

QCA submission draft
18 December 2012

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

Aurizon Network Pty Ltd

User Funding – Rail Corridor Agreement

*[insert Extension
name]*

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Date

Parties

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

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

Background

- A The Trustee wishes to:
- (a) design, supply, procure, construct, commission and complete the Extension Infrastructure; and
 - (b) operate, manage, repair, maintain and Modify the Extension Infrastructure,
- on the Extension Land.
- B The Landholder is the owner, lessee or licensee of the Extension Land and the Landholder Infrastructure.
- C The Parties agree that the Trustee may:
- (a) access and use the Extension Land and Modify the Landholder Infrastructure for the purpose of designing, supplying, procuring, constructing, commissioning and completing the Extension Infrastructure; and
 - (b) access and use the Extension Land for the purpose of operating, managing, repairing, maintaining and Modifying the Extension Infrastructure,
- in accordance with the terms of this Agreement.
-

Agreed terms

1 Interpretation

1.1 Definitions

In this Agreement:

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

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

Activities means an activity in connection with “railway operations” as defined under the Rail Safety Act.

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

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

Associates of a Party means the Party’s officers, employees, contractors, agents and invitees (including licensees) or any of them (and, for the avoidance of doubt, in the case of the Trustee, includes the Project Manager, Works Contractors and the Extension Lessee but in the case of the Landholder does not include the Trustee).

Authority means any government or any governmental, semi-governmental, regulatory, statutory or similar entity or authority.

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

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

Charge has the meaning given in **clause 22.4**.

Chargee has the meaning given in **clause 22.4**.

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

Commencement Date means the date of this Agreement.

Confidential Information of a Disclosing Party means:

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

Disclosing Party is the Trustee, any Unit Holder or a Related Body Corporate of a Unit Holder),

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

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

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

but does not include:

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

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

Defect has the meaning given in the Project Management Agreement.

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

Disclosing Party has the meaning given in **clause 20.1(a)**.

Discrimination Dispute has the meaning given in **clause 19.2(a)**.

Dispute has the meaning given in **clause 19.1(a)** and includes a matter referred to an Expert for determination under this Agreement.

Dispute Notice has the meaning given in **clause 19.1(a)**.

DTMR means the State represented by the Department of Transport and Main Roads.

Expert has the meaning given in **clause 19.3(b)**.

Extension has the meaning given in the Unit Holders Deed.

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

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

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

Extension Land means:

- (a) from the Commencement Date until the Final Certificate Date, the area indicated on the plan(s) in **part 1 of schedule 2** as the "Extension Area" and the "Extension Construction Area"; and
- (b) after the Final Certificate Date, the area indicated on the plan(s) in **part 1 of schedule 2** as the "Extension Area",

as varied from time to time in accordance with **clause 3.4**.

Extension Lessee means the party that is:

- (a) 'Sublessee' under the Extension Infrastructure Agreement; and
- (b) 'Aurizon' under the Extension Infrastructure Lease.

Fee means the amount of \$1.00.

Final Certificate has the meaning given in the Project Management Agreement.

Final Certificate Date means the date on which the Final Certificate is taken to be given by the Project Manager to the Trustee under clause **[4.7]** of the Project Management Agreement.

Governmental Agency means a government or a governmental, semi-governmental or judicial entity or authority (including a self-regulatory organisation established under statute or a stock exchange).

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

Head Lease means a lease from the Governor in Council to DTMR of land that includes all or part of the Extension Land.

Infrastructure Lease means each of:

- (a) the lease of infrastructure dated 30 June 2010 between Queensland Treasury Holdings Pty Ltd (ACN 011 027 295) (as lessor) and the Landholder (as lessee); and
- (b) the lease of infrastructure dated 30 June 2010 between Queensland Rail Limited (ACN 132 181 090) (as lessor) and the Landholder (as lessee).

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

- (a) 2%; and
- (b) the Commonwealth Bank of Australia's "Corporate Overdraft Reference Rate" (monthly charging cycle) quoted by the Commonwealth Bank of Australia on its public website for the last trading day of the previous Month (or in the event that such a rate is not so quoted at or in respect of any relevant date, such other similar rate as is quoted by a major commercial bank as agreed by the Parties or, failing agreement, as determined by an Expert under **clause 19.4**).

Interface Risks means all risks to the safety of persons and property and Risks to the Environment arising from the interaction or interface between the Trustee's and its Associates' Activities or property, including:

- (a) the carrying out of the Works for the Extension; and
- (b) the operation, management, repair, maintenance and Modification of the Extension Infrastructure by the Extension Lessee (and persons authorised by the Extension Lessee) under the Extension Infrastructure Lease or Extension Infrastructure Agreement (as applicable),

and any one or more of:

- (c) the Railway Network (excluding the Extension Infrastructure);
- (d) Activities or property on the Railway Network (including those of the Landholder); and
- (e) persons using the Railway Network, persons on or near the Railway Network or members of the public (including any Activities on the Railway Network that may affect those matters).

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;
- (c) identify appropriate controls and measures to manage effectively all identified Interface Risks within a risk management framework, including:

- (i) applicable safe working procedures and safety standards; and
- (ii) applicable environmental procedures and standards; and
- (d) identify the Party responsible for implementing, complying with and/or ensuring compliance with such controls and measures and ensuring their ongoing effectiveness.

Interface Risk Management Plan means the plan which sets out each of the matters required to be identified and assessed during an Interface Risk Assessment, as agreed or determined in accordance with **clause 6**, as amended from time to time in accordance with this Agreement.

Isolation means the action or arrangement whereby an electrical section is isolated from all possible sources of electrical supply and earthed so that it is no longer energised with electricity.

Landholder Infrastructure means any rail infrastructure that is:

- (a) owned, leased or licensed by the Landholder; and
- (b) located on the Rail Infrastructure Area,

but does not include the Extension Infrastructure.

Landholder Requirements has the meaning given in **clause 3.7(a)(viii)**.

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

Losses has the meaning given in **clause 16.1**.

Modify means, in respect of the Landholder Infrastructure or Extension Infrastructure, any removal or replacement of, or modifications, alternations, additions or changes to, any part of the Landholder Infrastructure or Extension Infrastructure (as applicable).

Month means a calendar month, except that:

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

Non-Discrimination Provision means each of **clauses 3.7(b), 6.1(e), 7.1(d), 7.3(d) and 7.4(b)**.

Non-Proposing Party has the meaning given in **clause 3.4(a)**.

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

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

Permitted Purpose:

- (a) in respect of Extension Infrastructure which is “Extension Infrastructure” (as defined in the Extension Infrastructure Agreement), means the same as “Permitted Use” (as defined in the Extension Infrastructure Agreement); and
- (b) in respect of Extension Infrastructure which is “Leased Extension Infrastructure” (as defined in the Extension Infrastructure Lease), has the meaning given in the Extension Infrastructure Lease.

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

Proceedings has the meaning given in **clause 19.7(b)**.

Project Management Agreement has the meaning given in the Unit Holders Deed.

Project Manager means:

- (a) the party that is the “Project Manager” under the Project Management Agreement; or
- (b) if the Trustee engages a Replacement Project Manager under, and in accordance with, the Project Management Agreement, the Replacement Project Manager on and from the Replacement Date.

Proposed Variation has the meaning given in **clause 3.4(a)**.

Proposing Party has the meaning given in **clause 3.4(a)**.

Protection Officer means a protection officer or any other employee (including contract employee) of the Landholder authorised to act in that capacity.

Rail Infrastructure Area means the area(s) of land indicated on the plan(s) in **part 2 of schedule 2** as the “Rail Infrastructure Area”.

[Drafting Note: The Rail Infrastructure Area will be defined on a case-by-case basis as an area of land over which the Landholder has tenure that may be adversely affected (including any adverse affects on the Landholder Infrastructure) as a consequence of the acts or omissions of the Trustee or the Trustee’s Associates in relation to the Extension Infrastructure or the Extension Land. The Rail Infrastructure Area will include, but not be limited to, the Extension Land.]

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

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

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

RCTI has the meaning given in **clause 21.4(a)(i)**.

Recipient has the meaning given in **clause 20.1**.

Redundant Extension Infrastructure means

- (b) “Redundant Extension Infrastructure” (as defined in the Extension Infrastructure Agreement); and

- (c) “Redundant Extension Infrastructure” (as defined in the Extension Infrastructure Lease).

Reference Project means a notional rail infrastructure project of the same or similar nature and size as the Extension funded by the Landholder.

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

Relevant Information has the meaning given in **clause 3.9(a)**.

Removed Infrastructure means:

- (a) a “Removed Obsolete Part” or “Replaced Part” (as defined in the Extension Infrastructure Agreement); or
- (b) “Removed Infrastructure” (as defined in the Extension Infrastructure Lease).

Replacement Date has the meaning given in the Project Management Agreement.

Replacement Project Manager has the meaning given in the Project Management Agreement.

Risks to the Environment means a matter which may have an adverse effect or potential adverse effect (whether temporary, permanent and of whatever magnitude, duration or frequency) on the physical surroundings of humans including:

- (a) land, water, atmosphere, climate, sound, odour and taste;
- (b) the biological factors of animals and plants; or
- (c) the social factor of aesthetics affecting any human individually or in their social groupings,

and includes:

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

Security Interest means any mortgage, pledge, lien, charge, encumbrance or any security or preferential interest or arrangement of any kind including:

- (a) any thing which gives a creditor priority to other creditors with respect to any asset; and
- (b) retention of title other than in the ordinary course of day-to-day trading and a deposit of money by way of security,

but it excludes a charge or lien arising in favour of a Governmental Agency by operation of statute unless there is default in payment of money secured by that charge or lien.

Segment has the meaning given in the Unit Holders Deed.

State means the State of Queensland.

Sublease means any sublease of the Head Lease between DTMR and the Landholder in respect of land including all or part of the Extension Land.

Supplier has the meaning given in **clause 21.3**.

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

Track Closure means the closure of a section of the operating track to all rail traffic other than rail traffic utilised in connection with the carrying out of the Works for the Extension.

Track Possession means the period of a Track Closure granted by the Landholder to the Trustee during which the Trustee or its Associates are authorised to carry out Construction Work over, under or adjacent to the closed operating railway track.

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

Trust has the meaning given in the Trust Deed.

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

Trustee Supplies has the meaning given in **clause 21.4(a)(i)**.

Unit Holder has the meaning given in the Trust Deed.

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

WH&S Act means the *Work Health and Safety Act 2011* (Qld).

WH&S Regulation means the *Work Health and Safety Regulation 2011* (Qld).

Wilful Default means an intentional breach of the terms of this Agreement.

Works Contractor has the meaning given in the Project Management Agreement.

Works for the Extension means all design, supply, procurement, testing, construction, commissioning, Defects rectification and ancillary works and services associated with the construction and completion of the Extension.

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) where the day on or by which any thing is to be done is not a Business Day, it must be done on or by the preceding Business Day;
- (c) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;

- (e) “includes” means includes without limitation;
- (f) no rule of construction will apply to the disadvantage of one Party on the basis that that Party put forward the documents comprising this Agreement;
- (g) if the documents comprising this Agreement contain any ambiguity, discrepancy or inconsistency, then the following order of precedence will apply to resolve that ambiguity, discrepancy or inconsistency:
 - (i) this Agreement excluding the schedules; and
 - (ii) the schedules;
- (h) words in the singular include the plural and vice versa;
- (i) words importing one gender will include every gender;
- (j) references to clauses and schedules are references to clauses of, and schedules to, this Agreement;
- (k) a requirement for a Party to obtain the consent or approval of the other Party requires the first Party to obtain the consent or approval in writing; and
- (l) a reference to:
 - (i) a person includes any company, partnership, joint venture, unincorporated association, corporation or other body corporate and a government or statutory body or authority;
 - (ii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified, consolidated, re-enacted or replaced;
 - (iii) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
 - (iv) a right includes a benefit, remedy, discretion and power;
 - (v) time is to local time in Brisbane, Queensland;
 - (vi) \$ or dollars is a reference to Australian currency;
 - (vii) this Agreement or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;
 - (viii) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmission;
 - (ix) a Party includes that Party’s successors according to law and permitted assigns and any person to whom it novates its rights and obligations; and
 - (x) on land includes over or under the surface of the land.

2 Term

This Agreement commences on the Commencement Date and will continue until the earlier of:

- (a) the termination of the Trust; and
- (b) the expiration or earlier termination of any Sublease or Infrastructure Lease.

3 Licence

3.1 Grant of licence in respect of Extension Land

Subject to **clause 6.3**, the Landholder grants to the Trustee a non-exclusive licence to access and use the Extension Land at the Trustee's own cost and risk for the purposes of:

- (a) undertaking the Works for the Extension but only to the extent that the Works for the Extension are project managed by the Project Manager under, and in accordance with, the Project Management Agreement;
- (b) using for a Permitted Purpose, operating, managing, repairing, maintaining and Modifying the Extension Infrastructure but only to the extent that those activities are undertaken by the Extension Lessee (or a person authorised by it) under, and in accordance with, the Extension Infrastructure Agreement or Extension Infrastructure Lease (as applicable); and
- (c) undertaking any other activities:
 - (i) incidental or ancillary to the purposes specified in **clause 3.1(a)** or **3.1(b)**; or
 - (ii) required or permitted by any other provision of this Agreement, but only to the extent that those activities are undertaken by the Project Manager or the Extension Lessee (or a person authorised by it), in accordance with the terms of this Agreement.

3.2 Grant of licence in respect of Landholder Infrastructure

Subject to **clause 6.3**, the Landholder grants to the Trustee a non-exclusive licence to Modify the Landholder Infrastructure at the Trustee's own cost and risk for the purpose of undertaking the Works for the Extension but only to the extent that the Modifications are project managed by the Project Manager under, and in accordance with, the Project Management Agreement, in accordance with the terms of this Agreement.

3.3 Access and use

For the avoidance of doubt, the Landholder and its Associates and any third parties entitled by law are entitled to:

- (a) access and use the Extension Land; and

- (b) access and use the Landholder Infrastructure.

3.4 Extension Land

- (a) A Party (**Proposing Party**) may notify the other Party (**Non-Proposing Party**) of a proposal to vary the area of the Extension Land (**Proposed Variation**) (which proposal must include details of the variation, the reasons for the variation and any alternatives to that variation).
- (b) The Parties must meet to discuss a Proposed Variation within ten Business Days after a notice is given under **clause 3.4(a)** (or such longer period as agreed by the Parties, acting reasonably).
- (c) Within ten Business Days after a meeting under **clause 3.4(b)** (or such longer period as agreed by the Parties, acting reasonably), the Non-Proposing Party must notify the Proposing Party that the Non-Proposing Party either:
 - (i) consents to the relevant Proposed Variation together with any reasonable requirements or conditions; or
 - (ii) does not consent to the relevant Proposed Variation together with the reasons why it does not give that consent,provided that any such consent must not to be unreasonably withheld.
- (d) If the Non-Proposing Party does not give a notice under **clause 3.4(c)** within the time period specified in **clause 3.4(c)**, then the Non-Proposing Party is taken to consent to the Proposed Variation.
- (e) A Party must not give a Dispute Notice in respect of any Dispute relating to any matter under this **clause 3.4** (unless otherwise agreed by the Parties).
- (f) If a Party consents (or is deemed to consent) to a Proposed Variation, the Extension Land will be taken to be varied in accordance with that Proposed Variation from the date of such consent (or deemed consent).
- (g) Promptly following a variation to the Extension Land under this **clause 3.4**, the Landholder must give the Trustee a revised version of **schedule 2** which incorporates that variation and that revised version of **schedule 2** is taken to replace the existing **schedule 2**.

[Drafting note: This clause 3.4 is drafted on the basis that any additional land which becomes Extension Land as a consequence of a variation will be land in respect of which the Landholder already has appropriate tenure.]

3.5 Trustee responsible for Associates

Subject to **clause 17.1**:

- (a) the Trustee:
 - (i) must ensure that its Associates comply with the provisions of this Agreement; and

- (ii) is responsible for the acts and omission of its Associates as if those acts and omissions were the acts and omissions of the Trustee itself; and
- (b) the exercise of rights, or discharge of obligations, of the Trustee under this Agreement by any of its Associates will be treated as an exercise of those rights, or the discharge of those obligations, by the Trustee.

3.6 Role of Project Manager and Extension Lessee

- (a) The Landholder acknowledges that the Trustee has appointed the Project Manager under the Project Management Agreement as the disclosed agent of the Trustee for the purpose of:
 - (i) performing the Trustee's obligations; and
 - (ii) exercising the Trustee's rights (other than the Trustee's rights under **clauses 3.1** and **3.2** and its rights in respect of Disputes under **clause 19**),

under this Agreement, other than to the extent such obligations and rights must, by operation of law, be personally performed or exercised by the Trustee, during the term of the Project Management Agreement.

- (b) The Landholder acknowledges that the Trustee has appointed the Extension Lessee under the Extension Infrastructure Lease as the disclosed agent of the Trustee for the purpose of:
 - (i) performing the Trustee's obligations; and
 - (ii) exercising the Trustee's rights (other than the Trustee's rights under **clauses 3.1** and **3.2** and its rights in respect of Disputes under **clause 19**),

under this Agreement, other than to the extent such obligations and rights must, by operation of law, be personally performed or exercised by the Trustee, following the termination of the Project Management Agreement.

3.7 Trustee's general obligations

- (a) The Trustee must:
 - (i) not access or use the Extension Land, or permit it to be accessed or used, except as permitted under **clause 3.1**;
 - (ii) not Modify or otherwise interfere with the Landholder Infrastructure, or permit it to be Modified or otherwise interfered with, except as permitted under **clause 3.2**;
 - (iii) obtain and maintain, at its own cost, all necessary Authority Approvals required in connection with its and its Associates' access to and use of the Extension Land or Modification of the Landholder Infrastructure and, once obtained, provide copies of all such Authority Approvals to the Landholder;

- (iv) comply, at its own cost, with all Legislation, Authority Approvals and directions from Authorities applicable to its and its Associates' access to and use of the Extension Land or Modification of the Landholder Infrastructure;
- (v) promptly provide any information and documentation to the Landholder, and permit the Landholder to make copies of such information and documentation, which the Landholder reasonably requires from time to time in connection with this Agreement;
- (vi) notify the Landholder as soon as reasonably practicable of any damage to, or destruction of, the Rail Infrastructure Area, the Landholder Infrastructure or any property on the Rail Infrastructure Area which is caused or contributed to by the Trustee or its Associates except as authorised by the Landholder or in accordance with the express terms of this Agreement;
- (vii) not interfere with, hinder or prejudice the Landholder's conduct of its operations or business except as authorised by the Landholder or in accordance with the express terms of this Agreement; and
- (viii) subject to **clause 3.7(b)**, comply with all directions, policies, rules and procedures (including, in relation to safety, health and environmental matters) (**Landholder Requirements**) notified by the Landholder to the Trustee from time to time in connection with:
 - (A) the Trustee's and its Associates' access to and use of the Extension Land or Modification of the Landholder Infrastructure; and
 - (B) the Rail Infrastructure Area, the Landholder Infrastructure and the Extension Infrastructure.
- (b) The Landholder must not require the Trustee to comply with any Landholder Requirements which are materially more onerous than those which the Landholder would require of a Reference Project in the same or similar circumstances.

3.8 Landholder's obligations

- (a) Subject to **clause 3.8(b)** and except as otherwise provided under this Agreement, the Landholder must not damage, interfere with or Modify the Extension Infrastructure.
- (b) Aurizon Network Pty Ltd may interfere with or Modify or do anything else in relation to the Extension Infrastructure which it is permitted or required to do as:
 - (i) 'Sublessee' under the Extension Infrastructure Agreement;
 - (ii) 'Aurizon' under the Extension Infrastructure Lease;
 - (iii) 'Lessee' under an Infrastructure Lease;
 - (iv) 'Sublessee' under a Sublease; or
 - (v) 'rail infrastructure manager' under the Rail Safety Act.

3.9 Provision of information

- (a) Subject to **clause 3.9(c)**, the Landholder must, within a reasonable period after request from the Trustee, provide the Trustee with a copy of any document, in existence at the time of the request, in relation to the Extension Land and Landholder Infrastructure which is reasonably required by the Trustee for the purpose of carrying out the Works for the Extension (**Relevant Information**).
- (b) Without limiting **clause 3.9(a)**, but subject to **clause 3.9(c)**, the Landholder must, within a reasonable period after receipt of that request from the Trustee, provide the Trustee with:
 - (i) technical and engineering information and standards (including specifications in respect of the Landholder Infrastructure) to the extent reasonably relevant to carrying out the Works for the Extension;
 - (ii) interface, safety, environmental and cultural heritage standards in respect of the Landholder Infrastructure to the extent reasonably relevant to carrying out the Works for the Extension;
 - (iii) details of Authority Approvals relevant to the Landholder Infrastructure to the extent reasonably relevant to carrying out the Works for the Extension;
 - (iv) information in respect of train operations to the extent reasonably relevant to carrying out the Works for the Extension;
 - (v) access to employees of the Landholder who have knowledge of the Landholder Infrastructure and train operations but only for the purpose of discussing matters reasonably relevant to carrying out the Works for the Extension; and
 - (vi) details of existing utilities (including power, gas and water) to the extent reasonably relevant to carrying out the Works for the Extension.
- (c) The Project Manager may refuse to provide any information, and delete from any document, which the Landholder is otherwise required to provide to the Trustee under this **clause 3.9** any information, which:
 - (i) is not Relevant Information;
 - (ii) would be privileged from production in a legal proceeding on the ground of legal professional privilege;
 - (iii) if disclosed to the Trustee, would give rise to a breach of an obligation or duty of confidence by the Landholder;
 - (iv) relates to the planning and development of subsequent actual or potential projects for the development of new rail infrastructure or modifications of, or additions to, existing rail infrastructure; or
 - (v) which relates to the assessment of the Landholder's commercial position in relation to any matter.

- (d) For the avoidance of doubt, **clause 25.5(b)** will apply to any costs and expenses incurred by the Landholder in complying with its obligations under this **clause 3.9**.

4 Limited rights

- (a) The rights of the Trustee under this Agreement rest in contract only and do not create or confer upon the Trustee any tenancy or any estate or interest whatsoever in or over the Rail Infrastructure Area, the Extension Land or the Landholder Infrastructure.
- (b) The rights of the Trustee under this Agreement are those of a licensee only and do not comprise or include any further or other rights.

5 Fee

- (a) No fee is payable by the Trustee to the Landholder on the execution of this Agreement.
- (b) The Fee is payable by the Trustee to the Landholder on each anniversary of the Commencement Date, if demanded by the Landholder until the termination of this Agreement.
- (c) The Trustee will bear and pay all charges for utilities (for example gas, sewerage, water and electricity) consumed by the Trustee or its Associates on the Extension Land prior to the date which is the "Available Date" for the last of the "Segments" to become "Available" (each as defined in the Project Management Agreement) and must make its own arrangements for procuring and accessing such utilities.

6 Interface and other risk management

6.1 Development of Interface Risk Management Plan

- (a) Promptly after the Commencement Date, the Parties must:
 - (i) jointly undertake an Interface Risk Assessment; and
 - (ii) negotiate diligently and in good faith to endeavour to agree an Interface Risk Management Plan as a result of such Interface Risk Assessment.
- (b) Promptly upon the request at any time by either Party and, in any event, at least once every 12 months and upon the engagement of a Replacement Project Manager, the Parties must:
 - (i) jointly undertake an Interface Risk Assessment; and
 - (ii) negotiate in good faith to endeavour to agree any amendments to the Interface Risk Management Plan as a result of such Interface Risk Assessment.

- (c) If, following an Interface Risk Assessment under **clause 6.1(b)**, the Parties agree to amend the Interface Risk Management Plan, the Interface Risk Management Plan will be amended as agreed in writing between the Parties.
- (d) If, following an Interface Risk Assessment under **clause 6.1(a)** or **6.1(b)**, the Parties are unable to agree the Interface Risk Management Plan, or any aspect of it or amendment to it, the Interface Risk Management Plan, or the relevant aspect of it or amendment to it, will be determined by the Landholder.
- (e) In determining an Interface Risk Management Plan or an aspect of, or amendment to, an Interface Risk Management Plan under **clause 6.1(d)**, the Landholder must not impose requirements on the Trustee which are materially more onerous than those which the Landholder would require in respect of the relevant Interface Risks in respect of a Reference Project in the same or similar circumstances.

6.2 Role of Project Manager and Extension Lessee

The Trustee must procure the Project Manager (during the term of the Project Management Agreement) and the Extension Lessee (after the term of the Project Management Agreement) to:

- (a) jointly undertake any Interface Risk Assessments, with the Landholder, as required under **clause 6.1**; and
- (b) negotiate in good faith to endeavour to agree to the Interface Risk Management Plan and any amendments to it,

as disclosed agent for the Trustee.

6.3 Compliance with Interface Risk Management Plan

- (a) The Trustee must not exercise any rights under **clause 3** until the initial Interface Risk Management Plan has been agreed or determined.
- (b) The Parties must comply with their respective obligations under the Interface Risk Management Plan in force from time to time.
- (c) The Trustee must not do anything or permit anything to be done which may give rise to Interface Risks that are not addressed in the then applicable Interface Risk Management Plan.
- (d) The Trustee must procure the Project Manager (during the term of the Project Management Agreement) and the Extension Lessee (after the term of the Project Management Agreement), as disclosed agent for the Trustee, to comply with the Trustee's obligations under the Interface Risk Management Plan.

7 Construction Works

7.1 Approval of designs and specifications

- (a) Prior to any Construction Works being carried out, the Trustee must submit to the Landholder, for the Landholder's prior approval (not to be unreasonably withheld or delayed), detailed designs and specifications in respect of those Construction Works.
- (b) If the Trustee wishes to vary any Approved Designs and Specifications in respect of any Construction Works, the Trustee must submit to the Landholder, for the Landholder's prior approval (not to be unreasonably withheld or delayed), the variations to the Approved Designs and Specifications in respect of those Construction Works.
- (c) Subject to **clause 7.1(d)**, in considering whether to give or withhold its approval under **clause 7.1(a)** or **7.1(b)**, the Landholder is entitled to have regard to, without limitation:
 - (i) the Landholder's obligations and duties as railway infrastructure manager under the Rail Safety Act in respect of the Landholder Infrastructure, the Extension Land and the Rail Infrastructure Area;
 - (ii) the Landholder's interests as owner, lessee and/or licensee of the Extension Land and owner, lessee and/or licensee of the Landholder Infrastructure; and
 - (iii) the Extension Lessee's interests as sublessee under the Extension Infrastructure Agreement of existing Extension Infrastructure and/or the Extension Infrastructure to be constructed, incorporated, installed or attached during the carrying out of the Construction Works.
- (d) In exercising its discretion under **clause 7.1(a)** or **7.1(b)**, the Landholder must not impose requirements on the Trustee which are materially more onerous than those which the Landholder would require in respect of the same or similar Construction Works in respect of a Reference Project in the same or similar circumstances.
- (e) The giving of the Landholder's approval of any Approved Designs and Specifications, or variations to them, under this **clause 7.1** is not to be taken as either:
 - (i) an approval in relation to any safety, health or environmental matters; or
 - (ii) a representation that the Approved Designs and Specifications, or variations to them, are lawful or appropriate for the activities of the Trustee or the obligations of a Party under this Agreement or under any applicable Legislation (including in relation to any safety, health or environmental matters).
- (f) Any:

- (i) detailed designs and specifications submitted under **clause 7.1(a)**;
or
- (ii) any variations to Approved Designs and Specifications submitted under **clause 7.1(b)**,

by the Project Manager (other than a Replacement Project Manager), as disclosed agent for the Trustee, to the Landholder prior to the Replacement Date will be deemed to be approved by the Landholder.

7.2 Compliance

The Trustee must not carry out, or permit to be carried out, any Construction Works except in accordance with this Agreement and the Project Management Agreement, including:

- (a) the Approved Designs and Specifications in respect of those Construction Works;
- (b) all relevant Landholder Requirements;
- (c) all relevant Legislation, Authority Approvals and directions from Authorities; and
- (d) the Interface Risk Management Plan.

7.3 Supervision of Construction Works

- (a) If the Landholder determines that any aspects of the Construction Works require supervision by Protection Officers, the Landholder will provide such Protection Officers at the Trustee's cost.
- (b) The Trustee agrees that Protection Officers are entitled to stop or direct the movement of the Trustee's Associates in accordance with the Interface Risk Management Plan.
- (c) The Trustee must give the Landholder at least 14 days prior notice of the commencement and completion dates for the undertaking of any Construction Works that the Landholder has determined require supervision by Protection Officers.
- (d) The Landholder must ensure that a Protection Officer does not impose requirements on the Trustee that are materially more onerous than those which the Landholder would require in respect of the same or similar Construction Works in respect of a Reference Project in the same or similar circumstances.

7.4 Isolations, Track Closures and Possessions

- (a) Subject to **clause 7.4(b)**, the Landholder must arrange for any Isolations, Track Closures and Track Possessions required for the purpose of carrying out the Construction Works.
- (b) The Landholder must arrange Isolations, Track Closures and Track Possession under **clause 7.4(a)** which are not materially less favourable to the Trustee than those which the Landholder would arrange in respect

of the same or similar Construction Works in respect of a Reference Project in the same or similar circumstances.

7.5 Certification

Prior to operating or using any part of the Extension Infrastructure, or permitting any part of the Extension Infrastructure to be operated or used, for a purpose other than constructing, testing or commissioning of that part of the Extension Infrastructure, the Trustee must:

- (a) certify in writing to the Landholder that the relevant part of the Extension Infrastructure has been constructed and commissioned in accordance with this Agreement, including the applicable Approved Designs and Specifications; and
- (b) give the Landholder copies of all the certifications and reports from Works Contractors reasonably required by the Landholder in relation to the relevant part of the Extension Infrastructure.

8 Work health and safety

8.1 Definitions

In this **clause 8**:

- (a) the words “construction project”, “construction work”, “designer” (in relation to plant, substances and structures), “principal contractor”, and “workplace” each have the meaning given to that term in the WH&S Act and WH&S Regulation;
- (b) **Trustee Construction Workplace** means any part of the Extension Land or Extension Infrastructure where construction work is performed or to be performed by, for or on behalf of the Trustee;
- (c) **Workplace** includes a Trustee Construction Workplace, the Extension Land and the Extension Infrastructure.

8.2 Responsibility for health and safety

- (a) The Trustee agrees and acknowledges that:
 - (i) the Trustee is, for the purposes of the WH&S Act and WH&S Regulation:
 - (A) a person conducting a business or undertaking in respect of the workplace; and
 - (B) a person conducting a business or undertaking that commissions construction work or a construction project carried out at a Trustee Construction Workplace;
 - (ii) the Trustee must engage and appoint, or otherwise ensure the engagement or appointment of, the Project Manager as principal contractor for each construction project that is to be undertaken at a Trustee Construction Workplace under the WHS Act and WH&S

- Regulation, including authorising the Project Manager to have the necessary management or control of the relevant workplace;
- (iii) where the Trustee engages and appoints the Project Manager as principal contractor in accordance with **clause 8.2(a)(ii)**, then to the extent of any such appointment the Project Manager may engage and appoint a Works Contractor as the principal contractor for any construction project that is to be undertaken at a Trustee Construction Workplace under the WHS Act and WH&S Regulation, including authorising that Works Contractor to have the necessary management or control of the relevant workplace;
 - (iv) the Trustee must engage and appoint, or otherwise ensure the engagement or appointment of, the Project Manager or a Works Contractor as a designer of the Extension Infrastructure; and
 - (v) the Trustee must, so far as is reasonably practicable to discharge its obligations under the WHS Act and WH&S Regulation, consult with the designer of the Extension Infrastructure;
- (b) Where the Trustee engages and appoints a Works Contractor as a designer of the Extension Infrastructure, the Trustee must:
- (i) as soon as practicable after the engagement or appointment, provide notice to the Landholder of the engagement or appointment of the Works Contractor;
 - (ii) as soon as practicable after cessation of the engagement or appointment, provide notice to the Landholder of the cessation of the engagement or appointment of the Works Contractor; and
 - (iii) so far as its reasonably practicable, ensure the Works Contractor discharges the obligations imposed on the designer by the WH&S Act and WH&S Regulation.
- (c) The Trustee is responsible and assumes liability for the obligations under the WH&S Act and WH&S Regulation for which the Trustee is responsible and liable as between the Parties in accordance with this **clause 8**.
- (d) The Trustee will:
- (i) procure the Extension Lessee to develop (if not already developed) and, at all times during the term of this Agreement, implement a safety management system in relation to the ongoing operation and maintenance of the Extension Infrastructure;
 - (ii) procure the Project Manager and Extension Lessee to notify and keep the Landholder informed, to the Landholder's satisfaction, of the status of any safety or health related incidents that have occurred in relation to or in connection with the Extension Infrastructure;

- (iii) assist the Landholder as reasonably required with any investigations into any safety or health related incident in relation to or in connection with the Extension Infrastructure.

8.3 Indemnity

- (a) To the extent permitted by law, the Trustee indemnifies and will keep indemnified the Landholder from and against all loss and damage (excluding Consequential Loss) which may be brought against or made on the Landholder or which the Landholder may pay, sustain or be put to arising by reason of or in connection with:
 - (i) any breach by the Trustee of the WH&S Act, the WH&S Regulation, the Rail Safety Act, the Rail Safety Regulation or other safety related legislation at a workplace;
 - (ii) any breach by the Trustee of its obligations under this **clause 8** or the WH&S Act, the WH&S Regulation, the Rail Safety Act, the Rail Safety Regulation or other safety related legislation except to the extent that any negligent act, error or omission by the Landholder or any of its Associates or breach by the Landholder under this Agreement contributed to the loss or damage; and
 - (iii) the Landholder being deemed under the WH&S Act or the WH&S Regulation to be the principal contractor or designer for any workplace.
- (b) It is not necessary for the Landholder to incur expense or make a payment before enforcing any indemnity conferred by **clause 8.3**.

9 Sublease

- (a) The Trustee acknowledges that the Landholder's interest in the Extension Land is or may be held pursuant to a Sublease.
- (b) To the extent that the Landholder's interest in the Extension Land is or becomes held pursuant to a Sublease:
 - (i) the Trustee acknowledges that:
 - (A) this Agreement will be subject to all reservations contained in the Head Lease and the Sublease;
 - (B) it is a condition of the Head Lease that the land comprised within it is used for transport, purposes ancillary to transport and other commercial and community purposes as approved by the chief executive of DTMR; and
 - (C) it is a condition of the Sublease that the land comprised within it is used for the purpose of managing and operating a railway and is not used for any other purpose without the consent of the chief executive of DTMR;
 - (ii) despite any other clause in this Agreement, the Trustee:

- (A) must not act or omit to act or permit, cause or contribute to any act or omission which:
 - (1) causes a breach of the Sublease; or
 - (2) causes (directly or indirectly) the Landholder to incur any costs or expenses in complying with the Sublease that the Landholder would not otherwise have incurred;
- (B) must comply with the terms of the Sublease relevant to the Trustee's access to or use of any part of the Extension Land that is subject to the Sublease as if the Trustee were the sublessee under that Sublease;
- (C) acknowledges:
 - (1) DTMR's right to exercise any right or power held by the Landholder; and
 - (2) the rights of DTMR under the Sublease and that the Trustee's rights under this Agreement are subject to and subordinate to the rights of DTMR,in respect of any part of the Extension Land that is subject to the Sublease; and
- (D) acknowledges and agrees that:
 - (1) it must not create or allow to subsist a Security Interest over all or part of the Trustee's rights or interests under this Agreement or in the Extension Land (if any) without the prior consent of the Landholder; and
 - (2) without limitation to the Landholder's discretion to withhold the giving of such a consent, the Landholder is not required to give such a consent if doing so may breach the Sublease; and
- (iii) if there is an inconsistency between the terms of this Agreement and the terms of the Sublease which means that the Landholder or the Trustee cannot comply with both this Agreement and the Sublease, then the terms of the Sublease prevail to the extent of the inconsistency and the provisions of this Agreement will be construed accordingly.
- (c) If the Head Lease or the Sublease is terminated for any reason, then the Landholder must provide to the Trustee a copy of any such notice received in connection with the termination as soon as reasonably practicable (and in any event, not later than five Business Days) after it is received by the Landholder.
- (d) The Landholder must provide to the Trustee a copy of any notice which is given to the Landholder under the Sublease which materially affects the Trustee's rights and/or obligations under this Agreement as soon as

reasonably practicable (and in any event, not later than five Business Days) after it is received by the Landholder.

10 Ownership

- (a) Nothing in this Agreement will be construed as vesting in the Landholder any proprietary or other interest in the Extension Infrastructure or any Removed Infrastructure.
- (b) The Parties acknowledge that, as between them, the ownership of Removed Infrastructure is provided for under the Extension Infrastructure Agreement or the Extension Infrastructure Lease.

11 Rail infrastructure manager

11.1 Rail infrastructure manager

- (a) The Landholder must:
 - (i) if not already accredited, use reasonable endeavours to be accredited; and
 - (ii) once accredited, use reasonable endeavours to continue to be accredited,

as rail infrastructure manager under the Rail Safety Act for railway operations in respect of the Landholder Infrastructure, the Extension and the Rail Infrastructure Area.

- (b) Provided that the Landholder complies with **clause 11.1(a)**, the Trustee must not seek to be accredited as rail infrastructure manager under the Rail Safety Act for railway operations in respect of any part of the Landholder Infrastructure, the Extension or the Rail Infrastructure Area.

[Drafting note: This clause to be reviewed on a transaction-by-transaction basis having regard to the accreditation requirements under the Rail Safety Act at the time of entering into the transaction.]

11.2 Approval of railway manager

For the purposes of section 255 of the TIA, the Parties acknowledge and agree that the terms of this Agreement constitute:

- (a) the Landholder's approval as railway manager of all Construction Works and other activities to be undertaken by or for the Trustee on the Extension Land under and in accordance with this Agreement; and
- (b) for avoidance of doubt, reasonable conditions to which that approval is subject.

12 No impact on Landholder Infrastructure

- (a) The Trustee must, in accordance with proper and accepted work practices, construct, operate, manage, repair, maintain and Modify the Extension Infrastructure (and all parts of the Extension Infrastructure) as may be necessary from time to time during the term of the Agreement to ensure the safe, secure and proper operation of the Landholder Infrastructure.
- (b) The Trustee will notify the Landholder immediately after it becomes aware of any matter, act or thing which may impact upon or affect the safe, secure and proper operation of the Landholder Infrastructure.
- (c) The Trustee must:
 - (i) comply in all material respects with all environmental laws and the terms of any environmental Authority Approvals held by the Trustee;
 - (ii) notify the Landholder of any environmental damage to or contamination of the Rail Infrastructure Area or any adjoining land (or otherwise impacting on the Rail Infrastructure Area) which arises out of, is associated with, or is caused or contributed to by, the construction, operation, management, repair, maintenance or Modification of the Extension Infrastructure as soon as reasonably possible after the Trustee becomes aware of any such environmental damage or contamination;
 - (iii) remediate any environmental damage or contamination referred to in **clause 12(c)(ii)** to the reasonable satisfaction of the Landholder (provided that if, in the Landholder's reasonable opinion, the required remediation affects the Landholder Infrastructure or the continued operation of the Landholder Infrastructure, the Landholder may elect to carry out the remediation itself and recover the cost of doing so from the Trustee as a debt due and owing to the Landholder); and
 - (iv) upon request by the Landholder, cooperate with the Landholder in responding to any environmental Claims, notices or enquiries received by the Landholder in relation to the Rail Infrastructure Area.

13 Removal of infrastructure

13.1 General

Subject to the other Transaction Documents, the Trustee may, at any time, remove any part of the Extension Infrastructure with the prior consent of the Landholder (which consent must not be unreasonably withheld).

13.2 Redundant Extension Infrastructure

- (a) The Landholder may, in its absolute discretion:

- (i) itself (without any requirement for the consent of the Trustee); and/or
- (ii) require the Trustee to, within a reasonable period notified by the Landholder to the Trustee,

do any one or more of the following in respect of any part of the Redundant Extension Infrastructure:

- (iii) remove that part of the Redundant Extension Infrastructure;
- (iv) reinstate any Landholder Infrastructure that was Modified, altered, changed, removed, replaced or otherwise interfered with in connection with the construction, installation or attachment of that part of the Redundant Extension Infrastructure to the condition that such Landholder Infrastructure was in prior to such Modification, alteration, change, removal, replacement or other interference; and/or
- (v) remediate any part of the Extension Land which is affected by the:
 - (A) removal of that part of the Redundant Extension Infrastructure under this **clause 13.2(a)**; or
 - (B) reinstatement of such Landholder Infrastructure under this **clause 13.2(a)**,

to a state that the Landholder considers:

- (C) is safe, stable, clean and tidy; and
- (D) will not adversely affect:

- (1) the health and safety of any persons (including the risk of death, injury, illness or harm) in relation to or in connection with; or
- (2) the safe construction, operation, alteration, maintenance, use or other management of,
the Railway Network or the Rail Infrastructure Area.

(b) If the Landholder makes an offer to buy all or any part of any Redundant Extension Infrastructure and the Trustee accepts such offer, then the property in that Redundant Extension Infrastructure will pass to the Landholder on the payment of the consideration agreed between the Parties.

(c) If:

- (i) the Landholder makes an offer to buy all or any part of the Redundant Extension Infrastructure and the Trustee does not accept that offer;
- (ii) after such non-acceptance by the Trustee, the Landholder exercises its right under **clause 13.2(a)** to require the Trustee to remove any part of the Redundant Extension Infrastructure which was the subject of such offer; and

- (iii) that part of the Redundant Extension Infrastructure is not removed within 40 Business Days after the end of the time by which the Landholder requires the Trustee to remove that Redundant Extension Infrastructure under **clause 13.2(a)**,
- then:
- (iv) the Trustee must surrender and transfer all of the Trustee's right, title and interest in and to that Redundant Extension Infrastructure to the Landholder free from all Security Interests;
 - (v) that Redundant Extension Infrastructure, without further action from any Party, immediately vests in and becomes the absolute property of the Landholder free and clear of all Security Interests and the Trustee will cease to have any right, title and interest in that Redundant Extension Infrastructure; and
 - (vi) the Trustee must immediately deliver possession and control of that Redundant Extension Infrastructure to the Landholder.
- (d) For the avoidance of doubt, the Landholder may exercise its rights under **clause 13.2(a)** differently in relation to different parts of the Redundant Extension Infrastructure (for example, in respect of a particular part of the Redundant Extension Infrastructure, the Landholder may require the Trustee to remove that part of the Redundant Extension Infrastructure and to remediate the relevant part of the Extension Land but may itself reinstate the relevant part of the Landholder Infrastructure).
 - (e) If the Trustee does not do anything that the Landholder requires the Trustee to do in under **clause 13.2(a)** within the time period required under **clause 13.2(a)**, then the Landholder may elect to do that thing itself under **clause 13.2(a)**.
 - (f) The Landholder's costs and expenses of, or arising as a consequence of, exercising its rights or doing any thing under **clause 13.2(a)** (including costs and expenses associated with any Isolations, Track Closures and Track Possessions relating to the removal of the Redundant Extension Infrastructure) must be paid or reimbursed, as applicable, to the Landholder by the Trustee in accordance with **clause 14**.
 - (g) If the Landholder itself removes any part of the Redundant Extension Infrastructure, then:
 - (i) upon such removal, the Trustee must surrender and transfer all of the Trustee's right, title and interest in and to that Redundant Extension Infrastructure to the Landholder free from all Security Interests;
 - (ii) upon such removal, that Redundant Extension Infrastructure, without further action from any Party, immediately vests in and becomes the absolute property of the Landholder free and clear of all Security Interests and the Trustee will cease to have any right, title and interest in that Redundant Extension Infrastructure;

- (iii) following such removal, the Landholder must use its reasonable endeavours to dispose of (including sell or otherwise dispose of) that Redundant Extension Infrastructure; and
- (iv) following such disposal, the Landholder must pay the proceeds of such disposal to the Trustee less:
 - (A) the amount of the Landholder's costs and expenses referred to in **clause 13.2(f)** in respect of the removal of that Redundant Extension Infrastructure; and
 - (B) the Landholder's costs and expenses in connection with the disposal of that Redundant Extension Infrastructure,which costs and expenses will be taken to be paid by the Trustee to the Landholder under this Agreement.

14 Payments

14.1 Payment of invoices

- (a) Each Party will submit details of any amounts payable to it by the other Party under this Agreement when submitting invoices to that other Party.
- (b) 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 after the date on which that Party receives an invoice for that amount from the other Party.

14.2 Interest on overdue payments

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

14.3 Method of payment

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

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

15 Insurance

[Drafting note: Insurance requirements to be considered on a transaction by transaction basis.]

16 Indemnity

16.1 Trustee's indemnity

Subject to **clause 16.2**, the Trustee indemnifies the Landholder from and against all liabilities, actions, proceedings, Claims, demands, costs, losses, damage and expenses (**Losses**) (excluding Consequential Loss) which may be brought against or made upon the Landholder or which the Landholder may pay, sustain or be put to by reason of or in connection with:

- (a) any acts, errors or omissions of the Trustee (or its officers, employees, agents or contractors) under or in relation to this Agreement;
- (b) any acts, errors or omissions of the Trustee (or its officers, employees, agents or contractors) relating to:
 - (i) the design, construction, testing, commissioning, operation, management, repair, maintenance or Modification of the Extension Infrastructure; or
 - (ii) the Modification of the Landholder Infrastructure;
- (c) any acts, errors or omissions of persons other than the Trustee, but only if the same are a consequence of:
 - (i) the design, construction, commissioning, operation, management, repair, maintenance or Modification of the Extension Infrastructure; or
 - (ii) the Modification of the Landholder Infrastructure;
- (d) any negligence or default of the Trustee (or its officers, employees, agents or contractors) under or in relation to this Agreement; or
- (e) any breach by the Trustee (or its officers, employees, agents or contractors) of any intellectual property rights of a third party,

except to the extent that:

- (f) any:
 - (i) fraud or dishonesty; or
 - (ii) negligent act, error or omission,by the Landholder, the Project Manager (other than if a Replacement Project Manager) or Extension Lessee; or
- (g) any default by the Landholder under this Agreement, contributed to the Loss.

16.2 Limitation in relation to Defects

The indemnity given by the Trustee under **clause 16.1** does not extend to any Losses brought against or made upon the Landholder or which the Landholder pays, sustains or is put to by reason of or in connection with any Defects which the Extension Lessee must rectify, or procure the rectification of, under clause **[4.2]** of the Extension Infrastructure Lease.

17 Limitation of liability

17.1 Trustee not liable

- (a) Subject to **clause 17.1(b)**, the Landholder agrees that:
- (i) the Trustee will not be liable to the Landholder, and the Landholder will not have any Claim against the Trustee, under this Agreement; and
 - (ii) the Landholder will not have a right to terminate this Agreement, for any breach of this Agreement by the Trustee due to any act or omission of the Project Manager (during the term of the Project Management Agreement) or the Extension Lessee (after the term of the Project Management Agreement), acting as disclosed agent of the Trustee under this Agreement, except to the extent that such breach was caused, or contributed to (to the extent of the contribution), by an act or omission (including negligence) of:
 - (iii) the Trustee acting itself and not by the Project Manager or Extension Lessee (as applicable) acting as its disclosed agent; or
 - (iv) a Works Contractor.
- (b) **Clause 17.1(a)** does not apply during any period during which the Project Manager is a Replacement Project Manager.

17.2 Limitation of the Landholder's liability

Except to the extent:

- (a) that the Landholder has committed fraud, Gross Negligence or Wilful Default; or
- (b) otherwise prohibited by law,

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

17.3 Trustee's limitation of liability

- (a) The Landholder acknowledges that the Trustee enters into this Agreement only as trustee of the Trust, and in no other capacity (other

than in respect of the warranties in relation to trustee capacity in **clause 24.5** which are given by the Trustee in its personal capacity).

- (b) A liability of the Trustee arising under or in connection with this Agreement is limited to and can be enforced against the Trustee only to the extent to which the Trustee is entitled to be indemnified out of the Trust for the liability and the liability can be satisfied out of property of the Trust.
- (c) The limitation of liability in this **clause 17.3** will not apply to any liability of the Trustee to the extent that the liability is not satisfied out of the property of the Trust because there is a reduction in the Trustee's right of indemnity as a result of the Trustee committing fraud, "Gross Negligence" or "Wilful Default" (each as defined in the Trust Deed).

17.4 Exclusion of Consequential Loss

Despite any other provision of this Agreement, neither Party will be liable to the other for, nor will any indemnity by either Party under this Agreement extend to, any Consequential Loss suffered by or Claimed against that other Party.

17.5 Scope of Claim, liability or loss

For the avoidance of doubt, references in this **clause 17** to a Claim, liability or loss include:

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

17.6 Claims against Landholder

The Trustee will not have, and must not make, any Claim against the Landholder in relation to or arising out of the entry into or the performance or non-performance of this Agreement, or give a Dispute Notice to the Landholder in respect of such a Claim under **clause 19.1**, unless the Trustee first provides the Landholder with a notice of the purported Claim and allows the Landholder a reasonable period to rectify the relevant default and the Landholder fails to rectify that default within that reasonable period.

18 Termination

18.1 No right to termination

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

18.2 No prejudice as to right to damages

Subject to **clause 17**, nothing in this **clause 18** prejudices in any way a Party's right to Claim and recover damages for any breach of this Agreement by the other Party.

19 Disputes

19.1 Notification of Disputes

- (a) If any Claim, dispute or question (**Dispute**) arises between the Parties under this Agreement, any Party may give to the other Party a notice in writing (**Dispute Notice**) specifying reasonable details of the Dispute and referring it for resolution in accordance with this **clause 19**.
- (b) Unless otherwise expressly provided to the contrary in this Agreement, a Dispute must be resolved in accordance with this **clause 19**.

19.2 Discrimination Dispute

- (a) This **clause 19.2** applies if the Trustee Disputes that the Landholder has complied with a Non-Discrimination Provision when exercising a right, power or discretion under this Agreement (**Discrimination Dispute**).
- (b) Within ten Business Days after the giving of a Dispute Notice in respect of a Discrimination Dispute, the Landholder must give to the Trustee a notice specifying whether or not the Landholder considers that it has complied with the Non-Discrimination Provision providing reasonable details of the Landholder's reasons for forming that opinion.
- (c) If the Landholder specifies in a notice given under **clause 19.2(b)** that it considers that it has not complied with the relevant Non-Discrimination Provision, the Landholder must, within ten Business Days after the giving of that notice, re-exercise the relevant right, power or discretion in a manner that complies with the Non-Discrimination Provision (in which case, the relevant Discrimination Dispute will be taken to be resolved).
- (d) If the Landholder specifies in a notice given under **clause 19.2(b)** that it considers that it has complied with the relevant Non-Discrimination Provision, then within ten Business Days after the giving of that notice, the Trustee may refer the Discrimination Dispute to the chief executive officer of the Landholder (or his or her nominee) and the chief executive officer of the Trustee (or his or her nominee) for the purposes of this **clause 19.2(d)** for resolution.

19.3 Chief executive officer resolution

- (a) Within ten Business Days after the giving of a Dispute Notice (or in the case of a Discrimination Dispute, if the Discrimination Dispute is not resolved within ten Business Days after referral under **clause 19.2(d)**), any Dispute must be referred in the first instance to the chief executive officer of the Landholder (or his or her nominee) and the chief executive

officer of the Trustee (or his or her nominee) for the purposes of this **clause 19.3** for resolution.

- (b) If the Dispute is not resolved within ten Business Days after the referral under **clause 19.3(a)** or in the event that either chief executive officer appoints a nominee that is unacceptable to the other Party, then the relevant Dispute:
 - (i) must, where this Agreement expressly requires referral to an expert; and
 - (ii) may, by agreement of the Parties in any other case, be referred for resolution by an expert (**Expert**) in accordance with **clause 19.4**.

19.4 Expert determination

Where any matter is referred to an Expert under **clause 19.3** or otherwise in accordance with the terms of this Agreement then the following provisions of this **clause 19.4** will apply:

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within ten Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
 - (i) where the Parties agree the Dispute is purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;
 - (ii) where the Parties agree the Dispute is purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and
 - (iii) in any other case, the President (for the time being) of the Queensland Law Society, Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 19.4(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the Expert; and
 - (iii) the process specified in **clause 19.4(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the Expert accepts the appointment as the Expert;

- (c) subject to **clause 19.4(b)**, if the Expert is to be nominated by a person referred to in **clause 19.4(a)** and the person nominated as the Expert does not accept the appointment as the Expert, then an alternative person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 19.4(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 19.4(a)** the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert;
- (e) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert; and
- (f) the Expert must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose any such interest or duty by notice to the Parties before his or her appointment;
 - (iii) not be, or have been in the last five years, an employee of the Trustee, the Landholder or a Preference Unit Holder or a Related Body Corporate of the Trustee, the Landholder or a Preference Unit Holder;
 - (iv) not be permitted to act until he or she has given notice to the Parties that he or she is willing and able to accept the appointment;
 - (v) have regard to the provisions of this Agreement and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter submitted by the Parties;
 - (vi) provide both Parties with a copy of his or her determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after his or her appointment;
 - (vii) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties (including, if required by a Party,

by entering into a confidentiality agreement in favour of the Parties); and

- (viii) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration including, without limitation, the *Commercial Arbitration Act 1990* (Qld), will not apply to him or her or the determination or the procedures by which he or she may reach a determination.

19.5 Parties to assist Expert

The Parties must do everything reasonably requested by the Expert to assist the Expert in determining the Dispute, including producing information and materials requested by the Expert and attending any hearing convened by the Expert.

19.6 Decision of Expert

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

19.7 Determination by court

- (a) If any Dispute is not otherwise resolved in accordance with this **clause 19**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane.
- (b) Each Party irrevocably and unconditionally:
 - (i) agrees that the courts of the State, and any courts which have jurisdiction to hear appeals from any of those courts, are to have exclusive jurisdiction to settle disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this Agreement may be brought in, and only in, such courts;
 - (ii) waives any objection which it may have now or hereafter to the laying of the venue of any Proceedings in such courts and any Claim that any such Proceedings have been brought in an inconvenient forum; and
 - (iii) agrees that a final judgment in any Proceedings brought in such courts will be final and binding upon such Party and may be enforced in the courts of any other jurisdiction.

19.8 Injunctive relief

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

19.9 Discrimination Dispute

- (a) This **clause 19.9** applies in respect of a Discrimination Dispute.
- (b) If a Discrimination Dispute is not resolved in accordance with **clause 19.3** the Discrimination Dispute must be referred to an Expert to

determine whether or not the Landholder complied with the relevant Non-Discrimination Provision.

- (c) If it is agreed or determined through the Dispute resolution process that the Landholder failed to comply with a Non-Discrimination Provision, the Landholder must, as soon as reasonably practicable after such agreement or determination (and, in any event, within ten Business Days), exercise the relevant right, power or discretion in a manner that complies with the Non-Discrimination Provision (having regard to the agreement or determination, as applicable).
- (d) Despite a Discrimination Dispute, the exercise of the relevant right, power or discretion by the Landholder which is the subject of the Discrimination Dispute is taken to be valid unless and until:
 - (i) it is agreed or determined through the Dispute resolution process under this **clause 19** that the Landholder failed to comply with the Non-Discrimination Provision; and
 - (ii) the Landholder has, in accordance with **clause 19.9(c)**, exercised the relevant right, power or discretion in a manner that complies with the Non-Discrimination Provision.

19.10 Time bar

If a Party does not give a Dispute Notice under **clause 19.1(a)** in respect of a Dispute within 12 Months after the date the Party became aware, or ought reasonably to have become aware, of the occurrence of the event or circumstance giving rise to the Dispute:

- (a) the Party must not give the other Party such a Dispute Notice;
- (b) any such Dispute Notice which is given by the Party will be taken to be of no effect; and
- (c) the Party will not have, and must not make, any Claim against the other Party in respect of the Dispute.

20 Confidentiality

20.1 Confidentiality obligations

A Party (**Recipient**):

- (a) may use Confidential Information of the other Party (**Disclosing Party**) only for the purposes of this Agreement or another Transaction Document; and
- (b) must keep confidential all Confidential Information of a Disclosing Party except for disclosures permitted under **clause 20.2**.

20.2 Disclosure of Confidential Information

A Recipient may disclose Confidential Information of a Disclosing Party:

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

- (ii) before disclosure, have been directed by the Recipient to keep confidential all Confidential Information of the Disclosing Party;
- (i) if, and to the extent, the Recipient is required to do so by law (other than by section 275 of the *Personal Property Securities Act 2009* (Cth)), any taxation authority or by any rules or regulations of a recognised stock exchange (including where the disclosure is to a Related Body Corporate of the Recipient that is responsible for making such disclosures for the relevant group of companies and for the purpose of such a Related Body Corporate determining whether, and the extent to which, such a disclosure is required to be made);
- (j) if disclosure is lawfully required by the Access Regulator, or in accordance with the Access Undertaking;
- (k) to any government (whether Federal, State or Territory, municipal or local) and any agency, authority, commission, department, instrumentality, regulator or tribunal thereof, including the Commissioner of Taxation and Australian Taxation Office to the extent required by law or where such disclosure is determined by the Trustee to be reasonably required for the administration of the Trust;
- (l) to an Expert under this Agreement or an "Expert" (as defined in the Unit Holders Deed) under the Unit Holders Deed;
- (m) to a Unit Holder or a Related Body Corporate of a Unit Holder; or
- (n) to advisors of Unit Holders:
 - (i) whose duties in relation to the Unit Holder require the disclosure;
 - (ii) who are under a duty of confidentiality to the Recipient; and
 - (iii) who have been advised of the confidential nature of the Confidential Information.

20.3 Conditions of disclosure

If a Recipient discloses Confidential Information of a Disclosing Party to a person under **clause 20.2 (Disclosee)**, the Recipient must:

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

21 GST

21.1 Construction

In this **clause 21**:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law;

- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
- (c) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.

21.2 Consideration GST exclusive

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

21.3 Payment of GST

If GST is payable on any supply made by a Party (or any entity through which that Party acts) (**Supplier**) under or in connection with this Agreement, unless the consideration is expressly stated to be inclusive of GST, the recipient will pay to the Supplier an additional amount equal to the GST payable on the supply. Subject to **clause 21.4**, the recipient will pay the amount referred to in this **clause 21.3** in addition to, and at the same time that, the consideration for the supply is to be provided under this Agreement.

21.4 Tax invoices

- (a) (**Supplies by the Trustee**) The Parties agree that:
 - (i) the Landholder will issue a recipient created tax invoice (**RCTI**) in respect of any taxable supply which the Trustee makes to the Landholder under or in connection with this Agreement (**Trustee Supplies**);
 - (ii) the Trustee will not issue tax invoices in respect of the Trustee Supplies;
 - (iii) the Trustee is registered for GST as at the date of this Agreement and must notify the Landholder if it ceases to be registered;
 - (iv) the Landholder is registered for GST as at the date of this Agreement and must notify the Trustee if it ceases to be registered;
 - (v) the Landholder will issue an adjustment note to the Trustee for any adjustment events that arise in relation to a supply for which a RCTI has been issued;
 - (vi) each RCTI to be issued in accordance with this Agreement is a tax invoice belonging to the class of invoices that the Commissioner of Taxation has determined in writing may be issued by the recipient of a taxable supply; and
 - (vii) the agreement in this **clause 21.4(a)** will terminate immediately if the Landholder or the Trustee cease to satisfy any of the requirements under the GST Law for issuing a RCTI.
- (b) (**Supplies by the Landholder**) The Landholder must deliver a tax invoice or an adjustment note to the Trustee before the Landholder is

entitled to payment of an amount on account of GST under **clause 21.3** in respect of the supplies it makes to the Trustee. The Trustee can withhold payment of the amount on account of GST until the Landholder provides a tax invoice or an adjustment note, as appropriate.

21.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause 21.3** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

21.6 Reimbursements

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

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

22 Assignment

22.1 Assignment

Subject to **clauses 22.2, 22.3 and 22.4**, a Party must not assign, transfer, mortgage, charge, make the subject of a trust or otherwise deal with or encumber all or any of its rights or liabilities under this Agreement (or procure or permit any of those things) without the prior consent of the other Party.

22.2 Assignment by Landholder

- (a) If an entity will acquire all of the Landholder's interest in the parts of the Railway Network which include the Segments, the Landholder must transfer all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires the Landholder's interest in the relevant parts of the Railway Network.
- (b) If an entity will acquire a portion of all of the Landholder's interest in part of the Railway Network which include the Segments, the Landholder must transfer the same proportion of all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires the portion of the Landholder interest in the relevant part of the Railway Network.
- (c) The Trustee must, promptly upon demand by the Landholder, execute a deed of assignment or novation in a form acceptable to the Landholder (acting reasonably) to give effect to the transfer of any rights or liabilities of the Landholder required under this **clause 22.2**.

22.3 Assignment by Trustee

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

22.4 Charging

- (a) The Landholder may mortgage, charge or encumber (**Charge**) all or any of its rights and obligations under this Agreement in whole or in part, in favour of any financier, mortgagee or chargee (**Chargee**), provided that the Landholder, the Chargee and the Trustee execute any reasonable form of covenant, including terms to the effect that the Trustee acknowledges the existence of the Charge, and that the Chargee must comply with the provisions of this Agreement, including this **clause 22**, in the exercise of its rights under the Charge.
- (b) The Landholder must not Charge the Extension Infrastructure or any part of the Extension Infrastructure.

23 Notices

23.1 General

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

23.2 How to give a Notice

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

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

23.3 Particulars for giving of Notices

- (a) Each Party's particulars for the giving of Notices are initially the particulars set out in **item 1 of schedule 1**.
- (b) Each Party may change its particulars for the giving of Notices by notice to the other Party.

- (c) A notice given to a Party which is signed is evidence that the Notice has been signed by a person duly authorised by the sender and that Party is entitled to rely on that Notice without further inquiry or investigation.

23.4 Notices by post

Subject to **clause 23.6**, a Notice is given if posted:

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

23.5 Notices by fax

Subject to **clause 23.6**, a Notice is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

23.6 After hours Notices

If a Notice is given:

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

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

23.7 Process service

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

24 Representations and warranties

24.1 General representations and acknowledgements

- (a) The Trustee covenants that it has satisfied itself that there are no legal, commercial or technical impediments or impositions which will preclude it from constructing, operating and maintaining the Extension Infrastructure on the Extension Land and that the Extension Land is suitable for its intended purpose.
- (b) The Trustee acknowledges and agrees that the Landholder is not liable to the Trustee for any latent or patent defect of the Extension Land.

24.2 No warranty by the Landholder regarding Extension Land

No warranty is given by the Landholder in relation to any matter, act or thing concerning the Extension Land including the rights of the Trustee to construct, test, commission, operate, inspect, repair, replace, maintain, alter, add to or

remove the Extension Infrastructure and to undertake Works for the Extension on the Extension Land.

24.3 Liability and responsibility

- (a) Without limiting any responsibility that Aurizon Network may have as 'Project Manager' under the Project Management Agreement, 'Sublessee' under the Extension Infrastructure Agreement or 'Aurizon' under the Extension Infrastructure Lease, the Trustee is responsible for the design, construction, operation and maintenance of each and every aspect of the Extension Infrastructure and all Works for the Extension associated therewith and the completeness, adequacy and accuracy thereof, and the Landholder has no responsibility or duty of care whatsoever in respect of such matters.
- (b) Without limiting **clause 24.3(a)**, the Trustee must not hold the Landholder responsible in any way for the design of the Extension Infrastructure as a result of any acceptance given by the Landholder under **clause 7**.

24.4 General warranties

Each Party warrants that:

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

24.5 Trustee warranties

The Trustee warrants that:

- (a) it has full power and authority to enter into this Agreement and to perform the Trustee's obligations under this Agreement and the Trust Deed;
- (b) it is the sole trustee of the Trust and no action has been taken to remove or replace the Trustee; and
- (c) it has the right to be fully indemnified out of the assets of the Trust in respect of all its obligations under this Agreement, and the Trustee has

not done or omitted to do anything that would result in its right of indemnity being restricted or limited in any way.

24.6 Reliance

- (a) Each Party acknowledges that the other Party has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 24.4**.
- (b) The Trustee acknowledges that the Landholder has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 24.5**.

25 General

25.1 Survival

This **clause 25** and **clauses** [#] and [#] survive the termination of this Agreement.

25.2 Applicable law

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

25.3 Waiver

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

25.4 Duty

- (a) As between the Parties, the Trustee is liable for and must pay all duty (including any fine or penalty except where it arises from default by the Landholder) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If the Landholder pays any duty (including any fine or penalty) which the Trustee is liable to pay under **clause 25.4(a)**, the Trustee must pay that amount to the Landholder on demand.

25.5 Costs

The Trustee must pay (and, if paid by the Landholder, reimburse) to the Landholder:

- (a) the Landholder's legal costs and expenses of and incidental to the drafting, negotiating and execution of this Agreement; and

- (b) the Landholder's costs and expenses (including legal costs and expenses) of and incidental to performing its obligations and exercising its rights under this Agreement and enforcing this Agreement.

25.6 Amendments to be in writing

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

25.7 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.

25.8 Consents

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

25.9 Further assistance

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

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 and the other Transaction Documents together contain the entire understanding between the Parties as to the subject matter of this Agreement.
- (a) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and the other Transaction Documents and are of no effect. Neither Party is liable to the other Party in respect of those matters.
- (b) No oral explanation or information provided by a Party to the other Party:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between the Parties.

25.12 Relationship of Parties

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

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 the:
 - (A) scope and nature of this Agreement; or
 - (B) relative commercial or financial positions of the Parties; or
 - (ii) would be contrary to public policy.

25.14 Survival of representations and warranties

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

25.15 Enurement

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

25.16 Merger

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

25.17 Powers of attorney

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

25.18 Indemnity

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

Executed as an agreement.

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date: / /

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

.....
Company Secretary/Director

.....
Director

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

.....
Name of Director (print)

Date: / /

Schedule 1

Notice details

1 Particulars for Notices

1.1 Trustee

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

1.2 Landholder

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

Schedule 2

Part 1 – Extension Land

[Drafting note: *Plan(s) showing “Extension Area” and “Extension Construction Area” to be inserted on a transaction-by-transaction basis.*]

Part 2 – Rail Infrastructure Area

[Drafting note: *Plan(s) showing “Rail Infrastructure Area” to be inserted on a transaction-by-transaction.*]