

Queensland Rail's Draft Access Undertaking 1

February 2013



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Preamble

Queensland Rail was incorporated on 11 July 2008 and is a wholly government owned corporation. Queensland Rail was originally named QR Passenger Pty Ltd and was a subsidiary of Aurizon Operations Limited (formerly QR Limited) responsible for the Above Rail passenger Train Services.

On 30 June 2010, as part of the restructure and privatisation process for Aurizon (formerly QR National):

- Queensland Rail became an independent business – separate from the Aurizon corporate group; and
- the rail network previously managed by Aurizon Network (formerly QR Network Pty Ltd) (now part of the Aurizon corporate group) was divided between Aurizon Network and Queensland Rail.

This resulted in Aurizon Network continuing as the Railway Manager of the rail network in the Central Queensland Coal Region (including part of the North Coast Line) and Queensland Rail becoming the owner and Railway Manager of the remainder of the rail network previously managed by Aurizon Network.

Therefore, from 30 June 2010, Queensland Rail changed from a business which principally operated passenger Trains to a business that also manages a rail network including approximately 8,000 km of Queensland railway track used by freight and passenger Trains.

Queensland Rail's major businesses include passenger Trains (including inner-city commuter and long distance trains), rail holidays, travel centres and managing access to its rail network for a wide variety of Trains including for agricultural products, passengers, general freight, bulk minerals and coal. The needs of Trains on Queensland Rail's network vary greatly due to their different supply chain dynamics, geographic locations, rail corridor characteristics and interactions with other rail traffics.

While Queensland Rail's responsibilities regarding passenger Trains are important, the provision of Access to the Network for freight Trains is also a significant activity for Queensland Rail. Queensland Rail seeks to provide a safe and efficient rail based transport option for freight.

Much of Queensland Rail's network is supported by Transport Service Payments from the Queensland Government. The absence of these Transport Service Payments would result in large parts of the rail network being commercially unviable.

Queensland Rail competes with road transport for most non-coal Train Services as well as coastal shipping, air transport, slurry pipelines and other transport options. In this

sense, a large part of Queensland Rail's network business is not truly monopolistic as it is actively competing with other transport modes.

As part of Aurizon Operations Limited's restructure associated with the formation and privatisation of Aurizon, the 2008 Undertaking, with various modifications, was made to apply to Queensland Rail under *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld). The 2008 Undertaking's application to Queensland Rail will be superseded by this Undertaking on its approval by the QCA.

This Undertaking is a voluntary access undertaking in accordance with the provisions of the *Queensland Competition Authority Act 1997* (Qld) in relation to the declared service under section 250(1)(b) of the QCA Act. This Undertaking has been developed following extensive consultation with key stakeholders. It provides a balanced approach to the provision of Access and a framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Operators seeking Access to Queensland Rail's Network including addressing matters such as:

- the process for seeking Access in relation to the Network;
- the pricing principles for Access Charges including Reference Tariffs for coal carrying Train Services on the West Moreton System;
- Network Management Principles for the scheduling and prioritisation of Train Services;
- reporting obligations and dispute resolution;
- a Standard Access Agreement for coal carrying Train Services on the West Moreton System; and
- the principles applying to other Access Agreements.

For further information on the negotiation of Access in accordance with the provisions of this Undertaking, please contact:

Queensland Rail

Access and Business Strategy

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Part 1 Application and scope

1.1 Duration

This Undertaking is effective during the Term.

1.2 Scope

1.2.1 Application of this Undertaking

- (a) Subject to **clause 1.2.1(b)**, this Undertaking applies to negotiations between Queensland Rail and Access Seekers in relation to Access Rights.
- (b) Despite any other provision in this Undertaking:
 - (i) this Undertaking does not apply:
 - (A) to the negotiation or provision of services other than Access;
 - (B) to any matter involving an Access Holder or an Access Agreement, to the extent that compliance with this Undertaking is inconsistent with the relevant Access Agreement; or
 - (C) to any rail transport infrastructure (as defined in the TIA), including but not limited to the track, signalling and electrical overhead traction system (if applicable) for which Queensland Rail is the Railway Manager but which is not owned by Queensland Rail or in respect of which Queensland Rail is not entitled to grant rights of access; and
 - (ii) Queensland Rail is not obliged to comply with this Undertaking to the extent that it is inconsistent with Queensland Rail's compliance with its Passenger Priority Obligations and Preserved Train Path Obligations.
- (c) Nothing in this Undertaking requires Queensland Rail or any other party to an Access Agreement executed before the Approval Date to vary a term or provision of that Access Agreement.
- (d) Nothing in this Undertaking affects, and this Undertaking is subject to, Queensland Rail's rights under the QCA Act.

1.2.2 Procurement of services other than Access

Unless Queensland Rail otherwise agrees, Access Seekers are responsible for procuring any services other than Access, including Above Rail Services, required for the operation of Train Services.

1.2.3 Line diagrams

Queensland Rail will:

- (a) publish on its website line diagrams showing its rail network including:
 - (i) the parts of that rail network comprising the Network;
 - (ii) existing Private Infrastructure connection points to the Network; and
 - (iii) a description of the amendments made to the line diagrams (if any) since the last version of those line diagrams;
- (b) review and, if applicable, amend the line diagrams (at least every six months) during the Term; and
- (c) notify the QCA at no more than six monthly intervals during the Term of any amendments to the line diagrams during that time interval.

1.3 Consistency and differentiation

- (a) This Undertaking will be applied in a manner that is consistent between Access Seekers in the same circumstances.
- (b) Queensland Rail will comply with its obligations under the QCA Act (in particular, under sections 100 and 168C of the QCA Act) in relation to not unfairly differentiating between Access Seekers or between Access Holders.

1.4 Extensions

1.4.1 Obligation to construct Extensions

- (a) Subject to **clauses 1.4.2 to 1.4.6**, if:
 - (i) an Extension is necessary to provide the Additional Capacity required to grant Access Rights requested by an Access Seeker; and
 - (ii) Queensland Rail (in its absolute discretion) is not willing or able to fund the construction of the Extension,then Queensland Rail is not obliged to construct the Extension unless all of the following are satisfied:
 - (iii) the Access Seeker:
 - (A) agrees to provide funding (in advance) to Queensland Rail on terms and conditions satisfactory to Queensland Rail, for the costs and expenses to be paid or incurred by Queensland Rail in connection with constructing the Extension; and

- (B) satisfies Queensland Rail that it has the financial capacity to provide that funding;
- (iv) Queensland Rail bears no cost or risk in relation to constructing, owning, operating or managing the Extension;
- (v) if required by Queensland Rail, the Access Seeker has obtained or will obtain all necessary Authorisations and other consents required for Queensland Rail to construct the Extension;
- (vi) if required by Queensland Rail, the Access Seeker has acquired or procured for Queensland Rail all of the rights and interests in land or any thing that in Queensland Rail's opinion are necessary to construct, own, operate and manage the Extension, (on terms satisfactory to Queensland Rail) including, for example, the inclusion of additional land into Queensland Rail's land tenure arrangements with the State relating to the Network;
- (vii) in Queensland Rail's opinion (acting reasonably), the Extension (including constructing the Extension):
 - (A) is technically feasible;
 - (B) is consistent with the safe and reliable provision of Access and operation of the Network;
 - (C) does not impact on the safety of any person maintaining, operating or using the Network;
 - (D) does not adversely affect Capacity;
 - (E) complies with Queensland Rail's engineering, operational and other requirements; and
 - (F) does not adversely affect Queensland Rail's legitimate business interests (and Queensland Rail's legitimate business interests are otherwise protected);
- (viii) Access Agreements have been executed with Queensland Rail for the Additional Capacity that is expected to be created by the Extension on terms and conditions satisfactory to Queensland Rail;
- (ix) except to the extent expressly agreed otherwise by Queensland Rail (in its absolute discretion), those Access Agreements are or have become unconditional except for conditions relating to the construction of the Extension or the creation of the relevant Additional Capacity; and
- (x) all construction, funding, operational and other arrangements relating to the Extension (including the matters referred to

above) have been entered into by the Access Seeker (or, if applicable, the Access Seeker's Customer) and Queensland Rail (and are or have become unconditional) except to the extent expressly agreed otherwise by Queensland Rail (in its absolute discretion).

- (b) For clarity, if Queensland Rail is not willing or able to fund the construction of an Extension, then Queensland Rail will:
 - (i) discuss with the relevant Access Seeker (or that Access Seeker's Customer) options for that Access Seeker (or that Access Seeker's Customer) to provide funding for the Extension; and
 - (ii) use reasonable endeavours to negotiate, on a timely basis, and, if terms are agreed, enter into arrangements with that Access Seeker or that Access Seeker's Customer (as applicable) (**User**) in relation to the funding of the Extension (**Funding Agreement**).

1.4.2 Funding Agreements

Without limitation to **clauses 1.4.1** and **clauses 1.4.3 to 1.4.6**, a Funding Agreement must, unless otherwise agreed by Queensland Rail and the relevant User:

- (a) be consistent with the terms of this Undertaking;
- (b) not provide for Queensland Rail to obtain a greater return on capital than that included in Access Charges in accordance with this Undertaking;
- (c) result in the transaction being structured in a reasonable way that does not adversely affect Queensland Rail in respect of tax, duty and accounting treatments;
- (d) ensure Queensland Rail's legitimate business interests are protected and not adversely affected;
- (e) not result in Queensland Rail bearing any cost or risk:
 - (i) in relation to constructing, owning, operating or managing an Extension; or
 - (ii) as a result of the structure or terms of the Funding Agreement;
- (f) require Queensland Rail to use reasonable endeavours to ensure that an Extension is:
 - (i) constructed efficiently and in accordance with Prudent Practices taking into account all of the relevant circumstances (including Queensland Rail's relevant safety and construction requirements);

- (ii) operated and managed by Queensland Rail in a manner that is consistent with Queensland Rail's operation and management of the Network but subject to all of the relevant circumstances (including the specific operational and management needs of the Extension and the needs of existing Access Holders); and
- (g) satisfy the requirements set out in **clause 1.4.3**.

1.4.3 Rebates

- (a) A Funding Agreement must provide for an arrangement whereby, if the User has agreed with Queensland Rail to contribute funds to the construction of an Extension, and contributes funds for that construction, then, to the extent that Queensland Rail receives Access Charges relating to the use of that Extension by Train Services, Queensland Rail will rebate that part of those Access Charges that is a return of, or on, capital expended in relation to that Extension that relates directly to the contribution provided to Queensland Rail by the User in respect of that Extension.
- (b) **clause 1.4.3(a)** does not apply:
 - (i) to the extent that an Access Holder who has not contributed to the funding of the Extension uses the Extension but does not directly benefit from the Additional Capacity arising from that Extension – that is, if the Extension had not been constructed, then the Access Holder could still have been granted Access;
 - (ii) to the extent that Queensland Rail is adversely affected;
 - (iii) after the time when the rebates paid to the User under **clause 1.4.3(a)**, in aggregate, (but excluding all amounts that are a return on capital rather than a return of capital) equal the User's contributed funds in relation to the relevant Extension; and
 - (iv) to the extent that compliance with **clause 1.4.3(a)** would have the effect of Queensland Rail not receiving any amount that it is entitled to in relation to:
 - (A) owning, operating, managing or investing in the Network (including for maintenance costs); or
 - (B) any part of the Network excluding that part of the Network to the extent that it relates directly to the User's funding.
- (c) For clarity, a dispute between an Access Seeker and Queensland Rail in relation to the negotiation of a Funding Agreement is subject to the dispute resolution process under **clause 6.1**.

1.4.4 Construction, ownership, operation and management of Extensions

An Extension which is funded by an entity other than Queensland Rail will be constructed, owned, operated and managed by Queensland Rail unless otherwise agreed or required by Queensland Rail (in its absolute discretion).

1.4.5 No restriction

Nothing in **clauses 1.4.1, 1.4.2 or 1.4.3**:

- (a) obliges Queensland Rail to bear any cost or risk in relation to constructing, owning, operating or managing an Extension;
- (b) prevents or otherwise restricts Queensland Rail and an Access Seeker (in each party's absolute discretion) from entering into arrangements relating to the funding or construction of an Extension necessary to provide Additional Capacity required to grant Access Rights requested by that Access Seeker; or
- (c) restricts or otherwise limits Queensland Rail's ability to fund and construct Extensions and otherwise invest in the Network (in its absolute discretion).

1.4.6 Funding Agreement Register

- (a) Queensland Rail will maintain a register of Funding Agreements (**Funding Agreement Register**).
- (b) On request by the QCA, Queensland Rail must provide a copy of the Funding Agreement Register to the QCA for the purposes of resolving a Dispute under **clause 6.1**.

Part 2 Negotiation process

2.1 Preparing and submitting an Access Application

2.1.1 Access Applications

- (a) A request for Access Rights must be submitted to Queensland Rail in the form of an Access Application.
- (b) Queensland Rail will publish on its website the application forms for Access Applications (which may identify different requirements for different types of Train Services).
- (c) An Access Seeker must, when submitting an Access Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in this Undertaking relating to it or its Access Application and if the Access Seeker does not do so then Queensland Rail may refuse to accept the Access Application.

2.1.2 Preliminary discussions

An Access Seeker may request initial meetings with Queensland Rail, prior to submitting an Access Application, to discuss the Access Application and to clarify any matters relating to the negotiation process.

2.1.3 Preliminary information

Subject to **clause 2.2.2(b)**, Queensland Rail will provide to an Access Seeker information¹ requested by that Access Seeker where the Access Seeker can reasonably demonstrate the need for the information for the purpose of preparing its Access Application provided that:

- (a) doing so will not breach a confidentiality obligation binding on Queensland Rail; and
- (b) the information is ordinarily and freely available to Queensland Rail.

2.2 Confidentiality

2.2.1 Obligation to keep Confidential Information confidential

- (a) Subject to **clause 2.2.1(b)**, Queensland Rail and each Access Seeker (by submitting an Access Application) acknowledge, as a Recipient, that Confidential Information disclosed to it must:
 - (i) be treated as and kept confidential;
 - (ii) only be used for the purpose for which it was disclosed;
 - (iii) be treated as the property of the Disclosing Party; and

¹ Such as, path length availability, Available Capacity, axle load limitations, maximum speeds, a description of the relevant part of the Network for which Access Rights are sought, infrastructure characteristics, nominated sectional running times and applicable safeworking requirements.

- (iv) only be disclosed in accordance with this Undertaking or a confidentiality agreement between the parties.
- (b) A Recipient of Confidential Information is not required to comply with **clause 2.2.1(a)** in relation to a disclosure or use of Confidential Information to the extent that:
 - (i) the Disclosing Party has given its written consent (which must not be unreasonably withheld) to that disclosure or use; or
 - (ii) another Confidentiality Exception applies to that disclosure or use.

2.2.2 Requirement for confidentiality agreement

- (a) Queensland Rail or the relevant Access Seeker may require the other to enter into a confidentiality agreement and, if so, the parties must act reasonably and promptly to negotiate and execute such an agreement.
- (b) Neither Queensland Rail nor an Access Seeker is obliged to disclose Confidential Information to the other unless a confidentiality agreement on terms satisfactory to it (acting reasonably) has been executed.

2.2.3 Responsibility for disclosure

If a Recipient of Confidential Information discloses all or part of that Confidential Information to:

- (a) the directors, company secretary, officers or employees of the Recipient or a Related Party of the Recipient; or
- (b) the Recipient's solicitors, barristers, accountants, technical consultants or other advisers;

under a Confidentiality Exception, then the Recipient:

- (c) must use its best endeavours to ensure that person keeps the Confidential Information confidential; and
- (d) is responsible for the actions and omissions of that person in relation to the Confidential Information as though those actions and omissions were the Recipient's.

2.3 Acknowledgment of an Access Application

2.3.1 Requests for additional information or clarification

Queensland Rail may require the Access Seeker to provide additional or clarified information for the purpose of preparing an Indicative Access Proposal. Queensland Rail will notify the Access Seeker of any such requirement within five Business Days after receiving the Access Application.

2.3.2 Acknowledging Access Applications

Within five Business Days after the later of the receipt of:

- (a) an Access Application; or
- (b) the additional or clarified information required under **clause 2.3.1** in respect of that Access Application,

Queensland Rail will, subject to **clauses 2.6.4** and **2.9.3**, give the Access Seeker a written acknowledgement of receipt of the Access Application.

2.4 Provision of an Indicative Access Proposal

2.4.1 Time period for provision of Indicative Access Proposal

Subject to **clauses 2.6.4** and **2.9.3**, Queensland Rail will use reasonable endeavours to provide an Indicative Access Proposal to the Access Seeker:

- (a) within the estimated time period for doing so indicated in the acknowledgement² given under **clause 2.3.2**; or
- (b) if no such time period is indicated in the acknowledgement, within 20 Business Days after giving the acknowledgment under **clause 2.3.2**.

2.4.2 Inclusions in Indicative Access Proposal

The Indicative Access Proposal will, amongst other things:

- (a) set out the results of an indicative Capacity Analysis;
- (b) indicate whether any other Access Seekers have requested Access Rights which, if provided, would limit Queensland Rail's ability to grant Access Rights in accordance with the Indicative Access Proposal; and
- (c) provide a methodology for calculating Access Charges (including an initial estimate of any applicable rates or other inputs for formulae).

2.4.3 Indicative nature

An Indicative Access Proposal is non-binding and, unless it contains express provisions to the contrary, contains arrangements that are only indicative or preliminary in nature. An Indicative Access Proposal does not oblige Queensland Rail to provide Access in accordance with specific terms and conditions (including the methodology for calculating Access Charges or estimated rates and other inputs for formulae) set out in it.

2.5 Notification of intent to negotiate

2.5.1 Access Seeker to give notice of intent to negotiate

If an Access Seeker intends to proceed with its Access Application on the basis of the relevant Indicative Access Proposal, it must, subject to **clause 2.5.2**,

² Queensland Rail will only give such a time estimate in an acknowledgement if Queensland Rail considers that it is not reasonable to provide the Indicative Access Proposal within 20 Business Days after giving the acknowledgement.

give Queensland Rail written notice of its intention to do so as soon as reasonably practicable after receiving the Indicative Access Proposal.

2.5.2 Consequence of late notification of intent

- (a) If an Access Seeker gives the notice referred to in **clause 2.5.1** to Queensland Rail more than 20 Business Days after being given the Indicative Access Proposal, Queensland Rail may review the Indicative Access Proposal and either (in its absolute discretion):
 - (i) give the Access Seeker a revised Indicative Access Proposal; or
 - (ii) proceed on the basis of the existing Indicative Access Proposal.
- (b) If Queensland Rail gives a revised Indicative Access Proposal to an Access Seeker under **clause 2.5.2(a)**, then:
 - (i) the process in this **Part 2** recommences as though the revised Indicative Access Proposal was given to the Access Seeker under **clause 2.4**; and
 - (ii) the Access Seeker must comply with this **clause 2.5** in relation to that revised Indicative Access Proposal.
- (c) If an Access Seeker has not given the notice referred to in **clause 2.5.1** within three months after it was given an Indicative Access Proposal, then Queensland Rail may (in its absolute discretion) reject the relevant Access Application by giving notice of that rejection to the Access Seeker.

2.6 Negotiation of an Access Agreement

2.6.1 The negotiation period

- (a) Subject to **clause 2.5.2**, if an Access Seeker gives Queensland Rail a notice under **clause 2.5.1**, then Queensland Rail and the Access Seeker will commence negotiations as soon as reasonably practicable to progress towards an Access Agreement.
- (b) If negotiations have commenced in accordance with **clause 2.6.1(a)**, the period for negotiations (**Negotiation Period**):
 - (i) starts on the day Queensland Rail was given the notice under **clause 2.5.1** (subject to **clause 2.5.2(b)**); and
 - (ii) ends on the earlier of:
 - (A) execution of an Access Agreement by the parties in relation to the relevant Access Application;
 - (B) Queensland Rail giving the Access Seeker a notice under **clause 2.7.6(a)(iv)(A)**;

- (C) the Access Seeker notifying Queensland Rail that it no longer wishes to proceed with its Access Application;
 - (D) the date nine months after the date on which the period for negotiations started, or such later date as agreed by the parties;
 - (E) Queensland Rail giving the Access Seeker a Negotiation Cessation Notice; and
 - (F) the occurrence of any other event or circumstance where negotiations cease in accordance with this Undertaking.
- (c) Queensland Rail is not obliged to continue negotiations with an Access Seeker after the Negotiation Period for the relevant Access Application has ceased.

2.6.2 Issues to be addressed in negotiations

- (a) During the Negotiation Period, Queensland Rail and the Access Seeker will negotiate, and endeavour to agree, the terms of an Access Agreement. In order to facilitate the negotiation process:
- (i) subject to **clause 2.2.2(b)**, Queensland Rail will provide to the Access Seeker additional information relevant to the negotiations, as requested by the Access Seeker (acting reasonably) provided that:
 - (A) doing so will not breach a confidentiality obligation binding on Queensland Rail; and
 - (B) the information is ordinarily and freely available to Queensland Rail;
 - (ii) in order to analyse the impacts and requirements of the operations proposed by the Access Seeker, the Access Seeker must:
 - (A) prepare, and submit to Queensland Rail, a draft Operating Plan³ prior to the parties undertaking the Interface Risk Assessment; and
 - (B) finalise the Operating Plan while the Interface Risk Assessment is being undertaken and prior to the development of an IRMP;

³ Queensland Rail will use the Operating Plan to refine and finalise the Train Service Entitlement, the methodology, rates and other inputs for calculating Access Charges and other terms and conditions of the Access Agreement. The Operating Plan will also be used as a basis for any further or refined Capacity Analysis prepared by Queensland Rail.

- (iii) the parties must jointly:
 - (A) undertake an Interface Risk Assessment⁴; and
 - (B) after the Interface Risk Assessment is completed, develop an IRMP;
 - (iv) the Access Seeker must commission a suitably qualified person, acceptable to Queensland Rail (acting reasonably), to prepare an environmental investigation and risk management assessment for the purposes of the Interface Risk Assessment and development of an IRMP;
 - (v) Queensland Rail will provide a methodology for calculating the Access Charges (including any applicable rates or other inputs for formulae);
 - (vi) Queensland Rail will provide a Capacity Analysis to the Access Seeker;
 - (vii) Queensland Rail will provide a detailed description of the relevant Train Service Entitlement and the initial timetable;
 - (viii) the Access Seeker must demonstrate that the Rolling Stock and Train Configurations for which the Access Rights are applicable are consistent with the Interface Standards incorporated in the IRMP; and
 - (ix) Queensland Rail will provide the other terms comprising the Access Agreement.
- (b) During the Negotiation Period, Queensland Rail will, if relevant, also negotiate the terms of a separate arrangement with the Access Seeker for the connection of Private Infrastructure to the Network.

2.6.3 Negotiation Cessation Notice

- (a) Queensland Rail may, at any time, give a notice to an Access Seeker that it does not intend to enter into an Access Agreement with the Access Seeker (**Negotiation Cessation Notice**) for any one or more of the following reasons:
 - (i) the Access Seeker fails to comply with all of the relevant provisions of this Undertaking, and Queensland Rail (acting reasonably) is of the opinion that such non-compliance is material;

⁴ Queensland Rail will publish on its website information, standards and requirements that the Interface Risk Assessment and IRMP must be consistent with. For example, Queensland Rail will make available a sample IRMP which specifies a list of safety and Rolling Stock issues that should, at a minimum, be addressed by the parties during the Interface Risk Assessment, along with suggested controls for the identified safety and Rolling Stock issues. However, the IRMP developed by the parties may cover additional safety and/or Rolling Stock issues and associated controls depending on the circumstances of the particular operation.

- (ii) Queensland Rail (acting reasonably) is of the opinion that:
 - (A) there is no reasonable likelihood of material compliance by the Access Seeker with the terms and conditions of an Access Agreement;
 - (B) the Access Seeker has no genuine intention of obtaining, or has no reasonable likelihood of using, the Access Rights requested; or
 - (C) the Access Application is frivolous in nature;
 - (iii) Queensland Rail (acting reasonably) is not satisfied, at any time, that the Access Seeker meets the prudential requirements set out in **clause 2.9.1**; or
 - (iv) the Access Seeker fails to comply with the dispute resolution process under **clause 6.1** (including any outcome of that dispute resolution process).
- (b) In forming an opinion referred to in **clause 2.6.3(a)(ii)(B)**, Queensland Rail may, without limitation, consider any one or more of the following factors:
- (i) whether the Access Seeker has secured, or is reasonably likely to secure:
 - (A) the rights required to enter and leave the Network (for example, rights to unload at its destination); and
 - (B) if applicable, a rail haulage agreement for the operation of Train Services referred to in its Access Application; and
 - (ii) the speed and timeliness of the Access Seeker in conducting its negotiations.
- (c) If Queensland Rail gives a Negotiation Cessation Notice to an Access Seeker, then the Access Seeker must, on request by Queensland Rail (in its absolute discretion), pay and, if paid by Queensland Rail, reimburse, Queensland Rail its reasonable costs incurred in negotiations with the Access Seeker.

2.6.4 Frivolous requests for Access

Without limitation to **clause 2.6.3**, if, prior to the start of the Negotiation Period, Queensland Rail (acting reasonably) considers the relevant Access Application is frivolous in nature, Queensland Rail may reject that Access Application and, if it does so, is not obliged to comply with this Undertaking in relation to that Access Application.

2.6.5 Rail safety and other considerations for passengers

If:

- (a) Queensland Rail considers:
 - (i) (not acting arbitrarily) that the use of any proposed Access Rights sought by an Access Seeker may adversely affect the safety of any persons using or intending to use a passenger Train Service; or
 - (ii) (acting reasonably) that the use of any proposed Access Rights sought by an Access Seeker may adversely affect the operation of passenger trains in the Metropolitan Region;
- (b) Queensland Rail and the Access Seeker (both acting in good faith) have discussed Queensland Rail's concerns in relation to the matters in **paragraphs (a)(i) or (ii)** (as applicable) and after those discussions **paragraph (a)** continues to apply;
- (c) Queensland Rail (acting reasonably) does not consider that any measures can reasonably and practicably be implemented by Queensland Rail or the Access Seeker to avoid, or mitigate to Queensland Rail's reasonable satisfaction, those adverse affects; and
- (d) refusal to enter into an Access Agreement would be consistent with Queensland Rail acting in accordance with Prudent Practices,

then Queensland Rail may refuse to enter into an Access Agreement with the relevant Access Seeker⁵.

2.7 Access Agreement

2.7.1 Access Rights granted under an Access Agreement

The granting of Access Rights occurs when Queensland Rail and the Access Seeker execute an Access Agreement and that Access Agreement is or becomes unconditional.

2.7.2 Access Seekers competing for Access Rights

- (a) If:
 - (i) two or more Access Seekers are seeking Access Rights; and
 - (ii) the grant of Access Rights to one or more of those Access Seekers would result in Access Rights not being able to be granted to the other Access Seekers,

⁵ For example, Queensland Rail may refuse to enter into an Access Agreement for non-passenger Train Services that are proposed to stop or operate immediately adjacent to stations or platforms at a time when the station or platform is or may be in use by passenger Train Services or passengers for Train Services.

then Queensland Rail will:

- (iii) notify each of those Access Seekers as soon as practicable after it becomes aware of that circumstance; and
 - (iv) subject to **clauses 2.7.3(b)** and **(c)** and **clause 2.7.4**, prioritise Access Seekers for the grant of Access Rights based on how favourable an Access Agreement with each Access Seeker is likely to be to Queensland Rail (as assessed by Queensland Rail in its absolute discretion) – with the most favourable being given the highest priority for the grant of Access Rights.
- (b) For the purpose of **clause 2.7.2(a)(iv)**, Queensland Rail's assessment of how favourable an Access Agreement is likely to be will be based on:
- (i) the Access Charges that are expected to arise from the Access Agreement;
 - (ii) the cost and risk to Queensland Rail of providing Access Rights in accordance with the Access Agreement;
 - (iii) the ability of the Access Seeker to satisfy and to continue to satisfy the prudential requirements set out in **clause 2.9.1**;
 - (iv) the term of the Access Agreement; and
 - (v) any other effects that entering into the Access Agreement may have on Queensland Rail's financial and risk position.
- (c) If:
- (i) **clauses 2.7.2(a)(i)** and **(ii)** are satisfied;
 - (ii) Queensland Rail and each of the relevant Access Seekers is ready and willing to execute an Access Agreement; and
 - (iii) in Queensland Rail's opinion (acting reasonably):
 - (A) it is not possible to determine which of the proposed Access Agreements is the most favourable to Queensland Rail based on the criteria set out in **clause 2.7.2(a)(iv)**; or
 - (B) each of the proposed Access Agreements is equally favourable to Queensland Rail based on the criteria set out in **clause 2.7.2(a)(iv)**,
- then Queensland Rail will, subject to **clauses 2.7.3(b)** and **(c)** and **clause 2.7.4**, enter into an Access Agreement with the Access Seeker whose Access Application was received by Queensland Rail first.
- (d) If Queensland Rail believes (acting reasonably) in the circumstances and at the time that compliance with **clause 2.7.2(c)** was required,

that it was acting in compliance with **clause 2.7.2(c)** in entering into an Access Agreement, then Queensland Rail is not in breach of this Undertaking, and is not liable to any person (including any Access Seeker), in relation to or as a result of that entry into an Access Agreement, even if it is subsequently alleged that Queensland Rail did not comply with **clause 2.7.2(c)**.

- (e) If Queensland Rail rejects an Access Application under this **clause 2.7.2**, then Queensland Rail will provide feedback to the Access Seeker who lodged the Access Application in the form set out in **schedule D** so as to indicate where any of the matters referred to in **schedule D** applied in relation to that rejection.

2.7.3 Renewals

- (a) In this **clause 2.7.3**, a **Renewal Access Seeker** means, concerning an Access Agreement with an Access Holder:
 - (i) the Access Holder, where the Access Holder has no Customer;⁶ or
 - (ii) the person⁷ whom the Customer nominates in writing to Queensland Rail (**Customer Nominee**), where the Access Holder has a Customer.
- (b) Where an Access Seeker (who is not a Renewal Access Seeker) submits an Access Application for Access Rights concerning the Available Capacity that will arise when an existing Access Agreement expires, Queensland Rail will use reasonable endeavours to notify:
 - (i) the Access Holder for that Access Agreement;
 - (ii) that Access Holder's Customer (if any); and
 - (iii) the relevant Customer Nominee (if any),of Queensland Rail's receipt of that Access Application, as soon as reasonably practicable after receiving it.
- (c) Despite any other provision in this Undertaking to the contrary and subject to **clause 2.7.3(d)**, Queensland Rail may not execute an Access Agreement with the Access Seeker referred to in **clause 2.7.3(b)** until:
 - (i) the negotiations with the Renewal Access Seeker have ended in accordance with this Undertaking; or
 - (ii) nine months after the date on which Queensland Rail gave the relevant notice under **clause 2.7.3(b)**,

⁶ For example, where the mine operator who uses the Access Rights to transport coal from its mine is the Access Holder.

⁷ The Customer may nominate itself, the existing Access Holder or any other person. This opportunity to nominate the person who can lodge a Renewal will give the Customer added flexibility concerning, for example, directly holding Access Rights or changing Operators at the end of an Access Agreement's term.

whichever happens first.

- (d) **Clause 2.7.3(c)** only applies where:
- (i) Queensland Rail has given a notice under **clause 2.7.3(b)**;
 - (ii) the relevant existing Access Agreement concerns Train Services for which there is an applicable Reference Tariff;
 - (iii) the relevant Renewal Access Seeker's Access Application (**Renewal Application**):
 - (A) was submitted to Queensland Rail:
 - (1) no later than 20 Business Days after Queensland Rail gave the notice under **clause 2.7.3(b)**; and
 - (2) no less than two years before the expiry of the relevant Access Agreement;
 - (B) is for new Access Rights equivalent to all or part of the Access Rights under the existing Access Agreement (including for the same origin and destination) and which commence on that Access Agreement's expiry; and
 - (C) is for a term of:
 - (1) at least the period for which the Access Seeker referred to in **clause 2.7.3(b)** is seeking Access Rights; or
 - (2) the remaining life of the relevant coal mine as notified in writing to Queensland Rail by the Renewal Access Seeker (where it has no Customer) or otherwise the relevant Customer; and
 - (iv) **clause 2.7.3(d)(iii)(C)(2)** has not previously applied for any past Renewal Application in connection with the relevant Access Rights, unless Queensland Rail agrees otherwise.⁸
- (e) Nothing in this **clause 2.7.3** obliges Queensland Rail to enter into an Access Agreement with a Renewal Access Seeker or to do so on the same terms as the relevant existing Access Agreement for the relevant existing Access Rights.

⁸ Unless Queensland Rail agrees otherwise, **clause 2.7.3(c)** is only intended to operate once where a Renewal Application is for the remaining life of a coal mine. Any subsequent Renewal Application concerning the relevant Access Rights does not have the benefit of **clause 2.7.3(c)**. In those instances, the Access Seeker for that Renewal Application will be treated on the same basis as any other Access Seeker.

2.7.4 Contracting Available Capacity or Additional Capacity

Queensland Rail is not obliged to enter into an Access Agreement if:

- (a) the Network does not, in Queensland Rail's opinion, have sufficient Available Capacity to meet the Access Seeker's request for Access Rights; and
- (b) Queensland Rail has not agreed to provide Additional Capacity to meet the Access Seeker's request for Access Rights.

2.7.5 Development of Access Agreements

Unless otherwise agreed between Queensland Rail and the Access Seeker, an Access Agreement must be consistent with:

- (a) this Undertaking;
- (b) the terms of a Standard Access Agreement applicable to the relevant type of Train Service; or
- (c) if there is no applicable Standard Access Agreement, the principles in **schedule C** (provided that those principles do not limit the matters which may be included in an Access Agreement).

2.7.6 Execution of Access Agreements

- (a) If:
 - (i) Queensland Rail offers an Access Agreement; and
 - (ii) Queensland Rail and the Access Seeker are ready and willing to execute the Access Agreement,then:
 - (iii) both Queensland Rail and the Access Seeker must use reasonable endeavours to execute the Access Agreement as soon as practicable provided that Queensland Rail is not required to execute the Access Agreement before the Access Seeker; and
 - (iv) if the Access Seeker does not execute that Access Agreement within 20 Business Days after receiving Queensland Rail's offer (or such longer period as agreed by Queensland Rail), Queensland Rail may (in its absolute discretion):
 - (A) withdraw its offer by notice in writing to the Access Seeker; and
 - (B) cease negotiations with that Access Seeker.
- (b) Despite any other provision in this Undertaking, Queensland Rail may, but is not obliged to, grant Access Rights by agreeing to amend an existing Access Agreement.

2.7.7 Transfer of Access Rights

An Access Holder may only assign, novate or otherwise transfer the Access Holder's interest in an Access Agreement to a third party in accordance with the terms of that Access Agreement and with the prior written consent of Queensland Rail.

2.8 New Standard Access Agreements

- (a) The QCA may give Queensland Rail a notice requiring it to submit a proposed standard access agreement that is:
- (i) for a specified type of Train Service not covered by a Standard Access Agreement; and
 - (ii) consistent with this Undertaking and the principles contained in **schedule C**,
- (Proposed Standard Access Agreement)**, if the QCA has a reasonable expectation that this is warranted on the basis of there being sufficient interest from Access Seekers and after taking into account each of the matters set out in section 138(2)(a) to (h) of the QCA Act.
- (b) For the purpose of this **clause 2.8**:
- (i) a notice given by the QCA under **clause 2.8(a)** will be treated as if it were an initial undertaking notice given by the QCA under the QCA Act;
 - (ii) a Proposed Standard Access Agreement submitted by Queensland Rail to the QCA in accordance with this **clause 2.8** will be treated as though it was a draft access undertaking submitted under the QCA Act in response to an initial undertaking notice; and
 - (iii) Queensland Rail and the QCA will act in accordance with the provisions of the QCA Act as though this were the case.
- (c) For clarity, after a Proposed Standard Access Agreement is approved by the QCA in accordance with this **clause 2.8** this Undertaking will apply as though it were amended to include the Proposed Standard Access Agreement as a Standard Access Agreement.

2.9 Prudential requirements

2.9.1 Access Seekers must satisfy prudential requirements

An Access Seeker must at all times satisfy the following prudential requirements namely:

- (a) the Access Seeker must not be Insolvent;

- (b) the Access Seeker (and any Related Party of the Access Seeker) must not be, or have been at any time in the previous two years, in Material Default of:
 - (i) this Undertaking (or the 2008 Undertaking);
 - (ii) any agreement with Queensland Rail; or
 - (iii) any agreement under which access to Private Infrastructure has been provided to the Access Seeker or a Related Party of the Access Seeker; and
- (c) must be able to demonstrate to Queensland Rail that it has the financial capacity to perform its obligations, and satisfy its liabilities, under an Access Agreement (including timely payment of Access Charges or other amounts and of insurance premiums and deductibles under any required policies of insurance).

2.9.2 Requirement to demonstrate satisfaction of prudential requirements

Queensland Rail may, at any time, require an Access Seeker to demonstrate, within a reasonable period of no more than ten Business Days, that the Access Seeker satisfies the prudential requirements set out in **clause 2.9.1**.

2.9.3 Consequence of failing to satisfy prudential requirements

Despite any other provision of this Undertaking, if the Access Seeker cannot satisfy the prudential requirements referred to in **clause 2.9.1** to Queensland Rail's satisfaction (acting reasonably), then Queensland Rail may refuse to commence negotiations, or may cease negotiations, with that Access Seeker.

Part 3 Pricing principles

3.1 Pricing objectives

3.1.1 Revenue adequacy

Queensland Rail is entitled to earn revenue from providing Access, including from Access Charges and Transport Service Payments, that is at least enough to:

- (a) fully recover all Efficient Costs; and
- (b) provide a return on the value of assets and investment commensurate with the regulatory and commercial risks involved.

If Queensland Rail earns revenue in excess of this, then Queensland Rail may seek to reduce Transport Service Payments rather than Access Charges.

3.1.2 Network utilisation

- (a) Queensland Rail may establish different Access Charges for Train Services serving different markets to maximise the commercially viable use of Capacity while meeting, in aggregate, the Common Costs.
- (b) If the Available Capacity is potentially insufficient to satisfy the requests for Access Rights of all current and likely Access Seekers, then:
 - (i) Queensland Rail may (consistent with the principles set out in **clauses 3.1 to 3.3**) determine the highest Access Charge for a Train Service that it is likely to achieve from the current or likely Access Seekers (**Maximum Access Charge**);
 - (ii) the Maximum Access Charge may be quoted to all Access Seekers in respect of the Available Capacity (including any Additional Capacity that Queensland Rail has agreed to provide), irrespective of:
 - (A) any Access Seeker's ability to contribute to the Common Costs; or
 - (B) the Access Charges payable under existing Access Agreements for similar Train Services; and
 - (iii) if Queensland Rail:
 - (A) chooses to allocate Available Capacity to an Access Seeker for an Access Charge less than the Maximum Access Charge; and

- (B) another Access Seeker is willing to pay an Access Charge equal to the Maximum Access Charge,

then when determining a Ceiling Revenue Limit in accordance with **clause 3.2.3** for Train Services using that constrained section of the Network, the Access Charge for the Access Seeker is assumed to be the Maximum Access Charge.

3.2 Pricing limits

3.2.1 Applying a Ceiling Revenue Limit

Queensland Rail in setting the methodology, rates and other inputs for calculating Access Charges for an Access Seeker's proposed Train Services must do so such that, over the Evaluation Period, the Expected Access Revenue from any one of those Train Services and any combination of those Train Services does not exceed the Ceiling Revenue Limit for that Train Service or combination of Train Services, as applicable.

3.2.2 Applying a Floor Revenue Limit

- (a) Subject to **clause 3.2.2(b)**, Queensland Rail may (in its absolute discretion) set the methodology, rates and other inputs for calculating Access Charges for an Access Seeker's proposed Train Services such that, over the Evaluation Period, the Expected Access Revenue from any one of those Train Services or any combination of those Train Services falls below the Floor Revenue Limit for that Train Service or combination of Train Services, as applicable.
- (b) For the purposes of **clause 3.2.2(a)**, Queensland Rail must only exercise the discretion under **clause 3.2.2(a)** where:
 - (i) Queensland Rail receives Transport Service Payments for any part of the Network that will be used by the Access Seeker's proposed Train Services;
 - (ii) after taking into account the relevant Transport Services Payments the Expected Access Revenue would not fall below the Floor Revenue Limit; and
 - (iii) the methodology, rates and other inputs for calculating the relevant Access Charges includes a mechanism that allows Queensland Rail to vary the Access Charges from time to time in response to any decrease in the relevant Transport Service Payments.

3.2.3 Determination of Ceiling Revenue Limit

- (a) The Ceiling Revenue Limit means the aggregate of the following:
 - (i) the maximum amount of Expected Access Revenue; and

- (ii) where the Access Seeker’s proposed Train Services comprise all of the Train Services using the relevant part of the Network, the Transport Services Payments (if any) that are reasonably expected to be received by Queensland Rail in respect of that part of the Network (on a pro rata basis for that individual Train Service or combination of Train Services, as applicable),

over the Evaluation Period where the Ceiling Revenue Limit is measured such that the net present value of the cashflows associated with providing Access for the relevant Train Service(s) over the Evaluation Period is zero. This measurement can be expressed as:

$$0 = -AV_o + \sum_{t=1}^n \frac{(CRL_t - C_t - M_t - T_t)}{(1 + WACC)^t} + \frac{AV_n}{(1 + WACC)^n}$$

where:

- AV_o** is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with **clause 3.2.3(c)**, at the commencement of the Evaluation Period;
- n** is the number of years in the Evaluation Period;
- t** is each year within the Evaluation Period from one to n;
- CRL_t** is the Ceiling Revenue Limit for the Train Service(s) expressed as revenue that may be earned in each year of the Evaluation Period;
- C_t** is the capital expenditure for assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;
- M_t** is the Efficient Costs for the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;
- T** is the tax expense assessed through the application of the statutory tax rate for corporations to the taxable income reasonably expected to be earned through the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period, where such tax expense is reduced in each year by the application of the gamma factor, reflecting the market value of dividend imputation, as agreed by Queensland Rail and the QCA or, failing such agreement, as determined by the QCA; and
- AV_n** is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s),

assessed in accordance with **clause 3.2.3(c)**, at the end of the Evaluation Period.

WACC has the meaning given to that term in **clause 7.1**.

- (b) For the purposes of determining the variables under **clause 3.2.3(a)**, the assumed traffic task resulting from the Train Services(s) over the Evaluation Period is the forecast, as reasonably determined by Queensland Rail, for the traffic task resulting from the Train Service(s) over the Evaluation Period (including making allowance for any changes in traffic task that are expected to result from the commencement of projects that impact significantly on the traffic task).
- (c) The value of assets used in **clause 3.2.3(a)** is determined using the Depreciated Optimised Replacement Cost methodology.

3.3 Limits on price differentiation

- (a) Queensland Rail may differentiate the methodology, rates and other inputs for calculating Access Charges between Access Seekers or between Access Seekers and Access Holders in accordance with this **clause 3.3**.
- (b) The methodology, rates and other inputs for calculating Access Charges formulated by Queensland Rail for an Access Seeker may vary from:
 - (i) an applicable Reference Tariff to reflect differences in the cost and risk to Queensland Rail of providing Access to that Access Seeker compared to the basis on which the Reference Tariff was determined; or
 - (ii) if there is no applicable Reference Tariff, the methodology, rates and other inputs for calculating Access Charges for other Access Seekers or Access Holders in respect of a Train Service with similar characteristics to that Access Seeker's proposed Train Service⁹:
 - (A) on a unit rate basis to reflect differences in the cost and risk to Queensland Rail of providing Access to that Access Seeker compared to the other Access Seekers or Access Holders; and

⁹ Queensland Rail will determine whether the characteristics of Train Services are similar having regard to all relevant matters including the geographical area within which the Train Services operate, the origin and destination of the Train Services, the duration and quality of the Train Path including arrival and departure times of the day and week, the nature of the Rolling Stock and Train Configuration, characteristics of the Train Services, the commodity transported or transport service and the duration and terms of the relevant Access Agreement.

- (B) to reflect:
 - (1) changes that result in Queensland Rail no longer being able to commercially provide Access to Train Services in that geographic area at the current Access Charges (for example, changes in relevant Transport Service Payments);
 - (2) changes in the cost and risk to Queensland Rail of providing Access;
 - (3) changes in circumstances that have had, or may have, a material effect on the ability or willingness of Access Holders or Access Seekers to pay Access Charges or proposed Access Charges; or
 - (4) limitations on Available Capacity, over time.

3.4 Reference Tariffs

3.4.1 Application of Reference Tariffs

- (a) A Reference Tariff is an acceptable means by which Queensland Rail provides Access Seekers with information about the matters listed in sections 101(2)(a) to (c) of the QCA Act.
- (b) If Queensland Rail formulates an Access Charge for an Access Seeker's proposed Train Services based on a Reference Tariff, then Queensland Rail is taken to have complied with **clauses 3.1** and **3.2**.

3.4.2 Review of Reference Tariffs

- (a) Subject to **clause 3.4.2(b)**, **schedule A** specifies the period for which a Reference Tariff is effective and how the Reference Tariff may be reviewed during this period.
- (b) Without limitation to **clause 3.4.2(a)**:
 - (i) Queensland Rail will, prior to 30 June 2013 (or such later date as approved by the QCA), review the Reference Tariffs and submit to the QCA proposed new Reference Tariffs that are to take effect from 1 July 2013 (including, if Queensland Rail wishes to do so, a determination or review, as applicable, of the asset value for the West Moreton System for the purpose of developing the Reference Tariffs);
 - (ii) if Queensland Rail does not submit proposed new Reference Tariffs in accordance with **clause 3.4.2(b)(i)**, then Queensland Rail will be taken to have submitted the

Reference Tariffs under this Undertaking as the proposed new Reference Tariffs; and

- (iii) for the purpose of this **clause 3.4.2(b)**:
- (A) Queensland Rail's submission of proposed new Reference Tariffs under this **clause 3.4.2(b)** will be treated as if it were a draft access undertaking submitted by Queensland Rail under the QCA Act in response to an initial undertaking notice given by the QCA;
 - (B) Queensland Rail and the QCA will act in accordance with the provisions of the QCA Act as though this were the case; and
 - (C) for clarity, after new Reference Tariffs are approved by the QCA in accordance with this **clause 3.4.2(b)** this Undertaking will apply as though it were amended to replace the Reference Tariffs with those new Reference Tariffs with effect on and from 1 July 2013.

3.5 Rate review provisions

Queensland Rail or an Access Seeker may require rate review provisions in an Access Agreement that is being negotiated to enable the methodology, rates and other inputs for calculating Access Charges to be adjusted to be consistent with changes over time in:

- (a) the cost and risk to Queensland Rail of providing Access;
- (b) (if a Reference Tariff applies to the Train Service type) the applicable Reference Tariff (including any matters under **schedule A**); and
- (c) (if no Reference Tariff applies to the Train Service type) the methodology, rates and other inputs for calculating Access Charges offered to other Access Seekers in respect of a Train Service with similar characteristics to that Access Seeker's proposed Train Service.¹⁰

3.6 QCA Levy

An Access Charge for a Train Service may include a QCA Levy component to be collected for the QCA by Queensland Rail. This component will, where applicable, be determined from year to year based on the QCA Levy levied by

¹⁰ Queensland Rail will determine whether the characteristics of Train Services are similar having regard to all relevant matters including the geographical area within which the Train Services operate, the origin and destination of the Train Services, the duration and quality of the Train Path including arrival and departure times of the day and week, the nature of the Rolling Stock and Train Configuration, characteristics of the Train Services, the commodity transported or transport service and the duration and terms of the relevant Access Agreement.

the QCA to Queensland Rail and allocated amongst Train Service types in a manner approved by the QCA.

Part 4 Network Management Principles and Operating Requirements Manual

4.1 Network Management Principles

- (a) Queensland Rail will:
 - (i) perform scheduling, Train Control and associated services; and
 - (ii) provide Capacity related information to Access Holders, in accordance with the Network Management Principles¹¹ and subject to the terms of each Access Holder's Access Agreement.
- (b) Each Train Service Entitlement will:
 - (i) include specified scheduling constraints (which will vary between different types of Train Services); and
 - (ii) be expressed in terms so that it can be used in the development of any MTP and DTP.
- (c) Queensland Rail will, subject to the Network Management Principles, manage the scheduling of train plans, including the MTP and DTP, to optimise the use of the Network from time to time.

4.2 Operating Requirements Manual

4.2.1 Obligation to comply with Operating Requirements Manual

- (a) An Access Agreement executed during the Term may include provisions requiring Queensland Rail and the relevant Access Holder to comply with the Operating Requirements Manual, in performing obligations or exercising rights under that Access Agreement.
- (b) Queensland Rail must make the Operating Requirements Manual available to Access Seekers and Access Holders.

4.2.2 Amending the Operating Requirements Manual

- (a) Queensland Rail may amend the Operating Requirements Manual from time to time.
- (b) **Clauses 4.2.2(c) to 4.2.2(e)** do not apply to amendments made to the Operating Requirements Manual by Queensland Rail:
 - (i) (not acting arbitrarily) on safety grounds;
 - (ii) in response to a Material Change; or

¹¹ For clarity, the Network Management Principles are set out in **schedule B**.

- (iii) if required for the purposes of Queensland Rail implementing a change to the assets, equipment, facilities, infrastructure, processes, procedures or systems used for the purposes of any train management system (including, for example, a Train Control system or a train protection system) where Queensland Rail (acting reasonably) implements the change for the purpose of improving safety, network capabilities, network capacity or system reliability (or a combination of any of these).
- (c) If in Queensland Rail's opinion (acting reasonably) the proposed amendment to the Operating Requirements Manual will materially adversely affect an Access Holder then Queensland Rail will only amend the Operating Requirements Manual after:
 - (i) notifying the Access Holder of the proposed amendment; and
 - (ii) providing the Access Holder with a reasonable opportunity to discuss the proposed amendment with Queensland Rail.
- (d) A notice issued by Queensland Rail under **clause 4.2.2(c)** must include details of:
 - (i) the proposed amendment including the proposed implementation date;
 - (ii) the period during which the Access Holder may discuss the proposed amendment with Queensland Rail; and
 - (iii) the date by which the Access Holder may lodge with Queensland Rail any submission in respect of the proposed amendment.
- (e) Without limiting the matters that Queensland Rail must consider when deciding whether to proceed with any proposed amendment, Queensland Rail must consider any submissions from an Access Holder.
- (f) If Queensland Rail amends the Operating Requirements Manual, Queensland Rail must:
 - (i) notify all Access Holders and Access Seekers of the amendment and specify the date on which the amendment will take effect; and
 - (ii) in specifying the date on which the amendment will take effect, allow a reasonable period as determined by Queensland Rail, being not less than ten Business Days, for each Access Holder who is reasonably likely to be affected by the amendment to amend its processes, procedures and plans to comply with the amended Operating Requirements

Manual, except where Queensland Rail requires immediate compliance for safety reasons.

- (g) If Queensland Rail amends the Operating Requirements Manual in accordance with this **clause 4.2**, the Operator must bear its own costs of implementing the proposed amendments including the equipping of Rolling Stock with new or additional equipment or making any other modification to Rolling Stock.

4.2.3 Disputes about amendments to Operating Requirements Manual

- (a) This **clause 4.2.3** does not apply to amendments made to the Operating Requirements Manual by Queensland Rail:
 - (i) on safety grounds;
 - (ii) if required pursuant to a Material Change; or
 - (iii) if required for the purposes of Queensland Rail implementing a change to the assets, equipment, facilities, infrastructure, processes, procedures or systems used for the purposes of any train management system (including, for example, a Train Control system or a train protection system) where Queensland Rail (acting reasonably) implements the change for the purpose of improving safety, network capabilities, network capacity or system reliability (or a combination of any of these).
- (b) Subject to **clause 4.2.3(a)**, if:
 - (i) Queensland Rail amends the Operating Requirements Manual; and
 - (ii) an Access Holder considers that an amendment to the Operating Requirements Manual Unfairly Differentiates,then the Access Holder may, within 20 Business Days after being given notice of the amendment by Queensland Rail under **clause 4.2.2(f)(i)**:
 - (iii) give Queensland Rail a notice setting out details of the dispute including grounds demonstrating that the amendment Unfairly Differentiates; and
 - (iv) subject to this **clause 4.2**, refer the matter to the QCA to be resolved as if it was a dispute that was required to be determined under **clause 6.1.4** and as though the Access Holder was an Access Seeker.
- (c) Subject to the final determination of a dispute referred to the QCA under **clause 4.2.3(b)**, an amendment to the Operating Requirements Manual takes effect from the date specified under **clause 4.2.2(f)** and the exercise by an Access Holder of a right under **clause 4.2.3(b)** does not affect the implementation of the amendment and the

Operating Requirements Manual is deemed to have been amended on an interim basis pending the final determination of the dispute.

- (d) If and to the extent that it is finally determined in respect of a dispute referred to the QCA under **clause 4.2.3(b)** that the amendment Unfairly Differentiates, then Queensland Rail may, at its election, either:
 - (i) specify a date on which the amendment will lapse and implement reasonable transitional arrangements; or
 - (ii) where the determination indicates how the amendment may be varied so that it does not Unfairly Differentiate, vary the amendment consistent with that determination.
- (e) Nothing in this **clause 4.2.3** restricts or otherwise limits the rights of an Access Holder or Queensland Rail to refer a dispute about whether any amendment to the Operating Requirements Manual Unfairly Differentiates to a court provided that:
 - (i) the dispute was first referred to, and determined by, the QCA; and
 - (ii) proceedings are commenced within 20 Business Days after the QCA's determination of that dispute.
- (f) For clarity:
 - (i) for a dispute in relation to whether any amendment to the Operating Requirements Manual Unfairly Differentiates, the Access Holder bears the onus of proving that it does Unfairly Differentiate; and
 - (ii) if court proceedings in respect of the dispute are not commenced within the time period referred to in **clause 4.2.3(e)(ii)**, then the QCA's determination is final and binding on Queensland Rail and Access Holders.

4.2.4 Liability

- (a) If Queensland Rail believes (acting reasonably and in good faith) in the circumstances and at the time that compliance with this **clause 4.2** was required, that it was acting in compliance with this **clause 4.2** in amending the Operating Requirements Manual, then Queensland Rail is not in breach of this Undertaking, and is not liable to any person (including any Access Seeker or Access Holder), in relation to or as a result of amending the Operating Requirements Manual (including on an interim basis) or the due implementation and observance of an amendment to the Operating Requirements Manual (whether on an interim or final basis), even if it is subsequently alleged that Queensland Rail did not comply with this **clause 4.2** or that the amendment Unfairly Differentiates.

- (b) An Access Agreement may provide that Queensland Rail has no liability (on any basis whatsoever including in negligence) to the Access Holder in relation to or as a result of amending the Operating Requirements Manual (including on an interim basis) or the due implementation and observance of an amendment to the Operating Requirements Manual (whether on an interim or final basis) where Queensland Rail believes (acting reasonably and in good faith) in the circumstances and at the time that compliance with this **clause 4.2** was required, that it was acting in compliance with this **clause 4.2** in amending the Operating Requirements Manual.

Part 5 Reporting

5.1 Quarterly network train performance reports

5.1.1 Obligation to publish quarterly report

- (a) Subject to **clause 6.4(c)**, within 20 Business Days after the end of each Quarter in the Term, Queensland Rail will publicly release a quarterly report for that Quarter containing the information set out in **clause 5.1.2** and/or other indicators approved by the QCA from time to time.
- (b) Queensland Rail will use reasonable endeavours to ensure that the information contained in each quarterly report is accurate.
- (c) Queensland Rail must ensure that each quarterly report is accompanied by a responsibility statement signed by the Chief Executive Officer of Queensland Rail.

5.1.2 Content of quarterly report

A quarterly report published under **clause 5.1.1** will:

- (a) contain the following information:
 - (i) a comparison of the information described in **clauses 5.1.2(a)(ii) to 5.1.2(a)(vii)** in relation to the subject Quarter and, subject to **clause 6.4(b)**, the four preceding Quarters;
 - (ii) for Train Services that operated in the subject Quarter:
 - (A) the number and percentage of Train Services that reached their destination within the Allotted Time Threshold;
 - (B) the number and percentage of Train Services that did not reach their destination within the Allotted Time Threshold:
 - (1) due solely to the acts or omissions of Queensland Rail in its capacity as the Railway Manager;
 - (2) due solely to delays attributed to an Access Holder or a Nominated Railway Operator; and
 - (3) due to any other reason; and
 - (C) the total number of Train Services;
 - (iii) the average Above Rail Delay, Below Rail Delay and Unallocated Delay, in minutes, per 100 train kilometres for the aggregate of the Train Services that operated in the subject Quarter;

- (iv) the number and percentage of Train Services scheduled in the DTPs relating to the subject Quarter that were cancelled in each of the following circumstances:
 - (A) where that cancellation can be solely attributed directly to Queensland Rail in its capacity as the Railway Manager;
 - (B) where that cancellation can be solely attributed directly to an Access Holder or a Nominated Railway Operator; and
 - (C) where that cancellation occurred for any other reason;
 - (v) the number of major reportable incidents, as reported to the Rail Safety Regulator, for Train Services that operated in the subject Quarter;
 - (vi) the average percentage, and the average number of kilometres, of Track under a temporary speed restriction for the subject Quarter (excluding Track in the Metropolitan Region); and
 - (vii) the most recent measure of Track quality, in the subject Quarter (if any), for the Network measured by a quality index with component measures including gauge, top, twist and versine; and
- (b) the information referred to in **clauses 5.1.2(a)(ii) to 5.1.2(a)(v)**, will be limited to, and aggregated by, Train Services operated in the following sections of the Network:
- (i) the West Moreton Reporting Area;
 - (ii) the Mt Isa Reporting Area;
 - (iii) the North Coast Reporting Area; and
 - (iv) the Network outside the West Moreton Reporting Area, the Mt Isa Reporting Area and the North Coast Reporting Area.

Schedule E sets out a tabular representation of the information referred to **clauses 5.1.2(a)(ii) to (vii)** and **(b)** in respect of a Quarter. However, **schedule E** does not alter or otherwise affect the operation or interpretation of this **clause 5.1**, the information requirements for quarterly reports or the format or style of quarterly reports.

5.2 Annual report on negotiation process

5.2.1 Obligation to publish annual report

- (a) Subject to **clauses 6.4(b)** and **(d)**, within four months after the end of each Year in the Term, or such longer time as agreed by the QCA,

Queensland Rail will publicly release an annual report in relation to that Year containing the information set out in **clause 5.2.2**.

- (b) Queensland Rail will use reasonable endeavours to ensure that the information contained in each annual report is accurate.
- (c) Queensland Rail must ensure that each annual report is accompanied by a responsibility statement signed by the Chief Executive Officer of Queensland Rail.

5.2.2 Content of annual report

An annual report published under **clause 5.2.1** will contain the following information for the relevant Year:

- (a) the number of requests for information received in accordance with **clause 2.1.3** and the average time (in Business Days) taken by Queensland Rail to provide that information;
- (b) the number and percentage of Access Applications acknowledged in accordance with this Undertaking and within the applicable timeframe nominated in **clause 2.3.2**;
- (c) for those Access Applications received in accordance with this Undertaking and that have not been acknowledged within the applicable timeframe nominated in **clause 2.3.2**, the average delay (in Business Days) by Queensland Rail to acknowledge the Access Applications;
- (d) the number and percentage of Indicative Access Proposals provided in accordance with this Undertaking within the applicable timeframe nominated in **clause 2.4.1**;
- (e) the number and percentage of Access Applications received in accordance with this Undertaking for which a time estimate within which an Indicative Access Proposal would be provided to the Access Seeker was provided in an acknowledgement notice given under **clause 2.3.2**;
- (f) for those Indicative Access Proposals provided in accordance with this Undertaking but that have not been provided within the applicable timeframe nominated in **clause 2.4.1**, the average delay (in Business Days) by Queensland Rail to provide the Indicative Access Proposals;
- (g) the number of disputes that are:
 - (i) referred to the dispute resolution process under **clause 6.1**; and
 - (ii) referred to the dispute resolution process under **clause 6.1** and determined in favour of the Access Seeker.

- (h) the number and percentage of Access Applications in relation to which Queensland Rail has given a Negotiation Cessation Notice in accordance with **clause 2.6.3**;
- (i) the number of Access Agreements executed by Queensland Rail; and
- (j) the number of Access Agreements (excluding agreements which extend or renew an Access Holder's Access Rights that existed immediately prior to execution of the agreement) executed by Queensland Rail for which the negotiation period was:
 - (i) three months or less;
 - (ii) more than three months but not more than six months;
 - (iii) more than six months but not more than 12 months; and
 - (iv) more than 12 months.

Schedule E sets out a tabular representation of the information referred to in this **clause 5.2.2** in respect of a relevant Year. However, **schedule E** does not alter or otherwise affect the operation or interpretation of this **clause 5.2**, the information requirements for annual reports or the format or style of annual reports.

5.3 General reporting obligations

5.3.1 Accuracy

- (a) Queensland Rail will use reasonable endeavours to ensure the reports referred to in **clauses 5.1** and **5.2** are accurate.
- (b) If, in Queensland Rail's opinion, there is a material error in a report published or provided under **clauses 5.1** or **5.2**, then it will, as soon as reasonably practicable, take the steps it considers reasonable to correct that error.

5.3.2 Information requested by the QCA

- (a) Subject to **clause 5.3.2(b)**, the QCA may, by written notice, request Queensland Rail to provide information or a document that the QCA reasonably requires for the purpose of complying with this Undertaking.
- (b) A notice given by the QCA under **clause 5.3.2(a)** must include a description of the information or document required, the purpose for which it is required, and the day by which it is required, provided that the day stated in the notice must be reasonable.
- (c) Queensland Rail will comply with a request by the QCA under **clause 5.3.2(a)** by the day stated in the request unless it has a reasonable excuse for non-compliance.

5.3.3 Audit

- (a) If the QCA believes, acting reasonably, that the information contained in a quarterly report or annual report released by Queensland Rail under **clause 5.1** or **5.2** is inaccurate in a material way, the QCA may instruct Queensland Rail to obtain an audit of the relevant quarterly report or annual report (as applicable).
- (b) Where the QCA has instructed Queensland Rail to obtain an audit under **clause 5.3.3(a)**, the QCA may require that the audit be conducted by a third party and, if it does, the following process will apply (unless otherwise agreed by the QCA and Queensland Rail):
 - (i) Queensland Rail will appoint an auditor subject to the QCA's prior approval of the auditor and, if the QCA does not approve a particular auditor, Queensland Rail must nominate an alternative auditor as soon as practicable;
 - (ii) the auditor will have a duty of care to the QCA in providing the audit and, in the event of a conflict between the auditor's obligations to Queensland Rail and its duty of care to the QCA, the auditor's duty of care to the QCA will take precedence;
 - (iii) prior to commencing the audit, the auditor must agree an audit plan with Queensland Rail, document that audit plan and obtain the QCA's approval of that audit plan;
 - (iv) the audit plan referred to under **clause 5.3.3(b)(iii)** will consist of a proposed work program for the execution of the audit and will include the establishment of an audit liaison group, comprising the auditor, Queensland Rail and the QCA, to provide a forum for the resolution of any audit issues that arise during the course of the audit;
 - (v) Queensland Rail will be responsible for the costs of the auditor;
 - (vi) subject to **clause 5.3.3(b)(vii)**, Queensland Rail will provide any relevant information the auditor reasonably requires to conduct the audit, within a nominated timeframe that is determined by the auditor to be reasonable after consultation with Queensland Rail;
 - (vii) the auditor must enter into a confidentiality deed with Queensland Rail in relation to any information provided by Queensland Rail, to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the Audit Report detailed below;

- (viii) the auditor must prepare:
 - (A) a statement (**Audit Statement**):
 - (1) specifying only whether, in the opinion of the auditor, the information contained in the quarterly report or annual report (as applicable) released by Queensland Rail under **clause 5.1** or **5.2** (as applicable) is materially inaccurate; and
 - (2) describing the process adopted for the conduct of the audit; and
 - (B) a report (**Audit Report**):
 - (1) explaining the information set out in the Audit Statement in greater detail; and
 - (2) in the event that the auditor identifies that the information contained in the quarterly report or annual report (as applicable) is inaccurate in a material way, providing information on the inaccuracy.
- (c) Within a reasonable period following Queensland Rail's receipt of a completed Audit Statement and Audit Report, Queensland Rail must provide the Audit Statement and Audit Report to the QCA.
- (d) The QCA may publicly release an Audit Statement, but not an Audit Report.

Part 6 Administrative provisions

6.1 Dispute and complaint resolution process

6.1.1 Alternative dispute process

Nothing in this **clause 6.1** prevents an Access Seeker and Queensland Rail from agreeing (in each party's absolute discretion) to use a different dispute resolution process or different timeframes to the dispute resolution process or timeframes set out in this **clause 6.1**.

6.1.2 Application of dispute and complaint resolution process

- (a) If any dispute, complaint or question arises between Queensland Rail and an Access Seeker in relation to any provision of this Undertaking, a request for Access or the negotiation of an Access Agreement (**Dispute**), then:
 - (i) that Dispute will be resolved in accordance with this **clause 6.1**; and
 - (ii) either the Access Seeker or Queensland Rail may give the other a notice in writing (**Dispute Notice**) setting out details of the Dispute and that the Dispute is to be dealt with in the manner set out in this **clause 6.1**.
- (b) Disputes in relation to an Access Holder or an Access Agreement must be dealt with in accordance with the provisions of the relevant Access Agreement and must not be dealt with under this Undertaking.

6.1.3 Resolution by escalation

- (a) Within five Business Days (or such longer period as agreed by the parties) after the date on which a party gives the other party a Dispute Notice (**Dispute Notice Date**), representatives of the parties must meet and use reasonable endeavours to resolve the Dispute.
- (b) If the Dispute is not resolved under **clause 6.1.3(a)**, senior management representatives of the parties (who, for a party, are senior to that party's representative(s) referred to in **clause 6.1.3(a)**) must, within ten Business Days (or such longer period as agreed by the parties) after the Dispute Notice Date, meet and use reasonable endeavours to resolve the Dispute.
- (c) If the Dispute is not resolved under **clause 6.1.3(b)**, the Dispute must be referred to each party's chief executive officer (or his or her nominee – who, for a party, must be more senior than that party's representative(s) referred to in **clauses 6.1.3(a)** and **(b)**) who must use reasonable endeavours to resolve the Dispute within ten Business Days (or such longer period as agreed by the parties) after the Dispute has been so referred.

6.1.4 Resolution by QCA

- (a) If a Dispute is not resolved under **clause 6.1.3** within the last of the applicable time frames, then:
 - (i) either the Access Seeker or Queensland Rail (or both of them) may give an access dispute notice (as defined in the QCA Act) to the QCA; and
 - (ii) the Dispute will be resolved in accordance with Division 5, Part 5 of the QCA Act.
- (b) If a Dispute is referred to the QCA for arbitration in accordance with Division 5, Part 5 of the QCA Act, the QCA must:
 - (i) ask the Rail Safety Regulator to make a decision on those aspects of the Dispute (if any) that relate to safety matters (as defined in the TRSA);
 - (ii) provide to the Access Seeker and Queensland Rail a copy of any decision that it receives from the Rail Safety Regulator; and
 - (iii) not make any access determination in respect of the Dispute relating to a safety matter that is inconsistent with any decision of the Rail Safety Regulator.

6.1.5 Reporting unresolved disputes and complaints to the QCA

If:

- (a) a Dispute is referred to the dispute resolution process in this **clause 6.1**;
- (b) that Dispute is not resolved by the Access Seeker and Queensland Rail; and
- (c) neither the Access Seeker nor Queensland Rail gives an access dispute notice to the QCA in accordance with **clause 6.1.4(a)(i)**,

then, within three months after the Dispute Notice Date, Queensland Rail will report that Dispute (including a brief description of the Dispute) to the QCA.

6.2 QCA Decision-making

- (a) The QCA may not make a decision (**Decision**) under this Undertaking that may affect Queensland Rail (including to require Queensland Rail to do, give or submit anything to the QCA, to resolve a Dispute, to approve or consent to or grant anything or to refuse to approve or consent to or grant anything), unless:
 - (i) the QCA observed the rules of natural justice;
 - (ii) the QCA observed any procedures that were required by any applicable Law or this Undertaking;

- (iii) the QCA had jurisdiction to make the Decision under this Undertaking;
- (iv) the QCA was authorised to make the Decision under this Undertaking;
- (v) the QCA's Decision was a proper exercise of the power conferred by this Undertaking and, without limitation, it will not be a proper exercise of power if:
 - (A) the QCA takes an irrelevant consideration into account in the exercise of a power;
 - (B) the QCA fails to take a relevant consideration into account in the exercise of a power; or
 - (C) the QCA exercises:
 - (1) a power for a purpose other than a purpose for which the power is conferred;
 - (2) a discretionary power in bad faith;
 - (3) a personal discretionary power at the discretion or behest of another person;
 - (4) a discretionary power in accordance with a rule or policy without regard to the merits of a particular case;
 - (5) a power in a manner that is so unreasonable that no reasonable person could so exercise the power;
 - (6) a power in such a way that the result of the exercise of the power is uncertain; or
 - (7) a power in a way that is an abuse of the power;
- (vi) the QCA's Decision involves an error of law (whether or not the error appears on the record of the Decision);
- (vii) the QCA's Decision was induced or affected by fraud;
- (viii) to the extent that any matters were required to be established before the Decision could be made or taken, there was not some material or evidence from which the QCA could reasonably be satisfied the matter was established to justify the Decision or, to the extent that the existence of a particular fact forms the basis on which the Decision is made, the fact did or does not exist; and
- (ix) the Decision was otherwise contrary to law or this Undertaking.

For the avoidance of doubt, where words and phrases in this **clause 6.2(a)** are also used under the *Judicial Review Act 1991* (Qld) and are not expressly defined in this Undertaking, then those words and phrases have the same meaning as used in the *Judicial Review Act 1991* (Qld).

- (b) The requirements set out in **clause 6.2(a)** also apply to the QCA's conduct in making a Decision.
- (c) If the QCA's Decision or conduct is challenged on the basis of a breach of a requirement in this **clause 6.2**, Queensland Rail and the QCA agree that Queensland Rail may seek an order suspending the operation of the Decision and a stay of any proceedings under the Decision.
- (d) This **clause 6.2** does not affect the right of any party to seek any other form of remedy or relief including relief by way of the equitable remedies of injunction or declaration or to seek review under the *Judicial Review Act 1991* (Qld).

6.3 Notices

6.3.1 Form of Notices

A notice or other document (**Notice**) relating to this Undertaking must be in writing in English.

6.3.2 Means of giving Notices

In addition to any other lawful means, a Notice may be given by being, personally delivered or sent by pre-paid post or email.

6.3.3 Effect and receipt of a Notice

- (a) Unless a later time is specified in it, any Notice takes effect and is given from the earlier of the time it is actually given or is taken to be given.
- (b) A Notice is taken to be given, in the case of a Notice given by:
 - (i) hand, at the time of delivery;
 - (ii) post, on the second day following the date of posting (other than a Notice acknowledging the receipt of an Access Application which is taken to be given on the date of posting); and
 - (iii) email, when the sender receives an automated message confirming delivery or four hours after the time 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, whichever happens first,

provided that, if a Notice is given:

- (iv) after 5:00pm in the place of receipt; or
 - (v) on a day which is not a Business Day in the place of receipt,
- it is taken as having been given on the next Business Day.

6.3.4 Process service is not affected

This **clause 6.3** does not affect any process or other document relating to litigation, administrative or arbitral proceedings relating to this Undertaking (which may be served in accordance with any applicable Law).

6.4 Transitional provisions

- (a) All acts, applications, approvals, approval processes, arrangements, circumstances, conduct, decisions, determinations, dispute resolution processes, events, Force Majeure Events, matters, negotiations, notices, omissions, requests, time periods, votes, warranties or any other process or thing whatsoever (**Matter**) done, agreed, arising, given, received, undertaken, commenced or established (**Done**) or deemed to be Done under the 2008 Undertaking are deemed to be Done and, as applicable, continue under this Undertaking as though the Matter was Done under this Undertaking to the extent that this Undertaking provides for equivalent Matters to be Done.
- (b) If this Undertaking requires Queensland Rail to report to the QCA on a Quarter or a Year that began prior to the Approval Date, then:
 - (i) the relevant report will include information in respect of the period prior to the Approval Date; and
 - (ii) Queensland Rail is only obliged to provide information for the period prior to the Approval Date as would have been required to be provided under the 2008 Undertaking in respect of that same type of report.
- (c) If the Approval Date is the first day of a Quarter, then Queensland Rail will report on the last Quarter prior to the Approval Date in accordance with the requirements of the 2008 Undertaking.
- (d) If the Approval Date is the first day of a Year, then Queensland Rail will report on the prior Year in accordance with the requirements of the 2008 Undertaking.

Part 7 Definitions and interpretation

7.1 Definitions

In this Undertaking:

2008 Undertaking means Aurizon Network’s access undertaking as approved by the QCA on 23 October 2008 (as amended pursuant to submissions by Queensland Rail which were approved by the QCA) but only to the extent that it applied to Queensland Rail pursuant to section 9(1)(j) of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld);

Above Rail Delay means a delay to a Train Service from its scheduled Train Path in the DTP, where that delay can be solely attributed directly to an Access Holder (or its Nominated Railway Operator) in operating its Train Services, but excludes:

- (a) cancellations;
- (b) delays resulting from compliance with a Passenger Priority Obligation; and
- (c) delays resulting from a Force Majeure Event;

Above Rail Services means those activities, other than Below Rail Services, required to provide and operate Train Services, including Rolling Stock provision, Rolling Stock maintenance, non-Train Control related communications, train crewing, terminal provision and services, freight handling and marketing and the administration of those activities and **Above Rail** has a similar meaning;

Access means:

- (a) the non-exclusive right to use a specified section of the Network; and
- (b) for non-passenger Train Services, excludes the right to use those parts of the Network provided for the benefit of passengers or passenger Train Services including:
 - (i) stations and platforms used predominantly for passengers or passenger Train Services; and
 - (ii) yards and associated facilities used to stage, maintain or store Rolling Stock used for passenger Train Services,

for the purposes of operating Train Services;

Access Agreement means an agreement between Queensland Rail and an Access Holder for the provision of Access;

Access Application means a request for Access Rights by an Access Seeker:

- (a) prepared in writing using the current Queensland Rail application form for the relevant type of Train Service; and

- (b) that includes:
- (i) all of the information required to fully and properly complete the application form; and
 - (ii) all additional or clarified information required by Queensland Rail (for example, under **clause 2.3.1**);

Access Charge means the charge or other amount payable by an Access Holder to Queensland Rail for the provision of Access under an Access Agreement and includes, except where the context requires otherwise, Take or Pay Charges and Adjustment Charges;

Access Holder means a person who holds Access Rights under an Access Agreement;

Access Rights means an entitlement to Access in accordance with a specified Train Service Entitlement;

Access Seeker means a person who is seeking new or additional Access Rights from Queensland Rail;

Accredited means accredited (including exempted from the requirement to be accredited) in accordance with Part 5 of the TRSA;

Additional Capacity means the additional capability of the Network to accommodate Train Services that would result from an Extension;

Ad Hoc Train Service means any Train Service:

- (a) additional to the number of Train Services permitted under an existing Access Agreement, but otherwise consistent with the Train Service Entitlement and Rolling Stock and Train Configuration authorised pursuant to that existing Access Agreement; or
- (b) varying from the Train Service Entitlement specified in an existing Access Agreement, but agreed to by Queensland Rail;

Adjustment Charge has the meaning given to that term in **clause 6.1(a)** of **schedule A**;

Allotted Time Threshold means the threshold within which a Train Service is considered to be on time as follows, for a Train Service operated for the purpose of:

- (a) transporting coal, 30 minutes;
- (b) transporting bulk minerals (other than coal), 60 minutes; and
- (c) transporting freight products, 60 minutes;

Approval Date means the date on which this Undertaking was approved by the QCA;

Aurizon Network means Aurizon Network Pty Ltd ACN 132 181 116;

Authorisation means any consent, accreditation, authorisation, registration, filing, lodgement, notification, agreement, licence, certification, commission,

permit, approval, exemption, ruling or other permission from, by or with an Authority required by any Law or lawfully required by any Authority;

Authority means:

- (a) the Crown or any minister of the Crown;
- (b) any government, federal, state or local government department or other governmental, semi-governmental or judicial body or authority including local government, a court or a tribunal;
- (c) any corporation, authority, body or force constituted for a public purpose (including any police service or force);
- (d) any holder of an office for a public purpose;
- (e) any governmental, semi-governmental or judicial person; and
- (f) any person (whether autonomous or not) who is charged with the administration or enforcement of a Law,

including any officer or agent of the foregoing acting in that capacity;

Available Capacity means Capacity excluding:

- (a) all Committed Capacity other than, in relation to an Access Application:
 - (i) Committed Capacity that will cease being Committed Capacity prior to the time period for which Capacity is being assessed for that Access Application; and
 - (ii) Capacity that is required to comply with any Passenger Priority Obligation or Preserved Train Path Obligation that can be allocated by Queensland Rail to that Access Application in accordance with that Passenger Priority Obligation or Preserved Train Path Obligation and is not otherwise Committed Capacity;
- (b) Queensland Rail's reasonable requirements for the exclusive use of the Network for the purposes of:
 - (i) performing activities associated with the maintenance or repair of the Network, or undertaking Extensions, including the operation of work Trains; and
 - (ii) attending to and performing activities associated with safety matters or the management of safety risks; and
- (c) Capacity that is not available as a result of:
 - (i) an Operational Constraint from time to time; or
 - (ii) restrictions imposed or required from time to time in accordance with any Law;

Below Rail Delay means a delay to a Train Service from its scheduled Train Path in the DTP, where that delay can be solely attributed directly to Queensland Rail in its capacity as the Railway Manager, but excludes:

- (a) cancellations;
- (b) delays resulting from compliance with a Passenger Priority Obligation; and
- (c) delays resulting from a Force Majeure Event;

Below Rail Services means the activities associated with the provision and management of the Network, including:

- (a) the construction, maintenance and renewal of Network assets; and
- (b) the network management services required for the safe operation of Train Services on the Network including:
 - (i) Train Control; and
 - (ii) the implementation of procedures and systems, including supporting communications systems, for the safe operation of Train Services and protection of work sites on the Network,

and **Below Rail** has a similar meaning;

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

Capacity means the capability of the Network to accommodate Train Services including all Additional Capacity that is expected to result from Extensions that Queensland Rail has committed to construct;

Capacity Analysis means an assessment of:

- (a) whether there is sufficient Available Capacity to accommodate an Access Seeker's requested Access Rights; and
- (b) if there is not sufficient Available Capacity to accommodate the requested Access Rights, the Additional Capacity and Extensions required to grant the requested Access Rights (including an outline of the investigations and works in relation to undertaking the Extensions and indicative estimate of the cost of and timing for such investigations and works),

which provides a basis for the negotiation of an Access Agreement;

Ceiling Revenue Limit has the meaning given to that term in **clause 3.2.3**;

Change in Law means:

- (a) any amendment, repeal, modification or enactment of any Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Authority;
- (d) the imposition of a requirement for Authorisations not required as at the Approval Date;
- (e) after the date of grant of any Authorisation, a change in the terms, conditions and requirements relating to that Authorisation including any new terms, conditions or requirements;
- (f) any such Authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application therefore being duly made, or being renewed on a basis that is materially less favourable than the original Authorisation;
- (g) an amendment to this Undertaking; or
- (h) a change in the application or interpretation of this Undertaking resulting from a decision of a court or other Authority;

Change to Credit means:

- (a)
 - (i) a change in the rate, or basis of calculation, of; or
 - (ii) the introduction or cessation of,
a credit, rebate, deduction, refund, exemption, concession or any other benefit or allowance (whether or not relating to an Impost), including, without limitation, a fuel tax credit, diesel fuel rebate or similar credit to which Queensland Rail is or was entitled; or
- (b) any change in the funding or other support received by Queensland Rail from any Authority in relation to any relevant part of the Network;

Committed Capacity means that portion of the Capacity that is required:

- (a) to meet Train Service Entitlements;
- (b) to comply with any Passenger Priority Obligation or Preserved Train Path Obligation;
- (c) without limitation to **paragraph (b)** of this definition, to comply with any Law requiring Queensland Rail to provide a passenger Train Service with access to the Network; or
- (d) without limitation to **paragraphs (b)** and **(c)** of this definition, to meet Queensland Rail's requirements from time to time for the operation of passenger Train Services;

Common Costs means those costs associated with provision of the Network by Queensland Rail that are not Incremental Costs for any particular Train Service;

Confidential Information means any information, data or other matter (in this definition, **information**) disclosed to a Recipient by, or on behalf of, a Disclosing Party where:

- (a) the Recipient knows or ought to know that the information is confidential;
- (b) the information is by its nature confidential; or
- (c) at the time of the disclosure to the Recipient, the information is marked or otherwise indicated as confidential when disclosed,

excluding information that:

- (d) was in the Recipient's lawful possession prior to the disclosure; or
- (e) whether before or after the disclosure:
 - (i) is in the public domain through means other than a breach of confidentiality by the Recipient (or anyone to whom the Recipient has disclosed it); or
 - (ii) is received by the Recipient independently from a third party who is free to disclose such information;

Confidentiality Exception means:

- (a) any disclosure or use of Confidential Information consented to by the Disclosing Party under **clause 2.2.1(b)(i)**; or
- (b) any disclosure or use of Confidential Information:
 - (i) to the extent necessary to:
 - (A) the Recipient's directors, officers or employees; or
 - (B) the directors, officers or employees of a Related Party of the Recipient;
 - (ii) to the extent required or compelled by any Law;
 - (iii) to the extent necessary for the conduct of any legal proceedings (including any dispute resolution process under this Undertaking or the QCA Act);
 - (iv) to the extent required under any stock exchange listing requirement or rule;
 - (v) to the Rail Safety Regulator or the QCA;
 - (vi) to the Recipient's solicitors, barristers, or accountants under a duty of confidentiality (which is not waived by the Recipient without the prior written consent of the Disclosing Party);

- (vii) to the Recipient's engineering or other technical consultants and advisers to the extent necessary for the provision of advice to the Recipient (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (viii) to the Recipient's banker, financier 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 Disclosing Party under which they are obliged to keep the Confidential Information confidential;
- (ix) if Queensland Rail is the Recipient, to the shareholding Ministers (as defined in the *Government Owned Corporations Act 1993* (Qld)) of Queensland Rail;
- (x) for the purpose of facilitating Train Control Directions where the disclosure of information is by Queensland Rail in the usual course of undertaking Train Control;
- (xi) by any person involved in clearing an incident or emergency that is preventing or affecting the operation of Train Services on the Network;
- (xii) by Queensland Rail for the purpose of responding to, managing or clearing an incident or emergency that is preventing or affecting, or is likely to prevent or affect, the operation of Train services on the Network; or
- (xiii) by Queensland Rail in the course of providing feedback on an unsuccessful Access Application under **clause 2.7.2(e)**;

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

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

whether arising in contract, in tort (including negligence), under any law, as a consequence of fraud or otherwise and whether present or future, fixed or unascertained, actual or contingent, but does not include:

- (e) a loss (including a loss arising out of a Claim by a third party) in respect of:
 - (i) the cost of repairing, replacing or reinstating any real or personal property owned or leased by any person (including a party) that has been lost, damaged or destroyed; or
 - (ii) personal injury to or death of any person; or
- (f) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;

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

CPI means the Consumer Price Index: All Groups – Brisbane (Australian Bureau of Statistics Publication No.6401.0) as published by the Australian Bureau of Statistics (or other successor, authority or instrumentality having jurisdiction in the matter);

Customer means:

- (a) a person that the Access Holder or Access Seeker is providing or intending to provide Train Services (as an Operator) for or on behalf of, and for the purpose of providing such Train Services, the Access Seeker or Access Holder is acquiring or has acquired Access Rights; and
- (b) in **schedule C**:
 - (i) any person that has a rail haulage agreement or arrangement with the Access Holder in relation to the Access Rights;
 - (ii) any consignor of goods to be transported by the Access Holder;
 - (iii) any person with title to, or an interest in, any thing to be transported by the Access Holder; and
 - (iv) any other person directly or indirectly benefitting from, or for whom the Access Holder operates, the Train Services;

Daily Train Plan or **DTP** means a plan that details the scheduled times for all Train Services and any Planned Possessions, Urgent Possessions and Emergency Possessions for a particular day on a specified part of the Network;

Dangerous Goods means any substance or thing defined as dangerous goods, explosives or radioactive material under a Dangerous Goods Code or any substance or thing identified as such in a relevant Access Agreement;

Dangerous Goods Code means:

- (a) the Australian Code for the Transport of Dangerous Goods by Road and Rail;
- (b) the Australian Code for the Transport of Explosives by Road and Rail; or

- (c) the Code of Practice for the Safe Transport of Radioactive Material, as published and in force from time to time and as amended or replaced;

Decision has the meaning given to that term in **clause 6.2(a)**;

Depreciated Optimised Replacement Cost means the value of assets determined as follows:

- (a) the replacement value of the assets will be assessed as the cost of the modern engineering equivalent replacement asset;
- (b) optimisation of the asset base will occur, but such optimisation will only consider whether or not the infrastructure standard and infrastructure capacity are excessive, given the current and likely future requirements of Access Holders; and
- (c) depreciation of the optimised replacement asset value will be undertaken over the useful life of the assets;

Disclosing Party means, in respect of Queensland Rail and an Access Seeker, either party to the extent that information is disclosed by or on behalf of that party to the other party during the negotiation of Access (including, as applicable, in an Access Application or by the provision of information prior to an Access Application being made);

Dispute has the meaning given to that term in **clause 6.1.2(a)**;

Dispute Notice has the meaning given to that term in **clause 6.1.2(a)(ii)**;

Dispute Notice Date has the meaning given to that term in **clause 6.1.3(a)**;

DTMR means the Department of Transport and Main Roads for the State of Queensland or other department from time to time responsible for the administration of the TIA;

Efficient Costs means, for each Year during the Evaluation Period, the costs that would be reasonably expected to be incurred by a Railway Manager adopting efficient work practices to provide, operate and maintain the Network at the required service standard and meet its obligations under Access Agreements, having regard to the circumstances in which Queensland Rail operates its business (including any transitional arrangements agreed between Queensland Rail and the QCA) and including business and corporate overheads and QCA Levy;

Emergency Possession means a Possession:

- (a) that is required to rectify a serious fault with the Network:
 - (i) that is considered by Queensland Rail to be dangerous or potentially dangerous to any person; or
 - (ii) where severe speed restrictions have been imposed that affect the scheduled Train Services of Access Holders; and
- (b) that Queensland Rail intends to carry out within less than five Business Days after the detection of the serious fault;

Endorsed Variation Event means the occurrence of any of the following events:

- (a) a Change in Law, Change to Credit or Impost Change occurs, that either alone or in combination with all other Changes in Law, Changes to Credit or Impost Changes that have occurred since the Approval Date, would cause a change in the costs reflected in, for Reference Tariffs specified in **schedule A**, any input of the relevant Reference Tariff, of greater than 2.5% excluding the impact of any Change in Law, Change to Credit or Impost Change that have previously resulted in a variation of the Reference Tariff; or
- (b) the QCA Levy is reviewed (taking into account any over or under recovery of fees via the QCA Levy in the previous year) following the QCA's announcement of its fees for the provision of regulatory services for the rail industry;

Escalation Date means each 1 July in each year;

Evaluation Period means:

- (a) for an individual Train Service, the expected duration of the proposed Access Rights in respect of that Train Service; and
- (b) for a combination of Train Services, the lesser of:
 - (i) the expected duration of the longest proposed Access Rights in respect of any one of those Train Services; and
 - (ii) ten years;

Expected Access Revenue means:

- (a) for an individual Train Service, the revenue reasonably expected from the Access Charge from that Train Service; and
- (b) for a combination of Train Services, the aggregate revenue reasonably expected from the Access Charges for all Train Services comprising that combination of Train Services, where the expected Access Charges for different Train Service types will be developed on a basis consistent with:
 - (i) if a Reference Tariff is to be developed for a Train Service type, the proposed Reference Tariff; and
 - (ii) if **paragraph (b)(i)** of this definition does not apply, current applicable Access Charges, except as provided in **clause 3.1.2(b)(iii)**;

Extension includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure);

First Escalation Date means 1 July 2012;

Floor Revenue Limit means the level of revenue that will recover the expected Incremental Cost of providing Access to the individual Train Service or combination of Train Services, as applicable;

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

- (a) is beyond the reasonable control of the affected party; and
- (b) by the exercise of due diligence the affected party was not reasonably able to prevent or is not reasonably able to overcome,

and includes:

- (c) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the affected party ;
- (d) a strike, lockout, boycott, 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, act of terrorists, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade, civil disturbance or public disorder;
- (g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Prudent Practices or accident or accidental damage to any thing;
- (h) malicious damage or sabotage;
- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste;
- (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, tsunami, earthquake, washaway, landslide, explosion, hail, lightning, severe weather conditions or other catastrophe or natural calamity;
- (m) any act or omission of any person other than the affected party or Queensland Rail (including the presence of any such person on or near the Network), without the express authorisation of Queensland Rail, that results in damage to the Network or the use or operation of the Network being prevented or impeded;
- (n) epidemic or quarantine restriction; and

(o) delay of a supplier due to any of the foregoing whenever arising, and, where the affected party is an Access Holder, excludes any cause, event or circumstance in connection with any right to access or use Private Infrastructure that is necessary in order to enter or exit the Network or otherwise operate the Train Services in accordance with the Access Holder's Access Agreement (including any failure by the Access Holder to obtain and maintain such rights, any exercise or performance of such rights and any inconsistency between such rights and the Access Holder's Access Agreement);

Funding Agreement has the meaning given in **clause 1.4.1(b)(ii)**;

Funding Agreement Register has the meaning given in **clause 1.4.6(a)**;

gtk means the gross tonne kilometres attributed to the relevant Train Service, being the total gross weight (in tonnes) of the Rolling Stock utilised in the relevant Train Service (including all goods, product, persons or matter carried) multiplied by the distance (in kilometres) travelled by the Train Service;

Impost means a tax, excise, charge, levy, duty, fee, impost, rate, royalty, imposition, withholding, fee for any Authorisation or other licence or approval fee or any other charge which is imposed, applied or administered by, or payable to or by, any Authority but excluding any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes;

Impost Change means:

- (a) the introduction or imposition of a new Impost;
- (b) a change in the rate, amount or application of an Impost; or
- (c) a change in the basis of calculation of an Impost;

Incremental Costs means the costs of providing Access that:

- (a) would not be incurred by Queensland Rail if the individual Train Service or combination of Train Services (as applicable) did not operate on the basis of the assets reasonably required for the provision of Access, including:
 - (i) capital (renewal and expansion) costs; and
 - (ii) the cost of bringing expenditure forward in time; and
- (b) are assessed as Efficient Costs;

Indicative Access Proposal means a non-binding written response from Queensland Rail to an Access Application which includes the information set out in **clause 2.4.2**;

Infrastructure Service Providers means those parties who provide maintenance, construction and other related services in respect of the Network;

Insolvent means, for an Access Seeker, that at any time in the last five years one or more of the following events has happened in relation to the Access Seeker:

- (a) the Access Seeker has not been able to pay all its debts from the Access Seeker's own money as and when they become due or has stated that it is unable to do so;
- (b) the Access Seeker has been presumed to be insolvent or unable to pay its debts under any applicable legislation;
- (c) a resolution is passed that the Access Seeker be wound up or placed in liquidation voluntarily or that an administrator be appointed;
- (d) an application or order has been made for the winding up or dissolution of the Access Seeker (other than an application which is dismissed or withdrawn within ten Business Days after such proceedings were commenced);
- (e) a controller, administrator, receiver, liquidator or provisional liquidator has been appointed to the Access Seeker or in respect of any of its property;
- (f) the Access Seeker has entered into or taken any action to enter into (whether formally or informally) an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of its creditors or members or a moratorium involving any of them;
- (g) a mortgagee has entered into possession of any of the Access Seeker's assets or undertakings; or
- (h) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction has occurred in respect of the Access Seeker,

provided that, for the purposes of this definition, a reference to the Access Seeker includes any Related Party of the Access Seeker;

Interface Risk Assessment means an assessment to:

- (a) identify, to the extent reasonably practicable, all Interface Risks;
- (b) assess the likelihood and consequences of those Interface Risks occurring and any factors relevant to the management of those Interface Risks; and
- (c) nominate suitable control mechanisms to manage the Interface Risks within a risk management framework;

Interface Risks means all risks to the safety of persons or property or to the environment¹² arising from the interaction between the Access Seeker's proposed operations and any one or more of:

- (a) the Network;
- (b) operations on the Network (including those of other Rail Transport Operators and Queensland Rail); and
- (c) persons using the Network, persons on or near the Network or members of the public (including any activities on the Network that may affect those matters),

provided that a reference to operations in this definition includes railway operations as defined in the TRSA;

Interface Standards means Queensland Rail's minimum requirements or standards relating to the interface between a Train and the Network (including to maintain agreed operating parameters – for example, axle load) with which the applicable Rolling Stock and Train Configurations must comply in order to operate on the Network;

IRMP means an interface risk management plan:

- (a) identifying the Interface Risks associated with the Access Seeker's proposed operations; and
- (b) specifying the control measures agreed between Queensland Rail and the Access Seeker to manage those Interface Risks to an acceptable level, including:
 - (i) the standards, procedures and systems relevant to the management of the Interface Risks;
 - (ii) the relevant Interface Standards;
 - (iii) requirements for monitoring, awareness, competence and complaint handling;
 - (iv) the audit, inspection and review regime; and
 - (v) the particular party responsible for implementing each element of the IRMP; and
- (c) which satisfies the requirements for an interface agreement between rail transport operators under the TRSA and the requirements under all other Laws relevant to the management of Interface Risks,

provided that a reference to operations in this definition includes railway operations as defined in the TRSA;

¹² Environmental risks include:

- risks in relation to water quality, pollution, contaminated land, nature conservation, hazardous substances and Dangerous Goods, waste and noise; and
- risks of serious environmental harm, material environmental harm and environmental nuisance as defined in the *Environmental Protection Act 1994* (Qld).

Law includes:

- (a) any statute, ordinance, code, law, by-law, proclamation, rule or regulation or any other subordinate legislation, whether State, Commonwealth or otherwise;
- (b) the terms of any Authorisation;
- (c) common law and equity; and
- (d) any order, circular, requirement, condition, notice, decree, decision, direction or guidelines of any Authority with which Queensland Rail, an Access Seeker, an Access Holder or other relevant person (as the case may be) is legally required to comply including any requirement to pay fees and charges,

whether now, or at any time in the future, in effect;

Loading Time means the time period between:

- (a) the time that a Train Service arrives at the entry signal to the Nominated Loading Facility; and
- (b) the time that the Train Service is ready to depart the Nominated Loading Facility provided that:
 - (i) the Train Service has presented at the exit signal at the Nominated Loading Facility; and
 - (ii) the Operator for the Train Service has notified the relevant Train Controller that the Train Service is ready to depart the Nominated Loading Facility;

Master Train Plan or **MTP** means a plan detailing the scheduled times as advised by Queensland Rail from time to time for all Train Services and any Planned Possessions on a specified part of the Network, where such scheduled times remain unchanged from week to week;

Margin means a rate of 4.77%, being the difference between the WACC as at the Approval Date and the risk free rate component of the WACC, expressed as a positive value;

Material Change means:

- (a) an Impost Change;
- (b) a Change in Law; or
- (c) a Change to Credit;

Material Default means, in respect of any document referred to in **clause 2.9.1(b)**:

- (a) any breach of a term of that document that could reasonably result or have resulted in the termination of that document; or
- (b) the repeated breach of the terms of that document;

Maximum Access Charge has the meaning given to that term in **clause 3.1.2(b)(i)**;

Metropolitan Region means that part of the Network bounded to the north by (and including) Nambour station and to the west by (and including) Rosewood;

Mixed Goods Train Service means any Train Service that is not a Unit Train Service;

Mt Isa Reporting Area means that part of the Network bounded to the east by (and including) Stuart and to the west by (and including) Mt Isa and including all branch lines comprised in that part of the Network;

Negotiation Cessation Notice has the meaning given to that term in **clause 2.6.3(a)**;

Negotiation Period has the meaning given to that term in **clause 2.6.1(b)**;

Network means the rail transport infrastructure (as defined in the TIA):

- (a) for which Queensland Rail is the Railway Manager; and
- (b) the use of which is taken, pursuant to section 250(1)(b) of the QCA Act, to be a service declared under Part 5, Division 2 of the QCA Act (but excluding any rail transport infrastructure (as defined in the TIA) the use of which is referred to in section 249(2) of the QCA Act);¹³

Network Management Principles means the principles set out in **schedule B**;

Nominated Infrastructure means that part of the Network over which the relevant Reference Train Service travels between the Nominated Loading Facility and Nominated Unloading Facility;

Nominated Loading Facility means a loading facility specified for a nominated Reference Train Service in **clause 2.2(a)** of **schedule A**;

Nominated Railway Operator means, for an Access Holder, an Operator nominated or appointed by that Access Holder in accordance with an Access Agreement for the purpose of operating Train Services for that Access Holder for specified periods in accordance with that Access Holder's Access Rights;

Nominated Unloading Facility means an unloading facility specified for a nominated Reference Train Service in **clause 2.2(b)** of **schedule A**;

North Coast Reporting Area means those parts of the Network bounded to the south by (and including) Nambour station, to the north by (and including) Cairns and to the west by (but excluding) Stuart and including all branch lines comprised in that part of the Network;

nt means the net tonnes attributed to the relevant Train Service, being the total gross weight (in tonnes) of the Rolling Stock, when loaded, utilised in the relevant Train Service (including all goods, product, persons or matter carried) less the weight of such Rolling Stock (in tonnes) when empty;

¹³ In this definition, a term defined in the QCA Act has the meaning given to that term in the QCA Act.

Operating Plan means an operating plan setting out how the proposed Train Services are to be operated and which is consistent with information, standards and requirements published by Queensland Rail on its website for such operating plans;

Operating Requirements Manual means the document entitled “Operating Requirements Manual” as last submitted by Queensland Rail to the QCA on or prior to the Approval Date, as amended from time to time by Queensland Rail under **clause 4.2**;

Operational Constraint means any temporary or permanent constraint on the operation or use of any part of the Network imposed by Queensland Rail as it considers necessary in relation to the proper, efficient or safe operation or management of the Network (including speed restrictions, load restrictions, Planned Possessions, Urgent Possessions, Emergency Possessions and signalling or overhead restrictions);

Operator means a person who operates or will operate Rolling Stock on the Network;

Passenger Priority Obligations means the obligations of a Railway Manager pursuant to sections 265 and 266 of the TIA;

Planned Possession means a Possession (other than an Urgent Possession or an Emergency Possession) where such Possession is entered into the MTP or DTP and adversely affects the operation of Train Services;

Possession means a temporary closure or occupation by Queensland Rail of part of the Network (including closure of Track or isolation of any electrical overhead traction system) for the purpose of carrying out Rail Infrastructure Operations, other work or other activities on or in the proximity of the Network;

Preserved Train Path Obligations means the obligations of a Railway Manager pursuant to section 266A of the TIA;

Private Infrastructure means rail transport infrastructure (as defined in the TIA), including but not limited to the track, signalling and electrical overhead traction system (if applicable) for which Queensland Rail is not the Railway Manager;

Proposed Standard Access Agreement has the meaning given to that term in **clause 2.8(a)**;

Prudent Practices means the exercise of that degree of diligence, care, foresight, prudence and skill that would reasonably be expected from a competent, skilled and experienced person in the same type of undertaking in the same or similar circumstances;

QCA means the Queensland Competition Authority as established under the QCA Act;

QCA Act means the *Queensland Competition Authority Act 1997* (Qld);

QCA Levy means the fee allocated to the nominated Train Services to cover the fees imposed by the QCA on beneficiaries of its regulatory services and, for a Reference Train Service, is that amount specified as such for that Reference Train Service in **schedule A**;

Quarter means a period of three consecutive months commencing on 1 July, 1 October, 1 January or 1 April;

Queensland Rail means Queensland Rail Limited ACN 132 181 090;

Queensland Rail Cause means Queensland Rail's inability to make the Network available for the operation of Train Services in accordance with a Train Service Entitlement as a result of:

- (a) a Planned Possession, Urgent Possession or Emergency Possession;
- (b) a Force Majeure Event affecting Queensland Rail;
- (c) the derailment of any Train caused solely by an act or omission of Queensland Rail; or
- (d) any other action by Queensland Rail other than Queensland Rail complying with an obligation in accordance with this Undertaking, any applicable Law or the relevant Access Agreement,
except where Queensland Rail's inability to do so is in any way attributable to the Operator, another Rail Transport Operator (other than Queensland Rail) or any other person;

Rail Infrastructure Operations means:

- (a) the construction of any rail transport infrastructure (as defined in the TIA) to improve, upgrade, expand, extend, replace or vary the whole or any part of the Network;
- (b) any management, maintenance or operational activities relating to the Network, including the improvement, maintenance, repair, modification, installation, removal, renewal or decommissioning of the whole or any part of the Network; and
- (c) any inspections or investigations of the Network;

Railway Manager means an Accredited rail infrastructure manager (as defined in the TRSA);

Rail Safety Regulator means the chief executive referred to in the TRSA;

Rail Transport Operator means:

- (a) any person who holds, or uses any other person's, rights of access to any part of the Network in relation to Train Services; and
- (b) any Accredited rail transport operator (as defined in the TRSA),
including:
- (c) the relevant Access Holder (and its Nominated Railway Operator);
and

(d) any person in control of, or operating, any Private Infrastructure;

Recipient means, in respect of Queensland Rail and an Access Seeker, either party to the extent that it receives information which is provided by or on behalf of the other party during the negotiation of Access (including, as applicable, in an Access Application or by the provision of information prior to an Access Application being made);

Reference Tariff means a prescribed Access Charge applicable for a specified Reference Train Service, set out in **schedule A**, the purpose of which is to provide information to Access Seekers as to the likely level of Access Charge for Train Services of a similar type as the specified Reference Train Service (as amended, replaced, varied or escalated in accordance with this Undertaking from time to time);

Reference Train Service means a notional Train Service described in **clause 2.1 of schedule A** in respect of a Reference Tariff and conforming to certain criteria, including carrying a specified commodity type, operating between specified geographical areas and conforming to specified technical characteristics, operational characteristics and contract terms and conditions;

Related Party means a related body corporate as defined in the Corporations Act;

Review Event means a material change in circumstances:

- (a) that Queensland Rail can reasonably demonstrate may give rise to a need to vary the relevant Reference Tariff; and
- (b) in respect of which Queensland Rail has given written notice to the QCA of Queensland Rail's intention to propose a variation to that Reference Tariff under **clause 5 of schedule A**;

Rolling Stock means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses Track;

rtp means the number of reference Train Paths that are taken to be used by the relevant Train Service calculated in accordance with **clause 7(b)(i) of schedule A**;

Stand Alone provision of Access means the provision of Access as if the relevant Train Service(s) was (were) the only Train Service(s) provided with Access by Queensland Rail;

Standard Access Agreement means a pro forma Access Agreement set out in **schedule F**;

Take or Pay Charge means a charge or other amount payable by an Access Holder to Queensland Rail under an Access Agreement in relation to the Access Holder not fully using its Access Rights for a specified period (and for a Reference Train Service is calculated as set out in **clause 4 of schedule A**);

Term means the period beginning on the Approval Date and ending on the Terminating Date;

Terminating Date means the earlier of:

- (a) where the Approval Date is 1 July, the day before the fifth anniversary of the Approval Date;
- (b) where the Approval Date is not 1 July, the last day of the fourth full Year after the Approval Date; and
- (c) the date on which this Undertaking is withdrawn in accordance with the QCA Act;

TIA means the *Transport Infrastructure Act 1994* (Qld);

Timetabled Service means a Train Service, the Train Service Entitlement in respect of which is defined in terms of a specified Train Path at a particular time on a particular day and/or week;

Track means that part of the Network comprising the rail, ballast, sleepers and associated fittings;

Train means any self-propelled configuration of Rolling Stock operating as a unit on Track;

Train Configuration means the description of the combination of Rolling Stock comprising a Train including the identification number, gross mass and tare mass of individual items of Rolling Stock and the order in which those Rolling Stock items are placed in the Train;

Train Control means the control, management and monitoring (including, as applicable, scheduling) of:

- (a) all Train Movements;
- (b) all other operations of Rolling Stock on the Network; and
- (c) any activities affecting or potentially affecting such Train Movements or Rolling Stock operation or the proper, efficient and safe operation and management of the Network;

Train Control Directions means instructions, directions and notifications from time to time issued by Queensland Rail for the purpose of Train Control (including, in relation to an Access Holder or an Access Agreement, preventing or minimising the effect of a material breach of the relevant Access Agreement);

Train Controller means a person appointed by Queensland Rail from time to time to perform Train Control for a relevant part of the Network;

Train Movement means the operation of a Train on the Network by a Rail Transport Operator;

Train Path means the use of a specified portion of the Network, which may include multiple sections in sequential order, at a specified time;

Train Service means the operation of a Train on the Network between a specified origin and a specified destination;

Train Service Entitlement means an Access Holder's entitlement under an Access Agreement to operate a specified number and type of Train Services over the Network within a specified time period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified transport service;

Transport Service Payments means payments to Queensland Rail from DTMR or any other Authority for specified Below Rail Services for nominated sections of the Network;

TRSA means the *Transport (Rail Safety) Act 2010* (Qld);

Unallocated Delay means a delay to a Train Service from its Train Path scheduled in the DTP that is neither an Above Rail Delay nor a Below Rail Delay;

Undertaking means this document (including all schedules) as amended from time to time;

Undertaking Risk Free Rate means the rate calculated:

- (a) by averaging the yield on a five year Commonwealth Government Bond over a 20 trading day period ending as close as practicable to but not later than the date that Queensland Rail offers an Access Agreement to an Access Seeker; and
- (b) in accordance with:
 - (i) the methodology used by the QCA to determine the yield on such a Commonwealth Government Bond; or
 - (ii) where **paragraph (b)(i)** of this definition does not apply, the methodology agreed between Queensland Rail and the QCA (acting reasonably) from time to time for the purpose of this definition;

Unfairly Differentiates means unfairly differentiates between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders;

Unit Train Service means a Train Service that carries a single commodity;

Unloading Time means the time period between:

- (a) the time that a Train Service arrives at the entry signal to the Nominated Unloading Facility; and
- (b) the time that the Train Service is ready to depart the Nominated Unloading Facility provided that:
 - (i) the Train Service has presented at the exit signal at the Nominated Unloading Facility; and

- (ii) the Operator for the Train Service has notified the relevant Train Controller that the Train Service is ready to depart the Nominated Unloading Facility;

Urgent Possession means a Possession:

- (a) that is required to correct problems in relation to the Network that are considered by Queensland Rail to be potentially dangerous to persons or property; and
- (b) that Queensland Rail intends to carry out within less than three months after the detection of the problem,

other than an Emergency Possession;

WACC means the weighted average cost of capital which:

- (a) as at the Approval Date, means a rate of 9.96% nominal post-tax; and
- (b) after the Approval Date, means a rate equivalent to the Undertaking Risk Free Rate plus the Margin;

West Moreton Reporting Area means that part of the Network bounded to the east by (and including) Rosewood and to the west by (and including) Miles but excluding all branch lines that would otherwise be comprised in that part of the Network;

West Moreton System means that part of the Network comprising the rail corridor from the port at Fisherman Islands to Miles, including all branch lines directly connecting coal mine loading facilities and coal unloading facilities to that rail corridor; and

Year means the period of 12 months commencing 1 July.

7.2 Interpretation

- (a) In this Undertaking unless the context otherwise requires:
 - (i) words in the singular include the plural and vice versa;
 - (ii) any gender includes the other genders;
 - (iii) if a word or phrase is defined, its other grammatical forms have corresponding meanings;
 - (iv) “include”, “includes” and “including” must be read as if followed by the words “without limitation”;
 - (v) a reference to a person includes a partnership, joint venture, unincorporated association, corporation, government or statutory body or authority and any other entity recognised by law;

(vi) where:

- (A) a group of persons are in a partnership, an unincorporated joint venture, an unincorporated association or other similar arrangement; and
- (B) that group of persons together execute or seek to execute an agreement (including an Access Agreement or a rail haulage agreement) or such an agreement is executed or is sought to be executed for or on behalf of that group of persons,

then that group of persons is deemed to constitute a single person, Customer, Access Seeker or Access Holder (as applicable);

(vii) a reference to:

- (A) “dollars” or “\$” means a reference to Australian currency;
- (B) a person includes the person’s legal personal representatives, successors, permitted assignees and persons substituted by novation;
- (C) constructing includes all associated activities such as designing, installing, procuring and commissioning;
- (D) an Extension includes any part of that Extension;
- (E) conduct includes:
 - (1) a benefit, remedy, discretion, authority or power; and
 - (2) any omission and any representation, statement or undertaking, whether or not in writing;
- (F) time is to local time in Brisbane;
- (G) a month is a reference to a calendar month;
- (H) subject to **clause 7.2(a)(vii)(I)**, a Part, Clause or Schedule is a reference to the corresponding Part or Clause found in **Part 1 to Part 7** of this Undertaking or Schedule to this Undertaking as amended or replaced from time to time;
- (I) in a Schedule to this Undertaking:
 - (1) a Part or Clause, is a reference to a Part or Clause of that Schedule unless otherwise stated; and

- (2) a Part or Clause of this Undertaking, is a reference to a Part or Clause found in **Part 1 to Part 7** of this Undertaking;
 - (J) this or any other document or agreement includes the document or agreement as varied, amended or replaced and despite any change in the identity of the parties to that document or agreement;
 - (K) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
 - (L) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes facsimile transmissions;
 - (viii) if the date on or by which any act must be done under this Undertaking is not a Business Day, the act must be done on or by the next Business Day;
 - (ix) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and
 - (x) if there is any inconsistency between matters contained in a Schedule or the Preamble and **Part 1 to Part 7** of this Undertaking, the provisions in **Part 1 to Part 7** of this Undertaking prevail.
- (b) Headings do not affect the interpretation of this Undertaking.
 - (c) To the extent that Queensland Rail's obligations under this Undertaking are or become inconsistent with Queensland Rail's obligations under any Law, this Undertaking does not apply to the extent of that inconsistency.
 - (d) If this Undertaking obliges Queensland Rail to provide any information, reports, documents or other material (in whatever form) (**Information**) to the QCA or any other person then, despite any other provision in this Undertaking, Queensland Rail is not required to comply with that obligation if Queensland Rail claims:
 - (i) on the ground of self incrimination a privilege Queensland Rail would be entitled to claim against providing the Information were Queensland Rail a witness in a prosecution for an offence in the Supreme Court; or
 - (ii) that legal professional privilege applies in respect of that Information.

If Queensland Rail does not comply with an obligation on that basis, Queensland Rail must notify the QCA of this and Queensland Rail or the QCA may apply to the Supreme Court of Queensland for a determination of the validity of such a claim of privilege.

- (e) Despite any other provision in this Undertaking, this Undertaking does not expressly or impliedly waive any claim that Queensland Rail may have to legal professional privilege in respect of any information, reports, documents or other material (in whatever form).
- (f) The preamble to this Undertaking does not affect the interpretation of this Undertaking and no reference may be made to that preamble to interpret this Undertaking.

Schedule A

West Moreton System Reference Tariff

1 Term

The Reference Tariffs set out in this Schedule are applicable during the Term.

2 Reference Train Service

2.1 Description of Reference Train Service

The description of the Reference Train Service for the Reference Tariffs set out in this Schedule is as follows:

- (a) **(Commodity)** The Reference Train Service carries only bulk coal.¹⁴
- (b) **(Geographic scope)** The Reference Train Service operates on the rail corridor directly connecting a specified Nominated Loading Facility in the West Moreton System and a specified Nominated Unloading Facility.¹⁵
- (c) **(Characteristics)** Each Reference Train Service:
 - (i) has a maximum Train length, including the locomotives, of 675 metres¹⁶;
 - (ii) has two locomotives and 41 wagons;
 - (iii) has a maximum axle load of 15.75 tonne with loading in excess of this maximum axle load dealt with in accordance with the relevant load variation table¹⁷;
 - (iv) utilises only diesel traction;
 - (v) complies with the maximum speeds permitted on the Nominated Infrastructure as specified by Queensland Rail;
 - (vi) complies with the Interface Standards applicable to the Nominated Infrastructure;

¹⁴ In defining bulk coal, no differentiation is to be made between coal qualities or types, or between the end use markets of the coal.

¹⁵ Diagrams showing the location of the Nominated Loading Facilities and the Nominated Unloading Facilities will be provided by Queensland Rail to Access Seekers on request.

¹⁶ This Train length comprises the following: static train length (which is the straight addition of individual rolling stock lengths) plus an allowance of 2% of this static train length for train handling accuracy and for slack movement in drawgear (includes free slack in the drag box, compression of the draftgear, clearance/free slack due to coupler wear and pin clearance at the yoke).

¹⁷ As published by Queensland Rail in relation to the Reference Train Service or a Train Service of the same type as the Reference Train Service that identifies allowable overloads for wagons and bogies and specifies relevant Operational Constraints and additional charges, where applicable, for such overloads.

- (vii) is otherwise compatible with the Nominated Infrastructure and requires no additional expenditure by Queensland Rail to implement varied Below Rail controls identified in the IRMP;
 - (viii) operates in accordance with nominated sectional running times specified by Queensland Rail for that Reference Train Service;
 - (ix) has a Loading Time that does not exceed the relevant time specified in **clause 2.2(a)** provided that the Nominated Loading Facility is available for use by the Reference Train Service when that Reference Train Service arrives at the Nominated Loading Facility;
 - (x) has an Unloading Time that does not exceed the relevant time specified in **clause 2.2(b)** provided that the Nominated Unloading Facility is available for use by the Reference Train Service when that Reference Train Service arrives at the Nominated Unloading Facility;
 - (xi) operates with an empty Train on the return journey from the relevant Nominated Unloading Facility to the relevant Nominated Loading Facility;
 - (xii) has the ability to operate on the configuration of the Nominated Infrastructure existing at the Approval Date without limiting the ability of existing Train Services to operate in accordance with their Train Service Entitlements and does not require any Additional Capacity;
 - (xiii) utilises bottom dump wagons with the “KWIK DROP” door operating mechanism suitable for use on the West Moreton System; and
 - (xiv) utilises measures to minimise coal spillage and/or leakage en route that are reasonable, having regard to the practices existing at the Approval Date.
- (d) **(Dangerous Goods)** The Reference Train Service does not carry any Dangerous Goods.
- (e) **(Below Rail Services)** The Reference Train Service:
- (i) only requires services from Queensland Rail that are Below Rail Services; and
 - (ii) assumes Below Rail Services comprised in Access are provided in accordance with this Undertaking.
- (f) **(Conditions of Access)** The Reference Train Service will operate in accordance with the terms and conditions of a Standard Access Agreement applicable to coal carrying Train Services in the West Moreton System.

- (g) **(Train Service Entitlement)** The Train Service Entitlement for the Reference Train Service will be:
- (i) based on its Trains being available for operation 24 hours per day and 365 days per year; and
 - (ii) specified in terms of Timetabled Service and will comply with the applicable corridor scheduling procedures.

2.2 Loading and unloading facilities

- (a) The Nominated Loading Facilities (together with loading times) are the loading facilities for coal at the following locations:

Nominated Loading Facility locations	Loading Time (hours)
Ebenezer	2
Jondaryan (New Acland)	2
Macalister (Wilkie Creek)	2.5

- (b) The Nominated Unloading Facilities (together with unloading times) are the unloading facilities for coal at the following locations:

Nominated Unloading Facility locations	Unloading Time (hours)
Fisherman Islands coal loader	1.9

3 Reference Tariffs

3.1 Calculation of the Reference Tariffs

- (a) The applicable Reference Tariff for a Reference Train Service will be calculated as follows:
- (i) for a Reference Train Service that uses the Nominated Loading Facility at Ebenezer:

$$\left(AT_1 \times \frac{gtk}{1000} \right) + (QCALevy \times nt)$$

- (ii) for a Reference Train Service that uses a Nominated Loading Facility at Jondaryan (New Acland) or Macalister (Wilkie Creek):

$$\left(AT_1 \times \frac{gtk}{1000} \right) + (AT_2 \times rtp) + (QCALevy \times nt)$$

where:

- AT₁** is the variable part of the Reference Tariff that is levied on a gross tonne kilometre basis specified as such under **clause 3.1(e)** for the relevant Reference Train Service;

AT₂ is the fixed part of the Reference Tariff that is levied on a reference Train Path basis specified as such under **clause 3.1(e)** for the relevant Reference Train Service,

provided that the above calculation is subject to the addition from time to time of any applicable Adjustment Charge (including, if necessary, on a pro rata basis with other Reference Train Services that have the same origin and destination and Access Holder and are run during the same billing period, as the relevant Reference Train Service) and any applicable Take or Pay Charge.

- (b) For the purposes of the calculation under **clause 3.1(a)**, the amounts of AT₁, AT₂, the QCA Levy, any Adjustment Charge and any Take or Pay Charge are GST exclusive. An Access Charge calculated based on a Reference Tariff will have an amount for GST added to it.
- (c) For the purposes of this **schedule A**, a Train Service is a one way Train Service, that is, the journey from the Nominated Loading Facility to the Nominated Unloading Facility is one Train Service, and the return journey from the Nominated Unloading Facility to the Nominated Loading Facility is a second Train Service.
- (d) For the purposes of **clause 3.1(a)**, gtk will be assessed for the relevant Train Service over the billing period for the Access Charge which is based on the Reference Tariff being calculated.
- (e) The amount of the Reference Tariff inputs are as follows:

- (i) for a Reference Train Service to or from the Nominated Loading Facility at Ebenezer:

Reference Tariff Input	\$
AT ₁	18.18
QCA Levy	0.03359

- (ii) for a Reference Train Service to or from a Nominating Loading Facility at Jondaryan (New Acland) or Macalister (Wilkie Creek):

Reference Tariff Input	\$
AT ₁	9.09
AT ₂	4284.43
QCA Levy	0.03359

The values inserted in this document are the values of the reference tariff inputs under the 2008 Undertaking as at the time that this document was originally submitted to the QCA for approval. If the Approval Date occurs after the First Escalation Date, then the Reference Tariff inputs in this document will still be escalated as though this document had been approved by the QCA prior to the First Escalation Date and those inputs

were escalated on the First Escalation Date in accordance with **clause 3.2**.

3.2 Escalation of Reference Tariffs

- (a) Each Reference Tariff input specified in **clause 3.1(e)**, except the QCA Levy, will automatically escalate annually on each Escalation Date commencing on the First Escalation Date in accordance with the following formula:

$$AT_n = AT_{n-1} \times \left(\frac{CPI_n}{CPI_{n-1}} \right)$$

where:

- AT_n** means the value of the relevant Reference Tariff input to apply after escalation;
- AT_{n-1}** means the escalated value of the relevant Reference Tariff input immediately prior to the relevant Escalation Date or, for the First Escalation Date, means the relevant Reference Tariff input referred to in **clause 3.1(e)**;
- CPI_n** means the CPI for the Quarter which commenced six months prior to the Escalation Date for which the variable AT_n is being determined; and
- CPI_{n-1}** means the CPI for the Quarter which commenced 18 months prior to the Escalation Date for which the variable AT_n is being determined.
- (b) Queensland Rail will publish the escalated inputs of the Reference Tariff on its website within five Business Days after each Escalation Date commencing with the First Escalation Date.
- (c) Where an error has been made in the calculation of the escalated inputs of a Reference Tariff, Queensland Rail will correct the error so that the relevant inputs of the Reference Tariff are escalated in accordance with **clause 3.2(a)**.
- (d) For clarity, if:
- (i) the basis of assessment of the CPI is altered in a material way; or
 - (ii) the CPI ceases (or is likely to cease) to be:
 - (A) published; or
 - (B) published at sufficiently regular intervals for the purpose of the calculation in clause 2.1 of this schedule 3,

Queensland Rail may submit a draft amending access undertaking to the QCA in relation to the amendment or replacement of the CPI.

4 Take or pay

- (a) The revenue that Queensland Rail is entitled to earn in relation to Reference Train Services includes Take or Pay Charges in accordance with this **clause 4**.
- (b) Take or Pay Charges will be determined for:
- (i) each Year during which the relevant Train Services are entitled to operate; or
 - (ii) the relevant part of a Year, if the relevant Train Services were only entitled to operate for part of the first or last Year during the term of the relevant Access Agreement because that entitlement commenced on a date other than 1 July or expired or terminated on a date other than 30 June,

(Take or Pay Period) and invoiced for each Take or Pay Period after the end of that Take or Pay Period.

- (c) The amount of the Take or Pay Charges for a Take or Pay Period will be the amount which is 80% of the amount calculated for that Take or Pay Period as follows:

$$\left(\left(AT_1 \times \frac{gtk}{1000} \right) + AT_2 \right) * NTNO$$

where:

- (i) AT_1 and AT_2 are the Reference Tariff inputs applicable on the last day of that Take or Pay Period;
- (ii) gtk is the average gtk for the relevant Train Services calculated using a nominal payload as determined by Queensland Rail (acting reasonably); and
- (iii) $NTNO$ means the number of relevant individual Train Services that were entitled to be operated for the Take or Pay Period in accordance with the relevant Train Service Entitlement and did not operate (excluding Train Services that did not operate due to Queensland Rail Cause),

provided always that the amount of Take or Pay Charges for a Take or Pay Period will not be less than zero.

- (d) When invoicing Take or Pay Charges, Queensland Rail will also include information on how the Take or Pay Charge was determined.

5 Variation of Reference Tariffs

5.1 Obligation to submit a variation

- (a) Queensland Rail:

- (i) may submit a variation of a Reference Tariff to the QCA, if Queensland Rail considers that the variation will promote efficient investment in the coal transport supply chain in the West Moreton System; or
- (ii) will submit a variation of a Reference Tariff to the QCA, subject to **clause 5.1(c)** within three months after:
 - (A) Queensland Rail becomes aware that an Endorsed Variation Event, or a Review Event, has occurred; or
 - (B) a written notice being given to Queensland Rail by the QCA in accordance with **clause 5.1(b)**.
- (b) The QCA may give Queensland Rail a written notice requiring it to submit a variation of a Reference Tariff if it has failed to submit a variation of a Reference Tariff under **clause 5.1(a)(ii)(A)** in respect of an Endorsed Variation Event.
- (c) The QCA may grant Queensland Rail an extension of the time for submitting, or resubmitting, a variation of a Reference Tariff if:
 - (i) Queensland Rail requests an extension of time; and
 - (ii) the extension of time is reasonable or necessary.

If the QCA grants Queensland Rail an extension of time under this **clause 5.1(c)**, Queensland Rail must submit or resubmit the variation of a Reference Tariff within the time specified by the QCA.

5.2 Development of Reference Tariff variation by the QCA

The QCA may develop a variation of a Reference Tariff that is consistent with the requirements under this **clause 5** for such a variation:

- (a) if Queensland Rail does not comply with a written notice given by the QCA under **clause 5.1(b)** or **5.4(c)(ii)** for it to submit, or resubmit, a variation of a Reference Tariff; or
- (b) if the QCA refuses to approve a variation of a Reference Tariff resubmitted by Queensland Rail in accordance with a notice given by the QCA under **clause 5.4(c)(ii)**.

5.3 Requirements for Reference Tariff variation

- (a) A variation of a Reference Tariff submitted by Queensland Rail in accordance with **clause 5.1(a)** must:
 - (i) nominate the Reference Tariff to be varied;
 - (ii) include details of the methodology, data and assumptions used to vary the Reference Tariff;
 - (iii) if the variation is submitted under **clause 5.1(a)(i)**, include information on:
 - (A) the matters set out in **clause 3.2** of **Part 3** of this Undertaking; and

- (B) why Queensland Rail considers that the variation of the Reference Tariff will promote efficient investment in the coal transport supply chain in the West Moreton System; and
 - (iv) if the variation is submitted under **clause 5.1(a)(ii)(A)**, include evidence that the Endorsed Variation Event or Review Event has occurred.
- (b) If the QCA considers it appropriate, the QCA may publish details of Queensland Rail’s proposed variation of a Reference Tariff and invite and consider comments from stakeholders regarding that proposed variation (provided that Queensland Rail must be given a reasonable period in which to respond to the QCA in respect of any such comments).

5.4 Decision to approve or refuse to approve variation

- (a) The QCA may approve a variation of a Reference Tariff submitted by Queensland Rail in accordance with **clause 5.1(a)** if the QCA is satisfied:
- (i) for a variation submitted under **clause 5.1(a)(i)**, that the variation is consistent with the Undertaking;
 - (ii) for a variation submitted in respect of an Endorsed Variation Event or Review Event (**Event**):
 - (A) the Event has occurred;
 - (B) the variation has been calculated as if all other Reference Tariffs were also being recalculated due to the occurrence that caused the Event; and
 - (C) the variation:
 - (1) is consistent with the change in the cost resulting from or that will result from the Event; and
 - (2) reflects the impact of the relevant Event on the financial position of Queensland Rail (including the impact of incremental maintenance and incremental capital costs).
- (b) If the QCA approves a variation to a Reference Tariff:
- (i) it will give Queensland Rail a notice in writing stating the reasons for its decision;
 - (ii) the variation will apply:
 - (A) from the first day of the month immediately following the date of the occurrence of the Endorsed Variation Event or Review Event (as applicable); or
 - (B) where the date of the occurrence of the Endorsed Variation Event or Review Event is the first day of a month, from that date; and

- (iii) Queensland Rail must:
 - (A) publish details of the variation on its website; and
 - (B) advise Access Holders and Access Seekers, in relation to the relevant Reference Train Service, of the variation.
- (c) If the QCA refuses to approve a variation to a Reference Tariff, it will give Queensland Rail a written notice:
 - (i) stating the reasons for its refusal and the way it considers that the variation should be amended; and
 - (ii) if that variation was required to be submitted by Queensland Rail in relation to an Endorsed Variation Event, requiring Queensland Rail to:
 - (A) vary the Reference Tariff in the way the QCA considers it appropriate; and
 - (B) resubmit the variation to the QCA, within 20 Business Days after Queensland Rail receives the notice issued to Queensland Rail under this **clause 5.4(c)**.
- (d) Queensland Rail will comply with a notice given under **clause 5.4(c)(ii)**.
- (e) The QCA may approve a variation to a Reference Tariff that was:
 - (i) resubmitted under clause 5.4(c)(ii); or
 - (ii) developed by the QCA under clause 5.2,
 - (iii) if the QCA is satisfied that the variation of the Reference Tariff:
 - (iv) is consistent with the matters specified under **clause 5.4(a)** (provided that for the purposes of so applying **clause 5.4(a)** the relevant variation will be treated as though it was submitted by Queensland Rail under the relevant provision in **clause 5.1(a)**); and
 - (v) if clause 5.4(e)(i) applies, is consistent with the relevant notice given by the QCA under clause 5.4(c).
- (f) If the QCA refuses to approve a variation to a Reference Tariff that was resubmitted under **clause 5.4(c)(ii)**, the QCA will give Queensland Rail a notice in writing stating the reasons for its refusal.

6 Adjustment Charges

6.1 Recovery or reimbursement of Adjustment Charges

- (a) If:
 - (i) this Undertaking specifies that a Reference Tariff is applicable or effective from a date prior to the QCA's approval of that Reference Tariff; or

- (ii) the QCA approves a variation of a Reference Tariff and that variation applies from or takes effect on a date prior to the QCA's approval of the variation,

Queensland Rail is entitled to recover from or will reimburse to, as applicable, each relevant Access Holder the amount (**Adjustment Amount**) which is the sum of:

- (iii) the aggregate of the differences, for each relevant Access Holder for each month (or part thereof) since the date on which the Reference Tariff or the variation of the Reference Tariff was to apply or take effect (**Effective Date**) until the date on which that Reference Tariff was approved by the QCA or the date on which the variation of the Reference Tariff was approved by the QCA, as applicable, between:
 - (A) the Access Charges paid or payable by that Access Holder in respect of the Train Services operated by or for that Access Holder during that month (or part thereof); and
 - (B) the Access Charges that would have been paid or payable by that Access Holder in respect of those Train Services if the Access Charges were calculated in accordance with the Reference Tariffs or the variation of Reference Tariffs referred to in **clause 6.1(a)(i)** or **(ii)** on and from the Effective Date; and
- (iv) the aggregate of the interest calculated in accordance with **clause 6.1(b)** in respect of the amount of each difference comprising the amount calculated in accordance with **clause 6.1(a)(iii)**,

by making adjustments to the Access Charges (**Adjustment Charge**) payable by Access Holders so as to recover or reimburse, as applicable, the Adjustment Amount (subject to the provisions of this Undertaking).

- (b) The interest referred to in **clause 6.1(a)(iv)** must be calculated:
 - (i) in respect of the amount of each difference comprising the amount calculated in accordance with **clause 6.1(a)(iii)**;
 - (ii) on the basis that the interest:
 - (A) accrues and is charged from day to day; and
 - (B) is capitalised at the end of each month and will thereafter itself bear interest;
 - (iii) at the rate equal to, for interest accruing in a month:
 - (A) the mid-point of the one month Bank Bill Swap Rate as published by the Australian Financial Markets Association (or its successor) for the Business Day immediately prior to the 21st day of the previous month; or

- (B) if that rate is no longer published, the rate will be an appropriate equivalent rate determined by Queensland Rail, acting reasonably; and
- (iv) for the period commencing on the date when the Access Charges paid or payable by the relevant Access Holder used to calculate the applicable difference in accordance with **clause 6.1(a)(iii)(A)** were due and payable and ending on the date when the Adjustment Charge is to be due and payable.

6.2 Obligation to submit Adjustment Charges

Queensland Rail:

- (a) may, if it submits a variation of a Reference Tariff and that variation is proposed to apply or take effect on a date prior to the date on which the QCA will approve the variation; or
- (b) must, if:
 - (i) the QCA approves a variation of a Reference Tariff and that variation applies or takes effect on a date prior to the date on which the QCA approves the variation (and subject to **clause 6.2(a)**); or
 - (ii) this Undertaking specifies that a Reference Tariff is applicable or effective from a date prior to the QCA's approval of that Reference Tariff,

submit to the QCA proposed Adjustment Charges.

6.3 Requirements for Adjustment Charge submission

- (a) Where Queensland Rail submits proposed Adjustment Charges to the QCA in accordance with **clause 6.2**, Queensland Rail's submission must, without limitation:
 - (i) identify, subject to **clause 6.3(b)**, the Access Holders to which the proposed Adjustment Charges will apply;
 - (ii) set out the proposed Adjustment Charges for each Access Holder including details of how those proposed Adjustment Charges were calculated; and
 - (iii) indicate the billing period(s) in respect of which the proposed Adjustment Charges are to be applied.
- (b) For the purposes of **clause 6.3(a)(i)**:
 - (i) an Adjustment Charge may only apply to an Access Holder (**New Access Holder**) that did not run the Train Services to which that Adjustment Charge relates (**Past Train Services**) if:
 - (A) the Access Holder who ran the Past Train Services no longer has (or, at the time when the Adjustment Charges are to be applied, will have ceased to have) a rail haulage

- agreement with the Customer for the Past Train Services in respect of Train Services with the same origin and destination as the Past Train Services;
- (B) the New Access Holder has a rail haulage agreement with the Customer referred to in **clause 6.3(b)(i)(A)** (including that Customer's successors and assigns) in respect of Train Services with the same origin and destination as the Past Train Services or the New Access Holder was that Customer (or is that Customer's successor or assign); and
 - (C) the New Access Holder has been granted Access Rights with the same origin and destination as the Past Train Services; and
- (ii) no Adjustment Charge will apply to an Access Holder who ran the Past Train Services if that Access Holder has, at the time when the Adjustment Charges are to be applied, ceased to have a rail haulage agreement with the Customer for the Past Train Services (including that person's successors and assigns) in respect of Train Services with the same origin and destination as the Past Train Services provided that with the cessation of that rail haulage agreement, the applicable Access Rights were either relinquished or expired.
- (c) If the QCA considers it appropriate, the QCA may publish details of Queensland Rail's submission of proposed Adjustment Charges and invite and consider comments from stakeholders regarding the proposed Adjustment Charges (provided that, to the extent that stakeholders provide comments, Queensland Rail must be given a reasonable period in which to provide a response to those comments to the QCA).

6.4 Decision to approve or refuse to approve variation

- (a) Where Queensland Rail submits proposed Adjustment Charges to the QCA in accordance with **clause 6.2**, the QCA must approve:
- (i) the Access Holders to which the Adjustment Charges will apply;
 - (ii) the Adjustment Charges that are to apply to each Access Holder; and
 - (iii) the billing period(s) in respect of which the Adjustment Charges will be applied,

if the proposed Adjustment Charges (excluding any interest component) are reasonable to recover or reimburse, as applicable, any under or over recovery of Access Charges that relate to each Access Holder and, where **clause 6.1(b)(iii)(B)** applies, the QCA is satisfied that Queensland Rail has acted reasonably in selecting an appropriate equivalent rate in accordance with that provision.

- (b) If the QCA refuses to approve the proposed Adjustment Charges, the QCA must give Queensland Rail a notice in writing:
 - (i) stating the reasons for its refusal and the way in which the QCA considers the proposed Adjustment Charges should be amended so as to constitute (excluding any interest component) a reasonable recovery or reimbursement, as applicable of any under or over recovery of Access Charges by Queensland Rail that relate to each Access Holder; and
 - (ii) requiring Queensland Rail to vary the proposed Adjustment Charges in the way the QCA considers it appropriate and resubmit the amended proposal to the QCA within 20 Business Days after Queensland Rail receives the notice.
- (c) Queensland Rail must comply with a notice given under **clause 6.4(b)**.
- (d) The QCA must approve a resubmitted proposal for Adjustment Charges, if the resubmitted proposal has been amended or developed in accordance with the QCA's notice given under **clause 6.4(b)**.
- (e) Queensland Rail must comply with an approval of the QCA given in accordance with **clause 6.4(a)** or **(d)** including in applying the Adjustment Charge approved for each Access Holder to the calculation of Access Charges payable by that Access Holder.

6.5 Review of Access Charges to provide for Adjustment Charges

The calculation of Access Charges under an Access Agreement must be reviewed and varied to provide for the payment of Adjustment Charges approved by the QCA in accordance with **clause 6.4(a)** or **(d)** by the relevant Access Holder including that:

- (a) the Access Charges payable by the Access Holder must include any applicable Adjustment Charge approved by the QCA from time to time in relation to or in connection with:
 - (i) any variation of a Reference Tariff approved by the QCA to apply or take effect on a date prior to the date on which the QCA approves the variation; or
 - (ii) any Reference Tariff that the Undertaking states is applicable or effective from a date prior to the date on which that Reference Tariff was approved by the QCA; and
- (b) an Adjustment Charge so determined by the QCA must be applied to the calculation of the amount of the invoice for charges payable by the Access Holder under the Access Agreement for the relevant billing period.

7 Variations to Reference Train Service

- (a) A varied Access Charge will be applicable to a Train Service that:

- (i) varies from the Reference Train Service characteristics specified in clauses 2.1(c) to (e); or
- (ii) operates under terms and conditions with agreed variations from the requirements of clauses 2.1(f) and (g),

but otherwise satisfies the nominated Reference Train Service description, so that the varied Access Charge varies from the applicable Reference Tariff due to differences in cost or risk to Queensland Rail of providing Access for that Train Service compared to the Reference Train Service.

- (b) Where a Train Service differs from the Reference Train Service due to it not complying with **clause 2.1(c)(vii)**, then Queensland Rail will, unless otherwise agreed with the QCA, quote an Access Charge that varies from the Reference Tariff by applying the following principles:

- (i) the number of reference Train Paths used by the proposed Train Service will be determined as follows:

$$rtp = \max[(A/B), (B/A)]$$

where:

- A is the maximum number of Reference Train Services at full utilisation; and
- B is the maximum number of the proposed Train Services at full utilisation;

provided that if:

- (A) the maximum number of proposed Train Services at full utilisation exceeds the maximum number of Reference Train Services at full utilisation; and
- (B) the scheduled section running times of the proposed Train Service are the same as the nominated section running times for the Reference Train Service,

then rtp is deemed to be one; and

- (ii) the maximum number of Train Paths available for a Reference Train Service and for the proposed Train Service will be determined using a readily available simulation package.

Schedule B

Network Management Principles

1 Train Planning Principles

1.1 Master Train Plan Principles

- (a) The MTP will indicate the Capacity necessary to satisfy all relevant Train Service Entitlements, all of Queensland Rail's passenger Train Services, and time allocated for Planned Possessions.
- (b) Access Holders' Train Service Entitlements and Queensland Rail's passenger Train Services will be allocated particular Train Paths.
- (c) The MTP will be in a form that sets out the time/distance (location) relationship of the Train Services and other activities on the Network and is readily convertible to a DTP.
- (d) Queensland Rail will notify all parties whose activities are affected by any modifications to the MTP at least 30 days prior to the commencement of the modification.
- (e) An Access Holder must give Queensland Rail sufficient notice of any requested changes to the MTP to enable Queensland Rail to consider the requested changes and, if Queensland Rail agrees to the making of those modifications, to comply with **clause 1.1(d)**.
- (f) Except as otherwise provided in an Access Agreement, the cancellation of a Train Service does not excuse either Queensland Rail or an Access Holder from any relevant obligations under that Access Agreement.

Modifying the MTP

- (g) The MTP may be modified by Queensland Rail, without consultation, where:
 - (i) any of the following apply:
 - (A) an Access Holder requests a long-term change to the times at which its Train Service/s operate, provided that change is within the scope of its Train Service Entitlement;
 - (B) an Access Holder requests to run an Ad Hoc Train Service;
 - (C) Queensland Rail creates a new or additional passenger Train Service, or modifies the times at which its passenger Train Services are scheduled in the MTP;

- (D) a new or additional Train Service Entitlement has been created (through the signing of an Access Agreement, or an amendment to an Access Agreement);
 - (E) Queensland Rail wishes to change the time at which a Train Service operates provided that change is within the scope of the relevant Access Holder's Train Service Entitlement;
 - (F) Queensland Rail alters (including reduces or resumes) all or part of an Access Holder's Train Service Entitlement in accordance with that Access Holder's Access Agreement, provided that the modification does not result in any other Access Holder's scheduled Train Services not being met;
- (ii) the modification is intended to accommodate any Operational Constraint;
 - (iii) a Planned Possession is cancelled; or
 - (iv) in Queensland Rail's opinion no Access Holders are adversely affected by the modification.
- (h) The MTP may be modified by Queensland Rail where Queensland Rail wishes to make a long-term change to the times at which one or more scheduled Train Services operate, provided that:
- (i) the modification is intended to accommodate:
 - (A) the creation of a new, additional, or modified Train Service Entitlement (through the signing of an Access Agreement, or an amendment to an Access Agreement) where that new or additional Train Service Entitlement cannot, in Queensland Rail's opinion, otherwise be reasonably accommodated in the MTP; or
 - (B) a new, additional or modified Queensland Rail passenger Train Service, where that service cannot, in Queensland Rail's opinion, otherwise be reasonably accommodated in the MTP; and
 - (ii) where the modification would result in an Access Holder's scheduled Train Services not being met, Queensland Rail:
 - (A) has consulted with that Access Holder; and
 - (B) to the extent that the modification is not within the scope of that Access Holder's Train Service Entitlement, has agreed the modifications with that Access Holder (such agreement not to be unreasonably withheld).
- (i) The MTP may be modified by Queensland Rail, where Queensland Rail wishes to make a long-term change to the times at which one or more scheduled Train Services operate due to a new or modified Planned Possession, provided that where the modification would result in an

Access Holder's scheduled Train Services not being met, Queensland Rail:

- (i) has consulted with that Access Holder; and
 - (ii) to the extent that the modification is not within the scope of that Access Holder's Train Service Entitlement, has used reasonable endeavours to mitigate the adverse impacts on that Access Holder.
- (j) The MTP may be modified by Queensland Rail where Queensland Rail and all affected Access Holders agree to the modification provided that where Queensland Rail seeks such a modification it:
- (i) invites affected Access Holders to consider the modification in an appropriate forum¹⁸; and
 - (ii) gives each of those parties a copy of the proposed modification five Business Days prior to the scheduled consideration of the modification.
- (k) For clarity, Queensland Rail may modify the MTP under any one of **clauses 1.1(g) to (j)** even if Queensland Rail cannot do so under, or does not comply with, any of the other of those clauses in respect of that modification.

1.2 Daily Train Plan Principles

- (a) The DTP will indicate all scheduled Train Services and Planned Possessions in a form that indicates the time/distance (location) relationship of all activities,
- (b) The DTP represents an expected performance target that each Access Holder must comply with for its Train Services, for a particular day of operation for a specified part of the Network.
- (c) At least one Business Day prior to the day of operation, Queensland Rail will schedule the DTP and provide all relevant Access Holders and Infrastructure Service Providers with a copy of that DTP.
- (d) Except as otherwise provided in an Access Agreement, the cancellation of a Train Service does not excuse either Queensland Rail or an Access Holder from any relevant obligations under an Access Agreement.

Scheduling the DTP in variation from the MTP

- (e) The DTP may be scheduled in variation to the MTP by Queensland Rail, without consultation, where, at least two Business Days prior to the day of operation, and prior to the DTP being scheduled:
 - (i) any of the following apply:

¹⁸ This could include a face-to-face meeting, a telephone conference or any other forum that provides the affected parties with the best opportunity to participate.

- (A) an Access Holder requests a short-term change to the times at which any of its Train Services, as scheduled in the MTP, operate;
 - (B) an Access Holder requests to run an Ad Hoc Train Service; or
 - (C) Queensland Rail modifies the times at which any of its passenger Train Services, as scheduled in the MTP, operate,

provided that the variation does not result in any other Access Holder's scheduled Train Services not being met; or

 - (ii) a Planned Possession is cancelled.
- (f) The DTP may be scheduled in variation from the MTP by Queensland Rail where at least two Business Days prior to the day of operation, and prior to the DTP being scheduled, Queensland Rail wishes to make a short-term change to the times at which one or more scheduled Train Services operate, provided that:
 - (i) the change is intended to accommodate:
 - (A) the modification of an existing Planned Possession;
 - (B) the creation of an Urgent Possession; or
 - (C) any other Operational Constraint affecting the DTP; and
 - (ii) where the variation would result in an Access Holder's scheduled Train Services not being met, Queensland Rail has consulted with that Access Holder.
- (g) The DTP may be scheduled in variation from the MTP by Queensland Rail where at least two Business Days prior to the day of operation, and prior to the DTP being scheduled, Queensland Rail makes a short-term change to the times at which one or more scheduled Train Service/s operate, whether or not within the scope of the applicable Access Holders' Train Service Entitlement, for the purpose of accommodating an Emergency Possession provided that where the variation would result in an Access Holder's scheduled Train Services not being met, Queensland Rail has consulted with that Access Holder.
- (h) The DTP may be scheduled in variation from the MTP by Queensland Rail where at least two Business Days prior to the day of operation, and prior to the DTP being scheduled, Queensland Rail and all affected Access Holders agree to the modification provided that where Queensland Rail seeks such a modification Queensland Rail:

- (i) invites affected Access Holders to consider the variation in an appropriate forum¹⁹, at least 36 hours prior to the day of operation; and
 - (ii) gives each of those parties a copy of the proposed variation at least 12 hours prior to the scheduled consideration of the variation.
- (i) For clarity, Queensland Rail may schedule the DTP in variation from the MTP under any one of **clauses 1.2(e) to (h)** even if Queensland Rail cannot do so under, or does not comply with, any of the other of those clauses in respect of that modification.

Making modifications to the DTP once scheduled

- (j) Queensland Rail may make modifications to the scheduled DTP on a case by case basis without the need for consultation:
 - (i) where:
 - (A) before the day of operation, Queensland Rail receives a request from an Access Holder to run an Ad Hoc Train Service; or
 - (B) before a Train Service commences operation, the Access Holder requests a change to the time at which its Train Service will operate and that change is within the scope of the Access Holder's Train Service Entitlement,provided that the modification does not result in any other Access Holder's scheduled Train Services not being met; or
 - (ii) where, before the commencement of a relevant Train Service, Queensland Rail notifies the Access Holder that an Emergency Possession is required.

2 Train Control Principles

Objective

- (a) The prime objective of Train Control is to facilitate the safe running of Train Services, and the commencement and completion of Possessions, as scheduled in the DTP.
- (b) Queensland Rail will manage the Network based on entry/exit times as specified in the DTP with the objectives of managing Train Services according to their schedule for on time exit, not contributing to late running and, if a Train Service is running late, making up time and holding the gain where reasonably possible.
- (c) A deviation from the DTP by Queensland Rail and/or an Access Holder on the day of running in accordance with this **clause 2** does not

¹⁹ This could include a face-to-face meeting, a telephone conference or any other forum that provides the affected parties with the best opportunity to participate.

necessarily excuse either party from any relevant obligations relating to the conduct in question.

Access Holders

- (d) Access Holders must ensure that Above Rail issues, including Train crewing, locomotive and wagon availability and loading and unloading requirements, are appropriately managed to ensure that such issues do not adversely affect the DTP.

Provision of Train Control information

- (e) Queensland Rail will provide an Access Holder with:
 - (i) real time Train Control information that indicates actual running of that Access Holder's Train Services against the relevant DTP;
 - (ii) subject to reasonable terms and conditions, access to Train Control diagrams that indicate actual running of that Access Holder's Train Services against the relevant DTP; and
 - (iii) subject to reasonable terms and conditions, information about the type of Train Services operated on the same network (including, for example, coal, freight, passenger and livestock Train Services) to assist Access Holders to determine whether the Train Controller is applying the principles in this Schedule in a consistent manner between Access Holders.

Traffic Management Decision Making Matrix

- (f) Where the operation of a Train Service differs from the DTP, the Train Controller will apply the Traffic Management Decision Making Matrix in **clause 2(h)**, for the purposes of giving a Train Control Direction.
- (g) In the context of the Traffic Management Decision Making Matrix the meaning of "On Time", "Ahead" and "Late" are determined by the scheduling of paths in the DTP. For example, if a Train Service is travelling in accordance with the DTP path allocated to it, it is running "On Time".

(h) The Traffic Management Decision Making Matrix is as follows:

		Train Service A - Current Status	
		Train Service Running "On Time" or "Ahead"	Train Service Running "Late"
Train Service B - Current Status	Train Service Running "On Time" or "Ahead"	Rule 2	Rule 1
	Train Service Running "Late"	Rule 1	Rule 3

Rule 1. The "Late" Train Service may be given priority provided that the other Train Service will still meet its "On Time" objective, subject to the principles for managing deviations from the DTP in **clause 2(i)**.

Rule 2. Both Train Services must meet their "On Time" objective.

Rule 3. Give priority to the Train Service that (in the Train Controller's opinion), based on its performance, will lose the least time (or make up more time) and hold a greater gain, subject to the principles for managing deviations from the DTP in **clause 2(i)**.

Principles for managing deviations from the DTP

(i) It is necessary for Train Controllers to have sufficient discretion to take into account the varying objectives of different traffic types, and the circumstances of a particular part of the Network, in assessing the priority to be given to Train Services and other activities on the Network. Train Controllers will apply the following principles in managing deviations from the DTP:

- (i) a Train Service may be given priority over other Train Services if it is necessary to do so:
 - (A) due to, or to avoid, an accident, emergency or incident relating to any part of the Network;
 - (B) to remedy, or to mitigate or avoid, the operation of Train Services on any part of the Network being congested, prevented or otherwise materially adversely affected;
 - (C) to remedy, or to mitigate or avoid, any Emergency Possession or Urgent Possession on any part of the Network being prevented or otherwise materially adversely affected;
 or

- (D) to ensure the safe operation of any part of the Network;
- (ii) subject to **clause 2(i)(i)**, passenger Train Services may be given priority over other Train Services if the Train Controller believes that this is necessary to seek to:
 - (A) bring a “Late” passenger Train Service back to being “On Time”; or
 - (B) avoid an “On Time” or “Ahead” passenger Train Service from becoming a “Late” passenger Train Service;
- (iii) subject to **clause 2(i)(i)**, livestock Train Services may be given priority over other Train Services if the Train Controller believes that this is desirable taking into consideration the livestock being transported (including, for example, the welfare of the livestock);
- (iv) subject to **clauses 2(i)(i) to (iii)**, a Train Service may be given priority over other Train Services if it is necessary to do so to remedy, or to mitigate or avoid, any Planned Possession on any part of the Network being prevented or otherwise materially adversely affected; and
- (v) subject to **clauses 2(i)(i) to (iv)**, where a Train Service is running “Late” due to a Below Rail Delay, it may be given preference over other Train Services if the Train Controller believes that this is consistent with the critical objectives of the Train Services in question, and that it will result in less aggregated consequential delays to other Train Services than otherwise would be the case.

Schedule C

Access Agreement Principles

1 Term

The Access Agreement will:

- (a) apply for a defined period (subject to any earlier termination and any relevant survival of provisions); and
- (b) not include an option for the Access Holder to renew the Access Rights.

2 Grant of Access Rights

- (a) Queensland Rail will grant to the Access Holder a non-exclusive right to operate Train Services on the Network during the term of the Access Agreement in accordance with a specified Train Service Entitlement.
- (b) An Access Holder's Train Services must only commence after all provisions of the Access Agreement required to be completed or complied with prior to the commencement of Train Services have been completed or complied with.

3 Accreditation

The Access Holder must or must procure that its Nominated Railway Operator:

- (a) be accredited in accordance with Part 5 of the TRSA in respect of the operation of the relevant Train Services;
- (b) maintain that accreditation during the term of the Access Agreement;
- (c) ensure Queensland Rail is provided with the material details of that accreditation; and
- (d) comply with that accreditation and not operate Rolling Stock unless it holds that accreditation.

4 Access Charges

- (a) The Access Agreement must set out the Access Charges agreed between the parties and payable in accordance with reasonable payment terms.
- (b) The Access Agreement may provide:
 - (i) that late payments accrue interest at a specified rate;

- (ii) a reasonable mechanism for dealing with disputes about payment;
- (iii) for the review of Access Charges;
- (iv) an adjustment mechanism where any change in the Access Charges is backdated; and
- (v) that all amounts payable under it are exclusive of GST.

5 Network management

5.1 Management and control of Network

- (a) Queensland Rail is responsible for the management and control of the Network (including Train Control).
- (b) Queensland Rail will maintain the Network such that the Access Holder can operate the relevant Train Services in accordance with the terms of the Access Agreement.
- (c) Queensland Rail may at any time, without the Access Holder's consent, impose operational constraints (such as speed or load restrictions).
- (d) Queensland Rail may at any time, without the Access Holder's consent, perform Rail Infrastructure Operations.

5.2 Train Control

- (a) Queensland Rail will perform scheduling and Train Control in accordance with the terms of the Access Agreement.
- (b) The Access Holder must comply with all of Queensland Rail's Train Control Directions and the Network Management Principles.
- (c) Queensland Rail must comply with all applicable Laws, safeworking procedures and safety standards, the Operating Requirements Manual and all other train operation requirements in the Access Agreement and is not liable to the Access Holder if doing so is otherwise inconsistent with the Access Agreement.
- (d) The Access Holder must:
 - (i) ensure all Trains are equipped with appropriate communication systems; and
 - (ii) provide and maintain all software and hardware, to Queensland Rail's satisfaction, to ensure an effective interface between Queensland Rail's and the Access Holder's information (including communication) systems.
- (e) Queensland Rail will be entitled to treat other Train Services preferentially to the Access Holder's Train Services for the purpose of seeking to:
 - (i) bring a passenger Train Service back to its scheduled running time;

- (ii) minimise any delay experienced by a passenger Train Service; or
- (iii) avoid a passenger Train Service that is operating, is scheduled to operate, or will be scheduled to operate in the Metropolitan Region during any peak period²⁰ becoming delayed.

6 Train operations

6.1 Operation of Train Services and Rolling Stock

- (a) The Access Holder must only operate Train Services in accordance with the Access Agreement unless the Access Holder has obtained Queensland Rail's prior written consent.
- (b) The Access Holder is responsible for the operation of Rolling Stock on the Network (including for ensuring the safe operation of Rolling Stock).
- (c) The Access Holder must comply with all applicable Laws, safeworking procedures and safety standards, the Operating Requirements Manual and all other train operation requirements in the Access Agreement.
- (d) The Access Holder must operate Train Services in accordance with the relevant scheduled times and Train schedule unless the Access Holder is permitted under the Access Agreement to do otherwise (including the Network Management Principles) or the parties agree otherwise.
- (e) If the Access Holder is not able to operate a Train Service in accordance with its scheduled time, then:
 - (i) the Access Holder must as soon as practicable notify Queensland Rail that it is not able to operate that Train Service and the reason for its inability; and
 - (ii) Queensland Rail will use reasonable endeavours to provide an alternative schedule time for the relevant Train Service (but is not obliged to do so if this would alter the scheduled time for other Trains or would result in Queensland Rail incurring additional costs or expenses).
- (f) Queensland Rail may collect information in respect of the Access Holder's Rolling Stock which is fitted with an operative digital tag and may provide the Access Holder with access to that information (at the Access Holder's cost). If Queensland Rail collects any such information and provides it to the Access Holder, then Queensland Rail has no responsibility, and is not liable, for the accuracy, completeness or veracity of that information.

²⁰ The time periods: (a) from 6:00am to 9:00am; and (b) from 3:30pm to 6:30pm, on Business Days or as otherwise notified by Queensland Rail (acting reasonably) from time to time.

- (g) The Access Holder must ensure the operation of the Rolling Stock (including loading, unloading and cleaning):
 - (i) does not affect the safe operation of the Rolling Stock or the Network or the operations or activities of Queensland Rail or other Rail Transport Operators; and
 - (ii) is such that all things on or in the Rolling Stock remain on or in the Rolling Stock (including secured in position) during transit.

6.2 Authorisation of Rolling Stock and Train Configurations

- (a) The Access Holder must obtain certification for the Access Holder's Rolling Stock and Train Configurations from an appropriately qualified person approved by Queensland Rail. Queensland Rail has a right to view a certificate of compliance and associated test results from an Access Holder in order to satisfy itself that the Rolling Stock and Train Configurations are as agreed by the two parties in the relevant IRMP.
- (b) If the Access Holder wishes to modify any of the Rolling Stock or Train Configurations, then the Access Holder must not use that Rolling Stock or Train Configuration unless and until:
 - (i) the IRMP has been reviewed;
 - (ii) the Access Holder has complied with clause 6.2(a); and
 - (iii) the parties have agreed any amendments to the Access Agreement (including varying the methodology, rates or other inputs for calculating Access Charges) as reasonably necessary, in relation to that Rolling Stock or Train Configuration (as applicable).

6.3 Entering and exiting the Network

The Access Holder is solely responsible for and bears the cost and risk of obtaining any rights to access or use Private Infrastructure and the Access Holder is not relieved of any obligation under the Access Agreement if the Access Holder cannot obtain any such rights.

6.4 Notification of damage or disrepair

The Access Holder must notify Queensland Rail of any damage or disrepair or failure in operation or function of any part of the Network of which the Access Holder becomes aware.

7 Interface risk management

- (a) The Access Holder must use reasonable endeavours to not do anything or permit anything to be done what would give rise to Interface Risks not addressed in the relevant IRMP. If the Access Holder does or permits such anything, then the Access Holder must notify Queensland Rail as soon as practicable.

- (b) Each party must notify the other party of any non-compliance that it becomes aware of (including details of how it has rectified or intends to rectify that non-compliance).
- (c) The Access Agreement must provide a process for the regular review of the relevant IRMP by the parties.
- (d) If the parties do not agree any matter in relation to such a review, that disagreement may be referred to dispute resolution under the Access Agreement.

8 Environmental and emergency management plan requirements

8.1 Dangerous goods

- (a) The Access Holder must not carry, or permit to be carried, Dangerous Goods except:
 - (i) as expressly provided in the Access Agreement; or
 - (ii) with the prior permission of Queensland Rail given in accordance with the Access Agreement.
- (b) If the Access Holder wishes to obtain Queensland Rail's permission to carry Dangerous Goods, the Access Holder must first satisfy Queensland Rail, acting reasonably, that:
 - (i) carrying the relevant Dangerous Goods in the manner proposed by the Access Holder is permitted under all relevant Laws and Authorities and any applicable Dangerous Goods Code;
 - (ii) any Authorisations required under any applicable Law or Dangerous Goods Code have been obtained and are available for inspection by Queensland Rail if requested; and
 - (iii) all Laws, including Authorisations, applicable in relation to those Dangerous Goods and all requirements of any applicable Dangerous Goods Code are complied with.
- (c) Unless otherwise expressly provided in the Access Agreement, where Dangerous Goods are permitted to be carried, the Access Holder must ensure that:
 - (i) any Authorisations required under any applicable Law or Dangerous Goods Code have been obtained prior to the operation of the Train Service carrying Dangerous Goods and are available for inspection by Queensland Rail if requested;
 - (ii) all Laws, including Authorisations, applicable in relation to those Dangerous Goods and all requirements of any applicable Dangerous Goods Code are complied with;

- (iii) Queensland Rail is notified of the details of the Dangerous Goods (including an accurate description of the Dangerous Goods and the applicable Dangerous Goods United Nations (UN) Number) as soon as practicable prior to the operation of a Train Service; and
- (iv) before any Dangerous Goods are carried on a Train Service, the Access Holder's emergency management plan must include procedures for responding to an incident involving those Dangerous Goods.

8.2 Environmental damage

The Access Agreement must include a process that:

- (a) allows Queensland Rail to notify the Access Holder:
 - (i) of environmental harm as defined in the *Environmental Protection Act 1994* (Qld) (or anything that is likely to result in environmental harm); and
 - (ii) any requirement that Queensland Rail or any relevant Authority considers necessary to prevent, mitigate or remedy that environmental harm; and
- (b) obliges the Access Holder to comply with those requirements and otherwise take whatever action or intervention is required to prevent, mitigate or remedy that environmental harm.

8.3 Emergency management plan

- (a) The Access Holder must develop an emergency management plan that details the procedures for the management of incidents on the Network involving the activities of the Access Holder (including all relevant matters outlined in the Operating Requirements Manual). The emergency management plan must be compatible with the Access Agreement and Queensland Rail's emergency procedures and consistent with the prudent practices of an operator of Trains in Australia.
- (b) The Access Holder must obtain a notice from Queensland Rail that it has no objection to the emergency management plan. The Access Agreement must set out a process for obtaining such a notice.

8.4 Obstructions and notifications

- (a) The Access Holder must not cause or contribute to, or permit to continue, any obstruction²¹ of the Network.
- (b) The Access Agreement must include notification requirements to Queensland Rail's satisfaction in relation to environmental harm,

²¹ An obstruction is any circumstance (including debris or other things on the Network), which has the potential to cause a disruption to or cancellation by Queensland Rail of Train Services or Train Movements and includes any Network incident (that is, any Rolling Stock derailment or disablement or any breakdown, accident, collision or any other unplanned occurrence on the Network which causes or could cause death or injury to any person, damage to property or environmental harm or a disruption to or cancellation by Queensland Rail of any Train Movement) but does not include an Operational Constraint imposed by Queensland Rail.

incidents on the Network involving the activities of the Access Holder, Dangerous Goods, obstructions, non-compliance with any safeworking procedures and any similar matter (and including any action or intervention taken or being taken by the Access Holder).

- (c) Queensland Rail may do anything that it considers necessary:
- (i) to remove, rectify, mitigate or otherwise deal with any obstruction; or
 - (ii) to recommence Train Movements where there is or was an obstruction,
- including to move, or remove from the Network, any of the Access Holder's Rolling Stock that is causing or contributing to an obstruction or preventing or hindering Train Movements.
- (d) If Queensland Rail gives a Train Control Direction to the Access Holder to assist in removing, rectifying, mitigating or otherwise dealing with an obstruction caused or contributed to by another Rail Transport Operator, Queensland Rail will reimburse to the Access Holder its reasonable direct costs and expenses of providing such assistance.

9 Noise mitigation

- (a) In addition to any requirements under the IRMP, the Operator must pay a contribution, as reasonably determined by Queensland Rail, to Queensland Rail's costs and expenses relating to any noise mitigation or management measures on the Network, or adjacent land, considered necessary by Queensland Rail either in accordance with Prudent Practices or to comply with any noise levels or limits applicable²² from time to time.
- (b) Queensland Rail will use reasonable endeavours to consult with the Access Holder prior to electing to implement noise mitigation or management measures and to notify the Access Holder of how it will determine the Access Holder's contribution to costs and expenses.

10 Inspection and audit rights

- (a) The Access Agreement will specify the reasonable terms and conditions on which Queensland Rail can carry out inspections and audits of the Access Holder's compliance with the Access Agreement and the loading of wagons used in a Train Service.
- (b) Queensland Rail may require the Access Holder, and the Access Holder must comply with Queensland Rail's requirements, to do anything reasonably necessary for Queensland Rail to conduct the inspection or

²² The applicable noise levels or limits will be those required to observe or comply with any applicable Laws or the lawful requirements of any relevant Authority or that are determined by Queensland Rail in accordance with Prudent Practices.

audit including to divert or delay a Train Service or to make any part of a Train available for inspection or weighing.

11 Risk and indemnities

- (a) The Access Holder must indemnify Queensland Rail against all claims which may be brought against or made upon Queensland Rail and all losses:
- (i) caused, or contributed to, by any default, act or omission by the Access Holder, the Access Holder's directors, officers, employees, contractors, agents, consultants or Customers;
 - (ii) subject to **clause 11(a)(iv)**, relating to damage to or loss of any property or any personal injury or death relating to the Train Services, the Rolling Stock or Train Movements except to the extent caused, or contributed to, by Queensland Rail's negligence;
 - (iii) in connection with or in relation to any obstruction²³, to the extent caused, or contributed to, by the Access Holder;
 - (iv) arising out of, or in any way associated with, the handling, loading, unloading, transportation, escape or release of Dangerous Goods in connection with or relating to any Train Service for a Mixed Goods Train Service, whether or not caused, or contributed to, by any act or omission (including negligence) of Queensland Rail (or its officers, employees, contractors or agents) (but excluding any part of the claim or loss that would have arisen regardless of whether Dangerous Goods were being carried on the relevant Train Service);
 - (v) relating to claims by a Customer;
 - (vi) relating to third party claims in relation to any data collected about Train Services and distributed by Queensland Rail (on a bona fide basis) in accordance with the Access Agreement.
- (b) The Access Holder is responsible for the conduct of the Access Holder's directors, officers, employees, contractors, agents and similar persons (including a delegate or subcontractor) in exercising any of the Access Holder's rights or complying with any of the Access Holder's obligations and that conduct is taken to be the Access Holder's conduct.
- (c) The Access Holder is responsible for the conduct of each passenger on the Access Holder's Train Services and that conduct is taken to be the Access Holder's conduct.

²³ See footnote 21.

12 Limitation of Liability

- (a) The liabilities of the parties for default will be limited or excluded as agreed in the Access Agreement.
- (b) Subject to **clause 12(c)** and except as otherwise provided in the Access Agreement, neither party has any liability for Consequential Loss in any circumstances.
- (c) Consequential Loss is excluded from the indemnity in **clause 11** except for any loss arising out of any claim by a third party including a Customer.
- (d) No exclusion or limitation of liability or restriction on the making of a claim in the Access Agreement will apply in respect of a claim by one party against the other for monies due and payable in accordance with the Access Agreement.
- (e) Without limitation to the matters for which Queensland Rail's liability may be excluded, Queensland Rail's liability in relation to:
 - (i) any loss of any thing carried by a Train Service;
 - (ii) any matter for which the Access Holder bears or assumes risk or liability (including the Access Holder's representations or warranties);
 - (iii) any act or omission by Queensland Rail referred to in **clause 8.4(b)** or **8.4(c)**;
 - (iv) any exercise of a right, or compliance with an obligation by Queensland Rail in accordance with the Access Agreement; or
 - (v) any data collected in connection with the Train Services,is excluded and if it cannot be excluded is limited to \$1.00.
- (f) The Access Agreement will specify the circumstances in which either party has a claim against the other party in respect of delays to Train Movements caused by a breach of the agreement by, or negligence of, the defaulting party.
- (g) The Access Agreement will specify the circumstances in which the Access Holder has a claim against Queensland Rail for the non-provision of Access or the cancellation of a Train Service caused by breach of the Access Agreement or negligence by Queensland Rail.
- (h) Claims by either party must be lodged within two years of the occurrence of the event or circumstance giving rise to the claim and must exceed \$500,000 for any one event or cause of action or series of related events or causes of action.
- (i) A party must use best endeavours to give the other party notice and full details of any such claim within 12 months after the event or circumstance giving rise to the claim occurs.

13 Default, suspension and termination

The Access Agreement will specify events of default and rights of suspension and termination.

14 Insurance

The Access Agreement will provide for insurances to be effected by the Access Holder to appropriately provide for the relevant insurance risks.

15 Security

- (a) The Access Holder must provide a security deposit to Queensland Rail in the form of a bank guarantee or other form satisfactory to Queensland Rail (and on terms acceptable to Queensland Rail) to secure the performance of its obligations under the Access Agreement.
- (b) Queensland Rail may review the amount of the security deposit to increase or decrease it as factors relevant to Queensland Rail's risk exposure change.

16 Adjustments

- (a) A mechanism will be provided to allow adjustments to the Access Agreement (including, if applicable, by adjusting the relevant Access Charges) where a material change occurs that has a net adverse financial effect on Queensland Rail in relation to it performing its obligations or exercising its rights so that:
 - (i) the net financial effect of the material change on Queensland Rail is removed; and
 - (ii) Queensland Rail is placed in the position it would have been in if the material change had not occurred.
- (b) A material change will include changes in taxes, credits, laws, standards and funding (for example from Transport Service Payments).
- (c) If the parties are not able to agree any adjustments to the Access Agreement, then the matter will be referred to an independent expert for determination as a dispute.
- (d) The Access Agreement may include rate review provisions as referred to in **clause 3.5** of this Undertaking.

17 Disputes

- (a) Any dispute between the parties is firstly to be escalated through each party's internal management structure and ultimately to each party's chief executive officer (or the nominee of the chief executive officer). If the dispute is not resolved, then the parties may agree to refer the

dispute for resolution by an expert (and must do so if the Access Agreement requires such a referral).

- (b) The dispute resolution provisions must recognise the ability of the Rail Safety Regulator under the TRSA to resolve disputes and must provide that a referral to the Rail Safety Regulator overrides the dispute resolution provisions in the Access Agreement to the extent of any inconsistency with the dispute resolution process in the Access Agreement.
- (c) Queensland Rail will be able to determine disputes in relation to amendments to an IRMP, the safety of persons or property, the environment or the land on which the Network is located (including the use of the Network) if the dispute is not resolved under the Access Agreement by agreement between the parties or by an expert or resolved by the Rail Safety Regulator.
- (d) If a dispute is not resolved by agreement or referral to an expert, then the dispute may be determined by a court.

18 Force Majeure Event

- (a) The obligations of a party (other than an obligation to pay monies due) will be suspended where a Force Majeure Event prevents or hinders that party from performing its obligations under the Access Agreement.
- (b) If part of the Network is damaged or destroyed by a Force Majeure Event, Queensland Rail may elect not to proceed with repairs or replacement unless the parties agree as to the funding of the cost of that work.
- (c) The Access Agreement may be terminated if a delay caused by a Force Majeure Event continues for a prolonged period.

19 Reduction and relinquishment of Access Rights

19.1 Reduction of Access Rights

An Access Agreement must include provisions that:

- (a) entitle Queensland Rail to reduce the Access Holder's Access Rights where the Access Holder has under-utilised the Access Rights; and
- (b) set out objective criteria for the purpose of assessing whether the Access Rights are consistently underutilised.

19.2 Relinquishment

An Access Agreement must include provisions which provide:

- (a) that the relevant Access Holder may relinquish all or part of its Access Rights (whether or not for the purpose of allowing a specified Access Seeker to be granted Access Rights by Queensland Rail that use all or

part of the Capacity that will become Available Capacity as a result of the relinquishment (**Relinquished Capacity**)); and

- (b) that any such relinquishment is subject to the Access Holder paying to Queensland Rail a fee:
 - (i) equivalent to the present value (calculated at a discount rate equal to the WACC) of the aggregate of the Take or Pay Charges that would have been payable on and from the date on which the relinquishment will take effect until the end of the term if the relevant Access Rights were not relinquished and the Access Holder did not use those Access Rights; and
 - (ii) if, prior to the date on which the relinquishment will take effect, Queensland Rail has granted Access Rights (with effect on or after that date) to an Access Seeker using the Relinquished Capacity (**New Access Holder**), adjusted to offset the aggregate of the Take or Pay Charges payable by the New Access Holder for all or part of the same period as that for which the Take or Pay Charges are calculated under **paragraph (i) above** (calculated assuming the New Access Holder does not use the relevant Access Rights) but only to the extent that those Take or Pay Charges are directly attributable to the Relinquished Capacity,

provided that in no circumstances will that fee be less than zero; and

- (c) if applicable, Queensland Rail will facilitate the Access Holder relinquishing Access Rights for the purpose of allowing an Access Seeker nominated by the Access Holder to be granted Access Rights by Queensland Rail, subject to Queensland Rail's requirements in relation to doing so being satisfied.

20 Assignment

- (a) Queensland Rail may assign, novate, transfer or otherwise deal with (**Assign**) its rights and obligations under the Access Agreement without the prior consent of the Access Holder. Queensland Rail must give notice to the Access Holder advising the effective date of the Assignment.
- (b) On the Assignee executing and delivering to the Access Holder a deed covenanting to be bound by and to perform Queensland Rail's obligations under the Access Agreement, Queensland Rail will be released and discharged from further liability under the Access Agreement in respect of obligations that the Assignee has undertaken to perform.
- (c) The Access Holder may Assign the whole of its rights and obligations under the Access Agreement with the prior consent of Queensland Rail provided that the Assignee enters into a deed of covenant with Queensland Rail (on terms satisfactory to Queensland Rail) to be bound

by and to perform the Access Holder's obligations under the Access Agreement.

- (d) The Access Holder may only mortgage, charge, encumber or otherwise grant any security (**Charge**) over its rights and obligations under the Access Agreement in favour of a person (**Chargee**) if the Access Holder, Chargee and Queensland Rail have entered into a deed of covenant (on terms satisfactory to Queensland Rail) where the Chargee must only exercise rights under the Charge as though the Chargee was the Access Holder.

21 Representation and warranties

The Access Agreement may set out representations and warranties given by the Access Holder in favour of Queensland Rail including, for example, that the Access Holder has satisfied itself as to both the standard and suitability of the Network for the Train Services and the ability of the Access Holder's Rolling Stock to safely interface with, and to operate on, the Network.

22 Confidentiality

The Access Agreement may include a confidentiality provision if required by either party.

23 Land tenure

- (a) The Access Agreement must include provisions that detail the Access Holder's obligations in relation to complying with the requirements of Queensland Rail's land tenure and to not contribute to Queensland Rail breaching its land tenure obligations.
- (b) If there is any inconsistency between the Access Agreement and a land tenure then the land tenure prevails to the extent of the inconsistency.
- (c) Queensland Rail is not liable to the Access Holder in relation to any amendment, replacement, surrender, termination, expiry or determination of any land tenure.

Schedule D

Feedback Form for Unsuccessful Access Application

Reason for unsuccessful Access Application		Tick as appropriate
1.	The Access Charges that are expected to arise from the Access Agreement (clause 2.7.2(b)(i))	
2.	The cost and risk to Queensland Rail of providing Access Rights in accordance with the Access Agreement (clause 2.7.2(b)(ii))	
3.	The ability of the Access Seeker to satisfy and continue to satisfy the prudential requirements set out in clause 2.9.1 (clause 2.7.2(b)(iii))	
4.	The term of the Access Agreement (clause 2.7.2(b)(iv))	
5.	Another effect that entering into the Access Agreement may have on Queensland Rail's financial and risk position (clause 2.7.2(b)(v))	
6.	The time of receipt of the Access Application (clause 2.7.2(c))	

Schedule E

Tabulated representations of quarterly and annual report information

1 Quarterly reports

			Mt Isa	West Moreton	North Coast	Other ²⁴
Train Services						
Train Services that reached their destination within the Allotted Time Threshold		Number				
		%				
Train Services that did not reach their destination within the Allotted Time Threshold	Due solely to the acts or omissions of Queensland Rail in its capacity as the Railway Manager	Number				
		%				
	Due solely to delays attributed to an Access Holder or a Nominated Railway Operator	Number				
		%				
	Due to any other reason	Number				
		%				
Total Train Services		Number				
Delays						
The average Above Rail Delay		Minutes/100 train KMs				
The average Below Rail Delay						
The average Unallocated Delay						

²⁴ The Network outside the West Moreton Reporting Area, the Mt Isa Reporting Area and the North Coast Reporting Area.

			Mt Isa	West Moreton	North Coast	Other ²⁴
Cancellations						
Train Services scheduled in the Daily Train Plan (DTP) that were cancelled	Due solely to Queensland Rail in its capacity as the Railway Manager	Number				
		%				
	Due solely to delays attributed to an Access Holder or a Nominated Railway Operator	Number				
		%				
	Due to any other reason	Number				
		%				
Major Reportable Safety Incidents						
Major reportable incidents reported to the Rail Safety Regulator		Number				
Temporary Speed Restrictions						
Track under temporary speed restriction ²⁵		Average %				
		Average KMs				
Overall Track Quality Index						
Most recent measure of Track quality		OTCI				

2 Annual reports

Request for Preliminary Information	Number	Average time to provide information (Business Days)
Requests for preliminary information in accordance with clause 2.1.3		
Access Applications	Number	%
Access Applications acknowledged in accordance with the Undertaking within the applicable timeframe		

²⁵ This measure excludes the Metropolitan Region.

For Access Applications received in accordance with the Undertaking and not acknowledged within the applicable timeframe	Average delay to give acknowledge notice (Business Days)	
Indicative Access Proposals	Number	%
Indicative Access Proposals provided in accordance with the Undertaking within the applicable timeframe		
Acknowledgement notices including an extension of time for the provision of an Indicative Access Proposal		
Where Indicative Access Proposals are provided in accordance with the Undertaking but outside the applicable timeframe	Average delay to give Indicative Access Proposal (Business Days)	
Disputes under clause 6.1 dispute resolution process	Number	
Total		
Disputes determined in favour of the Access Seeker		
Negotiation Process	Number	%
Access Applications for which a Negotiation Cessation Notice have been given under clause 2.6.3		
Access Agreements executed by Queensland Rail (excluding agreements which extend or renew an Access Holder's Access Rights that existed immediately prior to execution of the agreement)	Negotiation Period	Number
	≤ 3mths	
	> 3 but ≤ 6mths	
	> 6 but ≤ 12mths	
	> 12mths	
Total		

Schedule F

Standard Access Agreement



Queensland Rail Limited

[Insert name of Operator]

Access Agreement

[This agreement is a standard access agreement for use with coal carrying Train Services in the West Moreton System with the same characteristics as the relevant Reference Train Service and where the Access Holder is the rolling stock operator for the relevant Train Services.]

Version: 1

Date Approved: [insert date]

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Date

Parties

Queensland Rail Limited ABN 71 132 181 090 of Level 15, 295 Ann Street, Brisbane, Queensland (**Queensland Rail**)

and

The person set out in **item 1** of **schedule 1 (Operator)**

Background

- A Queensland Rail operates, and is the Railway Manager for, the Network.
 - B The Operator is seeking, and Queensland Rail has agreed to provide to the Operator, access to the Network for the purposes of the Train Services.
 - C This agreement sets out the terms agreed by the Parties in accordance with which the Operator is granted non-exclusive access to the Network for the Train Services.
-

Agreed terms

1 Term

This agreement:

- (a) commences on the Commencement Date; and
- (b) terminates on the Termination Date (except to the extent that any provisions of this agreement are expressed or implied to survive the expiry or termination of this agreement).

2 Grant

Queensland Rail grants to the Operator the non-exclusive right to operate Train Services on the Network commencing on the Commitment Date until the Termination Date subject to, and in accordance with, this agreement (**Access Rights**).

3 Accreditation

- (a) The Operator must, on the Commitment Date (or such later date as agreed by Queensland Rail) and then for the remainder of the Term, hold the Accreditation necessary for it to operate the Train Services in accordance with this agreement.
- (b) The Operator must:
 - (i) on or before the Commitment Date (or such later date as agreed by Queensland Rail), satisfy Queensland Rail (acting reasonably) of its compliance with **clause 3(a)**; and
 - (ii) ensure that Queensland Rail is and continues to be provided with:
 - (A) all of the material details of that Accreditation that are relevant to the operation of the Train Services or the exercise of rights or performance of obligations under this agreement; and
 - (B) all relevant supplementary material to ensure those details remain correct and complete during the Term (including any notice from an Authority affecting or likely to affect the Operator's Accreditation and the relevant details of any renewal, suspension, amendment, restriction or termination).
- (c) The Operator must not operate Rolling Stock on the Network unless the Operator holds the Accreditation necessary to do so and then must do so in accordance with that Accreditation and this agreement.
- (d) For clarity, the agreement of Queensland Rail to a later date under **clause 3(a)** or **(b)(i)** does not waive, defer or otherwise affect the Operator's obligation to pay Access Charges or any other amount to Queensland Rail in accordance with this agreement.

4 Payment obligations

4.1 Access Charges

- (a) The Operator must pay to Queensland Rail the Access Charges at the times and in the manner set out in this agreement and any other charges or amounts payable in accordance with this agreement.
- (b) Commencing on the Commitment Date:
 - (i) after the last day of each calendar month during the Term; and
 - (ii) where this agreement has expired or terminated, after that expiration or termination,

Queensland Rail will provide to the Operator an invoice for the Access Charges and any other charges or amounts payable by the Operator under this agreement for that month or at or after the time of expiration or termination (as applicable).

- (c) For clarity:
 - (i) the amount of the Access Charges will include any adjustments for Queensland Rail Cause calculated in accordance with **schedule 3** and, despite any other term of this agreement, Queensland Rail will not otherwise be liable, and the Operator will have no other right, remedy or Claim against Queensland Rail, in relation to Queensland Rail Cause;
 - (ii) Queensland Rail will review and amend **schedule 3** (including to vary or escalate Access Charges Inputs) from time to time in accordance with this agreement (including the processes set out in **schedule 3** and **clause 16**); and
 - (iii) subject to **clauses 4.1(c)(i)** and **(ii)**, neither the exercise of any right, nor performance or non-performance of any obligation, by Queensland Rail under this agreement affects the Operator's obligation to pay Access Charges or the calculation of those Access Charges.

4.2 Obligation to make payments

- (a) Unless this agreement provides otherwise, the due date for the payment of an amount payable by a Party under this agreement is that date which is ten Business Days from the invoice date (as shown on the invoice) for that amount from the other Party.
- (b) After a Party receives an invoice from the other Party for an amount payable in accordance with this agreement the paying Party must, on or prior to the due date for the payment of that amount, either:
 - (i) pay the other Party an amount equal to the amount payable as shown on the invoice; or
 - (ii) if the paying Party disputes on a bona fide basis all or part of the amount payable as shown on the invoice:
 - (A) pay by the due date the amount not in dispute and 50% of the amount in dispute; and
 - (B) give notice in writing to the other Party that it disputes the amount payable as shown on the invoice and a detailed statement as to the reasons for disputing the amount payable.

4.3 Method of payment

A Party must pay any amounts payable to the other Party in accordance with this agreement in Australian currency by:

- (a) direct deposit into an account nominated by the invoicing Party for that purpose; or
- (b) such other method as the invoicing Party may reasonably require from time to time.

4.4 Disputing payments

- (a) If a Party has paid the amounts and given a notice in accordance with **clause 4.2(b)(ii)** then, unless the Parties resolve the dispute in accordance with **clause 17.2**, the dispute must be referred for determination by an Expert under **clause 17.3**.
- (b) Upon resolution of any dispute between the Parties about the calculation of an amount payable as shown on an invoice, if the amount payable as agreed by the Parties or determined by an Expert or a court is more or less than the amount that was paid, then the difference must be paid or refunded by the relevant Party to the other Party within five Business Days after the resolution of the dispute together with interest on that amount calculated in accordance with **clause 4.5** (provided that for the purpose of calculating that interest the due date for payment is deemed to be the date when the amount in dispute would have been due and payable but for the dispute).

4.5 Interest on overdue payments

- (a) If any amount which a Party is required to pay to another Party under this agreement is not paid on or before the due date for payment, interest will accrue on the outstanding amount from the due date for payment until that amount, together with the interest thereon, has been paid.
- (b) Interest will be calculated at the Interest Rate and must be paid monthly. Any interest accrued but unpaid at the end of each month will be capitalised and will thereafter itself bear interest.

4.6 Adjustments

- (a) If any change, escalation or variation in the Access Charges is backdated, or otherwise relates, to a date on or before the date on which particular Train Services were operated in accordance with this agreement, then the Access Charges paid or payable in respect of those Train Services must be adjusted by the Parties to pass through that change, escalation or variation.
- (b) After taking account of the adjustment referred to under **clause 4.6(a)**:
 - (i) if there has been an under-recovery of Access Charges by Queensland Rail, then the Operator must pay the amount of that under-recovery to Queensland Rail; and
 - (ii) if there has been an over-recovery of Access Charges by Queensland Rail, then Queensland Rail must refund the amount of that over-recovery to the Operator.
- (c) For clarity, if Queensland Rail has issued an invoice for Train Services but the Operator has not yet paid that invoice, then Queensland Rail may issue a replacement or additional invoice for the purposes of giving effect to **clauses 4.6(a) and (b)**.

- (d) Any adjustment of an Access Charge in accordance with this **clause 4.6** will include interest calculated in accordance with **clause 4.5** as though the adjustment was due and payable on the date when that Access Charge was originally due and payable.
- (e) This **clause 4.6** does not apply in relation to an Adjustment Charge (as defined in the Access Undertaking) which is incorporated in any Access Charge in accordance with **schedule 3** and the Access Undertaking.

4.7 Interim take or pay notices

- (a) Queensland Rail may, from time to time, give the Operator a statement of the accrued Take or Pay Charge liability in respect of a particular period. If such a statement is given, Queensland Rail and the Operator will meet, or otherwise discuss, that statement in good faith to seek to agree the accrued Take or Pay Charge liability in respect of that period.
- (b) Queensland Rail may, from time to time, give the Operator a notice under this **clause 4.7(b)** that states the accrued Take or Pay Charge liability in respect of a particular period (**Interim Take or Pay Notice**).
- (c) An Interim Take or Pay Notice is taken to be conclusive evidence of the accrued Take or Pay Charge liability in respect of the relevant period, subject to the resolution of any dispute by the Operator in respect of that Interim Take or Pay Notice.
- (d) If the Operator wishes to dispute any matter set out in an Interim Take or Pay Notice, then any Dispute Notice to be given by the Operator under **clause 17** must be given within ten Business Days (or such longer period as agreed by Queensland Rail) after the relevant Interim Take or Pay Notice was given to the Operator. Where the Operator does not give a Dispute Notice within that time period, the Operator is taken to agree that the matters in the relevant Interim Take or Pay Notice are correct.
- (e) Where an Interim Take or Pay Notice is disputed under **clause 4.7(d)** and that dispute has been finally resolved in a way that requires amendments to that Interim Take or Pay Notice, then Queensland Rail will give the Operator an amended Interim Take or Pay Notice (to replace the original Interim Take or Pay Notice) that is consistent with the resolution of the dispute.
- (f) Where two or more Interim Take or Pay Notices relate in whole or part to the same period:
 - (i) if there is any inconsistency between those Interim Take or Pay Notices in respect of that period, then the most recent Interim Take or Pay Notice prevails to the extent of that inconsistency; and
 - (ii) if there is no inconsistency between those Interim Take or Pay Notices in respect of that period, then the Operator has no right to dispute the accrued Take or Pay Charge liability for that period under any of those Interim Take or Pay Notices except to the

extent that the Operator still has a right to dispute the earliest of those Interim Take or Pay Notices under **clause 4.7(d)** (including where the Operator has already commenced such a dispute).

- (g) Despite any other provision in this agreement to the contrary and without limitation to **clause 4.7(d)**, the Operator has no right to, and must not, dispute the calculation of a Take or Pay Charge in respect of a Year to the extent that the Take or Pay Charge has been calculated in a manner consistent with the relevant Interim Take or Pay Notices relating to that Year.

5 Network management

5.1 Maintenance

- (a) Queensland Rail will maintain the Network in a condition such that the Operator can operate Train Services in accordance with this agreement.
- (b) Queensland Rail may at any time, without the need to obtain the Operator's consent, perform Rail Infrastructure Operations.
- (c) Queensland Rail reserves the right to permit third parties to carry out Third Party Works on, under or over the land on which the Network is located. The Operator agrees that Queensland Rail has no liability to the Operator nor will the Operator make a Claim against Queensland Rail for any costs, expenses, losses or damages incurred by the Operator in relation to or as a consequence of Third Party Works.

5.2 Train Control

- (a) Queensland Rail will provide, and has exclusive responsibility for, Train Control in respect of the Network.
- (b) Queensland Rail may exercise Train Control by issuing Train Control Directions to the Operator and the Operator's Associates.
- (c) In exercising Train Control, Queensland Rail may:
 - (i) delay, alter, add, cancel, re-route or re-schedule a Train Service; and
 - (ii) alter the Scheduled Times for Train Services in the Train Schedule.
- (d) The Operator must:
 - (i) comply with Train Control Directions;
 - (ii) ensure that:
 - (A) Train drivers are contactable by the Train Controller to receive Train Control Directions using communications systems which comply with the Operating Requirements Manual; and

- (B) all of the Operator's Trains are equipped with means of communication to permit the Operator's Associates to comply with this agreement;
 - (iii) notify the Train Controller as soon as the Operator becomes aware that it is not possible for the Operator (or the Operator's Associates) to comply with a Train Control Direction or the Operator (or the Operator's Associates) has not complied with a Train Control Direction; and
 - (iv) notify the Train Controller as soon as the Operator becomes aware of any changes or delays in Train Services or any circumstances which have affected or may affect Train Control including the ability of any Train Service to conform to its Scheduled Times.
- (e) Without limitation to **clauses 5.2(c)** or **5.3(b)** and despite any other provision of this agreement, Queensland Rail may treat other train services preferentially to the Operator's Train Services for the purpose of seeking to:
- (i) bring a passenger train service back to its scheduled running time;
 - (ii) minimise any delay experienced by a passenger train service; or
 - (iii) avoid a passenger train service that is operating, is scheduled to operate, or will be scheduled to operate in the Metropolitan Region during any Peak Period becoming delayed.

5.3 Compliance

- (a) Queensland Rail must observe and comply with:
- (i) all applicable Laws, to the extent that the Laws relate to Queensland Rail's performance of its obligations or exercise of its rights under this agreement;
 - (ii) the lawful requirements of relevant Authorities, to the extent that those requirements relate to Queensland Rail's performance of its obligations or exercise of its rights under this agreement;
 - (iii) this agreement;
 - (iv) the Network Management Principles;
 - (v) the Operating Requirements Manual; and
 - (vi) the Access Undertaking, to the extent that the Access Undertaking relates to Queensland Rail's performance of its obligations or exercise of its rights under this agreement,
- and, in the event of any inconsistency between them, in the above order to the extent of the inconsistency.
- (b) For clarity:
- (i) Queensland Rail may (in its absolute discretion) do, or not do, anything in order to comply with **clause 5.3(a)**; and

- (ii) to the extent that Queensland Rail does so, Queensland Rail:
 - (A) does not breach this agreement even if doing so is inconsistent with this agreement; and
 - (B) is not liable to the Operator whether in contract, in tort (including negligence), under any Law or otherwise.

6 Train operations

6.1 Operation of Train Services

The Operator must only operate Train Services in accordance with this agreement (including the Train Service Description and any Train Control Directions) unless the Operator:

- (a) has obtained the prior written approval of Queensland Rail (for example, an authority to travel) including any terms and conditions of that approval in addition to or varying this agreement in respect of those Train Services (including in respect of the Access Charges applicable); and
- (b) complies with that approval and those terms and conditions in operating the Train Services.

6.2 Compliance

- (a) The Operator must observe and comply with:
 - (i) all applicable Laws and Authorisations, to the extent that the Laws and Authorisations relate to the Operator's performance of its obligations or exercise of its rights under this agreement;
 - (ii) the lawful requirements of relevant Authorities, to the extent that those requirements relate to the Operator's performance of its obligations or exercise of its rights under this agreement;
 - (iii) this agreement;
 - (iv) the Network Management Principles;
 - (v) the Operating Requirements Manual;
 - (vi) all Train Control Directions;
 - (vii) the relevant requirements of:
 - (A) any Authorisation; and
 - (B) any other consent, approval, lease, licence or other authority,

held by or applying to Queensland Rail, or to which Queensland Rail is a party, from time to time in relation to the Network, other relevant facilities (if any) or land to which the Operator is provided access by Queensland Rail in accordance with this agreement (provided Queensland Rail has notified the Operator of those relevant requirements);

- (viii) the Operator's Emergency Management Plan, except to the extent it is inconsistent with anything in **clauses 6.2(a)(i) to (vii)**; and
- (ix) the Access Undertaking, to the extent that the Access Undertaking relates to the Operator's performance of its obligations or exercise of its rights under this agreement.

and, in the event of any inconsistency between them, in the above order to the extent of the inconsistency.

- (b) Without limitation to **clause 6.2(a)**, the Operator must:
 - (i) not access or be upon the Network (or the land on which the Network is located) for any purpose other than to exercise its rights and to comply with its obligations in accordance with this agreement;
 - (ii) at all times act in accordance with Prudent Practices;
 - (iii) do everything necessary in accordance with Prudent Practices to avoid causing or contributing to any nuisance, annoyance or disturbance to Queensland Rail or the occupiers or users of the Network, or land adjacent to the Network;
 - (iv) not do or omit to do anything that would cause or contribute to the Network (or the land on which the Network is located) not being clean, presentable, well maintained and in good repair, appearance and condition;
 - (v) not cause or allow any rubbish, substance or thing¹ to be deposited or released on or about the Network (or the land on which the Network is located) except as expressly required by the Operating Requirements Manual or any Train Control Directions;
 - (vi) obtain and maintain all necessary Authorisations required for the Operator to exercise the Operator's rights or comply with the Operator's obligations under this agreement;
 - (vii) not interfere with, hinder or prejudice:
 - (A) Queensland Rail's conduct of its operations;
 - (B) Queensland Rail's or any other Rail Transport Operator's use of the Network; or
 - (C) the functions and obligations of Queensland Rail as a Railway Manager (including under Queensland Rail's Accreditation);
 - (viii) ensure that its Rolling Stock operate safely, and otherwise be responsible for the operation of its Rolling Stock, on the Network; and

¹ But excluding exhaust gases and other substances required to be released in accordance with Prudent Practices for the purposes of operating the Operator's Rolling Stock.

- (ix) without limitation to **clause 6.2(b)(viii)**, ensure that the operation of its Rolling Stock (including the loading, unloading and cleaning of its Rolling Stock) is undertaken in a manner that:
 - (A) does not affect:
 - (1) the safe operation of the Rolling Stock or the Network;
or
 - (2) the operations or activities of Queensland Rail or other Rail Transport Operators; and
 - (B) ensures that all things on or in the Operator's Rolling Stock remain on or in the Operator's Rolling Stock (and, if applicable, are secured in position) during transit.
- (c) The Operator must notify Queensland Rail of any failure, or likely failure, by the Operator to comply with this agreement as soon as practicable after the Operator becomes aware of that failure or likely failure.

6.3 Compliance with Scheduled Time

The Operator must only operate Train Services in accordance with the applicable Scheduled Times and the relevant Train Schedule unless:

- (a) the Operator is expressly permitted or required to do otherwise in accordance with this agreement, the Operating Requirements Manual, the Network Management Principles or a Train Control Direction; or
- (b) the Parties agree otherwise.

6.4 Alterations to Train Services

- (a) If the Operator is not able to operate a Train Service in accordance with its Scheduled Time, then:
 - (i) the Operator must, as soon as practicable prior to the time when that Train Service was scheduled for operation, notify Queensland Rail that it is not able to operate that Train Service and the reason for its inability; and
 - (ii) if the Operator has complied with **clause 6.4(a)(i)**, then Queensland Rail will use reasonable endeavours to provide an alternative Scheduled Time for the relevant Train Service unless this would:
 - (A) alter the Scheduled Times for other Train Movements; or
 - (B) result in Queensland Rail incurring additional costs or expenses.
- (b) If Queensland Rail provides an alternative Scheduled Time for a Train Service in accordance with **clause 6.4(a)(ii)**, the Operator must notify Queensland Rail immediately whether the Operator accepts that alternative Scheduled Time. If the Operator accepts that alternative Scheduled Time, then the Operator must operate the Train Service in

accordance with that alternative Scheduled Time. For clarity, **clause 6.4(a)** does not apply to that alternative Scheduled Time.

- (c) If the Operator is not able to operate a Train Service in accordance with its Scheduled Time or an alternative Scheduled Time made available in accordance with **clause 6.4(a)(ii)** (or has not immediately notified Queensland Rail accepting such an alternative Scheduled Time), Queensland Rail may authorise the operation of another Train Movement at that Scheduled Time.

6.5 Operator to supply information

- (a) The Operator must provide and maintain all software, hardware and associated communication links necessary to ensure, to Queensland Rail's satisfaction, an effective interface between the Operator's and Queensland Rail's information systems as nominated by Queensland Rail. The interface with Queensland Rail's information systems will be subject to any requirements and controls specified by Queensland Rail (in its absolute discretion) including to protect the integrity and confidentiality of those information systems and the information contained in them.
- (b) The Operator must provide information to Queensland Rail as required in accordance with the Operating Requirements Manual (including any details in relation to Train Services or contact and other details for interface coordination).

6.6 Queensland Rail may supply Data

- (a) The Parties acknowledge that Queensland Rail may from time to time collect data in respect of the Operator's Rolling Stock (**Data**).
- (b) Queensland Rail may from time to time, in its absolute discretion, provide the Operator with access to the Data. The Operator will be responsible for all costs related to the transfer, conversion, modification and storage of any Data made available to the Operator by Queensland Rail.
- (c) Despite any other provision in this agreement, if the Operator receives any data from Queensland Rail that is not in respect of the Operator's Rolling Stock, then the Operator must:
 - (i) immediately notify Queensland Rail, providing details of the relevant data;
 - (ii) not use the data for any purpose;
 - (iii) not disclose the data to any person; and
 - (iv) comply with all directions given by Queensland Rail in relation to that data including the deletion, redirection or return of that data.
- (d) Any intellectual property rights in relation to the Operator's business or Train Services that are discovered or developed, or otherwise come into existence, in connection with the Data are assigned to and vest in Queensland Rail or its nominee on creation and Queensland Rail grants

to the Operator a free-of-charge, non-exclusive and irrevocable licence until the expiry or termination of this agreement to use, exploit, copy, improve, modify and share with third parties those intellectual property rights.

- (e) The Operator must undertake its own due diligence and investigations in relation to any Data made available by Queensland Rail. Queensland Rail does not warrant the accuracy or completeness or the standard of care taken in the collection of Data. The Operator acknowledges that Queensland Rail does not owe it any duty of care and that it will satisfy itself as to the accuracy, completeness or veracity of the Data which Queensland Rail makes available to it.

6.7 Authorisation of Rolling Stock and Train Configurations

- (a) The Operator must only operate a Train Service using Rolling Stock or a Train Configuration in respect of which the Operator has:
 - (i) provided to Queensland Rail:
 - (A) a certificate by a suitably qualified person, approved by Queensland Rail and appointed by and at the cost of the Operator, that the Operator's Rolling Stock and Train Configurations comply with the IRMP; and
 - (B) relevant documentation (including reports on trials and/or commissioning tests) demonstrating to the satisfaction of Queensland Rail that the Operator's Rolling Stock and Train Configurations comply with the IRMP, **(Certification)**; and
 - (ii) obtained from Queensland Rail a notice indicating that Queensland Rail is satisfied with that Certification for the purposes of those Train Services.

If the Operator obtains a notice referred to in **paragraph (ii)** that is subject to conditions (including conditions relating to the period for which that notice will apply), then the Operator must comply with those conditions and must only operate a Train Service in accordance with those conditions and while that notice applies.

- (b) During the Term, if the Operator wishes to modify any of the Rolling Stock or Train Configurations used for Train Services, then the Operator must not use any such Rolling Stock or Train Configurations unless and until:
 - (i) the IRMP has been reviewed in accordance with **clause 7** in relation to the modified Rolling Stock or Train Configurations;
 - (ii) the Operator has complied with **clause 6.7(a)** in relation to the modified Rolling Stock or Train Configurations, as applicable; and
 - (iii) the Parties have agreed any amendments to this agreement (including varying the methodology, rates or other inputs for

calculating Access Charges) reasonably necessary to reflect the authorisation and use of the modified Rolling Stock or Train Configurations on the Network.

6.8 Operating Requirements Manual

- (a) **Clauses 6.8(b) to (e)** do not commence while:
 - (i) the rail transport infrastructure (as defined in the TIA) used by Train Services forms part of the Network and the Access Undertaking applies in respect of persons seeking access to it; and
 - (ii) the Access Undertaking:
 - (A) defines the term 'Operating Requirements Manual'; and
 - (B) sets out a process that Queensland Rail must comply with in relation to making amendments to the Operating Requirements Manual.
- (b) Queensland Rail may amend the Operating Requirements Manual from time to time but if in Queensland Rail's opinion (acting reasonably) those amendments will materially adversely affect the Operator then Queensland Rail will only do so after:
 - (i) providing reasonable notice of the proposed amendment to the Operator; and
 - (ii) consulting with the Operator in relation to the amendment.
- (c) A notice issued by Queensland Rail under **clause 6.8(b)** must include details of:
 - (i) the proposed amendments including the proposed implementation date; and
 - (ii) the period during which the Operator can consult with Queensland Rail in relation to the proposed amendments.
- (d) Without limiting the matters that Queensland Rail must consider when deciding whether to proceed with any proposed amendments, Queensland Rail must consider any submissions from the Operator.
- (e) If Queensland Rail amends the Operating Requirements Manual, Queensland Rail must:
 - (i) notify the Operator of the amendments and specify the date on which the amendment will take effect; and
 - (ii) in specifying the date on which the amendment will take effect, allow a reasonable period as determined by Queensland Rail, being not less than ten Business Days, for the Operator to amend its processes, procedures and plans to comply with the amended Operating Requirements Manual, except where Queensland Rail requires immediate compliance for safety reasons.

- (f) **Clauses 6.8(b) to (d)** will not apply to amendments made to the Operating Requirements Manual by Queensland Rail:
 - (i) on safety grounds;
 - (ii) in response to a Material Change; or
 - (iii) if required for the purposes of Queensland Rail implementing a change to the assets, equipment, facilities, infrastructure, processes, procedures or systems used for the purposes of any train management system (including, for example, a Train Control system or a train protection system) where Queensland Rail (acting reasonably) implements the change for the purpose of improving safety, network capabilities, network capacity or system reliability (or a combination of any of these).
- (g) If Queensland Rail amends the Operating Requirements Manual in accordance with this **clause 6.8**, the Operator must bear its own costs of implementing the proposed amendments including the equipping of Rolling Stock with new or additional equipment or making any other modification to Rolling Stock.
- (h) Queensland Rail has no liability (on any basis whatsoever including in negligence) to the Operator in relation to or as a result of amending the Operating Requirements Manual (including on an interim basis) or the due implementation and observance of an amendment to the Operating Requirements Manual (whether on an interim or final basis) where Queensland Rail believes (acting reasonably and in good faith) in the circumstances and at the time:
 - (i) that compliance with the relevant provisions of the Undertaking in relation to making amendments to the Operating Requirements Manual (or, if applicable, this **clause 6.8**) was required; and
 - (ii) that it was acting in compliance with those provisions of the Undertaking (or, if applicable, this **clause 6.8**) in amending the Operating Requirements Manual.

6.9 Entering and exiting the Network

- (a) The Operator is solely responsible for and bears the cost and risk of obtaining and maintaining any rights to access or use Private Infrastructure that are necessary in order to enter or exit the Network or otherwise operate the Train Services in accordance with this agreement.
- (b) Despite any other provision in this agreement, the Operator is not relieved of any obligations under this agreement (and must continue to comply with all of its obligations under this agreement) even if the Operator cannot or does not obtain or maintain any such rights.

6.10 Notification of damage or disrepair

The Operator must notify Queensland Rail as soon as practicable of any damage to, disrepair of or failure in the operation or function of any part of the Network of which the Operator becomes aware.

7 Interface risk management

- (a) Each Party must observe and comply with the IRMP.
- (b) The Operator must use reasonable endeavours to not do anything or permit anything to be done which may give rise to Interface Risks that are not addressed in the IRMP. If the Operator does something or permits something to be done that gives rise to, or is likely to give rise to, Interface Risks that are not addressed in the IRMP, the Operator must notify Queensland Rail as soon as practicable after that thing is done or permitted to be done.
- (c) If a Party fails to comply with the IRMP it must notify the other Party of the non-compliance as and when it becomes aware of such non-compliance. The notice must include details of the nature of the non-compliance and how the non-complying Party has rectified or intends to rectify the non-compliance.
- (d) The Parties must upon the reasonable request at any time by either Party, but no less than once in any 12 month period, jointly review the IRMP, and amend it (including by replacing it) as necessary, to ensure all Interface Risks are effectively managed including by:
 - (i) adopting and implementing appropriate controls and measures to adequately address all Interface Risks;
 - (ii) identifying the Party responsible for the implementation of such controls and measures and ensuring their ongoing effectiveness;
 - (iii) identifying the applicable safeworking procedures and safety standards to be adhered to including Queensland Rail's safety policies and procedures and the Operating Requirements Manual;
 - (iv) identifying the environmental procedures and standards to be adhered to including relevant elements of Queensland Rail's environmental management system and the Operating Requirements Manual; and
 - (v) satisfying the requirements under the TRSA for an interface agreement (as defined in the TRSA) or under any other relevant Laws relating to health or safety.
- (e) For the purposes of a review referred to in **clause 7(d)**:
 - (i) if either Party is not satisfied that all relevant Interface Risks have been identified for the IRMP, then the Parties will undertake a joint Interface Risk Assessment as part of such a review; and

- (ii) if the Parties are not able to agree any matter in relation to such a review, either Party may treat that inability to agree as a Dispute for the purposes of **clause 17**.
- (f) Where the IRMP identifies that training of the Operator's Associates is required and the Operator can only obtain that training from Queensland Rail, then:
 - (i) Queensland Rail will provide the Operator with that training; and
 - (ii) the Operator must pay to Queensland Rail a reasonable commercial charge, as determined by Queensland Rail, for doing so.
- (g) For clarity, the Operator must not use any Rolling Stock or Train Configuration in operating a Train Service unless the IRMP has either been:
 - (i) prepared on the basis of the Train Services being operated using that Rolling Stock or Train Configuration (as applicable); or
 - (ii) reviewed in accordance with this **clause 7** in relation to that Rolling Stock or Train Configuration (as applicable).

8 Environmental and emergency management plan requirements

8.1 Dangerous Goods

The Operator must not carry Dangerous Goods on any Train Service.

8.2 Environmental damage

Where Queensland Rail becomes aware of:

- (a) any:
 - (i) Environmental Harm; or
 - (ii) event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Harm, as a result of the activities of the Operator, which in Queensland Rail's opinion (acting reasonably), could result in Queensland Rail or any other person incurring any liability or being subjected to a direction of any Authority (**Damage**); and
- (b) Queensland Rail:
 - (i) considers that action or intervention is required; or
 - (ii) is given a direction by an Authority that action or intervention is required,

to prevent, mitigate or remedy that Damage,

then:

- (c) Queensland Rail may notify the Operator of that requirement and, where practicable, any action or intervention that Queensland Rail or, if applicable, the relevant Authority considers necessary to prevent, mitigate or remedy the Damage; and
- (d) as soon as practicable after receiving such a notice, the Operator will:
 - (i) comply with the requirements of the applicable Authority and any other requirements specified by Queensland Rail in that notice; and
 - (ii) take whatever other action or intervention is required to prevent, mitigate or remedy that Damage.

8.3 Operator's Emergency Management Plan

- (a) Prior to the commencement of any Train Services (including any new or varied Train Services) the Operator must develop a proposed Operator's Emergency Management Plan which:
 - (i) details procedures that are adequate to manage an Incident including all actions to be taken to prevent, minimise or mitigate any threat or danger to any person or property including:
 - (A) the matters outlined in the Operating Requirements Manual, from time to time, relevant to the management of Network Incidents – for example, safety, emergency and environment matters; and
 - (B) any matters otherwise referred to in this agreement for inclusion in such a plan;
 - (ii) at all times during the Term is compatible with this agreement and the Queensland Rail Emergency Procedures; and
 - (iii) is consistent with Prudent Practices,

and obtain a notice from Queensland Rail that it has no objection to that plan.
- (b) As soon as practicable after receiving the proposed Operator's Emergency Management Plan, Queensland Rail must either notify the Operator that it:
 - (i) has no objections; or
 - (ii) has objections (including details of those objections),

to the proposed Operator's Emergency Management Plan.
- (c) If Queensland Rail notifies the Operator, under **clause 8.3(b)**, that Queensland Rail has objections, then:
 - (i) the Operator must develop an amended plan in accordance with **clause 8.3(a)**; and

- (ii) **clause 8.3(b)** and this **clause 8.3(c)** will apply in respect of that amended plan.
- (d) If the Operator intends to amend the Operator's Emergency Management Plan, then:
 - (i) the Operator must notify Queensland Rail and provide Queensland Rail with details of the proposed amendments and the reasons for them;
 - (ii) **clauses 8.3(a) to (c)** will also apply in respect of those amendments as if they were a proposed Operator's Emergency Management Plan; and
 - (iii) those amendments will not be effective unless and until the Operator has obtained a notice from Queensland Rail that it has no objection to those amendments.
- (e) The Operator must ensure procedures are in place, and are implemented, which ensure compliance by the Operator with any reporting requirements in the Operator's Emergency Management Plan and, to the extent relevant, the Queensland Rail Emergency Procedures.

8.4 Obstructions

- (a) The Operator must not cause or contribute to any Obstruction or permit to continue any Obstruction to the extent caused or contributed to by the Operator.
- (b) Queensland Rail may do anything that it considers necessary:
 - (i) to remove, rectify, mitigate or otherwise deal with any Obstruction; or
 - (ii) to recommence Train Movements where there is or was an Obstruction,

including to move, or remove from the Network, any of the Operator's Rolling Stock that is causing or contributing to an Obstruction or preventing or hindering Train Movements. To the extent that an Obstruction is caused or contributed to by the Operator, the Operator must pay Queensland Rail's costs and expenses incurred by Queensland Rail in relation to that Obstruction (including costs and expenses for doing anything under this **clause 8.4(b)**) and those costs and expenses will be a debt due and owing by the Operator to Queensland Rail.
- (c) Queensland Rail will use reasonable endeavours to consult with the Operator, prior to exercising any right under **clause 8.4(b)**, where Queensland Rail intends to interfere with the Operator's Rolling Stock or any other thing for which the Operator is responsible. A failure by Queensland Rail to consult with the Operator does not affect the validity of anything done by Queensland Rail under **clause 8.4(b)**.

- (d) If Queensland Rail gives a Train Control Direction to the Operator to assist Queensland Rail to remove, rectify, mitigate or otherwise deal with an Obstruction caused or contributed to by another Rail Transport Operator (including to use any of the Operator's Rolling Stock to move, or remove from the Network, any Rolling Stock of another Rail Transport Operator), Queensland Rail will reimburse to the Operator its reasonable direct costs and expenses of providing such assistance.

8.5 Notification

- (a) Queensland Rail will notify the Operator of any Network Incident that may reasonably be expected to materially adversely affect the Operator's Train Services as soon as practicable after the Network Incident comes to Queensland Rail's attention.
- (b) As soon as practicable after the Operator or the Operator's Associates become aware of:
 - (i) any Incident;
 - (ii) any Environmental Harm;
 - (iii) any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Harm;
 - (iv) any Obstruction;
 - (v) any breach or suspected breach of any safeworking procedures, safety standards or other safety requirements set out in the Operating Requirements Manual; or
 - (vi) anything which the Operator observes may cause or contribute to the occurrence of any matter referred to in **clauses 8.5(b)(i) to(v)**, **(Notifiable Events)**, the Operator must notify Queensland Rail of that Notifiable Event (including any action or intervention taken or being taken by the Operator).

8.6 Noise mitigation

- (a) In addition to any noise mitigation or management requirements under the IRMP, the Operator must pay to Queensland Rail a contribution, as reasonably determined by Queensland Rail, to the costs and expenses incurred by Queensland Rail in relation to any noise mitigation or management measures on the Network, or land adjacent to the Network, that are considered necessary by Queensland Rail:
 - (i) in accordance with Prudent Practices; or
 - (ii) to comply with any noise levels or limits applicable from time to time.
- (b) Queensland Rail will use reasonable endeavours:
 - (i) to consult with the Operator prior to Queensland Rail electing to implement noise mitigation or management measures on the

- Network, or land adjacent to the Network, to comply with any applicable noise levels or limits from time to time; and
- (ii) to notify the Operator of how it will determine the Operator's contribution to its costs and expenses in relation to any noise mitigation or management measures.
- (c) For clarity, the applicable noise levels or limits will be those that are required to observe or comply with any applicable Laws or the lawful requirements of any relevant Authority or that are determined by Queensland Rail in accordance with Prudent Practices.

9 Queensland Rail's inspection and audit rights

- (a) Subject to **clause 9(b)**, Queensland Rail may at any time give a notice to the Operator requiring an inspection or audit for the purpose of assessing:
- (i) the Operator's compliance with this agreement; or
 - (ii) whether any one or more of the individual wagons used by the Operator in the provision of a Train Service is loaded:
 - (A) in excess of its rated carrying capacity; or
 - (B) in an unsafe or potentially unsafe manner.
- (b) Queensland Rail must use reasonable endeavours in exercising its rights under **clause 9(a)**:
- (i) to minimise the disruption to the Operator's Train Services; and
 - (ii) to avoid damage or injury to the Operator's business activities.
- (c) In conducting an inspection or audit under **clause 9(a)**, Queensland Rail may require the Operator, and the Operator must comply with Queensland Rail's requirements, to do anything reasonably necessary in order for Queensland Rail to conduct that inspection or audit, including to divert or delay a Train Service or to make any part of any relevant Train available for inspection or weighing.

10 Risk and indemnities

10.1 Operator's indemnity

The Operator indemnifies Queensland Rail against all Claims which may be brought against or made upon Queensland Rail and all Losses which Queensland Rail suffers or incurs:

- (a) to the extent caused, or contributed to, by:
- (i) a breach of this agreement; or
 - (ii) any act or omission,
- by the Operator, the Operator's Associates or any Operator's Customer;

- (b) in respect of damage to or loss of any property or personal injury to or death of any person in connection with or in relation to the Train Services, the Operator's Rolling Stock or Train Movements except to the extent that such damage, loss, injury or death is caused, or contributed to, by any negligent act or omission of Queensland Rail;
- (c) in connection with or in relation to any Obstruction, to the extent caused, or contributed to, by the Operator;
- (d) in connection with or in relation to any Claims by an Operator's Customer in connection with or in relation to:
 - (i) the entry into, performance or non-performance of this agreement by any Party or the exercise of a right under this agreement by any Party; or
 - (ii) the Network (including the operation or maintenance of the Network), the Operator's rights under this agreement or the Train Services (including any delay or failure of Train Services to operate); or
- (e) in connection with or in relation to Claims by third parties:
 - (i) with whom the Operator has shared any Data (whether in its original, converted or a modified form) including any liability to an Authority whether or not caused, or contributed to, by any act or omission (including negligence) of Queensland Rail (or its officers, employees, contractors or agents); or
 - (ii) arising out of the Operator use of any Data or of any intellectual property rights referred to in **clause 6.6(d)**.

10.2 Assistance in defence of Claims arising from Network Incidents

Each Party must provide reasonable assistance to the other Party in the defence of any Claim made against that other Party by a third party arising out of any event in connection with a Network Incident.

10.3 Operator responsible for Operator's Associates

- (a) The Operator may allow any of the Operator's Associates to exercise any of the Operator's rights or to comply with any of the Operator's obligations under this agreement.
- (b) The Operator is responsible for the conduct of the Operator's Associates in exercising any of the Operator's rights or complying with any of the Operator's obligations as if that conduct was the conduct of the Operator itself.
- (c) If the Operator delegates or subcontracts the exercise or performance of any of its rights or obligations under this agreement to any person, then:
 - (i) the Operator remains fully responsible for the exercise or performance of the delegated or subcontracted (as applicable) rights or obligations; and

- (ii) any conduct of any delegate or subcontractor (as applicable) will be taken to be the conduct of the Operator.

11 Limitations on liability

11.1 No liability for Consequential Loss

- (a) Subject to **clause 11.1(b)**, despite any other provision in this agreement neither Party is liable to the other Party for any Consequential Loss suffered or incurred by, or Claimed against, the other Party.
- (b) The indemnity in **clause 10.1** extends to and includes Consequential Loss suffered or incurred by Queensland Rail arising out of any Claim by a third party including an Operator's Customer but does not otherwise extend to Consequential Loss suffered or incurred by Queensland Rail.

11.2 Exclusion of liability

To the extent permitted by law all and any liability of Queensland Rail (and its officers, employees, contractors and agents) in relation to:

- (a) any loss (including deterioration) of any thing carried by a Train Service;
- (b) any matter for which the Operator bears or assumes risk or liability (including any matter in relation to or in connection with any of the Operator's representations or warranties under **clause 21**);
- (c) anything done by Queensland Rail, or that Queensland Rail fails or omits to do, under **clauses 8.4(b) or (c)**;
- (d) any exercise of a right, or compliance with an obligation, by Queensland Rail in accordance with this agreement (including any delay or cancellation of Train Services which results from that exercise or compliance); or
- (e) any Data (whether in its original, converted or a modified form) including any collection, transfer or provision of, or other dealing with, any Data and any use of that Data,

is excluded or, if it cannot be excluded, is limited to \$1.00. This **clause 11.2** applies whether the liability arises in contract, in tort (including negligence), under any Law or otherwise.

11.3 Claims in respect of Train Movements

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

- (a) the delay was a result of a breach of this Agreement by the Defaulting Party, or negligence on the part of the Defaulting Party; and
- (b) the delay is not attributable to:
 - (i) the Affected Party;
 - (ii) another Rail Transport Operator (other than the Defaulting Party);

- (iii) a Force Majeure Event;
 - (iv) a Planned Possession, Urgent Possession or Emergency Possession of the Network in a manner consistent with the Network Management Principles;
 - (v) Rail Infrastructure Operations scheduled in a manner consistent with the Network Management Principles; or
 - (vi) any action taken by Queensland Rail, acting reasonably, in response to an emergency or a genuine safety risk; and
- (c) either:
- (i) the Parties have not agreed upon and implemented a regime to address the delays to Train Movements; or
 - (ii) the Parties have agreed upon and implemented a regime to address the delays to Train Movements, but the delays are of a magnitude which is beyond the scope of that regime.

11.4 Limitation on Claims

- (a) A Party must not make any Claim against the other Party under, in relation to or arising out of this agreement, its subject matter, any breach of this agreement or any act or omission of the other Party unless:
- (i) notice and full details of the Claim have been given to the other Party within two years after the occurrence of the event or circumstance out of which such Claim arises; and
 - (ii) the amount of the Claim exceeds \$500,000 in respect of any one event or cause of action or series of related events or causes of action (and, for clarity, the amount of any Claim is not limited to the amount exceeding that threshold).
- (b) A Party must use best endeavours to provide the other Party with notice and full details of any such Claim within 12 months after the occurrence of the event or circumstance out of which such Claim arises.

11.5 Failure to pay amounts

No exclusion or limitation of liability, or restriction on the existence of or ability to make any Claim, in this **clause 11** applies to Claims made by one Party against the other for monies due and payable in accordance with this agreement including, for example, under **clause 4**.

11.6 Claims in respect of non-provision of access

The Operator will not have, and must not make, any Claim against Queensland Rail in respect of the non-provision of access or the cancellation of any Train Service (**Claim Event**) unless, and will only have a Claim to the extent that each of the following is satisfied:

- (a) the Claim Event was a result of a breach of this agreement by, or the negligence of, Queensland Rail;

- (b) the Claim Event is not attributable (in whole or part) to:
 - (i) the Operator;
 - (ii) another Rail Transport Operator (other than Queensland Rail);
 - (iii) a Force Majeure Event;
 - (iv) a Planned Possession, Urgent Possession, Emergency Possession or Rail Infrastructure Operations or other works related to such a Possession;
 - (v) an event, incident or circumstance on Private Infrastructure; or
 - (vi) any action taken by Queensland Rail (acting reasonably) or by an Authority in response to or as a consequence of a safety risk, a Network Incident, an emergency, a Claim by a third party, personal injury to or death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network;
- (c) a Train Service is cancelled due to Queensland Rail failing to make the Network available for the Operator to operate the Train Service at the Scheduled Time and Queensland Rail was not able to offer a reasonable alternative Scheduled Time;
- (d) the total number of Train Services cancelled in the relevant month as a result of a failure by Queensland Rail to make the Network available exceeds 10% of the total number of Train Services that the Operator was entitled to operate during that month in accordance with this agreement; and
- (e) the Claim Event does not constitute (in whole or part) Queensland Rail Cause.

12 Suspension

12.1 Right of suspension

- (a) Queensland Rail may, by notice in writing to the Operator, immediately suspend the right of the Operator to operate some or all of the Train Services upon the occurrence of any one or more of the following events or circumstances:
 - (i) any event or circumstance described in **clauses 13.1(a) to (j)** occurs;
 - (ii) the Operator fails to comply with a notice given by Queensland Rail requiring the Operator (within the reasonable time specified in that notice) to cease conduct that Queensland Rail considers (acting reasonably) is causing or threatening to cause Serious Environmental Harm or Material Environmental Harm (as those terms are defined in the *Environmental Protection Act 1994* (Qld)); or

- (iii) the Operator has failed, or in Queensland Rail's opinion the Operator will, or intends to fail, to comply with:
 - (A) any Law, Train Control Direction or Operating Requirements Manual relating to the operation of Train Services; or
 - (B) any obligation of the Operator under this agreement.
- (b) Such a suspension will continue until such time as the Operator has satisfied Queensland Rail that:
 - (i) the relevant event or circumstance has been remedied or, if applicable, has been avoided and will not occur; and
 - (ii) where appropriate, that the Operator has taken action to prevent the recurrence of that event or circumstance.

12.2 Details of suspension

A notice of suspension given by Queensland Rail to the Operator in accordance with this **clause 12** must set out:

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

12.3 Effect of suspension

The suspension of any rights by Queensland Rail in accordance with this **clause 12**:

- (a) is revocable at any time by Queensland Rail;
- (b) has no effect upon obligations, debts or liabilities which have accrued before that suspension took effect;
- (c) does not affect or suspend any other obligation of the Operator, including the obligation to pay Access Charges relating to the period of the suspension; and
- (d) is without prejudice to Queensland Rail's other rights and remedies in respect of the relevant default, event or circumstance.

13 Default and termination

13.1 Termination by Queensland Rail

Subject to **clause 13.3**, without limiting any other rights of termination in this agreement or otherwise existing at Law, Queensland Rail may, by notice in writing to the Operator, immediately terminate this agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) the Operator fails, in any material respect, to perform or comply with this agreement;

- (b) the Operator fails to pay when due any amount payable, or to provide and maintain Security, in accordance with this agreement;
- (c) an Insolvency Event occurs in relation to the Operator;
- (d) Queensland Rail ceases to hold the Sublease, any other Land Tenure or any other right or interest that authorises, permits or otherwise entitles Queensland Rail:
 - (i) to grant or otherwise confer on the Operator all or any of the rights referred to in this agreement; or
 - (ii) to enter into or perform this agreement;
- (e) there are no Access Rights under this agreement including as a result of reductions or relinquishments in accordance with **clause 19**;
- (f) a Repeated Breach exists;
- (g) the Operator purports to Assign or Charge its rights or interest in this agreement other than in accordance with **clause 20**;
- (h) the Operator fails to comply with the Train Service Description without first obtaining the prior written consent of Queensland Rail;
- (i) the Operator fails to comply with the IRMP or any other safety related obligation under this agreement; or
- (j) the Operator's Accreditation is suspended, cancelled or amended so that it cannot perform its obligations or exercise its rights under this agreement.

13.2 Termination by the Operator

Subject to **clause 13.3**, without limiting any other rights of termination in this agreement or otherwise existing at Law, the Operator may, by notice in writing to Queensland Rail, immediately terminate this agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) an Insolvency Event occurs in relation to Queensland Rail;
- (b) Queensland Rail fails to pay when due any amount payable under this agreement; or
- (c) Queensland Rail fails, in any material respect, to perform or comply with this agreement other than where this agreement excludes Queensland Rail's liability for that failure or limits that liability to \$1.00, or where Queensland Rail is not otherwise liable under this agreement for that failure.

13.3 Remedy

- (a) If an event or circumstance set out in **clause 13.1** or **13.2** (except **clauses 13.1(c) to (f)** and **clause 13.2(a)**) (**Event**) occurs then the relevant Party (**Terminating Party**) may only terminate this agreement if:
 - (i) the Terminating Party serves a notice (**Notice to Remedy**) on the other Party (**Defaulting Party**) notifying the Defaulting Party of the

Event, providing details of the Event and requiring the Defaulting Party:

- (A) to remedy the Event (if the Event is capable of being remedied); or
- (B) to take action to ensure such an Event does not recur (if the Event is not capable of being remedied),

and specifying a reasonable period in which to do the things in **paragraph (A) or (B)**, as applicable having regard to the nature of the Event (**Relevant Period**) – however, if the Event is one in:

- (C) **clause 13.1(b) or 13.2(b)**, then the Relevant Period must be ten Business Days; or
- (D) **clause 13.1(a) or 13.2(c)**, then the Relevant Period must be 20 Business Days; and

(ii) the Defaulting Party does not, within the Relevant Period, if the Event:

- (A) is capable of being remedied, remedy the Event; or
- (B) is not capable of being remedied, take action to ensure such an Event does not recur and pay, if applicable, reasonable compensation to the Terminating Party in respect of the Event.

(b) If Queensland Rail is the Defaulting Party and compensation is payable under **clause 13.3(a)(ii)(B)**, then that compensation is subject to any limits and exclusions of liability under this agreement that may apply in relation to the relevant Event.

13.4 Termination for Change in Control

Queensland Rail may terminate this agreement immediately if:

- (a) there is a Change in Control; and
- (b) the Operator has not obtained Queensland Rail's prior consent to that Change in Control.

13.5 Obligations and other rights upon termination or expiration

(a) A Party's right:

- (i) to make a Claim or recover damages or avail itself of other remedies under this agreement or at Law; or
- (ii) to recover monies due to it under this agreement, including Access Charges,

is not prejudiced by:

- (iii) the termination or expiry of this agreement (including any termination under this **clause 13**); or

- (iv) the forbearance by a Party in exercising any rights under this **clause 13**.
- (b) The expiry or termination of this agreement:
 - (i) does not affect the provisions expressed or implied to operate, survive or have effect after such expiry or termination; and
 - (ii) is without prejudice to any Claim or right of action already accrued to any Party in respect of any breach of this agreement.

13.6 Removal of Rolling Stock following termination

- (a) Immediately on expiration of the Term, and as soon as practicable after termination of this agreement for any other reason, the Operator must, at the Operator's cost and risk, remove from the Network all of the Operator's Rolling Stock used in relation to operating Train Services.
- (b) If the Operator fails to remove the Operator's Rolling Stock from the Network:
 - (i) Queensland Rail may give a notice to the Operator demanding the removal of Rolling Stock by a time specified by Queensland Rail; and
 - (ii) if the Operator fails to remove that Rolling Stock by that time, Queensland Rail may remove that Rolling Stock and recover the reasonable costs of doing so from the Operator.
- (c) The Operator is liable, and indemnifies Queensland Rail, for all costs and expenses incurred by Queensland Rail in relation to any damage caused to the Network by the Operator in removing any Rolling Stock.
- (d) The Operator must comply with all Train Control Directions, and all other directions issued by Queensland Rail (acting reasonably), in relation to the removal of the Rolling Stock in accordance with this **clause 13.6**.

14 Insurance

14.1 Obligation to obtain and maintain Insurance

The Operator must:

- (a) effect, or cause to be effected, before the Commitment Date; and
- (b) maintain, or cause to be maintained, until the expiry of the Term,

insurance in accordance with Prudent Practices having regard to the Operator's activities, works, obligations and responsibilities under this agreement (including insurances covering all risks of an insurable nature in respect of which the Operator is obliged to indemnify Queensland Rail under this agreement) provided that such insurances must include (without limitation):

- (c) a public liability policy of insurance:
 - (i) that covers the Operator and each of the Operator's agents, consultants, contractors and their sub-contractors (each an **Insured Party**);
 - (ii) for an amount of not less than \$350 million per occurrence;
 - (iii) the coverage of which includes (without limitation)
 - (A) the rights, interests and liability in respect of any Claim against an Insured Party arising out of:
 - (1) any damage or loss occurring to any property; and
 - (2) injury (including death) to any person, arising out of or in connection with any thing done or omitted to be done in the performance or purported performance of this agreement²; and
 - (B) the Operator's operations and activities on the Network; and
 - (iv) that has a maximum deductible for any one claim of \$500,000;
- (d) a carrier liability policy of insurance:
 - (i) that covers the Operator's liability in relation to goods being transported by Train Services;
 - (ii) for an amount of not less than \$10 million per occurrence; and
 - (iii) that has a maximum deductible for any one claim of \$500,000; and
- (e) all other insurances that the Operator or the Operator's agents, consultants, contractors and their sub-contractors are required by Law to hold in relation to or in connection with the exercise of rights or the performance of obligations under this agreement.

14.2 Insurer

The Operator must ensure that any Insurance effected and maintained in accordance with **clause 14.1** is with an insurer having an insurance financial strength rating of "A" or better by Standard & Poor's or, if Standard & Poor's ceases to exist or to provide such ratings, the rating which most closely corresponds to that rating by another agency or person which is recognised in global financial markets as a major ratings agency.

² Including, without limitation, Claims arising out of or in relation to 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.

14.3 Essential terms and conditions

The Operator must ensure that, to the extent permitted by Law, all Insurances effected and maintained in accordance with **clause 14.1** must:

- (a) note the interests of Queensland Rail; and
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amend the cover provided without the written consent of Queensland Rail (which consent must not be unreasonably withheld or delayed).

14.4 Payment of premium and deductibles

The Operator:

- (a) must pay when due all premiums, charges and other expenses necessary for effecting and maintaining in force the Insurances; and
- (b) is responsible for the payment of all policy deductibles or excesses for Insurances.

14.5 No prejudicial action by the Operator

The Operator must not do or permit anything to be done (including any omission) which:

- (a) may result in any Insurance being vitiated or rendered void or voidable; or
- (b) would give rise to an entitlement by the insurer to avoid payment of any claim in whole or in part.

14.6 Disclosure of Insurance

- (a) The Operator must provide to Queensland Rail evidence of the insurance policies effected pursuant to this **clause 14** or, if requested by Queensland Rail, copies of such Insurances, to Queensland Rail's reasonable satisfaction:
 - (i) at least ten Business Days prior to the Commitment Date;
 - (ii) upon renewal of each Insurance during the Term; and
 - (iii) whenever reasonably requested to do so in writing by Queensland Rail.
- (b) If the Operator, whenever required to do so under this agreement, fails to produce to Queensland Rail evidence to the satisfaction of Queensland Rail (acting reasonably) of Insurances that have been effected or maintained by it, Queensland Rail may:
 - (i) effect and maintain the Insurance and pay the premiums and any amount so paid will be a debt due from the Operator to Queensland Rail; or
 - (ii) terminate this agreement under **clause 13.1(a)**.

14.7 Compliance

The Operator must at all times comply with the terms of all Insurances effected under this **clause 14**.

14.8 Claims

- (a) In addition to any other obligation on the Operator, the Operator must:
 - (i) notify Queensland Rail as soon as practicable after the occurrence of any claim, or an event that may give rise to a claim, under any Insurance (including providing reasonable details of the claim or the event); and
 - (ii) keep Queensland Rail informed of subsequent developments concerning any claim.
- (b) Upon settlement of a claim under any Insurance covering damage to the Network the monies received must be paid to Queensland Rail unless the Operator has already partially or totally indemnified Queensland Rail for the relevant damage, in which case the monies will be paid to the Operator but only to the extent that Queensland Rail has been indemnified.

14.9 Insurance not a limit of Operator's liability

The Operator's compliance with any Insurances does not limit the Operator's liabilities or obligations under this agreement.

15 Security

15.1 Obligation to provide Security

- (a) The Operator must:
 - (i) on or before the Commitment Date, provide to Queensland Rail security in the form set out in **clause 15.1(b)** for the Security Amount; and
 - (ii) thereafter maintain that security (including for any increased or decreased amount or any top up) in accordance with this **clause 15, (Security)**.
- (b) Security must be in the form of:
 - (i) a bank guarantee that:
 - (A) is unconditional and irrevocable and in favour of Queensland Rail;
 - (B) is issued by an Australian institution:
 - (1) authorised to carry on a banking business and entitled to call itself a 'bank' pursuant to the *Banking Act 1959* (Cth); and

- (2) which has a credit rating of “A” or better by Standard & Poor’s or, if Standard and Poor’s ceases to exist or to provide such credit ratings, the credit rating which most closely corresponds to that credit rating by another agency or person which is recognised in global financial markets as a major ratings agency;
- (C) requires the issuing bank to pay on demand by Queensland Rail:
 - (1) without recourse to the Operator or any other person;
 - (2) irrespective of the performance or non-performance of the Operator or Queensland Rail under this agreement; and
 - (3) despite any notice or other communication from the Operator or any other person,

an amount or amounts up to the amount specified in the bank guarantee;
- (D) has no expiry date; and
- (E) is otherwise in a form acceptable to Queensland Rail; or
- (ii) any other form acceptable to Queensland Rail (in its absolute discretion).

15.2 Recourse to Security

- (a) A Security may be called upon by Queensland Rail in any circumstance where:
 - (i) the Operator fails to pay, on or before the due date, any amount that is payable by the Operator to Queensland Rail under this agreement; or
 - (ii) Queensland Rail otherwise suffers or incurs a Loss in respect of which the Operator is required to indemnify Queensland Rail in accordance with this agreement.
- (b) If an Insolvency Event occurs, or Queensland Rail (acting reasonably) suspects that an Insolvency Event has occurred, in relation to the Operator, Queensland Rail may:
 - (i) in respect of any amounts due but unpaid by the Operator under this agreement:
 - (A) decline payment from the Operator of all or part of those amounts; and
 - (B) immediately call upon the Security for those amounts for which payment was so declined; or
 - (ii) in respect of any amounts paid by the Operator under this agreement after the time when the Insolvency Event occurred or

Queensland Rail (acting reasonably) suspects that an Insolvency Event occurred:

- (A) refund all or part of those amounts to the Operator; and
 - (B) immediately call upon the Security for the amounts so refunded.
- (c) If Queensland Rail calls on a Security, the Operator must deliver to Queensland Rail a further Security for the amount called upon, or a replacement Security for the remaining amount of the existing Security plus the amount called upon in exchange for the existing Security, within five Business Days after Queensland Rail calls on the Security so that the Security held by Queensland Rail is equal to the Security Amount.

15.3 Review of Security

- (a) Queensland Rail may:
- (i) at any time, from time to time, review the amount of the Security Amount, taking into consideration all of the matters that Queensland Rail considers relevant including:
 - (A) the financial performance of the Operator;
 - (B) the Operator's past performance under this agreement (whether in relation to payments or otherwise); and
 - (C) expected future payment obligations under this agreement; and
 - (ii) acting reasonably, determine that the amount of the Security Amount should be increased or decreased.
- (b) If Queensland Rail determines under **clause 15.3(a)** that the amount of the Security Amount should be:
- (i) increased, the Operator must deliver to Queensland Rail further Security for the amount of the increase, or a replacement Security for the revised amount in exchange for the existing Security; or
 - (ii) decreased, the Operator must deliver to Queensland Rail a replacement Security for the revised amount in exchange for the existing Security,

within ten Business Days after Queensland Rail gives notice of its determination so that the Security held by Queensland Rail is equal to the Security Amount as determined by Queensland Rail.

15.4 Return of Security

Queensland Rail must, subject to the rights of recourse to the Security under this **clause 15**, return the Security to the Operator as soon as practicable after both of the following occur:

- (a) this agreement has expired or terminated; and

- (b) in Queensland Rail's opinion (acting reasonably) there is no prospect that:
 - (i) money or damages will become owing (whether actually or contingently) by the Operator to Queensland Rail in connection with this agreement; and
 - (ii) any payment towards the satisfaction of the Operator's obligation to pay any amount to Queensland Rail under this agreement will be void, voidable or refundable under any Law (including any Law relating to insolvency),

provided that, in any event, Queensland Rail has no obligation to return the Security to the Operator earlier than three months after the expiry or termination of this agreement.

16 Adjustment for changes

16.1 Review of schedule 3

- (a) This **clause 16.1**:
 - (i) applies to the extent that a Reference Tariff applies to the Train Services (including where a relevant Reference Tariff is approved by the QCA after the Commencement Date); and
 - (ii) does not apply where there is no Reference Tariff that is applicable to the relevant Train Services.
- (b) **Schedule 3** must be reviewed by Queensland Rail as soon as practicable after a Reference Tariff Provision, or any change in a Reference Tariff Provision, is approved by the QCA from time to time. For clarity, Queensland Rail is not obliged to conduct such a review where there ceases to be a Reference Tariff that is relevant to the Train Services.
- (c) The purpose of the review under this **clause 16.1** is to determine the amendments to **schedule 3** that are necessary to ensure **schedule 3** remains consistent with the Reference Tariff Provisions—to the extent that **schedule 3** was consistent with those Reference Tariff Provisions at the Commencement Date (and always subject to any differences referred to in **clause 16.1(d)(ii)**).
- (d) Without limiting the matters that Queensland Rail must consider in a review under **clause 16.1(b)**, any review of **schedule 3** must have regard to the following:
 - (i) any relevant new or varied Reference Tariff;
 - (ii) the differences between the relevant Train Service and the Reference Train Service defined in the relevant Reference Tariff Provision; and
 - (iii) any other relevant provisions of the Access Undertaking.

- (e) After Queensland Rail's review of **schedule 3**, Queensland Rail must notify the Operator of the amendments to **schedule 3** that will apply and the date from which those amendments take effect (**Amendment Notice**). For clarity, the amendments may take effect retrospectively, but must not take effect prior to the time when the relevant Reference Tariff Provision, or amendments to the relevant Reference Tariff Provision, take effect as approved by the QCA.
- (f) If the Operator does not accept some or all of the amendments in the Amendment Notice, then:
 - (i) the Operator may only give Queensland Rail a Dispute Notice within ten Business Days after being given that Amendment Notice; and
 - (ii) if the Operator gives such a Dispute Notice and the Parties do not resolve the Dispute in accordance with **clause 17.2**, the Dispute must be referred for determination by an Expert under **clause 17.3**.
- (g) For clarity, in this **clause 16.1** a reference to **schedule 3** includes each other provisions (including defined terms) of this agreement relevant to **schedule 3** but only to the extent that they are directly necessary for the application, or interpretation, of **schedule 3**.

16.2 Relationship to clause 2.1 of schedule 3

For clarity, **clause 2.1** of **schedule 3** and **clause 16.1** must not be applied in a manner that will result in any part of an Access Charge Input being escalated twice for the same period based on the change in CPI over that period.

16.3 Adjustment for a Material Change

- (a) This **clause 16.3** does not apply in relation to a Material Change to the extent that the Net Financial Effect of that Material Change has been, or will be, removed as a result of:
 - (i) amendments to **schedule 3** in accordance with **clause 16.1**; or
 - (ii) the escalation or variation of Access Charge Inputs in accordance with this agreement.
- (b) If a Material Change occurs, then Queensland Rail may notify the Operator giving details of the Net Financial Effect of that Material Change.
- (c) Within five Business Days after Queensland Rail gives a notice under **clause 16.3(b)**, the Parties must meet and negotiate, in good faith, adjustments to this agreement, including adjustments to the Access Charges, in order to remove as far as practicable the relevant Net Financial Effect and to put Queensland Rail in the position it would have been in had there been no Material Change.
- (d) If the Parties do not reach agreement within 15 Business Days after Queensland Rail's notice under **clause 16.3(b)** or otherwise resolve the

matter in accordance with **clause 17.2**, then the matter must be referred to an Expert for determination in accordance with **clause 17.3**.

- (e) Each Party's obligations under this agreement will continue despite the existence of a Material Change.

17 Disputes

17.1 Application of Dispute resolution process

If any dispute, complaint or question arises between the Parties in relation to this agreement (**Dispute**), then:

- (a) that Dispute must be resolved in accordance with this **clause 17**; and
- (b) either Party may give the other Party a notice in writing (**Dispute Notice**) setting out details of the Dispute and requiring that it be dealt with in the manner set out in this **clause 17**.

17.2 Resolution by escalation

- (a) Within five Business Days after the date on which a Party gives the other Party a Dispute Notice (**Dispute Notice Date**), representatives of the Parties must meet and use reasonable endeavours to resolve the Dispute.
- (b) If the Dispute is not resolved under **clause 17.2(a)**, senior management representatives of the Parties (who, for a Party, are senior to that Party's representative(s) referred to in **clause 17.2(a)**) must, within ten Business Days after the Dispute Notice Date, meet and use reasonable endeavours to resolve the Dispute.
- (c) If the Dispute is not resolved under **clause 17.2(b)**, the Dispute must be referred to each Party's chief executive officer (or his or her nominee – who, for a Party, must be more senior than that Party's representative(s) referred to in **clauses 17.2(a)** and **(b)**) for resolution.
- (d) Subject to **clauses 17.4** and **17.5**, if the Dispute is not resolved under **clause 17.2(c)** within 20 Business Days after the Dispute Notice Date (or such other time as agreed between the Parties), the relevant Dispute:
 - (i) must, where this agreement requires referral to an Expert; and
 - (ii) may, by agreement of the Parties (in each Party's absolute discretion) in any other case,be referred for resolution by an Expert in accordance with **clause 17.3**.
- (e) If a Party's representative under **clause 17.2(a)** or **17.2(b)** is not authorised:
 - (i) to act on behalf of that Party in relation to the Dispute; or

- (ii) to resolve the Dispute with immediate binding effect on that Party, the Dispute is deemed to have not been resolved under **clause 17.2(a)** or **17.2(b)** (as applicable).

17.3 Resolution by Expert

- (a) This **clause 17.3** is subject to **clauses 17.4** and **17.5**.
- (b) If a Dispute, or any other matter, is required to be referred to, or determined by, an Expert in accordance with this agreement (including under **clause 17.2(d)**):
 - (i) the Expert must be appointed by agreement between the Parties or, in default of such appointment within ten Business Days after the need to refer the Dispute to an Expert, will be that person nominated, at either Party's request, by:
 - (A) where the Parties agree the Dispute is primarily of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;
 - (B) where the Parties agree the Dispute is primarily of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; or
 - (C) in any other case, the President (for the time being) of the Queensland Law Society Inc;
 - (ii) the Expert must:
 - (A) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (B) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose any such interest or duty by written notice to the Parties before his or her appointment;
 - (C) not be an employee of a Party or of a Related Party of a Party;
 - (D) not be permitted to act until he or she has given written notice to each Party that he or she is willing and able to accept the appointment;
 - (E) have regard to the provisions of this agreement and consider all submissions (including oral submissions by each Party provided that such oral submissions are made in the presence of the Parties), supporting documentation, information and data with respect to the matter submitted by the Parties;
 - (F) for clarity, only make a determination in a way that is consistent with this agreement;

- (G) provide the Parties with a copy of his or her determination in the form of a report within a reasonable time after his or her appointment;
 - (H) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties; and
 - (I) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration including the *Commercial Arbitration Act 1990* (Qld), will not apply to him or her or the determination or the procedures by which he or she may reach a determination; and
- (iii) if the Expert is to be nominated by a person referred to in **clause 17.3(b)(i)**, 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; and
 - (iv) 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 to be appointed as Expert.
- (c) The Parties must do everything reasonably requested by the Expert to assist the Expert including producing information and materials as requested by the Expert and attending any hearing convened by the Expert.
 - (d) In the absence of manifest error, a decision of the Expert is final and binding upon the Parties.
 - (e) The costs of the Expert (and any advisers engaged by the Expert) will be borne in equal shares by the Parties. Each Party must bear its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties).

17.4 Resolution of Disputes by Rail Safety Regulator

- (a) Nothing in this **clause 17** prevents a Party from, at any time, referring any relevant Dispute to the Rail Safety Regulator for resolution in accordance with the TRSA.
- (b) To the extent that any Dispute is referred to the Rail Safety Regulator for resolution in accordance with the TRSA, the process under the TRSA prevails to the extent of any inconsistency with this **clause 17**.

17.5 Resolution of Disputes by Queensland Rail

If:

- (a) any Dispute is in relation to:
 - (i) proposed amendments to the IRMP; or
 - (ii) the safety of any persons or property, or the environment, on or in relation to the Network or the land on which the Network is located or in relation to the use of the Network;
- (b) that Dispute is not otherwise resolved by the Parties in accordance with **clause 17.2** or **17.3** or by the Rail Safety Regulator; and
- (c) Queensland Rail considers that the failure to resolve that Dispute may have a material adverse affect on Queensland Rail's ability to comply with (or its cost or risk of, or liability for, complying with):
 - (i) this agreement (including any obligation to provide the Operator's Train Services with access to the Network);
 - (ii) any Laws, Authorisations (including its Accreditation) or Land Tenure; or
 - (iii) any obligations in relation to other Rail Transport Operators,

then that Dispute may be determined by Queensland Rail, at its election (acting reasonably), after considering any relevant matters raised by the Operator.

17.6 Determination by court

If any Dispute is not resolved in accordance with this **clause 17**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane.

17.7 Injunctive Relief

Nothing in this agreement prevents a Party from seeking urgent injunctive relief from a court.

17.8 Dispute not to affect performance of obligations

The Parties are not relieved from performing their obligations under this agreement because of the existence of a Dispute.

18 Force majeure

18.1 Force Majeure Event occurrence

- (a) If a Party (**Affected Party**) is prevented or hindered by a Force Majeure Event from fully or partly complying with any obligation (except for any obligation to pay money) under this agreement, that obligation is suspended during the time and to the extent that the performance of that obligation is prevented or hindered by the Force Majeure Event.
- (b) If the Affected Party wishes to claim the benefit of this clause, it must, as soon as practicable, give notice of the Force Majeure Event to the other

Party including reasonable details of:

- (i) the Force Majeure Event;
 - (ii) the effect of the Force Majeure Event on the performance of the Affected Party's obligations; and
 - (iii) the likely duration of the delay in performance of those obligations.
- (c) Subject to **clause 18.1(d)**, the Affected Party must use reasonable endeavours to remove the effect of the Force Majeure Event as soon as practicable and to identify alternative means to viably perform the relevant obligations or mitigate the effect of the Force Majeure Event, but is not obliged to settle any strike or other labour dispute contrary to its best judgment.
- (d) For the purposes of **clause 18.1(c)**:
- (i) Queensland Rail is not obliged to fund the repair or replacement of any part of the Network that:
 - (A) is necessary for the Operator's Train Services; and
 - (B) is damaged or destroyed by a Force Majeure Event;
 - (ii) if Queensland Rail is not prepared to fund any such repair or replacement, Queensland Rail will notify the Operator of:
 - (A) the repairs or replacement that Queensland Rail is not prepared to undertake unless a Rail Transport Operator agrees to pay to Queensland Rail (in advance) the cost of those repairs or that replacement (as applicable); and
 - (B) the estimated cost of those repairs or that replacement (as applicable);
 - (iii) if a Rail Transport Operator agrees (on terms satisfactory to Queensland Rail (in its absolute discretion)) to pay to Queensland Rail the cost of those repairs or that replacement (as applicable) in advance of Queensland Rail incurring those costs, or liability for those costs, then Queensland Rail will undertake those repairs or that replacement (as applicable) to a standard consistent with Prudent Practices, but only to the extent that the Rail Transport Operator has paid those costs to Queensland Rail; and
 - (iv) if the total cost of the repairs or replacement (as applicable) undertaken by Queensland Rail is less than the amount that the Rail Transport Operator paid to Queensland Rail under **clause 18.1(d)(iii)**, Queensland Rail will refund the difference to the Rail Transport Operator as soon as reasonably practicable after the total costs of the repairs or replacement (as applicable) have been finally determined by Queensland Rail.
- (e) The Affected Party must keep the other Party informed in relation to the Force Majeure Event, any material change in the Affected Party's ability

to perform its obligations and any matters relating to **clause 18.1(c)**.

18.2 Termination

If a delay caused by a Force Majeure Event continues for more than three consecutive months, then either Party may terminate this agreement by giving 20 Business Days notice to the other Party.

19 Reduction and relinquishment of Access Rights

19.1 Reduction of Access Rights

- (a) If the Operator fails to operate all Train Services on Scheduled Train Paths for seven or more (not necessarily consecutive) weeks out of any 12 consecutive weeks when such Train Services are scheduled, Queensland Rail may, within ten Business Days after the last of those seven occasions, give a notice to the Operator deleting the relevant Train Path from the Operator's Train Service Description.
- (b) A Train Service has not been operated on a Scheduled Train Path if the Operator has failed:
 - (i) to present the relevant Train at the scheduled entry point onto the Network; or
 - (ii) to operate the relevant Train so that it completes its full journey, in conformance with the locations and days set out in the Scheduled Train Paths applicable to such Train Service except:
 - (iii) where the prior agreement of Queensland Rail and the Operator has resulted in the Operator using an alternative Train Path for that Train service; and
 - (iv) where the reason for that failure is:
 - (A) a Force Majeure Event; or
 - (B) the failure of Queensland Rail to make the Network available.

19.2 Relinquishment of Access Rights

- (a) If the Operator intends to relinquish all or part of the Access Rights, the Operator must give Queensland Rail reasonable notice of its intention to do so specifying:
 - (i) the Access Rights that the Operator intends to relinquish (**Nominated Access Rights**);
 - (ii) if the Operator intends that all or part of the Relinquished Access Rights be used so Queensland Rail can grant specific access rights to a specified Access Seeker (as defined in the Access Undertaking) (**Transfer**), the identity of that Access Seeker (**Transferee**); and

- (iii) subject to **clause 19.2(b)**, the date (**Relinquishment Date**) on which and the period for which the Nominated Access Rights are to be relinquished.
- (b) The period from the giving of the notice under **clause 19.2(a)** until the Relinquishment Date must not exceed six months.
- (c) The relinquishment of any Nominated Access Rights in accordance with this **clause 19.2** is subject to and conditional on the Operator paying to Queensland Rail the Relinquishment Fee on or before the Relinquishment Date.
- (d) If the Operator pays the Relinquishment Fee to Queensland Rail on or before the Relinquishment Date, then the terms of this agreement will cease to apply in respect of the Nominated Access Rights on the Relinquishment Date.
- (e) Queensland Rail must facilitate a Transfer in respect of a Transferee if:
 - (i) the relevant access rights to be granted to the Transferee:
 - (A) are included in a new or varied access agreement with the Transferee on terms satisfactory to Queensland Rail; and
 - (B) only commence on the Relinquishment Date if the Operator has paid the Relinquishment Fee to Queensland Rail on or before the Relinquishment Date;
 - (ii) Queensland Rail is satisfied that the new or varied access agreement with the Transferee has been developed in accordance with the requirements of the Access Undertaking;
 - (iii) the Operator has complied with **clauses 19.2(a)** and paid the Relinquishment Fee to Queensland Rail; and
 - (iv) Queensland Rail has sufficient Available Capacity (as defined in the Access Undertaking) so that it can grant all of the relevant access rights to the Transferee without adversely affecting any other third party.
- (f) If the Relinquishment Fee is not paid on or prior to the Relinquishment Date, then the Operator is taken to have withdrawn the notice given under **clause 19.2(a)** and Queensland Rail has no further obligations under this **clause 19.2** in relation to the relevant relinquishment.

20 Assignment

20.1 Assignment by Queensland Rail

- (a) Queensland Rail may Assign all or part of its rights or obligations under this agreement without the prior consent of the Operator but Queensland Rail must give notice to the Operator advising the effective date of the Assignment.

- (b) On the Assignee executing and delivering to the Operator a deed covenanting to be bound by and to perform the obligations of Queensland Rail under this agreement to the extent of the rights and obligations Assigned to the Assignee, Queensland Rail is released and discharged from further liability under this agreement in respect of the obligations which the Assignee has undertaken to be bound by and to perform.

20.2 Assignment by the Operator

- (a) The Operator must not Assign all or part of its rights or obligations under this agreement without the prior written consent of Queensland Rail provided that consent must not be unreasonably withheld if Queensland Rail is satisfied that the Assignee:
 - (i) has the financial resources and capability to perform the obligations of the Operator under this agreement; and
 - (ii) has Accreditation to operate the Train Services.
- (b) Any Assignment by the Operator of its rights or obligations under this agreement is conditional on and does not take effect until the Assignee covenants with Queensland Rail by deed, on terms satisfactory to Queensland Rail, to be bound by and to perform the obligations of the Operator under this agreement.

20.3 Charging

The Operator may only mortgage, change, encumber or otherwise grant any security over (**Charge**) all or any of its rights and obligations under this agreement in whole or in part, in favour of any person (**Chargee**), if the Operator, the Chargee and Queensland Rail execute a covenant by deed on terms satisfactory to Queensland Rail, including terms to the effect that Queensland Rail acknowledges the existence of the Charge, and that the Chargee must comply with the provisions of this agreement including this **clause 20** in the exercise of its rights under the Charge as if it were originally a Party to this agreement in the position of the Operator.

20.4 Effect of Assignment or Charge

Any purported Assignment or Charge in breach of this **clause 20** is of no effect.

21 Representations and warranties

- (a) In addition to any other express or implied representations and warranties in this agreement, the Operator represents and warrants to Queensland Rail that:
 - (i) it is a corporation validly existing under the laws applicable to it;
 - (ii) it has the power to enter into and perform all of its obligations under this agreement and has obtained all necessary consents and approvals to enable it to do so;

- (iii) it has the resources and capability to perform all of its obligations under this agreement and is able to pay its debts as and when they fall due;
 - (iv) its obligations under this agreement are enforceable in accordance with their terms and are fully binding on it;
 - (v) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this agreement;
 - (vi) there is:
 - (A) no litigation, arbitration or administrative proceeding taking place, pending, commenced or, to its knowledge, threatened against it; and
 - (B) no judgment or award has been given or made by, any court, arbitrator, other tribunal or governmental agency against it, which would or could have a material adverse effect on its ability to perform its obligations under this agreement;
 - (vii) it will as soon as practicable notify Queensland Rail of the occurrence of, or pending or threatened occurrence of, any event that may cause or constitute a material breach of any of the acknowledgments, representations, warranties or covenants of the Operator under this agreement and any event that could have a material adverse effect on its ability to perform its obligations under this agreement;
 - (viii) it has assessed the quality and standard of the Network and has satisfied itself as to:
 - (A) the standard and suitability of the Network for the purposes of operating the Train Services; and
 - (B) the ability of the Operator's Rolling Stock to safely interface with, and to operate on, the Network (including the cost, expense and risk of doing so); and
 - (ix) all information provided by the Operator to Queensland Rail, whether pursuant to this agreement or otherwise, in relation to or in connection with the Train Services, the Operator's rights or obligations under this agreement or the negotiation of this agreement, is correct and complete in all material respects and is not, whether by omission or otherwise, misleading or deceptive in any material way.
- (b) The representations and warranties set out in **clause 21(a)** are taken to be given and made on the Commencement Date and on each day during the Term.

- (c) Subject to **clause 21(d)**, the Operator may, at its cost and risk, inspect the Network (including circumstances of the Network such as fencing and level crossing protection) to satisfy itself as to:
 - (i) the standard and suitability of the Network for the purposes of operating the Train Services;
 - (ii) the ability of the Operator's Rolling Stock to safely interface with, and to operate on, the Network (including the cost, expense and risk of doing so); and
 - (iii) the operational, environmental and safety risks associated with operation of Train Services on the Network.
- (d) Any inspection by the Operator under **clause 21(c)** is subject to:
 - (i) the Operator giving written notice to Queensland Rail of its request to inspect the Network a reasonable time prior to the date of the intended inspection;
 - (ii) the Operator receiving from Queensland Rail a notice (not to be unreasonably withheld) confirming that the inspection may occur and setting out the requirements for that inspection including in relation to any of the matters referred to in **clauses 21(d)(iii) to (v)**;
 - (iii) that inspection being conducted:
 - (A) in the presence of a nominated representative of Queensland Rail;
 - (B) at a time satisfactory to Queensland Rail; and
 - (C) in a manner that does not cause or contribute to any disruption of, or other adverse affect to, any Train Movements or Rail Infrastructure Operations;
 - (iv) the Operator paying, or if paid by Queensland Rail reimbursing, to Queensland Rail the costs and expenses incurred by Queensland Rail in relation to the Operator's inspection (including the costs and expenses of a representative of Queensland Rail attending the inspection and, if relevant, for any track protection officers) and those costs and expenses will be a debt due and owing by the Operator to Queensland Rail; and
 - (v) such other conditions as may be required by Queensland Rail in relation to the inspection including compliance with Queensland Rail's safeworking procedures and safety standards.

22 Confidentiality

22.1 Confidentiality obligation

Subject to **clause 22.2**, a Party (**Recipient**), in respect of the Confidential Information of the other Party (**Disclosing Party**), must:

- (a) treat that Confidential Information as (and keep it) confidential;
- (b) only use that Confidential Information for the purposes of this agreement or for which it was disclosed; and
- (c) treat that Confidential Information as the property of the Disclosing Party.

22.2 Exceptions

A Recipient of Confidential Information is not required to comply with **clause 22.1** to the extent that:

- (a) the Disclosing Party has given its written consent (which must not be unreasonably withheld) to the relevant disclosure or use; or
- (b) another Confidentiality Exception applies to the relevant disclosure or use.

22.3 Responsibility

If a Recipient of Confidential Information discloses all or part of that Confidential Information to:

- (a) the directors, officers or employees of the Recipient or a Related Party of the Recipient; or
- (b) the Recipient's solicitors, barristers, accountants, engineering or other technical consultants and advisers;

under a Confidentiality Exception, then the Recipient:

- (c) must use its best endeavours to ensure that person keeps the Confidential Information confidential; and
- (d) is responsible for the actions and omissions of that person in relation to the Confidential Information as though those actions and omissions were the Recipient's.

23 Notices

23.1 Form of Notice

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

23.2 Method of giving a Notice

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

- (a) personally delivered;
- (b) left at the Party's current delivery address for Notices;

- (c) sent to the Party's current postal address for Notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by facsimile to the Party's current facsimile number for Notices.

23.3 Particulars for the giving of Notices

- (a) The particulars for the giving of Notices are initially:

Queensland Rail

Delivery address: Floor 15, 295 Ann Street, Brisbane Qld 4000

Postal address: GPO Box 1429, Brisbane Qld 4001

Facsimile: (07) 3046 7521

Attention: General Counsel/Company Secretary

Operator

As set out in **item 2 of schedule 1**.

- (b) Each Party may change its particulars for delivery of Notices by notice to each other Party.

23.4 Effect and receipt of Notices

- (a) Subject to **clause 23.4(b)**, a Notice is given:
 - (i) if personally delivered, at the time of delivery;
 - (ii) if posted, on the third day after the date of posting; and
 - (iii) if sent by facsimile, when the machine from which the facsimile was sent produces a report that the facsimile was sent in full to the facsimile number of the recipient (and that report is conclusive evidence that the addressee received the facsimile in full at the time indicated on that report).
- (b) If a Notice is given:
 - (i) after 5:00pm in the place of receipt; or
 - (ii) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken to have been given on the next day which is not a Saturday, Sunday or public holiday in the place of receipt.

23.5 Process service

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this agreement may be served by any method contemplated by this **clause 23** or in accordance with any applicable Law.

23.6 Representatives of the Operator

- (a) The persons referred to in **item 7 of schedule 1** are the Operator's representatives in relation to the relevant matters for which they have been nominated in respect of this agreement or the Train Services.
- (b) The initial contact details for those persons are as set out in **item 7 of schedule 1**.
- (c) The Operator:
 - (i) must notify Queensland Rail of any changes to those representatives or their contact details on or prior to that change occurring (subject to **clause 23.6(c)(ii)**); and
 - (ii) must ensure that any person ceasing to be such a representative is replaced on or prior to (or, if this is not possible, as soon as practicable after) the time when that person ceases to be a representative.
- (d) Nothing in this **clause 23.6** limits the requirements that may be set out in the Operating Requirements Manual in relation to the nomination of representatives or the provision of contact details for nominated representatives (including, for example, the nomination of persons as incident response coordinators or for the recovery of Rolling Stock).

24 GST

24.1 Definitions

In this agreement the expressions **adjustment note, consideration, GST, input tax credit, supply, tax invoice, recipient** and **taxable supply** have the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

24.2 Sums exclude GST

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

24.3 Responsibility for GST

- (a) Despite any other provisions in this agreement, if GST is imposed 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 must pay to the Supplier an amount equal to the GST payable on the supply.
- (b) Subject to **clause 24.5**, the recipient must pay the amount referred to in **clause 24.3(a)** in addition to and at the same time as payment for the supply is required to be made under this agreement.

24.4 Reimbursement of expenses

If this agreement requires a Party to reimburse or indemnify any other Party for any expense, loss or outgoing (**reimbursable expense**) incurred by another

Party, the amount required to be reimbursed or indemnified by the first Party will be the sum of:

- (a) the amount of the reimbursable expense net of input tax credits (if any) to which the other Party (or the representative member of the GST group of which the other Party is a member) is entitled in respect of the reimbursable expense; and
- (b) if the other Party's recovery from the first Party is a taxable supply, any GST payable in respect of that supply.

24.5 Tax invoice

If an amount on account of GST or a GST inclusive price is charged or varied under this agreement, the Supplier must provide the recipient of the supply a valid tax invoice or adjustment note at or before the time of payment or variation.

24.6 Adjustment

If the amount of GST paid or payable by the Supplier (or the representative member of the GST group of which the Supplier is a member) on any supply made under this agreement differs from the amount on account of GST paid by the recipient, because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the Supplier or the Supplier to the recipient, as the case requires.

25 General

25.1 Duty

- (a) The Operator as between the Parties is liable for and must pay all duty (including any fine, interest or penalty except where it arises from default by Queensland Rail) on or relating to this agreement, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If Queensland Rail pays any duty (including any fine, interest or penalty) on or relating to this agreement, any document executed under it or any dutiable transaction evidenced or effected by it, the Operator must pay that amount to Queensland Rail on demand.

25.2 Legal costs

Except as expressly stated otherwise in this agreement, each Party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this agreement.

25.3 Waiver and exercise of rights

- (a) Waiver of any right arising in relation to a failure to comply with this agreement must be in writing and signed by the Party granting the waiver.

- (b) A single or partial exercise or waiver by a Party of a right relating to this agreement does not prevent any other exercise of that right or the exercise of any other right.
- (c) A Party is not liable for any Loss 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.
- (d) A failure or delay in the exercise, or partial exercise, of a right arising from a breach of this agreement does not result in a waiver of that right.

25.4 Amendments

Except as otherwise provided in this agreement, an amendment of this agreement will only be effective if it is in writing and executed by all Parties.

25.5 Rights cumulative

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

25.6 Consents

Except as expressly stated otherwise in this agreement, a Party may conditionally or unconditionally give or withhold any consent, approval, acceptance or notice of no objection to be given under this agreement and is not obliged to give its reasons for doing so.

25.7 Further steps

Each Party must promptly do whatever any other Party reasonably requires of it to give effect to this agreement and to perform its obligations under it.

25.8 Governing law and jurisdiction

- (a) This agreement is governed by and is to be construed in accordance with the laws applicable in the State of Queensland.
- (b) Each Party irrevocably and unconditionally:
 - (i) agrees that the courts of the State of Queensland and any courts which have jurisdiction to hear appeals from any of those courts are to have exclusive jurisdiction to settle disputes which may arise out of or in connection with this agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this agreement may be brought in, and only in, such courts;
 - (ii) waives any objection which it may have now or in the future to the laying of the venue of any Proceedings in such courts and any claim that any such Proceedings have been brought in an inconvenient forum; and
 - (iii) agrees that a final judgment in any Proceedings brought in such courts are conclusive and binding upon such Party and may be enforced in the courts of any other jurisdiction.

25.9 Liability

An obligation of two or more persons binds them separately and together.

25.10 Counterparts

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

25.11 Entire understanding

- (a) This agreement contains the entire understanding between the Parties as to the subject matter of this agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this agreement are merged in and superseded by this agreement and are of no effect.
- (c) No oral explanation or information provided by any Party to another:
 - (i) affects the meaning or interpretation of this agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

25.12 Relationship of Parties

This agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

25.13 Severability

- (a) Subject to **clause 25.13(b)**, if a provision of this agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this agreement.
- (b) **Clause 25.13(a)** does not apply if severing the provision:
 - (i) materially alters:
 - (A) the scope and nature of this agreement; or
 - (B) the relative commercial or financial positions of the Parties; or
 - (ii) would be contrary to public policy.

25.14 Survival

- (a) **Clauses 4, 5.1(c), 6.6(c) to (e), 10, 11, 13.5, 13.6, 14.8, 15.2, 15.4, 16, 17 and 22 to 26** remain in full force and effect and survive the expiry or termination of this agreement.
- (b) **Clause 13.6** remains in full force and effect and survives the expiry or termination of this agreement until it is fully complied with by the Operator.

- (c) All indemnities contained in this agreement survive the expiration or termination of this agreement.
- (d) All representations and warranties in this agreement survive the execution and delivery of this agreement and the completion of the transactions contemplated by it.

25.15 Benefit

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

25.16 No merger

The rights and obligations of the Parties:

- (a) continue until satisfied in full;
- (b) do not merge on the completion of any transaction contemplated by this agreement; and
- (c) survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

25.17 Enforcement of indemnities

It is not necessary for a Party to incur expense or make a payment before enforcing an indemnity contained in this agreement.

25.18 Sublease

- (a) The Operator acknowledges that:
 - (i) Queensland Rail's interest in all or part of the land on which the Network is located and over which the Train Services will operate is or will be held under:
 - (A) the Sublease; or
 - (B) a lease, easement, licence, statutory right or other arrangement or right other than the Sublease, **(Land Tenure)**; and
 - (ii) this agreement is subject to the terms and conditions (including all reservations), whether express or implied, of the Sublease (or the Head Lease) and any other Land Tenure.
- (b) Queensland Rail may, from time to time, do either or both of the following:
 - (i) give the Operator a copy of any Land Tenure (together with any relevant amendments from time to time); or
 - (ii) notify the Operator of any requirements that the Operator must comply with in relation to that Land Tenure (together with any amendments from time to time) **(Tenure Requirements)**.

- (c) Despite any other clause in this agreement and to the extent that the Operator operates Train Services on any part of the Network on land, or otherwise accesses land, that is the subject of any Land Tenure, the Operator must:
 - (i) observe and comply with all relevant obligations of Queensland Rail under that Land Tenure and the Tenure Requirements; and
 - (ii) not act, omit to act or permit, cause or contribute to any act or omission that may result in Queensland Rail:
 - (A) breaching a term of any Land Tenure; or
 - (B) incurring (directly or indirectly) any costs or expenses in complying with a Land Tenure that Queensland Rail would not otherwise have incurred.
- (d) Without limitation to the circumstances where the Operator may fail to comply with **clause 25.18(c)**, the Operator must be taken to fail to comply with **clause 25.18(c)** if the Operator, by act or omission, fails to comply (or permits any non-compliance) with any Tenure Requirements.
- (e) If there is an inconsistency between the terms of this agreement and the terms of any Land Tenure or Tenure Requirements which means that Queensland Rail or the Operator cannot comply with both this agreement and that Land Tenure or those Tenure Requirements, then the terms of that Land Tenure or those Tenure Requirements (as applicable) prevail to the extent of the inconsistency and the provisions of this agreement will be construed accordingly.
- (f) Queensland Rail does not warrant or represent:
 - (i) that it will not surrender all or part of any Land Tenure; or
 - (ii) that any Land Tenure will not be terminated or determined for any reason.

Queensland Rail will not be liable to the Operator for any Claims which may be brought against or made upon the Operator, or any Losses which the Operator suffers or incurs, in connection with any amendment, replacement, surrender, termination, expiry or determination of any Land Tenure.

26 Interpretation

26.1 Definitions

In this agreement:

Access Charge Input means a rate or other input, used for the purpose of calculating Access Charges, as specified in **clause 1** of **schedule 3** (including as varied, escalated or replaced from time to time in accordance with this agreement).

Access Charges means the charges determined in accordance with **schedule 3**.

Access Rights has the meaning given in **clause 2**.

Access Undertaking means Queensland Rail's access undertaking as approved by the QCA under the QCA Act, from time to time.

Accreditation means accreditation (including any exemption from the requirement for such accreditation) in accordance with Part 5 of the TRSA and **Accredited** means to have Accreditation.

Affected Party has the meaning given in **clause 18.1(a)**.

Assign means assign, novate, transfer or otherwise deal with, and **Assignment** and **Assignee** have a corresponding meaning.

Authority means:

- (a) the Crown or any minister of the Crown;
- (b) any government, federal, state or local government department or other governmental, semi-governmental or judicial body or authority including local government, a court or a tribunal;
- (c) any corporation, authority, body or force constituted for a public purpose (including any police service or force);
- (d) any holder of an office for a public purpose;
- (e) any governmental, semi-governmental or judicial person; and
- (f) any person (whether autonomous or not) who is charged with the administration or enforcement of a Law,

including any officer or agent of the foregoing acting in that capacity.

Authorisation means any consent, accreditation, authorisation, registration, filing, lodgement, notification, agreement, licence, certification, commission, permit, approval, exemption, ruling or other permission from, by or with an Authority required by any Law or lawfully required by any Authority;

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

Certification has the meaning given in **clause 6.7(a)(i)**.

Change in Law means:

- (a) any amendment, repeal, modification or enactment of any Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Authority;

- (d) the imposition of a requirement for Authorisations not required as at the Commencement Date;
- (e) after the date of grant of any Authorisation, a change in the terms, conditions or requirements relating to that Authorisation including any new terms, conditions or requirements;
- (f) any such Authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application therefore being duly made, or being renewed on a basis that is materially less favourable than the original Authorisation;
- (g) an amendment to or replacement of the Access Undertaking; or
- (h) a change in the application or interpretation of the Access Undertaking resulting from a decision of a court or other Authority.

Change in Control means:

- (a) a change in the entity that controls the Operator;
- (b) an entity that controls the Operator ceases to control the Operator; or
- (c) if the Operator is not controlled, another entity acquires control of the Operator,
except where:
 - (d) the Operator is listed on the Australian Securities Exchange before, and remains listed after, the relevant change;
 - (e) the relevant change relates directly to the initial listing of the Operator on the Australian Securities Exchange; or
 - (f) for paragraphs (a) and (b), the ultimate holding company of the Operator remains the same following the relevant change.

For the purposes of this definition “control”, “controls”, “controlled” and “ultimate holding company” have the meaning given to those terms in the Corporations Act.

Change to Credit means:

- (a) (i) a change in the rate, or basis of calculation, of; or
(ii) the introduction or cessation of,
a credit, rebate, deduction, refund, exemption, concession or any other benefit or allowance (whether or not relating to an Impost), including, without limitation, a fuel tax credit, diesel fuel rebate or similar credit to which Queensland Rail is or was entitled; or
- (b) any change in the funding or other support received by Queensland Rail from any Authority in relation to the Network.

Charge has the meaning given in **clause 20.3**.

Chargee has the meaning given in **clause 20.3**.

Claim means any claim, cause of action, proceeding, liability, suit or demand (including by way of contribution or indemnity) whether:

- (a) arising in contract, in tort (including negligence), under any Law or otherwise; or
- (b) present or future, fixed or unascertained, actual or contingent.

Claim Event has the meaning given in **clause 11.6**.

Commitment Date has the meaning given in **item 5 of schedule 1**.

Commencement Date has the meaning given in **item 3 of schedule 1**.

Confidential Information means:

- (a) the terms of this agreement; and
- (b) any information, data or other matter (in this definition, **information**) disclosed to a Recipient by, or on behalf of, a Disclosing Party where:
 - (i) the Recipient knows or ought to know the information is confidential;
 - (ii) the information is by its nature confidential; or
 - (iii) at the time of the disclosure to the Recipient, the information is marked or otherwise indicated as confidential when disclosed,

excluding information that:

- (iv) was in the Recipient's lawful possession prior to the disclosure; or
- (v) whether before or after the disclosure:
 - (A) is in the public domain through means other than a breach of confidentiality by the Recipient (or anyone to whom the Recipient has disclosed it); or
 - (B) is received by the Recipient independently from a third party who is free to disclose such information;

Confidentiality Exception means:

- (a) any disclosure or use of Confidential Information consented to by the Disclosing Party under **clause 22.2(a)**; or
- (b) any disclosure or use of Confidential Information:
 - (i) to the extent necessary to:
 - (A) the Recipient's directors, officers or employees; or
 - (B) the directors, officers or employees of a Related Party of the Recipient;
 - (ii) to the extent required or compelled by any Law (other than section 275(1) of the *Personal Property Securities Act 2009* (Cth));

- (iii) to the extent necessary for the conduct of any legal proceedings (including any dispute resolution process under the Access Undertaking or the QCA Act);
- (iv) to the extent required under any stock exchange listing requirement or rule;
- (v) to the Rail Safety Regulator or the QCA;
- (vi) to the Recipient's solicitors, barristers, or accountants under a duty of confidentiality (which is not waived by the Recipient without the prior written consent of the Disclosing Party);
- (vii) to the Recipient's engineering or other technical consultants and advisers to the extent necessary for the provision of advice to the Recipient (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (viii) to the Recipient's banker, financier 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 Disclosing Party under which they are obliged to keep the Confidential Information confidential;
- (ix) if Queensland Rail is the Recipient, to the shareholding Ministers (as defined in the *Government Owned Corporations Act 1993* (Qld)) of Queensland Rail;
- (x) for the purpose of facilitating Train Control Directions where the disclosure of information is by Queensland Rail in the usual course of undertaking Train Control;
- (xi) by any person involved in clearing an incident or emergency that is preventing or affecting the operation of Train services on the Network;
- (xii) by Queensland Rail for the purpose of responding to, managing or clearing an incident or emergency that is preventing or affecting, or is likely to prevent or affect, the operation of Train services on the Network; or
- (xiii) by Queensland Rail in the course of providing feedback on an unsuccessful Access Application in accordance with the Access Undertaking.

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

- (a) any special, indirect or consequential loss;
- (b) any economic loss in respect of any claim in tort;

- (c) any loss of profits, loss of production, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill, wasted overheads or any damage to credit rating whatsoever; and
- (d) any loss arising out of any Claim by a third party, whether arising in contract, in tort (including negligence), under any law, as a consequence of fraud or otherwise and whether present or future, fixed or unascertained, actual or contingent, but does not include:
 - (e) a loss (including a loss arising out of a Claim by a third party) in respect of:
 - (i) the cost of repairing, replacing or reinstating any real or personal property owned or leased by any person (including a Party) that has been lost, damaged or destroyed; or
 - (ii) personal injury to or death of any person; or
 - (f) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims.

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

CPI means the Consumer Price Index: All Groups – Brisbane (Australian Bureau of Statistics Publication No.6401.0) as published by the Australian Bureau of Statistics (or other successor, authority or instrumentality having jurisdiction in the matter) as varied from time to time in accordance with this agreement.

Damage has the meaning given in **clause 8.2(a)**.

Dangerous Goods means any substance or thing defined as dangerous goods, explosives or radioactive material under a Dangerous Goods Code and includes any substance or thing specifically identified as such in **schedule 2**.

Dangerous Goods Code means:

- (a) the Australian Code for the Transport of Dangerous Goods by Road and Rail;
- (b) the Australian Code for the Transport of Explosives by Road and Rail; or
- (c) the Code of Practice for the Safe Transport of Radioactive Material, as published and in force from time to time and as amended or replaced.

Data has the meaning given in **clause 6.6(a)**.

Disclosing Party has the meaning given in **clause 22.1**.

Dispute has the meaning given in **clause 17.1**.

Dispute Notice has the meaning given in **clause 17.1(b)**.

Dispute Notice Date has the meaning given in **clause 17.2(a)**.

Emergency Possession means a Possession:

- (a) that is required to rectify a fault with the Network:
 - (i) that is considered by Queensland Rail to be dangerous or potentially dangerous to any person; or
 - (ii) where severe speed restrictions have been imposed that affect the scheduled Train services of Rail Transport Operators; and
- (b) that Queensland Rail intends to carry out within five Business Days after the detection of the fault.

Environmental Harm means environmental harm as defined in the *Environmental Protection Act 1994* (Qld).

Expert means an expert appointed in accordance with **clause 17.3**.

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

- (a) is beyond the reasonable control of the Affected Party; and
- (b) by the exercise of due diligence the Affected Party was not reasonably able to prevent or is not reasonably able to overcome,

and includes:

- (c) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the Affected Party;
- (d) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the 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, act of terrorists, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade, civil disturbance or public disorder;
- (g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Prudent Practices or accident or accidental damage to any thing;
- (h) malicious damage or sabotage;
- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste;
- (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, tsunami, earthquake, washaway, landslide, explosion, hail, lightning, severe weather conditions or other catastrophe or natural calamity;
- (m) any act or omission of any third party (including any third party's presence on or near the Network), without the express authorisation of Queensland Rail, that results in damage to the Network or the use or operation of the Network being prevented or impeded;
- (n) epidemic or quarantine restriction; and
- (o) delay of a supplier due to any of the foregoing whenever arising,

and, where the Operator is the Affected Party, excludes any cause, event or circumstance in connection with any right referred to in **clause 6.9** (including any failure by the Operator to obtain and maintain such rights, any exercise or performance of such rights and any inconsistency between such rights and this agreement).

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

Head Lease means the lease from the Governor in Council to the State of Queensland (represented by the Department of Transport and Main Roads) of land on which all or part of the Network is located, granted in accordance with section 240(2) of the TIA.

Impost means a tax, excise, charge, levy, duty, fee, impost, rate, royalty, imposition, withholding, fee for any Authorisation or other licence or approval fee or any other charge which is imposed, applied or administered by, or payable to or by, any Authority but excluding any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.

Impost Change means:

- (a) the introduction or imposition of a new Impost;
- (b) a change in the rate, amount or application of an Impost; or
- (c) a change in the basis of calculation of an Impost.

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

Insolvency Event means, in relation to a Party, any one or more of the following events:

- (a) the Party is not able to pay all its debts from the Party's own money as and when they become due or has stated that it is unable to do so;
- (b) the Party has been presumed to be insolvent or unable to pay its debts under any applicable legislation;
- (c) a resolution is passed that the Party be wound up or placed in liquidation voluntarily or that an administrator be appointed;
- (d) an application or order has been made for the winding up or dissolution of the Party (other than an application which is dismissed or withdrawn within ten Business Days after such proceedings were commenced);

- (e) a controller, administrator, receiver, liquidator or provisional liquidator has been appointed to the Party or in respect of any of its property;
- (f) the Party has entered into or taken any action to enter into (whether formally or informally) an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of its creditors or members or a moratorium involving any of them;
- (g) a mortgagee has entered into possession of any of the Party's assets or undertakings; or
- (h) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction has occurred in respect of the Party,

provided that, for the purposes of this definition, a reference to the Party includes any Related Party of the Party.

Insurance means those insurances to be effected and maintained in accordance with **clause 14**.

Interest Rate means the rate which is the aggregate of:

- (a) 2% per annum; and
- (b) the Commonwealth Bank of Australia's reference rate being the "Reference Rate" quoted by the Commonwealth Bank of Australia (or any successor bank) for borrowers with overdrafts of \$100,000 or more on any relevant date as published in the Australian Financial Review (or in the event that such a rate is not so quoted or published at or in respect of any relevant date, such other similar rate to the "Reference Rate" specified by a major commercial bank agreed between the Parties or, if not agreed, a rate determined by an Expert in accordance with **clause 17.3**).

Interface Risk Assessment means an assessment to:

- (a) identify, to the extent reasonably practicable, all Interface Risks;
- (b) assess the likelihood and consequences of those Interface Risks occurring and any factors relevant to the management of those Interface Risks; and
- (c) nominate suitable control mechanisms to manage the Interface Risks within a risk management framework.

Interface Risks means all risks to the safety of persons or property or to the environment³ arising from the interaction between the Operator's proposed operations and any one or more of:

- (a) the Network;
- (b) operations on the Network (including those of other Rail Transport Operators and Queensland Rail); and
- (c) persons using the Network, persons on or near the Network or members of the public (including any activities on the Network that may affect those matters),

provided that a reference to operations in this definition includes railway operations as defined in the TRSA.

Interface Risk Management Plan and **IRMP** mean the interface risk management plan set out in **schedule 4** as amended from time to time in accordance with **clause 7**.

Land Tenure has the meaning given in **clause 25.18(a)(i)**.

Law includes:

- (a) any statute, ordinance, code, law, by-law, proclamation, rule or regulation or any other subordinate legislation, whether State, Commonwealth or otherwise;
- (b) the terms of any Authorisation;
- (c) common law and equity; and
- (d) any order, circular, requirement, condition, notice, decree, decision, direction or guidelines of any Authority with which the Operator or Queensland Rail (as the case may be) is legally required to comply including any requirement to pay fees and charges,

whether now, or at any time in the future, in effect.

Loss means loss, damage, cost or expense including the costs and expenses of defending or settling any Claim (including legal costs and expenses on a full indemnity basis) whether:

- (a) arising in contract, in tort (including negligence), under any Law or otherwise; or
- (b) present or future, fixed or unascertained, actual or contingent.

Material Change means:

- (a) an Impost Change;

³ Environmental risks include:

- risks in relation to water quality, pollution, contaminated land, nature conservation, hazardous substances and dangerous goods, waste and noise; and
- risks of serious environmental harm, material environmental harm and environmental nuisance as defined in the *Environmental Protection Act 1994* (Qld).

- (b) a Change in Law; or
- (c) a Change to Credit.

Metropolitan Region means that part of the Network bounded to the north by (and including) Nambour station and to the west by (and including) Rosewood.

Net Financial Effect means the net adverse effect in financial terms of a Material Change on Queensland Rail in relation to performing its obligations or exercising its rights under this agreement including any offsetting benefits or adverse effects directly or indirectly connected to the Material Change.

Network means the rail transport infrastructure (as defined in the TIA):

- (a) for which Queensland Rail is the Railway Manager; and
- (b) the use of which is taken, pursuant to section 250(1)(b) of the QCA Act, to be a service declared under Part 5, Division 2 of the QCA Act (but excluding any rail transport infrastructure (as defined in the TIA) the use of which is referred to in section 249(2) of the QCA Act).⁴

Network Incident means any Rolling Stock derailment, Rolling Stock disablement or breakdown, accident, collision or any other unplanned occurrence on the Network which causes or could cause death or injury to any person, damage to property or Environmental Harm or a disruption to or cancellation by Queensland Rail of any Train Movement.

Network Management Principles has the meaning given to that term in the Access Undertaking (from time to time) or, if the Access Undertaking ceases to define that term, the network management principles included in the Operating Requirements Manual from time to time.

Nominated Access Rights has the meaning given in **clause 19.2(a)(i)**.

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

Notifiable Events has the meaning given in **clause 8.5(b)**.

Obstruction means any thing or circumstance (including debris or other things on the Network), which has the potential to cause a disruption to or cancellation by Queensland Rail of Train Services or Train Movements and includes any Network Incident but does not include an Operational Constraint imposed by Queensland Rail.

Operating Requirements Manual has the meaning given in the Access Undertaking, provided that on and from the date that **clauses 6.8(b) to (e)** commence in accordance with **clause 6.8(a)** the term means the 'Operating Requirements Manual' as defined under the Access Undertaking as at that date as amended from time to time by Queensland Rail under **clause 6.8**.

Operational Constraint means any temporary or permanent constraint on the operation or use of any part of the Network imposed by Queensland Rail as it considers necessary in relation to the proper, efficient or safe operation or

⁴ In this definition, a term defined in the QCA Act has the meaning given to that term in the QCA Act.

management of the Network (including speed restrictions, load restrictions, Planned Possessions, Urgent Possessions, Emergency Possessions and signalling or overhead restrictions).

Operator's Associates means any director, officer, employee, contractor, agent or consultant of the Operator and any other person under the control or supervision of, or acting for or on behalf of, the Operator.

Operator's Customer means:

- (a) any person that has a rail haulage agreement or arrangement with the Operator in relation to the Access Rights;
- (b) any consignor of goods to be transported by the Operator;
- (c) any person with title to, or an interest in, any thing to be transported by the Operator; and
- (d) any other person directly or indirectly benefitting from, or for whom the Operator operates, the Train Services.

Operator's Emergency Management Plan means a plan (including any amendments from time to time) developed and maintained by the Operator in accordance with **clause 8.3** and for which the Operator has obtained a notice from Queensland Rail, in accordance with **clause 8.3(a)** (and, if applicable, **clause 8.3(d)(iii)**), that Queensland Rail has no objection to that plan (including any amendments).

Parties means collectively Queensland Rail and the Operator, and **Party** means one of them.

Peak Periods means the time periods:

- (a) from 6:00am to 9:00am; and
- (b) from 3:30pm to 6:30pm,

on Business Days or as otherwise notified by Queensland Rail (acting reasonably) from time to time.

Planned Possession means a Possession (other than an Urgent Possession or an Emergency Possession) where such Possession is entered into the Train Schedule and adversely affects the operation of Train Services.

Possession means the temporary closure or occupation by Queensland Rail of part of the Network (including closure of Track or isolation of any electrical overhead traction system) for the purpose of carrying out Rail Infrastructure Operations, other work or other activities on or in the proximity of the Network.

Present Value means the present value calculated at a discount rate equal to the Weighted Average Cost of Capital (WACC) (as defined in the Access Undertaking from time to time).

Private Infrastructure means rail transport infrastructure (as defined in the TIA), including but not limited to the track, signalling and electrical overhead

traction system (if applicable) for which Queensland Rail is not the Railway Manager.

Proceedings has the meaning given in **clause 25.8(b)(i)**.

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

QCA means the Queensland Competition Authority established under the QCA Act.

QCA Act means the *Queensland Competition Authority Act 1997* (Qld).

Quarter means a period of three consecutive months commencing 1 July, 1 October, 1 January or 1 April.

Queensland Rail Cause means Queensland Rail's inability to make the Network available for the operation of Train Services in accordance with this agreement as a result of:

- (a) a Planned Possession, Urgent Possession or Emergency Possession;
- (b) a Force Majeure Event affecting Queensland Rail;
- (c) the derailment of any Train caused solely by an act or omission of Queensland Rail; or
- (d) any other action by Queensland Rail other than Queensland Rail complying with an obligation in accordance with this agreement, the Access Undertaking or any applicable Law,

except where Queensland Rail's inability to do so is in any way attributable to the Operator, another Rail Transport Operator (other than Queensland Rail) or any other person.

Queensland Rail Emergency Procedures means Queensland Rail's emergency procedures as set out in the Operating Requirements Manual.

Rail Infrastructure Operations means:

- (a) the construction of any rail transport infrastructure (as defined in the TIA) to improve, upgrade, expand, extend, replace or vary the whole or any part of the Network;
- (b) any management, maintenance or operational activities relating to the Network, including the improvement, maintenance, repair, modification, installation, removal, renewal or decommissioning of the whole or any part of the Network; and
- (c) any inspections or investigations of the Network.

Railway Manager has means an Accredited rail infrastructure manager (as defined in the TRSA).

Rail Safety Regulator means the chief executive under the TRSA.

Rail Transport Operator means:

- (a) any person who holds, or uses any other person's, rights of access to any part of the Network in relation to Train services; and
- (b) any Accredited rail transport operator (as defined in the TRSA),
including:
 - (c) the Operator; and
 - (d) any person in control of, or operating, any Private Infrastructure.

Recipient has the meaning given in **clause 22.1**.

Reference Tariff means a prescribed access charge applicable for a specified Reference Train Service as set out in the Access Undertaking.

Reference Tariff Provisions means, to the extent that a Reference Tariff applies to the Train Services, the provisions in the Access Undertaking that either set out that Reference Tariff or are directly or indirectly related to the application or interpretation of that Reference Tariff.

Reference Train Service means a notional Train service described in the Access Undertaking in respect of a Reference Tariff and conforming to certain criteria, including carrying a specified commodity type, operating between specified geographical areas and conforming to specified technical characteristics, operational characteristics and contract terms and conditions.

Related Party means a related body corporate as defined in the Corporations Act.

Relinquished Access Rights means the Available Capacity (as defined in the Access Undertaking) that is created as a result of a relinquishment by the Operator of Nominated Access Rights in accordance with **clause 19.2**.

Relinquishment Date has the meaning given in **clause 19.2(a)(iii)**.

Relinquishment Fee means a fee:

- (a) equivalent to the Present Value of the aggregate of the Take or Pay Charges that would have been payable on and from the Relinquishment Date until the end of the Term if the relevant Access Rights were not relinquished and the Operator did not use those Access Rights; and
- (b) if, prior to the Relinquishment Date, Queensland Rail has granted access rights (with effect on or after the Relinquishment Date) to a third party (including a Transferee) (**New Access Holder**) under an access agreement using the Relinquished Access Rights, adjusted to offset an amount equivalent to the Present Value of the aggregate of the take or pay charges, under that access agreement, payable by the New Access Holder:
 - (i) that are directly attributable to that part of the access rights granted to the New Access Holder derived solely from the Relinquished Access Rights;

- (ii) for all or part of the same period as that used to calculate the amount under **paragraph (a)**; and
- (iii) calculated assuming the New Access Holder does not use the relevant access rights,

provided that if this calculation would result in an amount less than zero, then the fee equals zero.

Repeated Breach means an event or circumstance where:

- (a) Queensland Rail has given to the Operator at least two notices to remedy a breach of a particular provision of this agreement;
- (b) each notice referred to in **paragraph (a)** relates to a separate breach of the particular provision;
- (c) the Operator commits a further breach of the particular provision; and
- (d) all of the breaches happened within a period of 12 months.

Rolling Stock means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses Track.

Scheduled Time means the time at which a Train Service has been scheduled by Queensland Rail to operate on the Network as detailed in the Train Schedule or as modified or varied by Queensland Rail from time to time on the day of operation in accordance with the Network Management Principles.

Scheduled Train Path means a Train Path that has been scheduled by Queensland Rail in a Train Schedule.

Security has the meaning given in **clause 15.1(a)**.

Security Amount has, subject to **clause 15.3**, the meaning given in **item 6 of schedule 1**.

Standard and Poor's means Standard and Poor's Financial Services LLC and its Related Parties.

Sublease means:

- (a) the sublease of the Head Lease between the State of Queensland (represented by the Department of Transport and Main Roads) (as sublessor) and Queensland Rail (as sublessee) for all or part of the land on which the Network is located; and
- (b) any tenure or other right to that land which replaces all or part of that sublease from time to time and entitles Queensland Rail to operate, and provide access to, the Network.

Take or Pay Charges means that part of the Access Charges calculated as "TP" in accordance with **schedule 3**.

Tenure Requirements has the meaning given in **clause 25.18(b)(ii)**.

Term means the term of this agreement as determined in accordance with **clause 1**.

Termination Date has the meaning given in **item 4** of **schedule 1**.

Third Party Works means any works, maintenance of any thing or other activities (including design, construction, testing and commissioning activities) undertaken or required to be undertaken on, over or under the land on which the Network is located:

- (a) by or on behalf of an Authority;
- (b) which Queensland Rail must permit in accordance with any Law or direction from an Authority;
- (c) by or on behalf of a third party who wants and is entitled to install and operate services or other infrastructure on, over or under that land; or
- (d) which Queensland Rail is required to permit either in accordance with the Sublease or because Queensland Rail's rights under the Sublease are subject to the rights of a third party to install and operate services or other infrastructure on, over or under that land.

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

Track means that part of the Network comprising the rail, ballast, sleepers and associated fittings.

Train means any self-propelled configuration of Rolling Stock operating as a unit on Track.

Train Configuration means the description of the combination of Rolling Stock comprising a Train including the identification number, gross mass and tare mass of individual items of Rolling Stock and the order in which those Rolling Stock items are placed in the Train.

Train Control means the control, management and monitoring (including, as applicable, scheduling) of:

- (a) all Train Movements;
- (b) all other operations of Rolling Stock on the Network; and
- (c) any activities affecting or potentially affecting such Train Movements or Rolling Stock operation or the proper, efficient and safe operation and management of the Network.

Train Control Directions means instructions, directions and notifications from time to time issued by Queensland Rail for the purpose of Train Control (including preventing or minimising the effect of a material breach of this agreement).

Train Controller means a person appointed by Queensland Rail from time to time to perform Train Control for a relevant part of the Network.

Train Control System means the software, databases and systems used from time to time by Queensland Rail in connection with Train Control.

Train Movement means the operation of a Train on the Network by the Operator or any other Rail Transport Operator.

Train Path means the use of a specified portion of the Network, which may include multiple sections in sequential order, at a specified time.

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

Train Service means the operation of a Train in accordance with this Agreement and, in **schedule 3**, a Train Service is a one way Train Service – that is, the journey from the origin to the destination is one Train Service, and the return journey from the destination to the origin is a second Train Service.

Train Service Description means the details set out in **schedule 2**.

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

Transfer has the meaning given in **clause 19.2(a)(ii)**.

Transferee has the meaning given in **clause 19.2(a)(ii)**.

Urgent Possession means a Possession:

- (a) that is required to correct problems in relation to the Network that are considered by Queensland Rail to be potentially dangerous to persons or property; and
- (b) that Queensland Rail intends to carry out within less than three months after the detection of the problem,

other than an Emergency Possession.

Year means, as applicable:

- (a) the period from the Commencement Date to the next 30 June;
- (b) a 12 month period during the Term subsequent to the period in **paragraph (a)** of this definition (subject to **paragraph (c)** of this definition); and
- (c) if the Termination Date is not 30 June, the period from (and including) 1 July immediately preceding the Termination Date and ending on the Termination Date.

26.2 Construction

Unless expressed to the contrary, in this agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;

- (d) “include”, “includes” and “including” must be read as if followed by the words “without limitation”;
- (e) 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;
- (f) a reference to a term or expression:
 - (i) having the meaning given to it in the Access Undertaking; or
 - (ii) as defined in the Access Undertaking,
 is a reference to that term or expression as having the meaning given to it in the Access Undertaking, or as defined in the Access Undertaking, as at the Commencement Date;
- (g) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation, a government or statutory body or authority and any other entity recognised by law;
 - (ii) a person includes the person’s legal personal representatives, successors, permitted assignees and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
 - (v) a right includes a benefit, remedy, discretion or power;
 - (vi) conduct includes:
 - (A) a benefit, remedy, discretion, authority or power; and
 - (B) any omission and any representation, statement or undertaking, whether or not in writing;
 - (vii) time is to local time in Brisbane;
 - (viii) a month is a reference to a calendar month;
 - (ix) “\$” or “dollars” is a reference to Australian currency;
 - (x) this or any other document includes this agreement or that other document, as applicable, as novated, varied or replaced and despite any change in the identity of the Parties or, for another document, the parties to that document;
 - (xi) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes facsimile transmissions;

- (xii) this agreement includes all schedules and annexures to it;
- (xiii) a clause, schedule or annexure is a reference to a clause, schedule or annexure, as the case may be, of this agreement; and
- (xiv) an Authority includes:
 - (A) any successor to, or replacement of, that Authority;
 - (B) any re-constitution or re-naming of that Authority; and
 - (C) any other Authority who is transferred any of the powers of functions of that Authority;
- (h) if the date on or by which any act must be done under this agreement is not a Business Day, the act must be done on or by the next Business Day;
- (i) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and
- (j) if there is any inconsistency:
 - (i) between matters contained in a schedule to this agreement and other provisions of this agreement that are not contained in a schedule, then those other provisions of this agreement prevail; or
 - (ii) between matters contained in the Access Undertaking and this agreement, the provisions of this agreement prevail.

26.3 Headings

Headings do not affect the interpretation of this agreement.

Schedule 1

Reference schedule

1	Operator	[insert name] ABN [insert] of [insert]
2	Operator's particulars for Notices	Delivery address: [insert] Postal address: [insert] Facsimile: [insert] Attention: [insert]
3	Commencement Date	[insert date of execution by Parties]
4	Termination Date	The earlier of: (a) [insert]; and (b) the termination of this agreement in accordance with its provisions (including clauses 13 and 18.2 , as applicable) or any Law.
5	Commitment Date	[insert date when access is to be available]
6	Security Amount	[insert]
7	Initial details for the Operator's representatives	<p>Representative for Obstructions</p> Name: Position: Phone: Mobile: Facsimile: Email:
		<p>Representative for loading of Train Services</p> Name: Position: Phone: Mobile: Facsimile:

		<p>Email:</p> <p>Representative for Operational Meetings</p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p> <p>Representative for Contractual Meetings</p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p> <p>Representative for Document Control</p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p>
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Schedule 2

Train Service Description

The details for the Train Service Description are as follows:

Origin	
Destination	
Average Haul Distance	
Commodity	
Dwell Times⁵	
Applicable Network	The part of the Network to be used by the Train Services is described in the train route acceptance in Attachment 3 of this schedule 2 .
Rolling Stock and Train Configuration	The details for the Rolling Stock and Train Configuration to be used for the Train Services are set out in the train route acceptance in Attachment 3 of this schedule 2 .
Train Service Levels	The description of the Train Service levels is set out in Attachment 1 of this schedule 2 .
Special Operating Requirements	The special operating requirements of the Train Service are set out in Attachment 2 of this schedule 2 .
Storage	The Train Services do not include the storage of Trains (whether short or long term) on the Network except short term storage as agreed, from time to time, between the Parties (in each Party's absolute discretion).

⁵ A dwell time is the time period from when the Train Service arrives at a specified point until it has completed all relevant activities, is ready to depart from that point and has advised the relevant Train Controller accordingly.

Differences from the relevant Reference Train Service	<p>The Train Services must only differ from the Reference Train Service as follows:</p> <ul style="list-style-type: none"> • [insert]; • [insert]; and • in accordance with any other differences as expressly set out in this agreement.
Dangerous Goods	Nil

Attachment 1 – Train Service levels

[insert relevant Train Services levels including daily, weekly, monthly and/or annual description of Train Services and other details relevant to the preparation of the Master Train Plan, including section run times.]

[Drafting Note: If a Train Service is only a one way Train Service for the purposes of this description, then this should be specifically referred to in the description.]

Attachment 2 – Special operating requirements

1 Provisioning locations

The provisioning locations for Train Services are:

- (a) [insert]; and
- (b) any other locations as agreed with Queensland Rail (in its absolute discretion),

except that if a Network Incident or delay occurs that affects more than one Train Service, the provisioning locations will be as agreed between the Parties (acting reasonably) for agreed Train Services and an agreed time period.

2 [insert]

[insert other requirements – for example, exit and entry points, shunting areas]

Attachment 3 – Train route acceptance

- 1 Applicable Network
[insert]
- 2 Rolling Stock and Train Configuration
[insert]

Schedule 3

Calculation of Access Charges and other charges

1 Access Charge Inputs

(a) The Access Charge Inputs (as at the Commencement Date) to apply for specific Train Services are as set out below.

Origin	Destination	Access Charge Inputs		
		Variable rate AT ₁ (\$/1000gtk)	Fixed rate AT ₂ (\$/Train Path)	QCA Levy ⁶ QL (\$/Net Tonne)

Miscellaneous train services ⁷	Access Charge Input
	Miscellaneous train service rate (\$/tkm ⁸)
Unscheduled repositioning of Rollingstock within the Applicable Network described in schedule 2.	
All other such relocations and movements	

(b) The Access Charge Inputs will be varied or escalated in accordance with **clauses 2 and 3** of this **schedule 3** and **clause 16**, as applicable.

⁶ The QCA Levy is a fee imposed by the QCA on the beneficiaries of the QCA's regulatory services. This levy will be reviewed and endorsed by the QCA annually.

⁷ For clarity, a miscellaneous train service to which the miscellaneous train service rates apply will be treated as a special type of ad hoc train service for the purposes of this agreement including the application of the Network Management Principles and are comprised in 'Ad Hoc Train Services' as referred to under the Network Management Principles.

⁸ Where tkm is a reference to train kilometre – that is, each kilometre or part thereof travelled on the Network by the Train(s) or Rollingstock involved. For example, if the relevant miscellaneous train service rate is \$X/tkm and the total tkm for in respect of those miscellaneous train services is 1000, then the relevant charge will be X multiplied by 1000.

2 CPI escalation

2.1 Calculation of CPI escalation

Unless otherwise agreed between the Parties, the Access Charge Inputs (other than the QCA Levy), and any other charges or rates expressed in this agreement as being subject to escalation, will escalate on each 1 July during the Term (**Escalation Date**), in accordance with the following formula:

$$ACI_n = ACI_{n-1} \times \left(\frac{CPI_n}{CPI_{n-1}} \right)$$

Where:

ACI_n means the amount of the relevant Access Charge Input (or other charge or rate) that commences to apply on the relevant Escalation Date;

ACI_{n-1} means the amount of the relevant Access Charge Input (or other charge or rate) applicable immediately prior to the relevant Escalation Date;

CPI_n means the CPI for the Quarter which commenced six months prior to the relevant Escalation Date;

CPI_{n-1} means the CPI for the Quarter which commenced 18 months prior to the relevant Escalation Date.

2.2 Review of CPI

- (a) If:
- (i) the basis of assessment of the CPI is altered in a material way; or
 - (ii) the CPI ceases (or is likely to cease) to be:
 - (A) published; or
 - (B) published at sufficiently regular intervals for the purpose of the calculation in **clause 2.1** of this **schedule 3**,

then either Party may notify the other Party that the CPI is required to be replaced.

- (b) After a notice is given in accordance with **clause 2.2(a)** of this **schedule 3**:
- (i) the Parties will negotiate in good faith for the purpose of agreeing to vary or replace the CPI; and
 - (ii) if the Parties fail to agree within 30 days after that notice is given, then the matter must be referred to an Expert for determination in accordance with **clause 17.3**.
- (c) For clarity, if the Parties reach agreement, or the Dispute is resolved, after the relevant Escalation Date, the Parties agree to retrospectively adjust any Access Charges (or other relevant amounts) invoiced since

that date to be consistent with that agreement, or the resolution of the Dispute, in accordance with **clause 4.6**.

- (d) This **clause 2.2** is subject to **clause 16.1** and does not apply to the extent that the CPI is, or is proposed to be, varied in accordance with **clause 16.1**.

3 Variation of QCA Levy

Queensland Rail may, from time to time, vary the Access Charge Input for the QCA Levy by giving notice in writing to the Operator of that variation. However, that Access Charge Input must only be varied by Queensland Rail if the QCA:

- (a) requires a change in the QCA Levy;
- (b) has approved a different allocation of the QCA Levy amongst different types of train services; or
- (c) otherwise approves that variation.

4 Calculation of invoice for access

4.1 Invoice calculations

The amount of the invoice for charges payable by the Operator to Queensland Rail under this agreement for a relevant month is calculated in accordance with the following formula:

$$TC = AC \times (1 + GST) + G$$

where:

- TC** is the total amount of charges payable by the Operator for the relevant month;
- AC** is the sum of VC, FC and QCAL for each Train Service for the relevant month and, if the relevant month is:
- (a) the last month of the Year; or
 - (b) the month in which this agreement has expired or terminated,
- TP;
- FC** is the fixed charge component for the relevant Train Service calculated by the formula:

$$AT_2 \times rtp$$

where:

- rtp** has the meaning given to that term in the Access Undertaking in relation to the relevant Train Service; and

AT₂ is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as escalated, or varied, from time to time in accordance with this agreement;

VC is the variable charge component for the relevant Train Service calculated by the formula:

$$AT_1 \times \frac{gtk}{1000}$$

where:

gtk is the gross tonne kilometres for the relevant Train Service calculated in accordance with **clause 5.2** of this **schedule 3**; and

AT₁ is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as escalated, or varied, from time to time in accordance with this agreement;

QCAL is the QCA Levy component for the relevant Train Service which is calculated by the formula:

$$QL \times nt$$

where:

QL is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as varied from time to time in accordance with this agreement; and

nt is the net tonnes for the relevant Train Service calculated in accordance with **clause 5.3** of this **schedule 3**;

TP is the take or pay charge for the relevant Year which is the greater of zero and the amount calculated by the formula:

$$\left(\left(AT_1 \times \frac{gtk}{1000} \right) + AT_2 \right) \times NTNO \times 0.8$$

where:

AT₁ is the amount specified as such in **clause 1** of this **schedule 3**, as escalated, or varied, from time to time in accordance with this agreement, for the relevant Train Service as applicable on the last day of the relevant Year;

AT₂ is the amount specified as such in **clause 1** of this **schedule 3**, as escalated, or varied, from time to time in accordance with this agreement, for the relevant Train Service as applicable on the last day of the relevant Year;

gtk is the average gross tonne kilometres for the relevant Train Services calculated in accordance with **clause 5.2** of this **schedule 3**; and

NTNO is the amount calculated by the formula:

$$\text{NTNO} = \text{TSEY} - \text{TSOY} - \text{TSQRCY}$$

where:

TSEY is the number of Train Services that the Operator was entitled to operate for the Year under this agreement;

TSOY is the number of Train Services that the Operator operated for the Year under this agreement; and

TSQRCY is the number of relevant Train Services which failed to operate for the Year under this agreement due to a Queensland Rail Cause;

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

G is the sum of any other amount due and payable under this Agreement including charges for GST not already factored in by the formula for AC including, but not limited to, interest, payment for ad-hoc train services and miscellaneous train services not calculated in AC above, any Adjustment Charges (as defined in the Access Undertaking) and any other adjustments (positive or negative).

5 Interpretation

5.1 Train Services operate in the period in which they commence to operate

For the purposes of **clause 4.1** of this **schedule 3**, a Train Service is taken to have operated in the month or a Year in which it commenced operation from its origin even if that Train Service does not reach its destination until the next month or Year.

5.2 Gross tonne kilometres

- (a) The gross tonnes (**gt**) for a Train Service is calculated as the sum of:
- (i) the maximum gross mass as specified in the Train Control System for each locomotive comprised in the Train Service;
 - (ii) if the Train Service is operated loaded or partly loaded, the maximum gross mass as specified in the Train Control System for each wagon comprised in the Train Service (for clarity, an empty wagon in a loaded Train Service will be treated as a loaded wagon);

- (iii) if the Train Service is operated empty, the tare mass as specified in the Train Control System for each wagon comprised in the Train Service; and
 - (iv) for all other Rolling Stock, the maximum gross mass specified in the Train Control System for each item of such Rolling Stock comprised in the Train Service.
- (b) The gross tonne kilometres (**gtk**) for a Train Service is determined as:
- (i) the multiple of the gt for the Train Service and the distance travelled in kilometres by the Train Service, provided that there has been no change in the gt of the Train Service over the relevant haulage distance being assessed; or
 - (ii) where there has been a change in gt for the Train Service over the relevant haulage distance (refer to average haul distance as listed in **schedule 2**) being assessed, the gtk must be determined separately for each part of the haulage distance for which there is a different gt and then each such gtk is aggregated to determine the total gtk for the Train Service over the relevant haulage distance.

5.3 Net tonnes

The net tonnes (**nt**) for a Train Service is equal to the gt for the Train Service calculated in **clause 5.2(a)** of this **schedule 3** less the sum of:

- (a) the maximum gross mass as specified in the Train Control System for each locomotive comprised in the Train Service;
- (b) the tare mass as specified in the Train Control System for each wagon comprised in the Train Service; and
- (c) for all other Rolling Stock, the tare mass specified in the Train Control System for each item of such Rolling Stock comprised in the Train Service.

Schedule 4

Interface Risk Management Plan

Executed as an agreement.

Executed by Queensland Rail)
Limited by its duly authorised officer in)
the presence of:)

.....
Witness

.....
Officer

.....
Name of Witness (print)

.....
Name of Officer (print)

Executed by [Insert name of)
Operator])

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)