Network, the Access Holder and/or the Train Operator (as applicable) must provide all reasonable assistance to the ~~other party~~ Inspecting Party in conducting any inspection or audit including allowing ~~a party~~ the Inspecting Party, its appointed representative or person appointed to conduct an inspection or audit to discuss any relevant matter with its staff. A member of the "Staff" (as defined in the Train Operations Deed) of the party the subject to the inspection or audit may be present at the inspection or audit.
- ~~(f)~~(g) The parties must provide each other with a copy of any report of any inspection or audit in respect of its compliance with the IRMP.

4.3 Costs of inspection or audit

- (a) The Inspecting Party bears the reasonable costs of conducting the inspection or audit unless the inspection or audit confirms the stated grounds for the conduct of an inspection or audit of a party's operations have been demonstrated to exist, in which case the party whose operations are inspected or audited (**Audited Party**) must:
- (i) bear the reasonable costs of conducting such inspection or audit; and
- (ii) to the extent that the Inspecting Party has paid any costs of conducting such inspection or audit, reimburse the Inspecting Party such reasonable amounts paid by the Inspecting Party in conducting the inspection or audit.

- (b) Unless otherwise agreed, where the Inspecting Party requires the conduct of an inspection or an audit, the Inspecting Party is liable to the other party in respect of loss or damage (including damages for Consequential Loss) suffered or incurred by the other party arising from the conduct of the inspection or audit if, and only if, no reasonable person in the position of Inspecting Party could have formed the view that the stated grounds for such inspection or audit existed, provided that the other party must use all reasonable endeavours to mitigate the loss or damage arising from the conduct of the inspection or audit.
- (c) The Inspecting Party bears the burden of establishing that a reasonable person in its position could have formed that view.
- (d) Notwithstanding **clauses 4.3(b) and 4.3(c)**, Aurizon Network will not be liable to a Train Operator for any third party claims (including a claim for Consequential Loss), made against the Train Operator in relation to an inspection or audit where the third party is the Access Holder and the Access Holder has a direct contractual relationship with Aurizon Network in respect to the Access Rights to which the inspection or audit relates.
- ~~(b) If the inspection or audit confirms that no reasonable person in the position of the Inspecting Party could have formed the view that the stated grounds for such inspection or audit existed, it must bear any reasonable loss or damage suffered by the Audited Party and the Inspecting Party bears the burden of establishing that a reasonable person in its position could have formed that view.~~

Appendix 5
Aurizon Network Proposed Amendments to Part 5
(Mark-up against QCA Consolidated Draft Decision drafting of Part 5 published
December 2015)

Part 5: Access Agreements

5.1 Development of Access Agreement

- (a) The granting of Access will be underpinned by an Access Agreement that will be developed and finalised under **Part 4** of this Undertaking (**Negotiation Process**).
- (b) The parties to the Access Agreement will be Aurizon Network and the Access Holder. The Access Holder need not be the Railway Operator for the relevant Train Services.
- (c) The terms of an Access Agreement must be:
 - (i) for coal carrying services, the Standard Access Agreement; and
 - (ii) for non-coal carrying services, an Access Agreement consistent with the Standard Access Agreement amended to reflect the fact that the Access is for non-coal carrying services.
- (d) Despite **clause 5.1(c)**, the Access Seeker may agree with Aurizon Network during the Negotiation Process to vary the terms of the Standard Access Agreement and any provision of this Undertaking incorporated by reference into the Standard Access Agreement (including **clauses 7.4.2** (Transfers), **7.4.3** (Relinquishments), **and 7.6** (Capacity resumption) ~~and 7.7 (Force majeure)~~), in which case, any amendments proposed to those terms must be negotiated by both Aurizon Network and the Access Seeker ~~acting reasonably~~ and in good faith.

[AN note: See comments on the above amendments in Aurizon Network's submission.]
- (e) Where the terms of an Access Agreement cannot be agreed within the time set out in **clause 4.10.1(c)(iv)**, and the matter is referred for dispute resolution under **Part 11**, any Dispute will be resolved by the QCA or an expert, as applicable, by completion of:
 - (i) where Access is required for coal carrying services, the Standard Access Agreement; and
 - (ii) where Access is required for non-coal carrying services, an Access Agreement which is consistent with the Standard Access Agreement, amended to reflect the fact that the Access is for non-coal carrying services.
- (f) Aurizon Network must not agree to include in an Access Agreement a term that limits its ability to require the Access Holder to disclose to Aurizon Network all information required by Aurizon Network (acting reasonably) to prepare and publish the MTP.

- (g) Once the Access Seeker notifies Aurizon Network that it is satisfied with the terms and conditions of the Access Agreement provided to it, Aurizon Network must, as soon as reasonably practicable, provide the Access Agreement (or, where appropriate, an amendment to an existing Access Agreement) in final form, which reflects the agreement reached between Aurizon Network and the Access Seeker, to the Access Seeker for execution.
- (h) The parties must execute the final form of the Access Agreement:
 - (i) produced by the QCA or an expert in resolving a Dispute referred to in **clause 5.1(e)**; or
 - (ii) accepted by the Access Seeker under **clause 5.1(g)**, as soon as reasonably practicable after resolution of the Dispute or Aurizon Network delivers it to the Access Seeker (as applicable).
- (i) Aurizon Network must execute an Access Agreement with an Access Seeker up to two (2) years prior to the commencement of Train Services under the Access Agreement or such longer period as may be agreed.
- (j) Where an Access Seeker is seeking Access Rights that are additional rights to, or a variation of, an existing Access Agreement to which the Access Seeker is a party, nothing in this Undertaking obliges Aurizon Network to agree to terms in respect of those Access Rights that are consistent with that existing Access Agreement.

5.2 Access Charges under Access Agreements

- (a) An Access Holder's Train Service Entitlement may be comprised of various different types of Train Services described by reference to the characteristics set out in Part A, Schedule 2 of the Standard Access Agreement. The Standard Access Agreements refer to each type of Train Service as a "Train Service Type".
- (b) In the circumstances described in **clause 5.2(a)**, the Access Charges may be calculated by reference to each type of Train Service.

5.3 Development of Train Operations Deed

- (a) To use the Access Rights granted under an Access Agreement, the Access Holder must procure a Train Operations Deed is negotiated as part of the Negotiation Process.
- (b) The parties to the Train Operations Deed will be Aurizon Network and the Train Operator for the relevant Train Services.
- (c) The terms of the Train Operations Deed must be the Standard Train Operations Deed.
- (d) Despite **clause 5.3(c)**, the Train Operator may agree to vary the terms of the Train Operations Deed, in which case any amendments

proposed to those terms must be negotiated by both Aurizon Network and the Train Operator ~~acting reasonably and~~ in good faith.

[AN note: See comments on the above amendment in Aurizon Network's submission.]

- (e) Where the terms of a Train Operations Deed cannot be agreed, and the matter is referred for dispute resolution under **Part 11** any Dispute will be resolved by the QCA or an expert, as applicable, by completion of (and incorporating amendments agreed by Aurizon Network and the Train Operator and not in dispute in respect of) a Standard Train Operations Deed.
- (f) Once the Train Operator and, if different, the Access Holder, has notified Aurizon Network in writing that it is satisfied with the terms and conditions of the Train Operations Deed provided to it, Aurizon Network will, as soon as reasonably practicable, provide the Train Operations Deed (or, where appropriate, an amendment to an existing Train Operations Deed) in final form, which reflects the agreement between Aurizon Network and the Train Operator (and, if different, the Access Holder), to the Train Operator for execution.
- (g) The parties must execute the final form of the Train Operations Deed:
 - (i) produced by the QCA or an expert in resolving a Dispute referred to in **clause 5.3(e)**; or
 - (ii) accepted by the Access Seeker under **clause 5.3(f)**, as soon as reasonably practicable after resolution of the Dispute or Aurizon Network delivers it to the Train Operator (as applicable).
- (h) Aurizon Network must execute a Train Operations Deed with a Train Operator at any time after the related Access Agreement has been entered into but, in any event, prior to the commencement of relevant Train Services under the related Access Agreement. For clarity, this **clause 5.3(h)** does not restrict the execution of subsequent Train Operations Deeds that relate to different Train Services.

5.4 Review of Standard Access Agreement or Standard Train Operations Deed

- (a) Subject to **clause 5.4(b)**, Aurizon Network must, within three (3) Months of the date of a written request from the QCA, and may otherwise:
 - (i) undertake a review of the Standard Access Agreement and/or Standard Train Operations Deed in respect of its workability, having regard to the reasonable views of Access Holders, Access Seekers and Train Operators; and
 - (ii) submit to the QCA a proposal outlining what amendments to the Standard Access Agreement and/or Standard Train Operations Deed that Aurizon Network (acting reasonably)

considers are appropriate to enhance the workability of the document, accompanied by detailed written reasons for the position.

(b) Subject to **clause 5.4(d)**, the QCA may submit a request to Aurizon Network under **clause 5.4(a) (QCA Request)** only once every two (2) years.

(c) Subject to **clause 5.4(d)**, Aurizon Network may submit a proposal to the QCA under **clause 5.4(a)** which is not in response to a QCA Request (**AN Initiated Proposal**) only once every two (2) years.

(d) The QCA must not submit a QCA Request, and Aurizon Network must not submit an AN Initiated Proposal, under **clause 5.4(a)** if two QCA Requests and/or AN Initiated Proposals have been submitted under **clause 5.4(a)** in the preceding two (2) years.

~~(b)~~ The QCA may submit a request to Aurizon Network, and Aurizon Network may provide a proposal, under **clause 5.4(a)**, only once every two (2) Years, provided that no more than two (2) reviews of the Standard Access Agreement or Standard Train Operations Deed are undertaken in any rolling two (2) Year period.

[AN note: See comments on the above amendments in Aurizon Network's submission.]

~~(e)~~(e) The QCA must assess any proposal submitted under **clause 5.4(a)** and seek submissions from stakeholders on that proposal.

~~(d)~~(f) If, having regard to the factors in section 138(2) of the Act, the QCA agrees with Aurizon Network's proposal submitted under **clause 5.4(a)**, it must give notice to Aurizon Network and relevant stakeholders of its approval, specifying a date upon which the proposed amendments will take effect.

~~(e)~~(g) If:

(i) Aurizon Network does not make any submission under **clause 5.4(a)(ii)** within the applicable timeframe; or

(ii) having regard to the factors in section 138(2) of the Act, the QCA does not agree with the proposal submitted by Aurizon Network under **clause 5.4(a)(ii)**,

then:

~~(iii)~~ the QCA must notify Aurizon Network and relevant stakeholders of the reasons for its disagreement; ~~and~~

~~(iv)~~ where the review has been initiated by the QCA under **clause 5.4(a)**, the QCA may impose amendments to the Standard Access Agreement and/or Standard Train Operations Deed that it considers appropriate to enhance the workability of the document and must give notice to

~~Aurizon Network specifying a date upon which the proposed amendments will take effect.~~

[AN note: See comments on the above provision in Aurizon Network's submission.]

~~(f)~~(h) Nothing in this **clause 5.4** prevents Aurizon Network from seeking amendments to the Standard Access Agreement or Standard Train Operations Deed it considers necessary to improve a workability issue, even if the QCA has previously refused to approve proposed amendments submitted in accordance with **clause 5.4(a)(ii)** in relation to the Standard Access Agreement or Standard Train Operations Deed.

~~(g)~~(i) In this **clause 5.4**, “workability” means an issue that affects the ability of the Standard Access Agreement and/or Standard Train Operations Deed to function effectively, including with each other and other relevant access agreements and train operations deeds, or affects the safe operation of trains. “Workability” does not include an issue that requires a change that materially impacts the commercial position of, or the risk allocation amongst, the parties to those agreements.

[AN note: See comments on the definition of “workability” in Aurizon Network's submission.]

Issues: QCA’s proposed drafting for UT4 Part 5 Access Agreements

This table sets out key issues relating to the QCA’s proposed drafting for UT4 Part 5 Access Agreements

Item	Clause Reference	Effect of clause	Issue
1	5.1(d)	Variation to the terms of the Standard Access Agreement (AA)	As provide in our issues table relating to the AA and TOD, Aurizon Network considers that clause 7.7 (Force majeure) should not be included in the Access Undertaking and incorporated by reference into the AA and TOD. Accordingly, Aurizon Network considers that clause 7.7 should be deleted from the Access Undertaking and that the force majeure provisions should be included in the Standard AA and TOD. Accordingly, the reference to “7.7 (Force majeure)” in clause 5.1(d) of the Access Undertaking should be deleted.
2	5.1(d) and 5.3(d)	Variation to the terms of the Standard AA and Standard Train Operations Deed (TOD)	Under section 100 of the QCA Act, Aurizon Network and an access seeker are obliged to negotiate in good faith in relation to an access agreement. Aurizon Network considers that that obligation under the QCA Act should be reflected in clauses 5.1(d) and 5.3(d) of the Access Undertaking. Accordingly, Aurizon Network submits that the reference to “acting reasonably and” in each of those clauses should be deleted.
3	5.3(a)	Negotiation of a TOD	In clause 5.3(a) of the Access Undertaking, include the word “is” after the words “Train Operations Deed”.
4	5.4(b)	Review of the Standard AA and Standard TOD	Aurizon Network considers that the drafting of clause 5.4(b) of the Access Undertaking is uncertain and should be clarified. Aurizon Network submits that clause 5.4(b) should be deleted and replaced with the following:

Item	Clause Reference	Effect of clause	Issue
			<p>“(b) Subject to clause 5.4(d), the QCA may submit a request to Aurizon Network under clause 5.4(a) (QCA Request) only once every two (2) years.</p> <p>(c) Subject to clause 5.4(d), Aurizon Network may submit a proposal to the QCA under clause 5.4(a) which is not in response to a QCA Request (AN Initiated Proposal) only once every two (2) years.</p> <p>(d) The QCA must not submit a QCA Request, and Aurizon Network must not submit an AN Initiated Proposal, under clause 5.4(a) if two QCA Requests and/or AN Initiated Proposals have been submitted under clause 5.4(a) in the preceding two (2) years.”</p> <p>The proposed drafting does not use the defined term “Year”.</p> <p>The proposed amendments require consequential amendments to the clause references in clause 5.4.</p>
5	5.4(e)(iv)	Review of the Standard AA and Standard TOD initiated by the QCA	Aurizon Network submits that the QCA should not be able to impose its own amendments to the Standard AA or Standard TOD under clause 5.4 of the Access Undertaking. AN considers that the QCA’s role should be limited to approving or rejecting amendments proposed by Aurizon Network. Accordingly, Aurizon Network submits that clause 5.4(e)(iv) of the Access Undertaking should be deleted.
6	5.4(g)	Scope of Workability issues in the Standard AA and Standard TOD	Clause 5.4(g) of the Access Undertaking includes a definition of “workability” for the purpose of clause 5.4. While AN considers that it is important to define “workability” for the purpose of clause 5.4, AN considers that the definition is uncertain which gives rise to the potential for disputes about the scope of clause 5.4. In particular, it is not clear what types of issues would constitute issues that affect the ability of the Standard AA and/or Standard TOD “to function effectively”. AN considers that the QCA should clarify the definition of “workability” to overcome that uncertainty. However, AN considers that it is important that the limitations on the definition of

Item	Clause Reference	Effect of clause	Issue
			"workability" in the second sentence in clause 5.4(g) are retained.