

Transferred and applying to Queensland Rail through Queensland Government Transfer Notice Act No 21 of 2009.

QR NETWORK PTY LTD

and

[*]**

**OPERATOR ACCESS AGREEMENT
COAL**

*** Note: For the purposes of this Access Agreement it is assumed that the Access Holder and the Operator are one and the same**

THIS AGREEMENT is made on the _____ day of _____ 200

BETWEEN **QR NETWORK PTY LTD** ACN 132 181 116 of Level 14, 305 Edward Street, Brisbane, Queensland ("**QR**")

AND The party specified in Item 1 of the Reference Schedule ("**Operator**")

RECITALS

- A** QR is responsible for the provision of the Infrastructure and Train Control.
- B** QR has agreed to grant non-exclusive rights to the Operator for the operation of Train Services over the Nominated Network and to provide Train Control for those Train Services on the terms and conditions of this Agreement.
- C** The Parties may enter into separate agreements for the provision of services by QR to the Operator other than the Access Rights.

OPERATIVE PROVISIONS

1. In this Agreement words and expressions which are defined in the General Conditions of Contract shall have the same meanings as are respectively assigned to them in the General Conditions of Contract.
2. The following documents shall be deemed to form and be read and construed as part of this Agreement:
 - (a) Reference Schedule attached to this Agreement as **Schedule A**;
 - (b) General Conditions of Contract attached to this Agreement as **Schedule B**; and
 - (c) all Schedules, exhibits and annexures to this Agreement.

and Clause 1.2 of the General Conditions of Contract shall apply to the extent that there is any inconsistency between any of the above documents.

ACCESS RIGHTS

1. Grant of Access Rights

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

2. Nature and Scope of Access Rights

- (a) The Access Rights granted under Clause 1 are non-exclusive contractual rights and do not give the Operator any right, title or interest of any proprietary nature in the Nominated Network.
- (b) The Operator must not:

- (i) operate on or use any part of the Infrastructure that is not specifically included in the Nominated Network; or
- (ii) use the Nominated Network for carrying out any provisioning, inspection, testing, maintenance of Rollingstock, any marshalling, shunting or other relocation of Rollingstock or storage of Rollingstock or for any other purpose other than the operation of Train Services

unless specifically directed by QR to do so in accordance with the provisions of this Agreement or as specified in this Agreement.

- (c) The Parties acknowledge and agree QR is required to provide the Operator with certain benefits, rights and services in accordance with Paragraphs 2.1(c) and 2.1(h) of QR's Access Undertaking, and to the extent that these requirements are relevant to the Operator's Access Rights it is intended the terms on which they are provided are detailed in this Agreement.

3 Ancillary Services

In consideration of the Operator agreeing to pay the charges for Ancillary Services, QR will provide the Ancillary Services (if any) set out in **Schedule 11**.

4. Renewal

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

- (a) subject to any provision to the contrary in QR's Access Undertaking, the Operator will not be granted priority over any other party seeking access to the Nominated Network; and
- (b) the chief executive of the Department of Transport has a right in priority to the Operator and any other party seeking access to reserve the capacity which is committed to the Operator under this Agreement with effect on and from the Termination Date for existing or proposed regularly scheduled passenger services.

SCHEDULE A

REFERENCE SCHEDULE

REFERENCE SCHEDULE

This Reference Schedule forms part of the Agreement dated the _____ day of _____ 200____
made between QR and the Operator listed in Item 1 below.

Item

1. **Operator:**

Name
ACN
Address

2. **Commencement Date:**

3. **Termination Date:**

4. **Commitment Date:**

5. **Security Deposit:**

Subject to QR's reasonable assessment of the creditworthiness of the Operator, the Security Deposit (if applicable) will be an amount equivalent to the greater of twelve (12) weeks Access Charges determined as if the Operator made maximum use of its Access Rights or the deductible for any one loss as specified in Schedule 7

(General Conditions of Contract Clause 2.4 (a))

6. **Date for Completion of Matters prior to the Commencement of Train Services:**

(General Conditions of Contract Clause 3.1(c))

SCHEDULE B

GENERAL CONDITIONS OF CONTRACT

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GENERAL CONDITIONS OF CONTRACT

These General Conditions of Contract form part of the Agreement dated the _____ day of _____ 200____ made between QR and the Operator.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

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

“**Access Rights**” means the rights of access to the Nominated Network granted pursuant to this Agreement;

“**Accreditation**” means accreditation in accordance with Part 4 of Chapter 6 of the Transport Infrastructure Act and “**Accredited**” means to have Accreditation;

“**Agreed Deterioration Threshold**” means the threshold allowance for deviations from a Train path within which a Train Service is considered to be on time, as agreed between QR and the Operator in **Schedule 1**;

“**Agreed Exit Threshold**” means the threshold allowance for deviations from a scheduled exit time within which a Train Service is considered to be on time, as agreed between QR and the Operator in **Schedule 1**;

“**Agreement**” or “**this Agreement**” means the Agreement, Reference Schedule and General Conditions of Contract between QR and the Operator and includes all annexures, Schedules and exhibits to this Agreement;

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

“**Ancillary Services**” means those services (if any) in addition to Access Rights which QR has agreed to supply to the Operator and which are set out in **Schedule 11**;

“**Assign**” means to assign, transfer, part possession with, license, charge, mortgage, become trustee of, grant an option or other right over or otherwise deal with or encumber, and “**Assignment**” and “**Assignee**” shall have comparable meanings;

“**Authority**” means the Crown, a minister of the Crown, a federal, state or local government department, a corporation or authority constituted for a public purpose, a holder of an office for a public purpose, a local authority, a court, a tribunal and any officer or agent of the foregoing acting as such that lawfully exercise jurisdiction over QR (but excluding QR Limited ACN 124 649 967);

“**Average Transit Time**” means the target average time scheduled for the relevant Train Service type from Origin to Destination or from Destination to Origin which comprises the relevant Sectional Running Times, delays for passing of other Trains on the Nominated Network, Operational Constraints relating to the Infrastructure (other than Operational Constraints attributable to a Railway Operator or a Force Majeure Event) but excluding Planned Dwell Times and which may be varied in accordance with the Interface Coordination Plan;

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

“Billing Period” means the period of a Month;

“Board of Inquiry” means a board of inquiry established under the Transport Infrastructure Act;

“Central Queensland Coal Region” means the rail corridors:

- (i) from the ports at Hay Point and Dalrymple Bay to Blair Athol mine, North Goonyella mine, Hail Creek mine and the junction with the Gladstone to Gregory mine corridor;
- (ii) from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Gregory mine and Rolleston mine;
- (iii) from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Moura mine;
- (iv) from the port of Abbot Point to Newlands mine; and
- (v) all branch lines directly connecting coal mine loading facilities to the abovementioned corridors;

“Change in Law” means:

- (a) any amendment, repeal, modification or enactment of any Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Authority;
- (d) the imposition of a requirement for authorisations not required as at the date of this Agreement;
- (e) after the date of grant of any authorisation, a change in the terms and conditions attaching to that authorisation or the attachment of any new terms or conditions; or
- (f) any such authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application being duly made, or being renewed on conditions which are materially less favourable than those attached to the original authorisation;

“Change in Relevant Taxes” means:

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

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

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

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

“Common Corridor” means:

- (i) for transfers of Access Rights within an Individual Coal System pursuant to Clause 3.3, that part of the Infrastructure that will be utilised by the New Railway Operator’s Trains in respect of which the Operator’s Relinquishment Fee is to be reduced provided that where the distance from the New Railway Operator’s origin to destination for its relevant train service is greater than the distance from the Operator’s Origin to Destination (“Operator’s haul distance”), the Common Corridor will only extend from the New Railway Operator’s destination (unloading facility) for a distance equal to the Operator’s haul distance;
- (ii) in all circumstances other than those described in subparagraph (i), that part of the Infrastructure that was utilised by the Operator for the Train Services for which Access Rights are being relinquished and will also be utilised by the New Railway Operator’s Trains in respect of which the Operator’s Relinquishment Fee is to be reduced;

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

“Consequential Loss” means:

- (i) any special, indirect or consequential loss or damage;
- (ii) any economic loss in respect of any claim in tort;
- (iii) any loss of profits, loss of production, loss of revenue, loss of use, loss of contract, loss of opportunity, loss of goodwill or wasted overheads whatsoever;
- (iv) any loss arising out of any Claim by a Third Party (other than a Claim in respect of loss or destruction of or damage to real or personal property or personal injury to or death of any person),

but does not include, in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;

“Contaminating Materials” means any material, substance, gas, liquid, chemical, biological substance, mineral or other physical matter which is toxic, flammable or inflammable, harmful to the environment (including any life form) or may cause pollution, contamination or otherwise cause damage;

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

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

“Cyclic Traffic” means a traffic such as coal traffic whose Train Service Description is defined in **Schedule 1** in terms of a number of Train Services within a particular period of time, for example, a year, month or week;

“Daily Train Plan” or **“DTP”** means that document detailing the scheduled times for all Train services operating on the Infrastructure and any Planned Possessions, Urgent Possessions and Emergency Possessions on a particular day on a specified part of the Infrastructure;

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

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

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

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

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

“Efficient Cost” means the cost for each Year during the Evaluation Period, that reflects the cost that would be reasonably expected to be incurred by a Railway Manager adopting efficient work practices in the provision of the Infrastructure to the required service standard, having regard to any matters particular to the environment in which QR operates, and including any transitional arrangements agreed between QR and the QCA to reflect the transition from QR’s actual cost to that efficient cost;

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

“Enhancement” means the improvement, upgrading or other variation of the whole or any part of the Infrastructure which affects the capabilities of the Infrastructure and any major replacement programme for elements of the Infrastructure;

“Environmental Authorities” means:

- (a) a development approval or registration certificate for a chapter 4 activity or an environmental authority, as those terms are defined under the *Environmental Protection Act 1994* (Qld); or
- (b) any authority which has effect under section 619 of the *Environmental Protection Act 1994* (Qld);

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

“Environmental Investigation and Risk Management Report” means the environmental investigation and risk management report referred to in Clause 8.1(a) and included in Part 1 of **Schedule 9**;

“Environmental Laws” means all planning, environmental, health, toxic, contaminating materials and dangerous goods, waste disposal or pollution laws, environmental protection policies, guidelines, regulations and relevant approved codes of practice and the conditions of all licences, notices, directions, approvals, consents, permissions or permits issued thereunder or amended from time to time;

“Environmental Management System” means a plan of management to address all environmental risks and to ensure compliance with all Environmental Laws and licences;

“Environmental Protection Agency” means the authority established under the Environmental Protection Act 1994;

“Equivalent Access Rights” means access rights which have the same Origin /Destination and have the same format of Train Service Description (that is, such as Cyclic Traffic) as the Access Rights under this Agreement which are being relinquished by the Operator under Clause 3.3;

“Escalation Date” means the date being 1 January, 1 April, 1 July and 1 October in each year during the Term, being the dates on which the Access Charges and other charges payable by the Operator to QR under this Agreement are to be escalated in accordance with **Schedule 3**;

“Evaluation Period” means:

- (i) when in reference to an individual Train service, the period which is equal to the length of the expected duration of the existing or proposed access agreement in respect of the relevant Train service;
- (ii) when in reference to a combination of Train services for the purpose of determining a Reference Tariff to apply for some or all of those Train services, the period for which that Reference Tariff will apply; or
- (iii) when in reference to a combination of Train services other than referred to in subparagraph (ii) of this definition, the period which is equal to the length of the expected duration of the longest existing or proposed access agreement in respect of any of the Train services comprising the combination of Train services, provided that such period does not exceed ten (10) years;

“First Escalation Date” means the Escalation Date identified as the First Escalation Date in Table 1.2 of **Schedule 3** for each Train Service type;

“Forecast Traffic” means the current tonnage forecast upon which an applicable Reference Tariff is based;

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

- (a) is beyond the reasonable control of the affected Party; and
- (b) by the exercise of due diligence the affected Party was not reasonably able to prevent or is not reasonably able to overcome and includes:
 - (i) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the affected Party;
 - (ii) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the Parties are a party to industrial action or would be able to influence or procure the settlement of such industrial action;

- (iii) act of God;
- (iv) war, invasion, terrorist act, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;
- (v) equipment failure or breakdown where such failure or breakdown could not have been prevented by Good Engineering Practices;
- (vi) malicious damage or sabotage;
- (vii) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (viii) failure of electricity supply from the electricity grid;
- (ix) delay, restraint, restriction, embargo or other material adverse effect arising from any act or omission of any Authority;
- (x) fire, flood, earthquake, washaway, landslide, explosion or other catastrophe, epidemic and quarantine restriction; and
- (xi) delay of a supplier due to any of the foregoing whether any such cause of delay exists before, at the time, or after the date of this Agreement;

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

“GST” means a tax in the nature of a supply or goods and services tax levied or imposed by the Commonwealth of Australia;

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

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

Where:

A = the GST inclusive amount paid by a Party for a Reimbursable Item;

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

C = any GST input tax credit that the Party can claim in respect of that Reimbursable Item;

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

“Incremental Costs” means those costs of providing access rights, including capital (renewal and expansion) costs, that would not be incurred (including the cost of bringing expenditure forward in time) if the particular Train service or combination of Train services (as appropriate) did not operate, where those costs are assessed as the Efficient Costs and based on the assets reasonably required for the provision of access rights;

“Individual Coal System” means any one of the following:

- (i) all coal carrying Train services operating to or from the port of Abbot Point on the Infrastructure comprising the rail corridor from the port of Abbot Point to Newlands mine, and all branch lines directly connecting coal mine loading facilities to that corridor;
- (ii) all coal carrying Train services operating to or from the ports of Hay Point or Dalrymple Bay on the Infrastructure comprising the rail corridor from the ports at Hay Point and Dalrymple Bay to Blair Athol mine, North Goonyella mine, Hail Creek mine and Oaky Creek mine and all branch lines directly connecting coal mine loading facilities to those corridors, with the exception of any branch lines south of Oaky Creek;
- (iii) all coal carrying Train services operating to or from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) on the Infrastructure comprising the rail corridor from the port of Gladstone to Gregory mine and Rolleston mine and all branch lines directly connecting coal mine loading facilities to that corridor with the exception of the corridor to Oaky Creek and the corridor to Moura;
- (iv) all coal carrying Train services operating to or from the Stanwell Power Station on the Infrastructure comprising the rail corridor from the Stanwell Power Station to Gregory mine, and all branch lines directly connecting coal mine loading facilities to that corridor with the exception of the corridor to Oaky Creek and the corridor to Moura;
or
- (v) all coal carrying Train services operating to or from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) on the Infrastructure comprising the rail corridor from the port of Gladstone to Moura mine, and all branch lines directly connecting coal mine loading facilities to that corridor with the exception of the corridor to Blackwater;

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

- (i) that Infrastructure comprising the rail corridor from the port of Abbot Point to Newlands mine, and all branch lines directly connecting coal mine loading facilities to that corridor;
- (ii) that Infrastructure comprising the rail corridor from the ports at Hay Point and Dalrymple Bay to Hail Creek mine, Blair Athol mine, North Goonyella mine and the junction with the Gregory mine branch line and all branch lines directly connecting coal mine loading facilities to those corridors, with the exception of any branch lines beyond the junction with the Gregory branch line;
- (iii) that Infrastructure comprising the rail corridor from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Gregory mine and Rolleston mine and all branch lines directly connecting coal mine loading facilities to that corridor with the exception of the corridor to Oaky Creek (and beyond) and the corridor to Moura mine (and beyond); or
- (iv) that Infrastructure comprising the rail corridor from the port of Gladstone (including domestic coal terminals in the vicinity of Gladstone) to Moura mine, and all branch lines directly connecting coal mine loading facilities to that corridor but excluding the corridor to Blackwater (and beyond);

“Infrastructure” means all rail transport infrastructure as defined in the Transport Infrastructure Act:

- (a) for which QR is the Accredited Railway Manager; or

- (b) for which QR is required to obtain ownership of under Clause 2.2 of QR's Access Undertaking (as that provision is amended, varied or replaced from time to time);

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

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

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in section 459F(1) of the Corporations Act;
- (b) a meeting is convened to place it in voluntary liquidation or to appoint an administrator unless the resolution is withdrawn within fourteen (14) days or the resolution fails to pass;
- (c) an application is made to a court for it to be wound up and the application is not dismissed within one Month;
- (d) the appointment of a liquidator, provisional liquidator or controller (as defined in the Corporations Act) of any of its assets if that appointment is not revoked within fourteen (14) days after it is made; or
- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement;

"Interface Coordination Plan" means the plan detailed in **Schedule 10** as updated from time to time which identifies the procedures to be followed and the responsible officers from each Party, in respect of all regular operational interfaces between the Parties that arise in the exercise by the Parties of their respective rights and the performance of their respective obligations under this Agreement other than those specified in the Network Management Principles;

"Interface Risk Assessment" means an assessment of the risks associated with the Operator's operations insofar as they interface with the Infrastructure and other Train services as provided in Clause 11;

"Interface Risk Management Plan" means the plan referred to in Clause 11 and included in Part 2 of **Schedule 9**;

"Interface Risks" means all the risks associated with the hazards (excluding environmental hazards and risks) arising from the interaction between the Operator's operations and:

- (i) the Nominated Network;
- (ii) the operation of other Train services; and
- (iii) any other activities on the Nominated Network that affect QR's Staff or QR's interfaces with members of the public;

"Investigation" means an investigation conducted in accordance with **Schedule 8**;

"Land" means the land on which the Nominated Network is situated and which is:

- (a) land owned or controlled by QR; or

- (b) land in respect of which entry is required to be given by QR under Subparagraph 2.1(c)(ii) of QR's Access Undertaking (as that provision is amended, varied or replaced from time to time);

“**Landowner**” has the meaning given to that term in Clause 22.18;

“**Law**” or “**Laws**” means a statute, ordinance, rule or regulation;

“**Load Variation Table**” means a table published by QR in respect to the relevant Reference Train Service or Train Service type identifying allowable overloads for wagons and bogies and specifying relevant Operational Constraints and additional charges, where applicable, for such overloads;

“**Maintenance Work**” means any work involving repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Infrastructure (other than Enhancements) and includes any inspections or investigations of the Infrastructure;

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

“**Master Train Plan**” or “**MTP**” means that document detailing the scheduled times as advised by QR from time to time for all Train services operating on the Infrastructure (where such scheduled times remain unchanged from week to week) and any Planned Possessions;

“**Material Change**” has the meaning given to that term in Clause 16.1(a);

“**Material Environmental Harm**” means material environmental harm as defined in the Environmental Protection Act 1994;

“**Maximum Allowable Gross Tonnage**” means the Maximum Allowable Gross Tonnage for a Wagon, Wagon bogie or Train as specified in **Schedule 4**;

“**Maximum Desirable Gross Tonnage**” means the Maximum Desirable Gross Tonnage for a Wagon as specified in **Schedule 4**;

“**Maximum Transit Time**” means the maximum below rail transit time for the relevant Train Service type that QR may utilise under this Agreement;

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

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

“**Network Management Principles**” means the principles for the provision of Train Control and scheduling as specified in Part 1 of **Schedule 10**;

“**Noise Planning Levels**” means the planning levels for railways referred to in the Environmental Protection (Noise) Policy 1997;

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

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

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

“Nominated Weekly Train Services” means the number of Train Services that the Operator is entitled to operate during any one (1) week period as specified in **Schedule 1** or as varied in accordance with this Agreement;

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

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

“Operational Constraint” means any restriction on the use of any part of the Infrastructure which impacts adversely on Train Services, including but not limited to speed restrictions, load restrictions, Planned Possessions, Emergency Possessions, Urgent Possessions or signalling or overhead restrictions;

“Operator Performance Level” means the Operator Performance Level specified in Part 1 of **Schedule 5**;

“Operator’s Controller” means the person for the time being nominated in that position pursuant to **Schedule 10** ;

“Operator’s Customer” means a party that has a rail haulage agreement with the Operator in respect of some or all of the Access Rights;

“Operator’s Emergency Response Plan” means the plan as defined in Clause 7.1(a);

“Operator’s Incident Response Coordinator” means the person appointed pursuant to paragraph 4.2 of Part 4 of **Schedule 10**;

“Operator’s Proposal” has the meaning given to that term in Clause 8.1(c);

“Operator’s Recovery Team Leader” means the person appointed pursuant to paragraph 4.3 of Part 4 of **Schedule 10**;

“Operator’s Representative” means the person for the time being appointed pursuant to paragraph 3.2 of Part 3 of **Schedule 10**;

“Operator’s Safety Management System” means the system referred to in Clause 11(a)(iii);

“Operator's Staff” means employees, contractors, volunteers and agents of the Operator and any other person under the control or supervision of the Operator who is involved in any activity associated with the Train Services;

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

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

“Overload Charge” means the charge determined in accordance with Part 6 of **Schedule 3**;

“Overload Detector” means a weighing mechanism other than a Weighbridge agreed upon for use by the Parties and specified in Part 6B of **Schedule 2**;

“Party” means a party to this Agreement and **“Parties”** means the parties to this Agreement;

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

“Performance Levels” means the QR Performance Level and the Operator Performance Level;

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

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

“Possession Protocols” means the protocols developed and advised by QR from time to time (as varied in accordance with this Agreement) for managing and scheduling track possessions of the Infrastructure;

“Private Facilities” means sidings, loading and unloading facilities and any other facilities of any kind which are required by the Operator to operate the Train Services and which do not form part of the Nominated Network;

“Private Facilities Agreement” has the meaning given to that term in Clause 5.11;

“QR Cause” means where QR is unable to make available the Infrastructure for Train services at the Scheduled Time in the Train Schedule or at a reasonable alternate Scheduled Time as a result of

- (i) Planned Possessions, Emergency Possessions or Urgent Possessions;
- (ii) a Force Majeure Event which prevents QR from making the Infrastructure available for Train services in accordance with the relevant access rights; or
- (iii) any other action by QR which directly resulted in the Infrastructure not being so available,

where such inability by QR is not attributable in any way to a Railway Operator or QR complying with its Passenger Priority Obligations;

“QR Commander” means a member of QR’s Staff who has been delegated responsibility for the direction and coordination of QR’s and the Operator’s resources in the performance of their respective roles and tasks at the site of an Incident, recording events during the course of an Incident and liaison with external agencies;

“QR Emergency Procedures” means the procedures developed and advised by QR from time to time (as varied by QR in accordance with this Agreement) for dealing with a Network Incident including all actions to be taken to minimise or alleviate any threat or danger to any person or property;

“QR Performance Level” means the QR Performance Level specified in Part 1 of **Schedule 5**;

“QR Representative” means the QR officer specified in **Schedule 10**;

“QR Train Control Direction” means any instruction or direction (whether given orally or in writing, by means of signal or other similar device) issued by QR or on behalf of QR relating to Train Movements;

“QR Train Controller” means the person nominated by QR as the supervisor of Train Movements on the relevant part of the Nominated Network and whose details are specified in **Schedule 10**;

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

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

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

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

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

“Rail Safety Accreditation Unit” or **“RSAU”** means the Rail Safety Accreditation Unit of the Department of Transport for the State;

“Railway Manager” has the meaning given to that term in the Transport Infrastructure Act;

“Railway Operator” means, as the context allows:

- (a) any party that holds rights of access to all or any part of the Infrastructure; and
- (b) any Accredited railway operator;

and for the avoidance of doubt may include, without limitation, the Operator;

“Recovery” means action to be taken in respect of any derailed, malfunctioning or immobilised Rollingstock for which the Operator is responsible to enable prompt recommencement of Train Movements, including the subsequent retrieval of any such Rollingstock;

“Reduction Factor” means for the purposes of Clause 3.3(d):

A / B

Where:

A = the annual train kilometres over the Common Corridor attributable to the New Railway Operator's Trains that utilise the access rights referred to in Clause 3.3(b) for which the Operator's Relinquishment Fee is to be reduced; and

B = the annual train kilometres over the Nominated Network attributable to the Train Services for which the Operator is seeking to relinquish Access Rights;

"Reference Tariff" means an access charge applicable to a specified Reference Train Service over a specified part of the Infrastructure as specified in QR's Access Undertaking;

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

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

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

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

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

"Relevant Rollingstock" means any Rollingstock of the Operator with a minimum value of ONE MILLION DOLLARS (\$1,000,000) and which has been nominated as Relevant Rollingstock in Part 3 of **Schedule 4**;

"Relevant Tax" means any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on QR by, or payable by QR to, any Authority but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes;

"Relinquishment Fee" means the amount equivalent to the present value of the payment of the take or pay amount that would have been payable for the remainder of the Term of this Agreement if the Agreement remained on foot but the Operator did not operate the relevant Train Services;

"Removal Expert" means the person for the time being holding the position of Safety Regulator or such other person as agreed between the Parties;

"Restoration" means the removal of any Obstruction, the rectification of any Incident and the prompt recommencement of Train Movements including all requisite repairs to the Infrastructure but does not include Recovery;

"Review Date" means the date determined as the Review Date pursuant to Clause 3.1.2 of **Schedule 3**;

"Rollingstock" means locomotives, carriages, Wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicles which operate on or use a Track and where used in respect of the Operator's Rollingstock includes Rollingstock which is

owned, hired or leased by the Operator, supplied by a contractor of the Operator or is otherwise in the possession or control of the Operator;

“Rollingstock Configuration” means the description of the combinations of Rollingstock comprising a Train including identification number and gross mass of individual items of Rollingstock and the order in which those Rollingstock items are placed in the Train;

“Rollingstock Interface Standards” means those Rollingstock Interface Standards agreed as part of the Interface Risk Assessment and included in the Interface Risk Management Plan;

“Safety Regulator” means the person for the time being holding the position of Safety Regulator in the Rail Safety Accreditation Unit (RSAU);

“Safety Related Work” means safety activity in one or more of the following:

- (a) driving and operation of Trains;
- (b) control of the movement of Trains;
- (c) the design, construction, repair, maintenance, upgrading, inspection or testing of Track, Rollingstock, civil and electric traction infrastructure and Signalling and Telecommunications Equipment; and
- (d) any other duties prescribed by QR as safety related work;

“Safety Standards” means all standards relating to safety, including occupational health and safety, established in published guidelines, industry practice or QR policies as specified in **Schedule 6** or varied in accordance with Clause 5.10 of this Agreement and all standards relating to safety, including occupational health and safety, prescribed by any Laws;

“Safeworking Procedures” means the procedures and systems, including supporting communications systems, for the safe operation of Trains and protection of worksites on the Infrastructure as specified in Part 1 of **Schedule 6** or varied in accordance with Clause 5.10 of this Agreement;

“Schedule” means a schedule to this Agreement and any other schedule which amends, replaces or substitutes a schedule to this Agreement issued from time to time by QR pursuant to Clause 22.20;

“Scheduled Time” means the time of arrival or departure for a Train Movement at specified locations on the Nominated Network as detailed in the Train Schedule or as amended or altered by QR from time to time on the day of operation pursuant to the Network Management Principles provided that such amendments or alterations do not result in a notice for cancellation by the Operator pursuant to Clause 5.3(d);

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

“Security Deposit” means initially an amount equal to the amount specified in Item 5 of the Reference Schedule;

“Security Interest Rate” means the “Cash Rate: average 11am rate” as published in the Australian Financial Review (or in the event that such a rate is not so quoted or published at or in respect of

any relevant date, such other similar rate included in another publication agreed between the Parties) less 0.5%;

“Serious Environmental Harm” means serious environmental harm as defined in the Environmental Protection Act 1994;

“Signalling and Telecommunications Equipment” means all electronic, electrical and other equipment, including signalling systems, safety devices and communications facilities installed on or as part of the Infrastructure or on Rollingstock, for the purpose of compliance with Safeworking Procedures and to facilitate Train Control;

“State” means the State of Queensland;

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

“System Forecast” means the forecast of G_{tk} for the relevant Individual Coal System Infrastructure that is specified for the relevant Reference Train Service in the relevant Reference Tariff Schedule;

“System G_{tk}” means the actual G_{tk} achieved by all coal carrying Train services to the extent those Train services travel on the relevant Individual Coal System Infrastructure over the relevant period;

“System Wide Requirements ” means the Network Management Principles, the Possession Protocols, the Interface Coordination Plan, the Rollingstock Interface Standards, the Safeworking Procedures and Safety Standards, the QR Emergency Procedures and QR’s Investigation Procedures;

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

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

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

“Third Party” means a person other than the Operator or QR;

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

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

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

“Track” means the part of the Infrastructure comprising the rail, ballast, sleepers and associated fittings upon which Trains operate;

“Train” means any configuration of Rollingstock operating as a unit on the Track;

“Train Control” means the scheduling and control of all Train Movements and of all other operation of Rollingstock on the Infrastructure and of any activities affecting or potentially affecting such Train Movements or Rollingstock operation;

“Train List” means the information required to be supplied by the Operator in accordance with Part 2 of **Schedule 10** in respect of each individual Train Service to be operated on the Nominated Network;

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

“Train Schedule” means the train diagrams, yard schedules, terminal schedules and any other form of train timetable prepared by QR prior to the day of operation in accordance with the Interface Coordination Plan showing the programmed times of arrival or departure for Train Movements at specified locations on the Infrastructure;

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

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

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

“Transport Infrastructure Act” means the Transport Infrastructure Act 1994;

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

“Variation Notice” has the meaning given to that term in Clause 3.2(a);

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

“Weekly Train Plan” or **“WTP”** means a seven (7) day plan that details the scheduled times for all Train services and Planned Possessions, Urgent Possessions and Emergency Possessions on a specified part of the Infrastructure on each day of the relevant week;

“Weighbridge” means a weighbridge or weightometer certified under the Trade Measurement Act 1990, as specified in Part 6A of **Schedule 2**; and

“Year” (when used with a capital) means the period from (and including) the first day of the Month in which the Commitment Date occurs to (but not including) the first anniversary thereof, and from every twelve (12) Month period thereafter except that the last year will end on the date of expiry or termination of this Agreement.

1.2 Interpretation

In this Agreement, unless expressed to the contrary:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes all other genders;
- (c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) a reference to:
 - (i) a person includes a firm, unincorporated association, corporation or other entity, government or statutory body and conversely;
 - (ii) a person includes its legal personal representative, successors and assigns;
 - (iii) conduct includes any omission and any representation, statement or undertaking, whether or not in writing;
 - (iv) conduct includes a benefit, remedy, discretion, authority or power;
 - (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
 - (vi) the words “include”, “includes” or “including” must be read as if they are followed by the words “without limitation”;
 - (vii) time is to local time in Queensland;
 - (viii) “A\$”, “\$” or “dollars” is a reference to the lawful currency of Australia;
 - (ix) this or any other document or agreement includes the document or agreement as varied, amended or replaced from time to time and notwithstanding any changes in the identity of the Parties;
 - (x) any thing (including any amount) is a reference to the whole or part or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
 - (xi) a Clause is to a clause of the General Conditions of Contract to this Agreement;
 - (xii) a Schedule is to a schedule to this Agreement (as amended from time to time in accordance with this Agreement);
 - (xiii) any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it;
 - (xiv) any Authority, association or body whether statutory or otherwise shall, in the event of any such Authority, association or body ceasing to exist or being re-constituted, re-named or replaced or the powers or functions thereof being transferred to any other Authority, association or body, be deemed to refer respectively to the Authority, association or body established or constituted in lieu thereof or as nearly as may be succeeding to the powers or functions thereof; and

- (e) if there is any inconsistency between matters contained in a Schedule and any other provisions of the Agreement, the other provisions of the Agreement prevail. If there is any inconsistency between matters contained in QR's Access Undertaking and this Agreement, the provisions of this Agreement prevail.

2. CHARGES

2.1 Access Charges

The Operator must pay to QR:

- (a) the Access Charges at the times and in the manner set out in this Agreement;
- (b) the charges for Ancillary Services (if any) calculated and payable in the manner set out in this Agreement;
- (c) any other charges or amounts payable in accordance with this Agreement; and
- (d) on demand and without prejudice to the rights, powers and remedies of QR under this Agreement or otherwise at Law, interest at the Default Rate calculated on daily balances and payable daily on any amount outstanding in respect of an invoice, including any disputed amount which is subsequently determined to be payable to QR, from the day after the invoice is due to be paid until the date that the amount outstanding is paid in full, and all interest payable but unpaid at the end of each Month shall be capitalised by QR and such capitalised amount shall itself bear interest at the Default Rate.

2.2 Invoicing

Unless agreed otherwise between the Parties:

- (a) QR will provide to the Operator an invoice for the Access Charges, charges for Ancillary Services (if any) and any other charges or amounts payable by the Operator under this Agreement as soon as practicable after the end of each Billing Period or, where this Agreement has expired or terminated on a date other than 30 June and the invoice is for annual take or pay charges, as soon as practicable after the first 30 June following that expiration or termination.
- (b) The first Billing Period will commence on the Commitment Date and end on the last day of the Month in which the Commitment Date falls, and each subsequent Billing Period during the Term will commence on the day following the last day of the immediately preceding Billing Period.
- (c) Subject to Clause 2.2(d), the Operator must pay to QR the amount of the invoice referred to in Clause 2.2(a) within fourteen (14) days after receipt of the invoice.
- (d) Where the Operator bona fide disputes an amount or amounts claimed in an invoice it shall give notice of that dispute (setting out in detail the grounds for its objection) to QR within fourteen (14) days after receipt of the invoice. Notwithstanding the Operator's objection to any amounts claimed in an invoice, the Operator must pay to QR the undisputed portion of the amount or amounts claimed in the relevant invoice together with 50% of the disputed portion within fourteen (14) days after receipt of the invoice.

- (e) Any dispute as to the amount claimed in an invoice shall be resolved by an expert in accordance with Clause 17.3. Upon resolution of such dispute in accordance with Clause 17.3:
- (i) the Operator must pay to QR the amount (if any) determined to be payable by the Operator to QR together with the interest on that amount calculated in accordance with Clause 2.1(d) within fourteen (14) days after being notified of the expert's determination; or
 - (ii) QR must credit to the Operator in the form of a deduction from the invoice for Access Charges and other charges for the Billing Period immediately following a resolution in accordance with Clause 17.3 any amount found to have been overpaid by the Operator together with interest on that amount at the Default Rate calculated on daily balances from the date of payment of the amount overpaid to the date of such credit. Such interest payable but unpaid at the end of each Month shall be capitalised and such capitalised amount shall itself bear interest at the Default Rate.
- (f) When providing the Operator with an invoice which includes, in whole or part, an amount for an annual take or pay charge, QR shall provide the Operator with information on how QR determined the amount of the annual take or pay charge.

2.3 GST

- (a) Unless otherwise stated, all amounts payable or other consideration to be provided under this Agreement are exclusive of GST.
- (b) If a Party is required to pay GST on any amount payable or other consideration to be provided under this Agreement, then the other Party must pay to that Party an amount equal to the GST payable on the same date as the payment giving rise to the GST.
- (c) If the supply of a Reimbursable Item under this Agreement is subject to GST, then a Party must pay the other Party in respect of that Reimbursable Item the GST Inclusive Reimbursement.
- (d) Each invoice prepared pursuant to Clause 2.2(a) shall take the form of a Tax Invoice.

2.4 Obligation to Grant Security

- (a) The Security Deposit (if applicable) shall initially be for the amount specified in Item 5 of the Reference Schedule. If a Security Deposit is applicable the Operator must deliver to QR, prior to the operation of Train Services, security for the performance of the Operator's obligations under this Agreement in the form of:
 - (i) an unconditional and irrevocable bank guarantee (or equivalent) issued by a bank holding a current Australian banking licence; or
 - (ii) any other security reasonably acceptable to QR,
 and containing such other terms and conditions as are reasonably acceptable to QR.
- (b) Where the Operator has delivered a Security Deposit to QR in the form of cash, QR will pay interest to the Operator annually at the Security Interest Rate published on the day the Security Deposit is provided. The Security Interest Rate shall be reset on the first business day of each Month ("**Reset Date**") for that Month. Such interest shall

be capitalised at each Reset Date and such capitalised interest shall itself bear interest at the Security Interest Rate.

- (c) The Operator may, with QR's consent, replace any Security Deposit provided by the Operator in accordance with this Clause with another form of Security Deposit acceptable to QR. If the Operator replaces the Security Deposit with another form of Security Deposit then QR will release the initial Security Deposit in accordance with Clause 2.6(b).
- (d) The provision and continuance of the Security Deposit (or of any additional or replacement Security Deposit provided by the Operator in accordance with Clause 2.4(c) or Clause 2.4(f)) is a condition of the performance by QR of its obligations under this Agreement.
- (e) If at any time during the Term QR does not hold a Security Deposit from the Operator, the Operator must provide a Security Deposit within fourteen (14) days after receipt of a notice from QR where:
 - (i) an event of default by the Operator in regard to payment of any amount due under this Agreement has occurred, that event of default is not the subject of a bona fide dispute between the Parties and such default continues for seven (7) days after notice of such default from QR; or
 - (ii) in the event of an Assignment or at any time during the Term, if QR is reasonably of the opinion that the Operator is:
 - (A) no longer financially sound;
 - (B) no longer able to meet its debts as and when they fall due; or
 - (C) not otherwise capable of performing its obligations under this Agreement.
- (f) If at any time during the Term the Security Deposit held by QR is less than the amount determined in accordance with Item 5 of the Reference Schedule (including for reasons that QR has drawn on or applied the Security Deposit in accordance with Clause 2.5), the Operator must increase the Security Deposit by the amount determined by QR as required to ensure that the amount of Security Deposit accords with Item 5 of the Reference Schedule, and deliver to QR an additional or replacement Security Deposit to reflect the change within fourteen (14) days after receipt of notice from QR.
- (g) If the Operator considers its financial circumstances have changed such that a Security Deposit would no longer be required, the Operator may request QR in writing (but not more than once in any twelve (12) Month Period) to review the creditworthiness of the Operator and QR will undertake such a review.

2.5 Exercise of Security

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

2.6 Return of Security

QR must repay or return to the Operator (and where appropriate provide to the Operator any necessary releases in relation to) any Security Deposit provided by the Operator under Clause 2.4:

- (a) subject to QR's rights of recourse to the Security Deposit in Clause 2.5, promptly after the Termination Date;
- (b) on receipt of an additional or replacement Security Deposit provided by the Operator in accordance with Clause 2.4(c) or 2.4(f); or
- (c) following a review pursuant to Clause 2.4(g), QR, acting reasonably, finds that it is not necessary for the Operator to provide QR with a Security Deposit.

2.7 Weighbridges and Overload Detectors

- (a) Where an operational Weighbridge or Overload Detector is located en route between Origin and Destination the Operator must use reasonable endeavours to operate its Trains over such Weighbridge or Overload Detector in a manner to facilitate weighing.
- (b) Where a Weighbridge or Overload Detector is located en route between Origin and Destination, the Party responsible for that Weighbridge or Overload Detector (as specified in Part 6 of **Schedule 2**) must use reasonable endeavours to ensure that:
 - (i) such Weighbridge or Overload Detector is available; and
 - (ii) Trains are operated in a manner that the Weighbridge or Overload Detector weighs the Operator's Trains.
- (c) QR may vary at any time the numbers and locations of Weighbridges and Overload Detectors, subject to providing reasonable notice to the Operator.
- (d) The Operator must use reasonable endeavours to ensure that the mass of any Wagon or Train operated by it under this Agreement does not exceed the relevant Maximum Allowable Gross Tonnage.
- (e) In the event that any Wagon or Train operated by the Operator is determined by a Weighbridge or Overload Detector to be in excess of the relevant Maximum Allowable Gross Tonnage, the Operator must reduce the gross mass to a level below the relevant Maximum Allowable Gross Tonnage. QR may direct a Train to a specific siding or location to allow such reduction and the Operator shall comply with such direction.
- (f) In the event that any Wagon operated by the Operator is determined to be in excess of the relevant Maximum Desirable Gross Tonnage, QR may:
 - (i) charge the Operator (and the Operator must pay) an Overload Charge (in accordance with Part 6 of **Schedule 3**) in respect of that Wagon; and

- (ii) impose any Operational Constraints which QR considers to be reasonable in the circumstances.

QR will include the Overload Charge in the invoice for Access Charges for the Billing Period immediately following such determination for payment by the Operator.

- (g) The Weighbridges to be used by QR in the calculation of Access Charges are those specified in Part 6A of **Schedule 2**.

- (h) Where the Operator's Trains are weighed by an operational Weighbridge or Overload Detector, the Party responsible for the Weighbridge or Overload Detector as specified in Part 6B of **Schedule 2** must use reasonable endeavours to:

- (i) keep a record of the gross mass of each loaded Wagon and Train (and the Operator must use reasonable endeavours to ensure such information is obtained from the operator of the Weighbridge or Overload Detector where the Weighbridge or Overload Detector is not owned or controlled by QR);
- (ii) provide such record to the party loading the Trains; and
- (iii) provide such record to the other Party within fourteen (14) days of the end of each Month.

- (i) If either Party reasonably believes that any Weighbridge or Overload Detector may be inaccurate, that Party may by notice to the other Party require the accuracy of such Weighbridge or Overload Detector to be tested, and the Weighbridge or Overload Detector shall be deemed to have malfunctioned from the date of such notice until such testing has been carried out and/or the Weighbridge or Overload Detector has been recalibrated and the mass will be determined in accordance with Part 2 of **Schedule 3**. Testing will be carried out in accordance with the following procedure:

- (i) As soon as reasonably practicable the Party responsible for the Weighbridge or Overload Detector as specified in Part 6 of **Schedule 2** must ensure that a suitably qualified person conducts a test of the calibration of the Weighbridge or Overload Detector and makes any adjustments required to correct the calibration.
- (ii) Except in the case of manifest error or fraud, the determination of the person conducting the test will be final and binding on the Parties.
- (iii) Where the person conducting the test determines that the Weighbridge or Overload Detector is measuring within the tolerances specified in Part 6 of **Schedule 2**, the Weighbridge or Overload Detector will be treated as having been measuring accurately from the date on which the relevant notice was given pursuant to this Clause 2.7(i) and the Access Charges (including any Overload Charge) will be determined from that date according to Part 5 of **Schedule 3**. The invoice for Access Charges in respect of the Billing Period following such determination will be adjusted to appropriately account for the difference in payment of Access Charges arising from having treated the Weighbridge or Overload Detector as malfunctioning pursuant to this Clause 2.7(i).
- (iv) The cost of conducting such test shall be met by:

- (A) the Party responsible for the Weighbridge or Overload Detector as specified in Part 6 of **Schedule 2** in the event that the Weighbridge or Overload Detector is determined to be not measuring within the tolerances specified in Part 6 of **Schedule 2**; or
 - (B) the Party giving notice under this Clause 2.7(i) in the event that the Weighbridge or Overload Detector is determined to be measuring within the tolerances specified in Part 6 of **Schedule 2**.
- (j) Notwithstanding any other provision in this Agreement, neither Party will be liable to the other for any damage, loss, cost or expense that the other may suffer or incur as a result of that Party, in good faith, acting on the basis of any mass determined in accordance with this Agreement.
- (k) Notwithstanding any other provision in this Agreement, neither Party shall have any Claim against the other Party as a result of or arising from any delay to or cancellation of Train Services as a result of the operation of Clause 2.7(i).

3. TRAIN SERVICE ENTITLEMENTS

3.1 Train Services

- (a) Without limiting any other provision of this Agreement, the Operator must not commence any Train Services unless and until the Operator has done each of the following in respect to those Train Services:
- (i) if applicable, delivered to QR the Security Deposit in accordance with Clause 2.4;
 - (ii) provided to QR a certificate of compliance for all of the Operator's Rollingstock and Rollingstock Configurations in accordance with Clause 5.9 and QR has authorised such Rollingstock and Rollingstock Configurations;
 - (iii) demonstrated to QR that the Operator has entered into agreements in respect of the Private Facilities as required by Clause 5.11 (if applicable);
 - (iv) provided to QR a copy of the Operator's Emergency Response Plan which must be compatible with the QR Emergency Procedures;
 - (v) provided to QR an acceptable Environmental Investigation and Risk Management Report in accordance with Clause 8.1;
 - (vi) implemented those elements of the Environmental Investigation and Risk Management Report, if applicable, which are to be implemented prior to the commencement of Train Services;
 - (vii) complied with the community liaison requirements referred to in Clause 8.6(a);
 - (viii) provided to QR evidence of its Accreditation as required by Clause 9.1(a);
 - (ix) conducted an Interface Risk Assessment in accordance with Clause 11(a);
 - (x) devised in collaboration with QR an Interface Risk Management Plan and implemented the elements of such plan required to be implemented prior to the commencement of Train Services;
 - (xi) developed the Operator's Safety Management System and incorporated into that system the elements and process referred to in Clause 11(a)(iii); and

- (xii) taken out the insurances required under Clause 13 and provided to QR evidence of that insurance as required by Clause 13.3.
- (b) QR will use all reasonable endeavours to cooperate with the Operator to facilitate the Operator's completion or compliance with Clause 3.1(a).
- (c) If the Operator has not done each of the acts, matters or things specified in Clause 3.1(a) for its initial Train Services by
 - (i) the date specified in Item 6 of the Reference Schedule and QR has no reasonable expectation that the Operator can commence the operation of Train Services by the Commitment Date; or
 - (ii) by the Commitment Date

then QR may, provided that QR has complied with Clause 3.1(b), notify the Operator in writing of its intention to terminate this Agreement and if the Operator has not complied with all the requirements of Clause 3.1(a) by a date which is thirty (30) days after the date of the notice, QR may terminate this Agreement.

- (d) The Operator must operate Train Services only in accordance with the Train Service Description and this Agreement. Unless acting under a QR Train Control Direction, the Operator must not operate Train Services which do not comply with the Train Service Description without the prior written approval of QR, which approval may specify terms in addition to or varying the terms of this Agreement in respect of those Train Services, including the Access Charges applicable. The Operator must comply with such terms in operating the Train Services.

3.2 Reduction of Access Rights

- (a) If:
 - (i) during any twelve (12) consecutive weeks during the Term, the Operator fails, for any reason other than due to a Force Majeure Event or the failure of QR to make the Access Rights available, to operate all the Nominated Weekly Train Services for seven (7) or more (not necessarily consecutive) weeks; and
 - (ii) QR is satisfied that it can demonstrate that it has:
 - (A) a reasonable expectation of a sustained alternative demand for that part of the Access Rights that have not been utilised: or
 - (B) a reasonable expectation of a commercial benefit for the provision of and management of the Infrastructure sufficiently material to justify the resumption of that part of the Access Rights that have not been utilised,

then QR may, within sixty (60) days of the last day of the relevant twelve (12) week period, give a notice ("**Variation Notice**") to the Operator proposing that the Operator's entitlement to operate Train Services be reduced from a nominated date (being a date at least twenty-one (21) days after the Operator receives the Variation Notice) ("**Date of Resumption**") to a level specified in the notice which level shall be no less than that which

is equivalent to the Operator's average weekly usage of the Nominated Weekly Train Services during the relevant twelve (12) week period.

- (b) After receipt of a Variation Notice the Operator shall have the opportunity to demonstrate to QR's reasonable satisfaction a sustained requirement for that part of the Access Rights that have not been utilised (or such other nominated number of Train Services).
- (c) If the Operator fails to demonstrate to QR's reasonable satisfaction a sustained requirement for that part of the Access Rights that have not been utilised (or such other nominated number of Train Services), the Operator's entitlement to operate Train Services shall be reduced to the level specified in the Variation Notice with effect on and from the Date of Resumption.
- (d) If the Operator does not agree with the reduction of the Operator's entitlement proposed by QR pursuant to Clause 3.2(a), the Operator may, within twenty one (21) days of receipt of the Variation Notice, notify QR in writing that it disputes the proposed reduction in which case the Operator may refer the dispute for determination by an expert in accordance with Clause 17.3 of this Agreement. The expert will determine whether the conditions for a reduction in Access Rights set out in Clause 3.2(a) have been met and whether the Operator has demonstrated, to QR's reasonable satisfaction, a sustained requirement for that part of the Access Rights to which the reduction would apply. QR must not effect the reduction proposed in the Variation Notice until resolution of the dispute and may only implement a reduction consistent with the expert's determination.
- (e) QR may withdraw the Variation Notice at any time prior to the Date of Resumption or fourteen (14) days following the resolution of the dispute, whichever is the later.
- (f) Where the Operator's Customer or Customers has or have provided concurrent written notification to QR and the Operator that they intend to vary or terminate their rail haulage agreement(s) with the Operator and use another Railway Operator for some or all of their rail haulage services, then QR will, as permitted under and subject to any restrictions specified in QR's Access Undertaking, reduce the Access Rights for the Operator necessary for the Customer or Customers to effect the termination or variation of the relevant rail haulage agreement(s). The provisions of Clause 17 shall not apply to this Clause 3.2(f).
- (g) In the event that the Operator's entitlement to operate Train Services is reduced in accordance with this Clause 3.2, the Agreement (including the Base Access Charges) will be varied accordingly.
- (h) The Operator shall have no claim or entitlement to compensation as a result of any reduction in Train Services pursuant to this Clause 3.2.

3.3 Relinquishment and Transfer of Access Rights

- (a) Where the Operator wishes to relinquish some or all of its Access Rights and no other existing or prospective Railway Operator ("**New Railway Operator**") has agreed to take up New Access Rights pursuant to Clause 3.3(g) or Other Access Rights pursuant to Clause 3.3(h) then provided that:
 - (i) the Operator has given to QR reasonable notice of its intention to relinquish such Access Rights; and
 - (ii) the Operator pays to QR the Relinquishment Fee within:

- (A) two (2) years of the notice provided in accordance with Clause 3.3(a)(i), where the Train Services under this Agreement (including those Train Services in relation to the Access Rights that are to be relinquished) operate in the Central Queensland Coal Region; or
- (B) six (6) Months of the notice provided in accordance with Clause 3.3(a)(i), in any other case,

then from the date of payment of the Relinquishment Fee, the Agreement (including the Base Access Charges) will be amended to reflect the relinquishment of the Access Rights. During the period between when the notice of intention is given and the Relinquishment Fee is paid, the terms of the Agreement will continue to apply in respect of the Access Rights which the Operator intends to relinquish.

- (b) The Relinquishment Fee payable under Clause 3.3(a)(ii) will be reduced in accordance with Clause 3.3(d) where:
 - (i) a Railway Operator has entered into an access agreement with QR in respect of access rights that QR could not have provided without using the whole or part of the relinquished Access Rights;
 - (ii) following the provision of notice pursuant to Clause 3.3(a)(i) but prior to the payment of the Relinquishment Fee pursuant to Clause 3.3(a)(ii), QR's obligation to provide such access rights under the new access agreement has commenced; and
 - (iii) no other Railway Operator is seeking to transfer or relinquish access rights that more closely resemble the access rights sought by the New Railway Operator.
- (c) Where QR is negotiating an access agreement with a New Railway Operator that, if executed, would reasonably be expected to result in a reduction to the Operator's Relinquishment Fee pursuant to Clause 3.3(b), QR will not unreasonably delay the process for negotiating and executing an access agreement with that New Railway Operator.
- (d) Where Clause 3.3(b) applies and subject to Clause 3.3(f), the Relinquishment Fee will be reduced by subtracting from it the product of the Relinquishment Fee and the Reduction Factor. To the extent that the New Railway Operator's average contribution to Common Costs per train kilometre for its relevant Train services is less than the Operator's average contribution to Common Costs per train kilometre for its relevant Train Services, the Reduction Factor will be decreased in proportion to the relative contribution.
- (e) Where the Train Services under this Agreement (including those Train Services in relation to the Access Rights that are to be relinquished) operate in the Central Queensland Coal Region, the amount payable by the Operator to QR under Clause 3.3(a) will not exceed 50% of the Relinquishment Fee (as determined prior to any reduction under Clause 3.3(d)).
- (f) In no circumstances will the Relinquishment Fee be reduced to less than zero (0).
- (g) Where the Operator wishes to relinquish some or all of its Access Rights and a New Railway Operator has agreed to take up access rights which are Equivalent Access Rights ("**New Access Rights**") then provided that:

- (i) the Operator has given QR reasonable notice of its intention to relinquish such Access Rights to enable the New Railway Operator to take up the New Access Rights;
- (ii) QR has, following the receipt of notice pursuant to Clause 3.3(g)(i), entered into an access agreement with that New Railway Operator for the New Access Rights and QR's obligation to provide such New Access Rights has commenced at the same time as this Agreement is varied or terminated (whichever is applicable); and
- (iii) the Operator pays to QR, where applicable, within fourteen (14) days of receipt of an invoice from QR, a transfer fee, determined by QR as equivalent to the present value, considered over the remaining Term, of any future expected reductions in contributions to QR's Common Costs in providing the Infrastructure (including the return earned on Infrastructure assets) due to the net effect of the relevant relinquishment of the Operator's Access Rights and the take up of the New Access Rights on the assumption that the Operator would have fully utilised the Access Rights for the remaining Term and provided that in no circumstances will the transfer fee be less than zero (0),

then from the date of payment of the transfer fee the Agreement (including the Base Access Charges) will be amended to reflect the relinquishment of such Access Rights.

- (h) Where the Operator wishes to relinquish some or all of its Access Rights and a New Railway Operator has agreed to take up access rights with a different origin/destination but with the same format of Train service description as the Access Rights (that is, a Cyclic Traffic) ("**Other Access Rights**") then provided that:
 - (i) the Operator has given QR reasonable notice of its intention to relinquish such Access Rights to enable the New Railway Operator to take up the Other Access Rights;
 - (ii) QR has, following the receipt of notice pursuant to Clause 3.3(h)(i), entered into an access agreement with that New Railway Operator for the Other Access Rights and QR's obligation to provide such Other Access Rights has commenced at the same time as this Agreement is varied or terminated (whichever is applicable);
 - (iii) the Operator has paid to QR, where applicable, a transfer fee equivalent to the Relinquishment Fee that would have been payable for relinquishment of the Access Rights provided that:
 - (A) where (and only where) the Other Access Rights are for the transportation of specified net tonnes of coal between a specified origin and destination that have not been included in the Forecast Traffic; or
 - (B) where the Other Access Rights are for Train services other than coal carrying Train services operating in the Central Queensland Coal Region,

the transfer fee will be reduced in accordance with Clause 3.3(d); and
 - (iv) no other Railway Operator is seeking to transfer access rights that more closely resemble the access rights sought by the New Railway Operator

then from the date of payment of the transfer fee the Agreement (including the Base Access Charges) will be amended to reflect the relinquishment of the Access Rights.

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

3.4 Forecasts

- (a) For the purposes of permitting QR to plan for the maintenance and upgrading of the Infrastructure the Operator will within thirty (30) days after being requested to do so by QR (such requests to be made not more than once in any six (6) Month period), provide to QR a forecast in writing representing the Operator's best estimate for the next six (6) year period specified by QR in its request of:
 - (i) the number and frequency of Train Services it will require;
 - (ii) the gross tonnage it will transport;
 - (iii) the average number of gross tonnes per Train it will transport; and
 - (iv) any changes in Rollingstock or Rollingstock Configuration which will vary any of the above,

such forecast of the above information to be made up of:

 - (i) a forecast for each Month of the first year of such period; and
 - (ii) a forecast for each of the remaining five (5) years of such period.
- (b) QR will, within thirty (30) days after being requested to do so by the Operator (such requests to be made not more than once in any six (6) Month period), provide to the Operator forecasts of planned major Enhancements relating to the Nominated Network for each of the next six (6) years.
- (c) The information and/or forecasts provided pursuant to Clauses 3.4(a) or (b) shall be prepared and supplied in good faith however the information and/or forecasts shall not be a representation or warranty as to the accuracy of the information and/or forecasts itself and the parties have no liability in any respect for the information and/or forecasting.

4. DAY TO DAY TRAIN MOVEMENTS

4.1 Train Control

QR will provide and will have exclusive responsibility for Train Control in respect of the Nominated Network.

4.2 Train Control Rights and Obligations

- (a) QR must exercise Train Control by the issue of QR Train Control Directions to the Operator and the Operator's Staff consistent with the Network Management Principles.
- (b) In exercising Train Control QR shall have regard to the safe conduct of rail operations on the Infrastructure and:

- (i) may delay, alter or add a Train Service;
 - (ii) may cancel, re-route or re-schedule a Train Service;
 - (iii) may alter the Scheduled Times for Train Services in the Train Schedule; and
 - (iv) may impose any Operational Constraint on the Nominated Network consistent with Clause 6.2.
- (c) The Operator must:
- (i) comply with QR Train Control Directions;
 - (ii) ensure the Operator's Staff comply with QR Train Control Directions;
 - (iii) ensure that Train drivers are contactable by the QR Train Controller to receive QR Train Control Directions;
 - (iv) notify the QR Train Controller as soon as the Operator becomes aware that it is not possible for the Operator or the Operator's Staff to comply with a QR Train Control Direction or the Operator or the Operator's Staff have not complied with a QR Train Control Direction; and
 - (v) notify the QR Train Controller as soon as the Operator becomes aware of any changes or delays in Train Services or any circumstances which have affected or may affect Train Control including the ability of any Train Service to conform to its Scheduled Times.

4.3 Train Control Communications

The Operator must ensure all Trains are equipped with or have available means of communication to permit the Operator's Staff to comply with this Agreement (including the Rollingstock Interface Standards and the relevant Safeworking Procedures).

5. TRAIN OPERATIONS

5.1 Compliance

- (a) To the extent relevant to the performance of its obligations under this Agreement the Operator must observe and comply with :
 - (i) all applicable Laws;
 - (ii) the conditions of its Accreditation;
 - (iii) the lawful requirements of relevant Authorities;
 - (iv) the Rollingstock and Rollingstock Configurations authorised in accordance with Clause 5.9;
 - (v) the Train Service Description (subject to the Network Management Principles);

- (vi) the description of the relevant Reference Train Service except as otherwise specified in this Agreement;
 - (vii) QR Train Control Directions;
 - (viii) the Safeworking Procedures and Safety Standards;
 - (ix) the Network Management Principles;
 - (x) the Interface Coordination Plan;
 - (xi) to the extent applicable, the QR Emergency Procedures;
 - (xii) the Operator's Emergency Response Plan;
 - (xiii) the Environmental Investigation and Risk Management Report;
 - (xiv) subject to the provision of reasonable notice specifying relevant requirements, the relevant requirements of the Environmental Authorities held by QR from time to time and the permits, approvals and licences in respect of facilities to which access is provided by QR to the Operator;
 - (xv) the Interface Risk Management Plan (including the Rollingstock Interface Standards);
 - (xvi) subject to the provision of reasonable notice specifying relevant licences and permits and their applicability to the Operator, to the extent applicable to the Operator, all licences and permits affecting the operations of QR; and
 - (xvii) to the extent applicable to the Operator, the terms of QR's Access Undertaking (including the ring fencing obligations) in effect from time to time.
- (b) To the extent relevant to the performance of its obligations under this Agreement QR must observe and comply with:
- (i) all applicable Laws;
 - (ii) the conditions of its Accreditation;
 - (iii) the lawful requirements of relevant Authorities;
 - (iv) to the extent applicable, QR Train Control Directions;
 - (v) the Safeworking Procedures and Safety Standards;
 - (vi) to the extent applicable, the Train Service Description (subject to the Network Management Principles);
 - (vii) the Network Management Principles;
 - (viii) the Interface Coordination Plan;
 - (ix) QR's Emergency Procedures;
 - (x) the Interface Risk Management Plan;

- (xi) all licences and permits affecting the operations of QR; and
 - (xii) the terms of QR's Access Undertaking (including the ring fencing obligations) in effect from time to time.
- (c) QR must ensure that as far as practicable:
- (i) the Network Management Principles;
 - (ii) the Safeworking Procedures and Safety Standards; and
 - (iii) QR's Emergency Procedures
- will be applied consistently for all Railway Operators on the Nominated Network.

5.2 Compliance with Scheduled Time

- (a) The Parties must use reasonable endeavours to:
- (i) operate Train Services in accordance with the relevant Daily Train Plan unless otherwise permitted by the Network Management Principles, varied in the circumstances specified in this Agreement or otherwise agreed between the Parties (such agreement not to be unreasonably withheld); and
 - (ii) otherwise comply with all other Scheduled Times.
- (b) A Train Service shall be deemed to operate in accordance with its Scheduled Time if it does not vary more than three (3) minutes from the Scheduled Time.

5.3 Alterations to Train Services

- (a) If the Operator does not propose to operate a Train Service the Operator must, prior to the scheduled operation of the Train Service, advise QR of the cancellation of such Train Service and the reason for such cancellation.
- (b) In the event that a Train Service is unable to operate in accordance with its Scheduled Time then, provided that the Operator has complied with Clause 5.2(a), QR will use its reasonable endeavours to provide an alternative Scheduled Time for the relevant Train Service provided that QR will be under no obligation to alter the scheduled times for other Train Movements.
- (c) In the event that for any reason the Operator does not operate a Train Service at its Scheduled Time in the Train Schedule or at any other Scheduled Time advised by QR in accordance with Clause 5.3(b), QR may authorise the operation of another Train Movement at that Scheduled Time.
- (d) In the event that a Train Service is for any reason unable to commence to operate in accordance with its Scheduled Time and following bona fide consultation between the Parties it is not possible for QR to provide an alternative Scheduled Time reasonably acceptable to both Parties, such Train Service may be cancelled by either Party giving notice to the other Party as soon as practicable.

5.4 Notification

- (a) QR must notify the Operator's Controller (such notification to include where relevant the anticipated effect on the relevant Train Service) as soon as reasonably practicable after QR discovers or becomes aware of any circumstances including Obstructions (other than those circumstances of which the Operator is aware or ought to have been aware) which:
 - (i) have materially affected, or could potentially materially affect, the ability of any Train Service to comply with its Scheduled Time; or
 - (ii) have affected, or could potentially affect, the security or safety of a Train Service or the Operator's Staff.
- (b) QR must at the earliest possible time after becoming aware of the relevant changes advise the Operator's Controller from time to time of changes to advices previously provided pursuant to Clause 5.4(a).
- (c) The Operator must inform QR of any failure to comply with:
 - (i) any applicable Laws relevant to the Operator's Train Services;
 - (ii) QR Train Control Directions; and
 - (iii) the Rollingstock and Rollingstock Configurations authorised in **Schedule 4**.

5.5 Operator to Supply Information

The Operator must provide to QR and at all times maintain operable all necessary software, hardware and associated communication links to establish, to QR's reasonable satisfaction, an interface with QR's information systems and must provide information to QR in relation to each Train Service prior to operation on the Nominated Network in accordance with paragraph 2.1 of Part 2 of **Schedule 10**. The interface with QR's information systems will be subject to any controls specified by QR to protect the integrity and confidentiality of the systems and the information contained therein.

5.6 Performance Levels

- (a) The Performance Levels which apply to the performance by the respective Parties of their obligations under this Agreement are set out in Part 1 of **Schedule 5**. A failure by either Party to achieve the relevant Performance Level will not constitute a breach of this Agreement and the only consequences of such failure as between the Parties shall be the consequences set out in this Clause 5.6.
- (b) If the Operator does not comply with the Operator Performance Level then the Operator must pay to QR the amount determined in accordance with **Schedule 5** as part of the invoice issued by QR for Access Charges and other charges for the Billing Period immediately following QR becoming entitled to that amount.
- (c) If QR does not comply with the QR Performance Level then QR will credit to the Operator the amount determined in accordance with **Schedule 5** by way of a deduction from the invoice issued by QR for Access Charges and other charges for the Billing Period immediately following the Operator becoming entitled to that amount.
- (d) The Parties must, if requested by either Party, meet to review the Performance Levels subject to such review not occurring within six (6) Months of the Commitment Date or any previous review of the Performance Levels. If either Party notifies the other that it considers that the Performance Levels are no longer appropriate, the Parties

may agree on varied Performance Levels and any associated variations to the Agreement including the Base Access Charges and the Train Service Description. If the Parties are unable to agree to such variations then the existing Performance Levels shall continue to apply unless varied by QR in accordance with the provisions of Clause 5.6(e).

- (e) In the event that the Operator
 - (i) does not comply in any material respect with the Train Service Description; and
 - (ii) the Operator fails to demonstrate to the reasonable satisfaction of QR when requested to do so, that the Operator will consistently comply with the Train Service Description for the remainder of the Term

then, following consultation with the Operator, QR will be entitled to:

- (iii) vary the Train Service Description to a level it reasonably expects to be achievable by the Operator for the remainder of the Term having regard to the extent of previous compliance with the Train Service Description (ignoring, for the purpose of assessing previous compliance, any non-compliance to the extent that the non-compliance was attributable to another Railway Operator or to QR); and
- (iv) vary the Agreement (including, without limitation, the Operator Performance Level and the Base Access Charges) to reflect the impact of the change in the Train Service Description.
- (f) The Operator shall be entitled to dispute any variation proposed by QR pursuant to Clause 5.6(e) and such dispute will be referred to an expert for resolution in accordance with Clause 17.3.

5.7 Interface Coordination Plan

- (a) QR and the Operator agree to comply with the Interface Coordination Plan in exercising their rights and performing their obligations under this Agreement.
- (b) QR will provide the Operator with that information identified in paragraph 3(f) of Part 1 of **Schedule 10** relevant to the Operator's operation of Train Services.

5.8 Operation of Trains and Rollingstock

The Operator is responsible for the safe operation of its Rollingstock on the Nominated Network and must ensure that at all times whilst operating on the Nominated Network:

- (a) its Rollingstock and Rollingstock Configurations comply with the Interface Risk Management Plan (including the Rollingstock Interface Standards);
- (b) it operates only authorised Rollingstock and Rollingstock Configurations as specified in **Schedule 4**; and
- (c) all loading and unloading of its Rollingstock is undertaken in a manner that:
 - (i) is consistent with the requirements of **Schedule 4** and the Rollingstock Interface Standards;

- (ii) does not affect the safe operation of the Rollingstock; and
- (iii) ensures that all items on or in the Operator's Rollingstock remain secured in position during transit.

5.9 Authorisation of Rollingstock & Rollingstock Configurations

- (a) Prior to the operation of any Train Services the Operator must:
 - (i) implement the control measures devised in the Interface Risk Management Plan relevant to assessing the compatibility of the Operator's Rollingstock and Rollingstock Configurations with the Nominated Network; and
 - (ii) without limiting Clause 5.9(a)(i), provide to QR a certificate by a suitably qualified person whom both QR and the Operator accept as being competent to provide such certification as to the compliance of the Operator's Rollingstock and Rollingstock Configurations with the Interface Risk Management Plan (including the Rollingstock Interface Standards) and the Rollingstock and Rollingstock Configurations the subject of that certificate shall then, subject to QR's reasonable satisfaction with the certificate provided, be authorised by QR and included in **Schedule 4** as the authorised Rollingstock and Rollingstock Configurations.
- (b) If requested to do so by QR, the Operator must provide to QR (or procure the certifying party to provide to QR) relevant documentation (including reports on trials and/or commissioning tests) demonstrating that the Rollingstock and Rollingstock Configurations comply with the Interface Risk Management Plan (including the Rollingstock Interface Standards).
- (c) Where QR is not satisfied, on the basis of documentation provided by the Operator or the certifying party in accordance with Clauses 5.9(a) and (b), that the Rollingstock and/or Rollingstock Configurations comply with the terms of the Interface Risk Management Plan, either Party may refer the adequacy of the documentation and whether the Rollingstock and/or Rollingstock Configurations comply with the terms of the Interface Risk Management Plan for resolution by an expert in accordance with Clause 17.3.
- (d) In the event that during the Term the Operator wishes to:
 - (i) modify any of the Operator's authorised Rollingstock or Rollingstock Configurations; or
 - (ii) have additional Rollingstock or Rollingstock Configurations authorised for use on the Nominated Network,

then prior to using any such modified or additional Rollingstock or Rollingstock Configurations on the Nominated Network:

- (i) the Operator must notify QR (giving details of the relevant modification or additional Rollingstock or Rollingstock Configurations);
- (ii) if QR considers it reasonably necessary to do so, the Operator must conduct a supplementary Interface Risk Assessment jointly with QR in accordance with Clause 11 (and the provisions of that Clause shall apply if there is any

dispute between the Parties in relation to the conduct of the supplementary Interface Risk Assessment);

- (iii) the Operator must provide to QR a certificate of compliance in respect of the modified or additional Rollingstock or Rollingstock Configurations in accordance with Clauses 5.9(a) to (c);
- (iv) the Interface Risk Management Plan shall be amended to reflect any changes agreed or determined in accordance with this Clause 5.9(d) and the Parties shall make any other amendments to this Agreement (including QR varying the Base Access Charges) which may be reasonably necessary to reflect the authorisation and use of the modified or additional Rollingstock or Rollingstock Configurations on the Nominated Network; and
- (v) QR must advise the Operator of any variations to the Base Access Charges payable by the Operator as a result of the authorisation of such modified or additional Rollingstock or Rollingstock Configurations. If the Operator disputes the variations to the Base Access Charges advised by QR in accordance with this Clause, either Party may refer the dispute to the QCA for determination in accordance with Clause 17.6.

5.10 Amendments to System Wide Requirements

- (a) QR may, acting reasonably, amend a System Wide Requirement by the issue of a notice (“**Amendment Notice**”):
 - (i) on safety grounds, at any time without the consent of the Operator subject to providing reasonable notice of the proposed amendment and consulting with the Operator prior to its implementation;
 - (ii) if required pursuant to a Material Change; and
 - (iii) in any other circumstance, subject to negotiating the Operator’s agreement to such proposed amendment prior to its implementation in accordance with this Clause 5.10 (the Operator’s agreement not to be unreasonably withheld or delayed).
- (b) The Amendment Notice issued by QR pursuant to Clause 5.10(a) must include details of the proposed amendments to the extent reasonably necessary so as to properly inform the Operator of the terms of the proposed amendments and to enable the Operator to assess the consequences and impact for the Operator of the proposed amendments and details of the proposed implementation date.
- (c) In respect of any amendment proposed pursuant to Clause 5.10(a)(iii), the Operator shall provide advice to QR as to whether:
 - (i) the proposed amendments will materially impact on the Operator’s operations to such an extent as to fundamentally frustrate the Operator’s operation of Train Services under this Agreement over a sustained period of time notwithstanding the Operator’s entitlement to reach agreement with QR in terms of the funding of any material financial impact pursuant to Clause 5.10(e)(ii); or
 - (ii) the Operator will suffer a net material financial impact (that is, a net cost equivalent to 1% or greater of the annual Access Charges directly as a result of the proposed amendments).

- (d) Where the Operator has provided advice to QR pursuant to Clause 5.10(c)(i) and has satisfied QR, acting reasonably, within thirty (30) days of receipt by QR of that advice, that the Operator's operation of Train Services under this Agreement will be fundamentally frustrated over a sustained period of time directly as a result of the proposed amendments notwithstanding the Operator's entitlement to reach agreement with QR in terms of the funding of any net material financial impact pursuant to Clause 5.10(e)(ii), QR will not implement the proposed amendments. In the event that the Operator is unable to so satisfy QR, QR may implement the proposed amendments at any time except that:
- (i) in the event that the circumstances outlined in Clause 5.10(c)(ii) exist, such implementation shall be subject to Clause 5.10(e); or
 - (ii) in the event that the Operator disputes QR's finding, either Party may refer the dispute for determination by an expert in accordance with Clause 17.3 and QR will not implement the proposed amendments pending the determination of the expert.
- (e) Where the Operator has provided advice to QR pursuant to Clause 5.10(c)(ii) that the relevant circumstances exist then:
- (i) within thirty (30) days of providing such advice the Operator shall provide to QR further advice of such net material financial impact including estimates of any additional costs, savings, benefits or detriments to be obtained or suffered or reasonably expected to be obtained or suffered, by the Operator directly as a result of implementing the proposed amendments and the Operator shall warrant that any estimates given by it are accurate on the basis of the information reasonably available to it and sufficiently detailed to enable QR to reasonably assess such net material financial impact; and
 - (ii) the Parties will negotiate in good faith to agree appropriate financial arrangements between them with respect to such net material financial impact and, failing agreement within a further thirty (30) day period, either Party may refer the matter of appropriate financial arrangements to an expert for determination in accordance with Clause 17.3 and QR will not implement the proposed amendments pending the expert's determination.
- (f) In making his determination the expert must have regard to, except in circumstances where consequences are otherwise provided under this Agreement, the costs and benefits accruing to the Operator but excluding any costs associated with other entitlements of QR under this Agreement.
- (g) The Operator shall use all reasonable endeavours to minimise the net material financial impact suffered by it due to the proposed amendments.
- (h) Notwithstanding Clause 5.10(e), where any System Wide Requirement is varied on safety grounds, each Party will fund its own costs of implementing the proposed amendments including the equipping of Rollingstock with new or additional equipment such as Signalling and Telecommunications Equipment or making any other modification to Rollingstock.
- (i) At any time following a determination pursuant to Clause 5.10(e), QR may elect not to proceed with the proposed amendments.
- (j) The Parties must account to each other in respect of the contributions agreed or determined pursuant to Clause 5.10(e)(ii) following completion of the implementation

of the proposed amendments and subsequent modifications to the Operator's systems, equipment or Rollingstock as required by the amendments.

- (k) Where QR implements the proposed amendments in accordance with this Clause 5.10, the relevant System Wide Requirement will be altered accordingly following completion of the implementation of the proposed amendments. The Parties must undertake all necessary action and make all necessary amendments to the Interface Risk Management Plan, the Environmental Investigation and Risk Management Report and/or the Operator's Emergency Response Plan in response to the relevant amendments including providing QR with a further certificate of compliance where the Operator's Rollingstock or Rollingstock Configurations require modification as a result of a change to a System Wide Requirement. QR will allow a reasonable period for the Operator to amend its procedures and plans to comply with any such amended System Wide Requirement, except in the case of emergency circumstances for safety reasons where QR may require immediate compliance.
- (l) In the event that QR undertakes an Enhancement, QR will only be required to vary the Rollingstock Interface Standards to reflect the impact of the Enhancement where the Parties have agreed as to the level and method of contribution to the funding of the Enhancement by the Operator.

5.11 Private Facilities

Prior to the commencement of any Train Services, the Operator must demonstrate to the reasonable satisfaction of QR that the Operator has entered into agreements with the owners or operators of the Private Facilities to enable the Operator to operate Train Services in the manner contemplated in this Agreement ("**Private Facilities Agreements**"). The Operator must use reasonable endeavours to maintain the Private Facilities Agreements in full force and effect for the period the Private Facilities are required for the operation of Train Services.

6. INFRASTRUCTURE MANAGEMENT

6.1 Management and Control of the Nominated Network

QR is responsible for the management of the Nominated Network and shall retain control over all activities on the Nominated Network.

6.2 Maintenance of the Nominated Network

- (a) QR must carry out Maintenance Work on the Nominated Network such that, subject to any agreed criteria and the Network Management Principles:
 - (i) the Infrastructure is consistent with the Rollingstock Interface Standards; and
 - (ii) the Operator can operate Train Services in accordance with its Scheduled Times.
- (b) QR may impose either temporarily or permanently such Operational Constraints as it considers necessary for the protection of any person or any property (including the Infrastructure) or to facilitate the performance of Maintenance Work or Enhancements provided that in exercising its rights under this Clause 6.2(b) QR must:
 - (i) use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing

alternate Scheduled Times having regard to the reasonable requirements of the Operator); and

- (ii) comply with the relevant procedures specified in the Interface Coordination Plan.
- (c) Except to the extent that an Operational Constraint resulted from a breach by QR of this Agreement, any delays or cancellations of Train Services caused by or resulting from Operational Constraints shall not constitute a default by QR of its obligations under this Agreement and QR will not be liable for any Claims suffered or incurred by or made or brought by or against the Operator as a result of or arising from the imposition of such an Operational Constraint.
- (d) The Operator must notify QR as soon as is reasonably practicable of any damage to or disrepair or failure in operation or function of any part of the Infrastructure of which the Operator becomes aware.
- (e) The Operator must provide reasonable cooperation to QR in relation to the timetabling of Planned Possessions provided that any such Planned Possessions are consistent with the Network Management Principles and implemented in accordance with the Possession Protocols.

6.3 Inspection by Operator

- (a) Subject to Clause 6.3(b), the Operator may, prior to the initial commencement of Train Services, at its cost and risk, inspect the Infrastructure and circumstances surrounding the Infrastructure comprising the Nominated Network including, but not limited to, fencing and level crossing protection in order to satisfy itself as to the standard of the Infrastructure and assess the operational, environmental and safety risks associated with operation of Train Services on the Infrastructure.
- (b) Any inspection by the Operator under Clause 6.3(a) shall be subject to
 - (i) the Operator providing reasonable written notice to QR of its requirement to inspect the Infrastructure and conducting that inspection at reasonable times;
 - (ii) any such inspection being conducted in the presence of a representative of QR; and
 - (iii) such other reasonable conditions as may be imposed by QR on such inspection including, but not limited to, compliance with QR's Safeworking Procedures and Safety Standards;

and shall be conducted in such a manner as to not cause any disruption to any Train Movements or to the undertaking of Maintenance Work or Enhancements.

7. INCIDENT MANAGEMENT

7.1 Operator's Emergency Response Plan

- (a) Prior to the commencement of any Train Services (including any new or varied Train Services) the Operator must develop and submit to QR a plan (the "**Operator's Emergency Response Plan**") which:

- (i) contains the set of procedures developed by the Operator which are adequate for dealing with an Incident including all actions to be taken to minimise or alleviate any threat or danger to any person or property;
 - (ii) without limiting Clause 7.1(a)(i) includes the matters outlined in Part 3 of **Schedule 6** relevant to the Operator's use of the Nominated Network; and
 - (iii) must at all times during the Term be compatible with the QR Emergency Procedures and this Agreement.
- (b) If QR is not reasonably satisfied that the Operator's Emergency Response Plan complies with Clause 7.1(a), QR must notify the Operator and if the Parties cannot agree on a mutually acceptable course of action to address QR's concerns within fourteen (14) days after the date of QR's notice, either Party may refer the matter to an expert in accordance with Clause 17.3. The expert will be required to determine whether or not the Operator's Emergency Response Plan:
- (i) is compatible with the QR Emergency Procedures and this Agreement; and
 - (ii) otherwise complies with Clause 7.1(a).
- If the expert determines that the Operator's Emergency Response Plan:
- (i) is not compatible with the QR Emergency Procedures and this Agreement, he must determine how the non-compliance should be rectified and the Operator must rectify the Operator's Emergency Response Plan accordingly; or
 - (ii) is compatible with the QR Emergency Procedures and this Agreement, the Operator's Emergency Response Plan must be treated as complying with Clause 7.1(a).
- (c) The Operator must ensure that any amendments to the Operator's Emergency Response Plan comply with the requirements contained in Clause 7.1(a).
- (d) If the Operator intends to amend the Operator's Emergency Response Plan it must notify QR of that fact, providing QR with details of the proposed amendments and the reasons for them. Within ten (10) days after receipt of that notice QR must notify the Operator if QR disputes any such proposed amendments, in which case any such dispute shall be resolved in accordance with the procedures set out in Clause 7.1(b).
- (e) No amendment to the Operator's Emergency Response Plan to the extent that it relates to the Operator's operations on the Nominated Network will be effective until it has been made in a manner permitted by this Clause 7.1.
- (f) The Operator must be able to demonstrate to QR that procedures are in place which ensure compliance by the Operator with any reporting requirements in the Operator's Emergency Response Plan and, to the extent relevant, the QR Emergency Procedures and that they are being observed.
- (g) The Operator must ensure that at all times sufficient members of the Operator's Staff are appropriately qualified to participate in Investigations and that the names and positions of those members of the Operator's Staff are maintained in the Operator's Emergency Response Plan.

7.2 Obstructions

The Operator must not cause any Obstruction or permit to continue any Obstruction caused by the Operator.

7.3 Notification

- (a) The Operator must notify the QR Train Controller as soon as reasonably practicable after the Operator or the Operator's Staff discover or become aware of:
 - (i) any Obstruction (including all Incidents) or any breach or suspected breach of Safeworking Procedures; or
 - (ii) anything which the Operator observes may cause or contribute to the occurrence of an Incident or Obstruction.
- (b) QR must notify the Operator of all Incidents involving the Operator's Rollingstock.

7.4 Management of Incident Response

- (a) QR will be responsible for the overall coordination and management of the response to an Incident (including notifying all relevant emergency services) so that Restoration and Recovery are effected as soon as practicable.
- (b) The Operator must arrange Recovery and must cooperate with and assist QR in Restoration. The Operator will be responsible for effecting timely Recovery in accordance with the Operator's Emergency Response Plan. Where QR reasonably believes that more timely recommencement of Train Movements can be achieved by QR, then QR may, subject to using reasonable efforts to consult with the Operator, take such action as is reasonably necessary (including the use of a Railway Operator's Rollingstock to clear the Operator's Rollingstock) and recover such reasonable direct costs incurred by QR in doing so. The Operator must pay to QR such reasonable direct costs incurred by QR.
- (c) If an Incident occurs the Operator will as soon as reasonably practicable notify QR and:
 - (i) take action as soon as reasonably practicable in respect of an Incident to prevent or minimise the occurrence of injury to any person or damage to any property (including environmental damage) where there is an imminent risk of such injury or damage but otherwise take no action without the prior approval of QR, which approval shall not be unreasonably withheld; and
 - (ii) comply with the directions of QR in respect of the coordination and management of Restoration and Recovery.
- (d) (i) Both Parties must use all reasonable endeavours to ensure that any property damage or delays to the recommencement of Train Movements arising from Restoration or Recovery are minimised provided that QR, subject to QR using reasonable efforts to consult with the Operator, will have the right to take such action (including to give directions to the Operator and the Operator's Staff and to remove or require the Operator to remove any of its Rollingstock) as it considers reasonably necessary to recommence Train Movements as soon as practicable and, subject to Clause 7.4(d)(ii) and (iv), QR shall have no liability for any damage to or loss of freight or Rollingstock caused by such actions.

- (ii) Where pursuant to Clause 7.4(d)(i) QR seeks to remove or require the Operator to remove any Relevant Rollingstock where QR considers such removal reasonably necessary to recommence Train Movements as soon as practicable and such removal would reasonably be expected to cause material damage to or materially increase the damage to the Relevant Rollingstock, QR and the Operator must:
 - (A) use all reasonable efforts to consult and agree on the removal of the Relevant Rollingstock as soon as reasonably practicable and at least within a period of six (6) hours after the occurrence of the Incident or such longer period as the Parties may agree; and
 - (B) if the Parties do not consult or reach agreement within a period of six (6) hours or such longer period as agreed, they will refer the decision to the chief executive officers of each Party or their nominated delegate as specified in **Schedule 10** who must in good faith seek to agree a course of action within two (2) hours of the referral to them or such longer period as the Parties may agree.
- (iii) Where the chief executive officers of each Party or their nominated delegates, do not consult or do not agree within the specified period in Clause 7.4(d)(ii)(B), QR must refer its proposed course of action with respect to the removal of the Relevant Rollingstock to the Removal Expert who shall assess whether, having regard to:
 - (A) the potential to further damage the Relevant Rollingstock;
 - (B) the impact on QR's ability to effect Restoration; and
 - (C) the time critical nature of the decision,
 the course of action proposed by QR is reasonable.
- (iv) QR shall be entitled to progress with the proposed course of action unless the Removal Expert assesses that QR's proposed course of action is unreasonable.
- (e) QR may, where it is reasonable and practicable in the circumstances to do so, issue a QR Train Control Direction to the Operator to provide assistance with clearing any Network Incident including providing Rollingstock, where appropriate, for use by or under the direction of QR and undertaking any variation in the operation of a Train Service (including coupling its Rollingstock with Rollingstock of QR or another Railway Operator). The Operator may recover from QR such reasonable direct costs incurred in complying with this Clause 7.4(e) as agreed and failing agreement within thirty (30) days after notice by the Operator to QR as determined by an expert in accordance with Clause 17.3.
- (f) In assessing the costs to be recovered under Clause 7.4(b) or Clause 7.4(e) for the use of Rollingstock, regard shall be had to any industry or other agreement covering such costs and any payments facilitated by such agreement.
- (g) Except as otherwise provided in this Agreement QR will not be liable for any delays, cancellation of Train Services or Claims suffered or incurred by or made or brought by or against the Operator as a result of complying with a request by QR pursuant to Clause 7.4(e).

7.5 Investigations

- (a) In the event of an Incident an Investigation into the Incident in the circumstances set out in **Schedule 8** must be commenced as soon as practicable unless otherwise agreed between the Parties and must be conducted in the manner and by the persons prescribed in **Schedule 8**.
- (b) Each Party must cooperate and ensure their respective staff cooperate fully with any Investigation and the Parties must consult in good faith in relation to the implementation of any recommendations arising from an Investigation in accordance with the requirements of **Schedule 8**.

8 ENVIRONMENTAL MANAGEMENT AND PROTECTION

8.1 Environmental Management

- (a) The Operator must, prior to the commencement of any Train Services (including any new or varied Train Services):
 - (i) cause a suitably qualified person reasonably acceptable to both Parties to prepare a report (“**Environmental Investigation and Risk Management Report**”) containing an environmental investigation component and an environmental risk management component which respectively identify:
 - (A) possible risks of Environmental Harm arising out of the proposed use of the Nominated Network by the Operator, including risks associated with those matters identified in Part 3 of **Schedule 6**; and
 - (B) the manner in which the Operator proposes to address the possible risks of Environmental Harm identified in the Environmental Investigation and Risk Management Report as well as the roles and responsibilities, including financial responsibility, for the control measures proposed and an audit regime,

provided that if the Operator has an existing Environmental Management System it proposes to use in connection with the proposed Train Services on the Nominated Network, the Environmental Investigation and Risk Management Report should also detail the extent to which the Operator believes its existing Environmental Management System addresses the risks identified in the Environmental Investigation and Risk Management Report; and
 - (ii) provide a copy of the Environmental Investigation and Risk Management Report to QR for its consideration and, if requested by QR, a copy of the relevant parts of the Operator’s existing Environmental Management System referred to in the Environmental Investigation and Risk Management Report.
- (b) If the Environmental Investigation and Risk Management Report discloses areas of risk which, in the reasonable opinion of QR, cannot be adequately managed by the proposals set out in the Environmental Investigation and Risk Management Report or, in the reasonable opinion of QR, fails to identify and adequately deal with additional relevant environmental risks, then QR may give notice to that effect to the Operator

within thirty (30) days after the date on which the Environmental Investigation and Risk Management Report was provided to QR (or such other period as the Parties, acting reasonably, may agree), detailing the risks not so adequately managed or not so identified or adequately dealt with. If QR does not give such notice, the Environmental Investigation and Risk Management Report shall be included in Part 1 of **Schedule 9** and amendments made to the Agreement (including variations to the Base Access Charges) if applicable.

- (c) If QR gives notice pursuant to Clause 8.1(b) the Operator may respond, by a date agreed by the Parties, with a written proposal which demonstrates how the Operator proposes to manage those risks (“**Operator’s Proposal**”). The Operator’s Proposal must:
 - (i) contain an investigation of the areas of risk and/or additional relevant environmental risks referred to in Clause 8.1(b);
 - (ii) (A) specify risk abatement or attenuation measures which the Operator proposes to undertake in relation to them; and/or
 - (B) specify how the Access Charges might contain a component reflecting the cost to QR of assuming all or some portion of the risk;
 - (iii) in relation to paragraph (ii)(A) specify a timeframe for implementation of those measures; and
 - (iv) specify details of any public consultation the Operator proposes to undertake in connection with the implementation of any such measures.
- (d) QR may, in the exercise of its reasonable discretion, accept or reject all or part of the Operator’s Proposal.
- (e) If QR accepts the Operator’s Proposal, then it will be incorporated into and form part of the Environmental Investigation and Risk Management Report which shall be included in Part 1 of **Schedule 9** and amendments made to the Agreement (including variations to the Base Access Charges) if applicable.
- (f) If the Operator fails to submit to QR an Operator’s Proposal by the date agreed by the Parties or if QR refuses to accept all or part of the Operator’s Proposal, QR may advise the Operator of the risks not adequately managed or not identified or adequately dealt with and then either Party may refer the issue of whether the Environmental Investigation and Risk Management Report and/or the Operator’s Proposal does or does not adequately manage or does or does not identify or adequately deal with the relevant environmental risks to an expert in accordance with Clause 17.3.
- (g) If the expert determines that the Environmental Investigation and Risk Management Report and/or Operator’s Proposal does adequately manage the risks or identifies and adequately deals with the risks, then the Environmental Investigation and Risk Management Report as modified by the Operator’s Proposal (if applicable) will be accepted, included in Part 1 of **Schedule 9** and amendments made to the Agreement (including variations to the Base Access Charges) if applicable.
- (h) If the expert determines that the Environmental Investigation and Risk Management Report and/or Operator’s Proposal does not adequately manage the risks or does not identify and adequately deal with the risks, then provided the Operator amends the

Environmental Investigation and Risk Management Report in accordance with the expert's determination and/or recommendations within the time frame specified by the expert, the Environmental Investigation and Risk Management Report as amended will be accepted and included in Part 1 of **Schedule 9** and amendments made to the Agreement (including variations to the Base Access Charges) if applicable.

- (i) If the expert determines that the Environmental Investigation and Risk Management Report and/or Operator's Proposal does not adequately manage the risks or does not identify and adequately deal with the risks and the Operator fails to amend the Environmental Investigation and Risk Management Report in accordance with the expert's determination and/or recommendations within the time frame specified by the expert, QR may terminate this Agreement.
- (j) The parties agree to implement the determination of the expert.

8.2 Environmental Management System

- (a) The Operator must prior to the commencement of any Train Services (including any new or varied Train Services) have in place an Environmental Management System.

The Environmental Management System prepared by the Operator must:

- (i) have regard to the issues raised in the Environmental Investigation and Risk Management Report and contain procedures for implementing the risk management proposals identified in it. The Environmental Investigation and Risk Management Report includes the results of any expert determination referred to in Clause 8.1(f) or any amendment of the Environmental Investigation and Risk Management Report arising from the recommendations of any environmental audit or review conducted pursuant to Clause 8.7;
 - (ii) address all legislative requirements, including the requirements of the Environmental Authorities held by QR from time to time that are relevant to the Operator's Train Services; and
 - (iii) identify systems (including audit systems) and procedures to address all relevant environmental risks and ensure compliance with all Environmental Laws.
- (b) Prior to the commencement of any Train Services (including any new or varied Train Services), QR will ensure that the elements of the Environmental Investigation and Risk Management Report which QR is responsible for implementing are incorporated into QR's Environmental Management System.

8.3 Carriage of Dangerous Goods on Train Services

- (a) The Operator must ensure that where Dangerous Goods are to be carried on a particular Train Service:
 - (i) all requirements of the Dangerous Goods Code are fully complied with (including placement of relevant, accurate and current documentation on Trains);
 - (ii) QR is advised of the details of the Dangerous Goods (including a description and the applicable Dangerous Goods United Nations (UN) Number) prior to the operation of a Train as part of the Train List; and

- (iii) any authorisation or prior approvals required under the Dangerous Goods Code have been obtained and are available for inspection by QR if so requested.
- (b) The Operator must ensure that, where there is any likelihood of Train Services carrying Dangerous Goods and before any Dangerous Goods can be carried on Train Services, the Operator's Emergency Response Plan prepared in accordance with Clause 7.1 includes procedures for responding to an Incident involving Dangerous Goods of the type to be carried.

8.4 Noise Management during Train Services

- (a) In addition to any noise attenuation or management measures which may form part of or be identified in the Environmental Investigation and Risk Management Report, the Operator shall contribute to, as reasonably determined by QR, the costs incurred by QR in taking noise abatement measures on or adjacent to the Nominated Network considered reasonably necessary by QR where the Noise Planning Levels are, or but for the taking of these measures by QR, would be exceeded during the Term.
- (b) If, during the Term, the Noise Planning Levels are reduced such that noise from the Nominated Network exceeds the new Noise Planning Levels, QR may elect, in its absolute discretion, to implement noise abatement measures on the Nominated Network to ensure compliance with the new Noise Planning Levels. The Operator shall contribute to the cost of those noise abatement measures as reasonably determined by QR.
- (c) If the Operator disputes any determination made by QR in accordance with this Clause 8.4 regarding the contribution of costs, either Party may refer that dispute to an expert in accordance with Clause 17.3.

8.5 Spillage of Contaminating Materials

- (a) Where:
 - (i) the activities of the Operator under this Agreement result in any release, spillage or leakage of any Contaminating Material, or QR is reasonably of the opinion that those activities are causing or likely to cause contamination or Environmental Harm, and QR reasonably considers that action is required to prevent, mitigate or remedy that contamination or Environmental Harm; or
 - (ii) QR is given a direction, notice or order by a relevant Authority that some action is required to prevent, mitigate or remedy any actual or threatened contamination or Environmental Harm resulting from, or contributed to by, the activities of the Operator under this Agreement,

then QR may notify the Operator of the action which is required and the Operator must at its cost, as soon as reasonably practicable after receiving such notice, implement such action.

- (b) If, in QR's reasonable opinion, any action pursuant to Clause 8.5(a) ought best be undertaken by QR, then QR may elect to undertake such action and the Operator shall pay to QR the costs incurred by QR in doing so.

- (c) If the Operator disputes any action taken by QR in accordance with this Clause 8.5, either Party may refer the dispute to an expert in accordance with Clause 17.3 and if the expert determines the dispute in favour of the Operator, QR will reimburse the Operator for the costs incurred by the Operator as a result of the actions taken by the Operator at QR's request (or, if applicable, QR will bear the costs incurred by QR in accordance with Clause 8.5(b) and shall not be able to recover those costs from the Operator) to the extent determined by the expert.

8.6 Community Liaison and Environmental Complaint Procedures

- (a) Prior to the commencement of any Train Services the Operator shall take all steps necessary to comply with all relevant community liaison requirements required by Law, any Authority or reasonably required by QR and shall invite QR to be represented at any community meetings organised by the Operator.
- (b) In the event that QR or the Operator receives noise complaints or other complaints dealing with environmental issues in relation to the Nominated Network, both QR and the Operator shall inform each other of those complaints as soon as reasonably practicable and shall cooperate in investigating and responding to those complaints.

8.7 Audit and Review of Environmental Investigation and Risk Management Report

- (a) The Operator will provide QR with copies of those parts of any environmental audits undertaken by or on behalf of the Operator in respect of its Train Services on the Nominated Network.
- (b) QR will provide the Operator with copies of those parts of QR's environmental audits that are relevant to the operation of the Operator's Train Services on the Nominated Network.
- (c) If QR becomes aware of:
 - (i) any inadequacy of the Operator's Environmental Investigation and Risk Management Report due to:
 - (A) any change in Environmental Laws of relevance to the operation of Train Services on the Nominated Network; or
 - (B) any conduct on the part of the Operator which causes or threatens to cause Serious Environmental Harm or Material Environmental Harm; or
 - (ii) any non-compliance by the Operator with its Environmental Investigation and Risk Management Report,

then, in addition to any other rights QR may have under this Agreement, QR may by notice to the Operator direct the Operator to undertake a review of the adequacy of its Environmental Investigation and Risk Management Report and/or the Operator's compliance with it. The review will only deal with:

- (i) the extent to which the Environmental Investigation and Risk Management Report appears not to address a change in Environmental Laws of relevance to the operation of Train Services on the Nominated Network; or

- (ii) the conduct causing or threatening to cause Serious Environmental Harm or Material Environmental Harm; or
- (iii) the extent of non-compliance by the Operator with its Environmental Investigation and Risk Management Report,

whichever is applicable in the circumstances.

- (d) If directed by QR to undertake a review in accordance with Clause 8.7(c), the Operator will ensure the review is carried out and will provide QR with a copy of the review report within a reasonable time after the review has been completed (and in any case, not later than three (3) Months after the notice from QR requiring the review).
- (e) The Operator must implement the reasonable recommendations arising from each review under this Clause 8.7 and the Parties shall amend the Environmental Investigation and Risk Management Report and this Agreement (including any variations to the Base Access Charges) as appropriate.
- (f) Either Party may refer any dispute as to the nature or extent of any amendments to the Environmental Investigation and Risk Management Report or this Agreement that ought to be made to an expert for resolution in accordance with Clause 17.3.

8.8 Notification

- (a) The Operator must advise QR of any failure by the Operator to comply with its Environmental Investigation and Risk Management Report and the Operator's Environmental Management System to the extent relevant to this Agreement as and when the Operator becomes aware of such failure and provide details of how it intends to address the non-compliance. The Operator must remedy such non-compliance as soon as practicable having regard to the nature of the non-compliance, the reasonable interests of QR and any action required by the Environmental Protection Agency.
- (b) QR must advise the Operator of any failure by QR to comply with the Operator's Environmental Investigation and Risk Management Report and QR's Environmental Management System to the extent relevant to this Agreement as and when QR becomes aware of such failure. QR must remedy such non-compliance as soon as practicable having regard to the nature of the non-compliance, the reasonable interests of the Operator and any action required by the Environmental Protection Agency.
- (c) The Operator must advise QR of any failure to comply with its obligations under the Environmental Protection Act 1994 ("EPA"), including any notices or directions relating to the operation of Train Services that it receives from the Environmental Protection Agency. Failure by the Operator to comply with its obligations under the EPA, where that failure causes or threatens to cause Serious Environmental Harm, entitles QR to terminate in accordance with Clause 20.
- (d) QR will notify the Operator of any changes to any Environmental Authorities held by QR or variations to any other environmental information provided by QR to the Operator relevant to the operation of Train Services.

9. ACCREDITATION

9.1 Evidence of Accreditation

- (a) The Operator must on or before the commencement of any Train Services provide to QR evidence of its Accreditation (including all conditions and/or variations).
- (b) Each Party must have and maintain Accreditation to the extent required to perform its obligations under this Agreement and, if requested to do so in writing by the other Party, provide to the other Party copies of documentation evidencing currency, renewal or amendment of its Accreditation within five (5) days of such request.
- (c) Each Party will notify the other as soon as possible of any notice from an Authority affecting or likely to affect its Accreditation and will provide a copy of that notice to the other Party on request.

10. OPERATOR'S STAFF

10.1 Safety of Staff

The Operator will be fully responsible and liable for the health and safety of the Operator's Staff and the personal property of the Operator's Staff, and indemnifies and releases QR to the extent permitted by law from any liability in relation to the Operator's Staff except to the extent that such liability is caused by the wilful default or negligence of QR or QR's Staff.

10.2 Qualifications of Operator's Staff

The Operator must:

- (a) ensure that all risks associated with Safety Related Work (including the competence of all Operator's Staff to safely and properly discharge their duties related to the exercise of the Operator's rights or performance of its obligations under this Agreement) are addressed in the Interface Risk Assessment;
- (b) ensure that all Operator's Staff hold and keep current all qualifications and accreditations required under any Law and as specified in Part 2 of **Schedule 9** and undertake any additional training from time to time in order to keep current such qualifications and accreditations;
- (c) meet all costs of any training and/or testing required to meet the requirements of this Clause 10.2; and
- (d) keep QR advised of the names and position titles of all Operator's Staff engaged in Safety Related Work on the Nominated Network and ensure that all Safety Related Work is performed only by those Operator's Staff whose details have been provided to QR in accordance with this Clause 10.2 and who satisfy the requirements of this Clause 10.2.

10.3 Entry onto Land

The Operator must ensure that the Operator's Staff do not enter upon the Land in a manner inconsistent with the Interface Coordination Plan, the Interface Risk Management Plan or the Operator's Emergency Response Plan without the prior written approval of QR and that, in the

event such approval is given, the relevant Operator's Staff comply with all conditions of the approval and hold the necessary qualifications and accreditations.

11. INTERFACE RISK MANAGEMENT

- (a) Prior to the commencement of any Train Services (including any new or varied Train Services):
 - (i) the Operator must conduct an Interface Risk Assessment jointly with QR in order to:
 - (A) identify all reasonably foreseeable Interface Risks to the Operator, QR and all persons and property and evaluate the possibility of the Interface Risks occurring and the safety and commercial consequences of those Interface Risks;
 - (B) agree the applicable controls and measures to adequately address the Interface Risks identified (including any training required for the Operator's Staff) and the Party responsible for implementation of such controls and measures and ensuring their on-going effectiveness;
 - (C) agree an audit, inspection and review regime;
 - (D) agree the applicable Safeworking Procedures and Safety Standards having regard to existing QR and industry practices;
 - (E) agree the Rollingstock Interface Standards (or, if already agreed, agree variations to the Rollingstock Interface Standards); and
 - (F) agree any consequential changes to the provisions of the Agreement, including the applicable Access Charges;
 - (ii) the Parties must incorporate the above agreed outcomes, as applicable, into:
 - (A) the Interface Risk Management Plan which shall be included in Part 2 of **Schedule 9**;
 - (B) Part 1 of **Schedule 6**;
 - (C) **Schedule 3**; and
 - (D) the relevant provisions of the Agreement; and
 - (iii) the Operator is responsible for the development of the Operator's Safety Management System which must incorporate:
 - (A) the risks identified and the controls and measures and other elements included in the Interface Risk Management Plan that the Operator is responsible for implementing; and
 - (B) necessary processes for ensuring that the Operator, its Rollingstock, Rollingstock Configurations and Train Services at all times comply with the requirements of this Agreement, including the agreed Interface Risk Management Plan.

- (b) If the Parties are unable to agree any element of the Interface Risk Assessment or the Interface Risk Management Plan (including the Rollingstock Interface Standards), each Party may give notice in writing to the other Party of the dispute (“**Dispute Notice**”) whereupon either Party may refer the matter in dispute (“**Dispute**”) to an expert for resolution in accordance with Clause 17.3. If the matter is not referred to an expert for resolution within fourteen (14) days after a Party gives a Dispute Notice to the other Party, then at any time thereafter:
- (i) if the matter has not been referred to the Safety Regulator in accordance with Clause 11(b)(ii) or the QCA in accordance with Clause 11(b)(iii), either Party may still refer the matter to an expert for resolution in accordance with Clause 17.3;
 - (ii) if the matter has not been referred to an expert in accordance with Clause 11(b)(i) or to the QCA in accordance with Clause 11(b)(iii), and in the opinion of the Safety Regulator the matters in dispute are solely related to safety issues, then either Party may refer the matter to the Safety Regulator; and
 - (iii) if the matter has not been referred to an expert in accordance with Clause 11(b)(i) or to the Safety Regulator in accordance with Clause 11(b)(ii), then either Party may refer the matter to the QCA (acting with the advice of the Safety Regulator) for resolution in accordance with Clause 17.6,

provided that if the matter is in the first instance referred to an expert for resolution (whether this occurs during or after the relevant fourteen (14) day period) and either Party is not satisfied with the determination of the expert, then notwithstanding Clause 17.3(i), either Party may, within twenty-one (21) days after the expert makes the determination, refer the matter for resolution by the Safety Regulator under Clause 11(b)(ii) or the QCA under Clause 11(b)(iii). Any determination made by the QCA or the Safety Regulator (whether or not following a determination by an expert) shall be final and binding on the Parties.

If an expert, the Safety Regulator or the QCA is called upon under this Clause to make a determination the effect of which would be to establish the content of any aspect of the Interface Risk Management Plan, then the expert, Safety Regulator or the QCA (as the case may be) shall comply with any guiding principles for the resolution of a Dispute under this Clause that may from time to time be determined by the Safety Regulator.

Where a Dispute is referred to the QCA in accordance with this Clause, the QCA shall seek the advice of the Safety Regulator on any aspect of the Dispute that either Party to the Dispute or the QCA considers to be a safety related matter. The QCA shall not make any decision that is inconsistent with any advice it receives from the Safety Regulator to the extent that the advice relates to any aspect of safety. The QCA will provide to the Parties a copy of any advice it receives from the Safety Regulator.

Where the QCA seeks advice from the Safety Regulator in relation to a Dispute, the costs of the Safety Regulator shall be borne by the Parties in such proportion as the QCA determines.

- (c) Prior to the commencement of any of the Operator’s Train Services, QR must incorporate the elements of the Interface Risk Management Plan it has agreed to be responsible for implementing into QR’s safety management system.
- (d) The Parties must advise each other of any failure to comply with the Interface Risk Management Plan as and when the Party becomes aware of such non-compliance,

including details of the nature of the non-compliance and how the Party has rectified or intends to rectify the non-compliance.

- (e) If at any time during the Term, either Party has reasonable grounds to believe that the Interface Risk Management Plan is no longer effective either in managing the Interface Risks it was intended to manage or in managing new or varied Interface Risks, the Parties must conduct a further joint Interface Risk Assessment to review the Interface Risks which are no longer effectively managed by the current Interface Risk Management Plan or the new or varied Interface Risks (as the case may be).
- (f) Where a Party has reasonable grounds to believe that the other Party has not or is not complying with any aspect of the Interface Risk Management Plan (including the Rollingstock Interface Standards) then, in accordance with the provisions of Clause 12, that Party may conduct or require the conduct of an inspection or audit of the relevant aspect of the Operator's Train Services or the Nominated Network (as applicable).
- (g) The Parties shall amend the Interface Risk Management Plan and this Agreement (including making any variations to the Base Access Charges) if, subsequent to an audit or inspection of the Interface Risk Management Plan, the Parties agree that such amendment is required having regard to the findings of such inspection or audit and, failing agreement, either Party may refer the issue of the need for such amendment to an expert for determination in accordance with Clause 17.3.
- (h) Where QR and the Operator agree that training of the Operator's Staff is required as a control or part of a control to a particular Interface Risk identified in the Interface Risk Assessment and the Operator can only obtain that training from QR, QR will provide the Operator with that training and be entitled to recover a reasonable commercial charge for providing such training.

12. INSPECTION AND AUDIT RIGHTS

12.1 Rights of Inspection and Audit

In addition to the rights of inspection and audit specified in Clauses 6 and 11(f) and subject to the provisions of this Clause 12, either Party may conduct or require the conduct of an inspection or audit relevant to assessing the other Party's compliance with the Interface Risk Management Plan (including the Rollingstock Interface Standards) and the Safeworking Procedures and Safety Standards periodically as specified in the Interface Risk Management Plan.

12.2 Inspection of Trains and Rollingstock

- (a) Where QR reasonably believes that the Operator's Rollingstock or Rollingstock Configurations do not comply with:
 - (i) the authorised Rollingstock and Rollingstock Configurations as specified in **Schedule 4**;
 - (ii) the Interface Risk Management Plan (including the Rollingstock Interface Standards); or
 - (iii) any applicable Laws relevant to the Operator's Train Services,

and QR cannot otherwise determine whether this is the case, QR may inspect any Trains or Rollingstock which is utilised or intended to be utilised in the operation of

Train Services or require the Operator to have an inspection conducted and for this purpose QR or QR's Staff will be entitled at any time to enter and ride on the Operator's Trains or Rollingstock.

- (b) QR shall have the right to require any of the Operator's Rollingstock (either loaded or empty) to be available at such location as QR may reasonably require, including locations on the Infrastructure but not on the Nominated Network, for weighing, measurement or other inspection at any reasonable time specified by QR.
- (c) Notwithstanding the provisions of Clause 2.7, if any of the Operator's Rollingstock is reasonably considered by QR to be loaded in excess of the limits specified in **Schedule 4** or in an unsafe or insecure manner, then QR may at any time require the Operator to discontinue the Train Service or to remove the excess or adjust the load at the Operator's expense. If the Operator fails to immediately remove the excess or adjust the load, QR may arrange for its removal or adjustment and the Operator will be responsible for all resultant costs incurred by QR.

12.3 Notice of Inspection or Audit

The Party conducting or requiring the conduct of an inspection or audit must give the other Party reasonable prior written notice of such inspection or audit except in the case of emergencies or if an event or circumstance referred to in Clauses 19 or 20 has occurred and such notice shall include the following:

- (a) details of the inspection or audit to be carried out;
- (b) the name of the person conducting the inspection or audit;
- (c) the timing and expected duration of the inspection or audit;
- (d) the location of the inspection or audit;
- (e) the grounds upon which the Party requires the inspection or audit; and
- (f) the Party's requirements of the other Party in relation to the inspection or audit.

12.4 Conduct of Inspection or Audit

- (a) Any inspection or audit carried out pursuant to this Agreement may be conducted by the relevant Party, its appointed representative or by a suitably qualified person reasonably acceptable to both Parties, provided that if the inspection or audit would require access to commercially sensitive information of a Party and that Party has a legitimate commercial reason for wanting to withhold access to that information from the other Party, then the inspection or audit shall be conducted by a suitably qualified independent person reasonably acceptable to both Parties who shall be given access to the commercially sensitive information by the Party the subject of the inspection or audit but who shall be prohibited from disclosing that commercially sensitive information to the other Party .
- (b) The Operator shall use reasonable endeavours to ensure that QR, its appointed representative or the person appointed to conduct an inspection or audit are entitled to enter and be upon land and premises (whether or not owned or leased by the Operator) on which the Operator's Rollingstock is located from time to time (which location is specified in a notice pursuant to Clause 12.3) for the purposes of carrying out any inspection or audit or exercising any other right under this Agreement.

- (c) In exercising any right of inspection or audit under this Agreement, a Party must not interfere unreasonably with the other Party's Trains and Rollingstock or Train Movements on the Nominated Network and must use its reasonable endeavours to avoid damage or injury and to minimise any disruption to the other Party's business activities.
- (d) Subject to Clause 12.4(e), a Party conducting an inspection or audit ("**Inspecting Party**") will not be liable for any delays or cancellation of Train Services or Claims suffered or incurred by or made or brought by or against the other Party as a result of the exercise by the Inspecting Party of its rights under this Clause 12 provided the Inspecting Party complies with Clause 12.4(c).
- (e) The Operator will be liable for and will indemnify QR in respect of any Claim made against QR by another Railway Operator as a result of a delay or cancellation of a Train service of that other Railway Operator as a result of the exercise by the Operator of its inspection or audit rights under this Clause 12, provided that the Operator will not be liable for, or be required to indemnify QR in respect of, any such Claim where:
 - (i) the Operator has complied with Clause 12.4(c) in exercising its inspection or audit rights; and
 - (ii) the inspection or audit reveals that QR is in breach of its obligations under this Agreement.

12.5 Cooperation by the Parties

Each Party shall provide all reasonable assistance required by the other Party in conducting any inspection or audit under this Agreement, including allowing a Party, its appointed representative or person appointed to conduct an inspection or audit to discuss any relevant matter with QR's Staff or the Operator's Staff (as applicable). A member of QR's Staff or the Operator's Staff (as applicable) may be present at the inspection or audit.

12.6 Costs of Inspection or Audit

- (a) The Party who conducts or requires the conduct of an inspection or audit under Clause 6 or an agreed periodic audit shall bear the reasonable costs of conducting the inspection or audit.
- (b) The Party whose operations are inspected or audited under Clause 11(f) or Clause 12.2 shall bear the reasonable costs of conducting the inspection or audit unless it is demonstrated that the stated grounds for requiring the conduct of the inspection or audit did not exist. In circumstances where the stated grounds for such inspection or audit have not been demonstrated to exist, the Party that required the conduct of the inspection or audit shall bear the costs of conducting such inspection or audit.

12.7 Copies of Reports

The Parties must provide each other with a copy of any report of any inspection or audit undertaken pursuant to this Clause 12 in respect of its compliance with the Interface Risk Management Plan (including the Rollingstock Interface Standards).

12.8 Consequences of Inspection or Audit

Unless otherwise agreed, where a Party requires the conduct of an inspection or an audit under Clauses 11(f) or 12.2(a)(ii) of this Agreement, that Party will be liable to the other Party in respect of loss or damage (including damages for Consequential Loss) arising from the conduct of the inspection or audit if, and only if, no reasonable person in the position of the Party who required the conduct of the inspection or audit could have formed the view that the stated grounds for such inspection or audit existed, provided that the other Party must use all reasonable endeavours to mitigate the loss or damage arising from the conduct of the inspection or audit. The Party who required the conduct of the inspection or audit shall bear the burden of establishing that a reasonable person in its position could have formed that view.

12.9 Parties' Obligations

An inspection or audit by a Party under this Agreement shall not relieve the other Party of its obligations under this Agreement or at Law.

13 INSURANCE BY OPERATOR

13.1 Maintain Insurance Policies

The Operator must prior to the commencement of Train Services at its expense take out and subsequently maintain current at all times during the Term insurance with a Corporation licensed to conduct insurance business in Australia (or otherwise reasonably acceptable to QR) those policies of insurance required by this Agreement.

13.2 Required Insurance Policies

The Operator must take out and maintain insurance for the risks and on the terms specified in Schedule 7.

13.3 Disclosure of Insurance Policies

The Operator must provide to QR evidence of the insurance policies effected pursuant to this Clause 13 or, if requested by QR, copies of such insurance policies, to QR's reasonable satisfaction:

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

13.4 Failure to Disclose Insurance Policies

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

- (a) effect and maintain the insurance and pay the premiums and any amount so paid will be a debt due from the Operator to QR; and/or
- (b) terminate this Agreement pursuant to Clause 20.1(g).

13.5 Minimum Terms of Policies

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

- (a) note the interests of the Operator, any contractor and QR;
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amends the cover provided without the written consent of QR (which consent shall not be unreasonably withheld or delayed); and
- (c) include the terms and be for the amounts referred to in **Schedule 7**.

13.6 Operator Not to Render Policy Void

The Operator must not render any of the insurances effected in accordance with this Clause 13 void or voidable or liable to refusal of any claim.

13.7 Compliance

The Operator must at all times comply with the terms and conditions of all insurance policies effected pursuant to this Clause 13.

13.8 Notice of Potential Claims

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

13.9 Operator to pay all excess/deductibles

The Operator must in respect of any claims by it or any other insured for which it is responsible, pay and bear all excesses/deductibles provided for in any insurances effected in accordance with this Clause 13.

13.10 Settlement of Claims

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

14. INDEMNITIES AND LIABILITIES

14.1 Indemnity by Operator

Subject to Clause 14.3, the Operator is solely liable for and releases, indemnifies and will keep indemnified QR, its directors and QR's Staff against all Claims of any nature suffered or incurred by or made or brought against QR, its directors or QR's Staff due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of QR) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the Operator or Operator's Staff.

14.2 Indemnity by QR

Subject to Clause 14.3, QR is solely liable for and releases, indemnifies and will keep indemnified the Operator, its directors and Operator's Staff against all Claims of any nature suffered or incurred by or made or brought against the Operator, its directors or the Operator's Staff due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of the Operator) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of QR or QR's Staff.

14.3 Liability to Third Parties

Notwithstanding Clause 14.1 or Clause 14.2, the Operator is solely liable for and releases, indemnifies and will keep indemnified QR, its directors and QR's Staff against all Claims due to or arising out of this Agreement in respect of damage to or loss of any property or personal injury to or death of any person where such person or property is being transported on Train Services except to the extent that such damage, loss, injury or death is caused by or contributed to (to the extent of the contribution) by the wilful default or any deliberate or negligent act or omission of QR or QR's Staff. Unless otherwise agreed, the Operator shall extend to QR any exclusion or limitation of liability afforded by the Operator's conditions of carriage with its customers and shall provide to QR details of the Operator's conditions of carriage relevant to QR's liability in place from time to time.

14.4 Liability from Infrastructure Standard

Notwithstanding any other provision of this Agreement, QR will not be liable to the Operator and the Operator will not have or make any Claim against QR in respect of any loss of or damage to real or personal property, including property of the Operator, or personal injury to or death of any person or any other damage, expense, injury, cost or loss whatsoever arising out of or in connection with the standard of the Infrastructure or any failure of or defect in the Infrastructure except to the extent that such loss, damage, injury, cost or expense results directly from the failure of QR to perform its obligations under Clause 6.2(a).

14.5 Defence of Claims

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

14.6 Continuation of Indemnities

The releases and indemnities contained in this Clause 14 for the benefit of either Party continue in full force and effect as to any Claims occurring or arising from any act occurring during the Term notwithstanding the termination of this Agreement whether by expiration of time or otherwise.

14.7 Determination of Liability

In the event of an Incident involving the Operator or any other event which results or could result in a Claim by or against the Operator or QR, liability as between the Operator and QR shall for the purposes of this Clause 14 be determined:

- (a) as agreed between the Parties;
- (b) failing such agreement within one (1) Month of either Party giving notice to the other requiring agreement on liability, by a loss adjuster appointed pursuant to Clause 14.8;
or

- (c) where the amount of the Claim exceeds the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) and either Party is dissatisfied with the report of the loss adjuster, by a Court of competent jurisdiction.

14.8 Loss Adjuster

Where a matter is to be referred to a loss adjuster in accordance with Clause 14.7 then the following provisions of this Clause shall apply:

- (a) The loss adjuster shall be appointed by the Parties, or in default of such appointment within fourteen (14) days after the need to appoint a loss adjuster, by the President of The Chartered Institute of Loss Adjusters Australasian Division.
- (b) In any event, the loss adjuster shall:
 - (i) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (ii) have no interest or duty which conflicts or may conflict with his function as a loss adjuster, he being required to fully disclose any such interest or duty before his appointment; and
 - (iii) not be an employee of the Operator or QR or of a Related Body Corporate of either Party.
- (c) The loss adjuster appointed pursuant to this Clause 14.8 shall not be permitted to act until he has given written notice of the acceptance of his appointment to both Parties.
- (d) Any loss adjuster appointed pursuant to this Clause 14.8 shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and the performance of his duties.
- (e) Any person nominated as a loss adjuster hereunder shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the Commercial Arbitration Act 1990 (Qld), shall not apply to him or his determination or the procedures by which he may reach his determination.
- (f) Each Party must ensure to the best of its ability that the loss adjuster is given the opportunity to interview any employee, agent or contractor involved in or with knowledge of the Incident or event giving rise to the Claim or with any other relevant information that may be of use to the loss adjuster.
- (g) Each Party must make available to the loss adjuster any files, documents, data, recordings or other information that may be of use to, or is requested by, the loss adjuster for the purposes of his investigation.
- (h) The loss adjuster will determine the quantum of the relevant Claim and the liability of the Operator and/or QR in respect of such Claim and shall provide a copy of his report on such matters to each of the Parties within a reasonable time after his appointment.
- (i) In the absence of manifest error, the decision of the loss adjuster shall be final and binding upon the Parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

14.9 Costs

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

15. LIMITATION OF LIABILITY**15.1 No Liability for Consequential Loss**

Except as otherwise expressly provided in Clauses 12.8 and 19.3(b), neither Party shall in any circumstances be liable to the other for (and the indemnities in Clauses 14.1 and 14.2 shall not extend to) any Consequential Loss.

15.2 Limitation on Claims

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

- (a) notice of the Claim has been given to the other within twelve (12) Months of the occurrence of the event or circumstance out of which such Claim arises; and
- (b) the amount of the Claim exceeds FIFTY THOUSAND DOLLARS (\$50,000.00) in respect of any one event or cause of action or series of related events or causes of action (provided that if this condition is satisfied then the Party may proceed for the full amount of the Claim and is not limited to only so much of the Claim as exceeds the required threshold of FIFTY THOUSAND DOLLARS (\$50,000.00)).

15.3 Claims in respect of non-provision of Access

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

- (a) a Train Service is cancelled as a result of a failure by QR to make the Infrastructure available for the Operator to operate the Train Service at the Scheduled Time in the Train Schedule and QR was unable to schedule the Train Service at a reasonable alternative time; and
- (b) the failure by QR to make the Infrastructure available was a result of a breach of this Agreement by QR, or negligence on the part of QR; and
- (c) the failure by QR to make the Infrastructure available is not attributable to:
 - (i) the Operator;
 - (ii) another Railway Operator (other than QR);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of (including Enhancements to) the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) any action taken by QR, acting reasonably, in response to an emergency or a genuine safety risk; and

- (d) either:
 - (i) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5.6 and **Schedule 5** and the total number of Train Services cancelled in a Billing Period as a result of a failure by QR to make the Infrastructure available exceeds the Allowable Threshold; or
 - (ii) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5.6 and **Schedule 5**, but the non-provision of Access or cancellation of Train Services is of a magnitude which is beyond the scope of that performance and adjustments regime.

15.4 Claims in respect of delays to Train Movements

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

- (a) the delay was a result of a breach of this Agreement by the Defaulting Party, or negligence on the part of the Defaulting Party; and
- (b) the delay is not attributable to:
 - (i) the Affected Party;
 - (ii) another Railway Operator (other than the Defaulting Party);
 - (iii) a Force Majeure Event;
 - (iv) Major Periodic Maintenance of (including Enhancements to) the Infrastructure scheduled in a manner consistent with the Network Management Principles; or
 - (v) any action taken by QR, acting reasonably, in response to an emergency or a genuine safety risk; and
- (c) either:
 - (i) the Parties have not agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5.6 and **Schedule 5**; or
 - (ii) the Parties have agreed upon and implemented a performance and adjustment regime for the purposes of Clause 5.6 and **Schedule 5**, but the delays are of a magnitude which is beyond the scope of that performance and adjustments regime.

16. MATERIAL CHANGE

16.1 Meaning of Material Change

In this Clause 16:

- (a) **“Material Change”** means a:
- (i) Change in Relevant Taxes;
 - (ii) Change in Law;
 - (iii) change in the funding from governments in respect of that part of the Nominated Network specified in Part 4 of **Schedule 2**; or
 - (iv) matter deemed to be a Material Change under Clause 22.18(b); and
- (b) **“Net Financial Effect”** means the net effect in financial terms of a Material Change on QR in relation to performing its obligations or exercising its rights under this Agreement including any offsetting benefits or adverse effects directly or indirectly connected to the Material Change. Any change in the funding from governments in respect of the Nominated Network which is adverse to QR shall, to the extent that change affects the financial position of QR, be deemed to be an additional cost to QR of performing its obligations under this Agreement.

16.2 Adjustment for a Material Change

- (a) If there is no Reference Tariff applicable to the relevant Train Service under this Agreement then:
- (i) if at any time after the date of this Agreement a Material Change occurs which affects the financial position of QR or the cost to QR of performing its obligations under this Agreement, QR may notify the Operator giving details of the Net Financial Effect of the Material Change;
 - (ii) within fourteen (14) days after receipt of a notice under Clause 16.2(a)(i), the Parties shall meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement in order to remove as far as practicable the Net Financial Effect of the Material Change and return QR to the position it would have been in had it not been for the Material Change. If the Parties do not reach agreement within twenty (20) days of QR’s notice, the matter will be referred to an expert for determination in accordance with Clause 17.3.
- (b) If a Reference Tariff is applicable to the relevant Train Service under this Agreement then the relevant Reference Tariff Schedule will provide for the consequences of Material Change.

16.3 Parties Obligations

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

17. DISPUTES

17.1 Method

If any claim, dispute or question (“**Dispute**”) arises under this Agreement or in relation to the Access Rights then unless otherwise expressly provided to the contrary in this Agreement such Dispute shall be resolved in accordance with this Clause 17 and either Party may give to the other Party to the Dispute a notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring that it be dealt with in the manner set out in this Clause 17.

17.2 Chief Executive Resolution

Except as otherwise provided in this Agreement, the Parties hereby agree that any Dispute shall be referred in the first instance and in any event within seven (7) days of the Dispute Notice to the chief executive of QR (or his nominee) and the chief executive of the Operator (or his nominee) for the purposes of this Clause 17.2 for resolution. Failing such resolution within fourteen (14) days or in the event that either chief executive appoints a nominee that is unacceptable to the other Party, the relevant Dispute may by agreement between QR and the Operator be referred for resolution by an expert in accordance with Clause 17.3 or by arbitration in accordance with Clause 17.4.

17.3 Expert

Where any matter may be referred to an expert pursuant to Clause 17.2 or is required by this Agreement to be referred to an expert then except as otherwise provided for in this Agreement, the matter must be referred for determination by a person:

- (a) who is appointed by the Parties, or in default of such appointment within fourteen (14) days after either Party giving notice in writing to the other Party requiring the appointment of an expert then that person is to be nominated at either Party’s request by, in the case of what the Parties agree are financial matters, the President for the time being of CPA Australia, in the case of what the Parties agree are non-financial matters, the President for the time being of the Institution of Engineers, Australia and, in the case of what the Parties agree are combined financial and non-financial matters or where the Parties cannot agree on the appropriate categorisation of a matter or where the Parties agree that it is appropriate, by the President for the time being of the Queensland Law Society Incorporated;
- (b) who has appropriate qualifications and practical experience having regard to the nature of the Dispute;
- (c) who has no interest or duty which conflicts or may conflict with his function as expert, he being required to fully disclose any such interest or duty by written notice to the Parties before his appointment;
- (d) who is not an employee of the Operator, the Operator’s Customer or QR or of a Related Body Corporate of any of them;
- (e) who shall not be permitted to act until he has given written notice to both Parties that he is willing and able to accept the appointment;
- (f) who shall have regard to the provisions of this Agreement and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter submitted by the Parties or submitted by the Parties as soon as reasonably practicable at his request and who must provide both Parties with a

copy of his determination in the form of a report within a reasonable time after his appointment;

- (g) who shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (h) who shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the Commercial Arbitration Act 1990 (Qld), shall not apply to him or his determination or the procedures by which he may reach his determination;
- (i) whose decision, in the absence of manifest error, shall be final and binding upon the Parties; and
- (j) whose costs (and the costs of any advisers to the expert) shall be borne by the Parties in equal shares, with each Party bearing its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties).

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

17.4 Arbitration

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

17.5 Determination by Court

If any Dispute is not resolved in accordance with Clause 17.2 nor referred to an expert in accordance with Clause 17.3, nor referred to arbitration by agreement of the Parties in accordance with Clause 17.4, nor referred to the QCA in accordance with Clause 17.6, then the Dispute shall be referred to the courts of the State.

17.6 Queensland Competition Authority (QCA)

The Parties may agree to refer and where required by this Agreement shall refer any Dispute to the QCA.

18. FORCE MAJEURE

18.1 Claim of Force Majeure

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

- (a) details of the Force Majeure Event and that part of the Nominated Network affected;
- (b) details of the obligations affected;

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

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

18.2 Suspension of obligations

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

18.3 Duty to Mitigate

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

18.4 End of period of Force Majeure

Subject to Clauses 18.5 and 18.6, the suspension of the obligations of the Parties due to a Force Majeure Event ends when the Party that issued the notice of the Force Majeure Event is able to resume full performance of its obligations under this Agreement at which time it must issue a notice to the other Party advising that it intends to recommence the performance of its obligations and must thereafter recommence the performance of its obligations.

18.5 Termination for Loss or Damage to Nominated Network

- (a) In the event that any part of the Nominated Network specified in Part 2 of **Schedule 2** is damaged or destroyed by a Force Majeure Event and in QR's reasonable opinion the cost of repairing such damage or replacing that part of the Nominated Network is not economic on the basis of the then and committed future utilisation of that part of the Nominated Network, QR may by written notice advise the Operator of:
 - (i) the estimated cost of effecting the necessary repairs or replacement; and
 - (ii) its intention to not repair or replace the relevant part of the Nominated Network unless the Operator and any other Railway Operator using that part of the Nominated Network pay the amounts specified by QR towards the cost of effecting the necessary repairs or replacement.
- (b) If the Operator gives notice to QR advising that it will bear the whole, or that part requested by QR, of the cost of necessary repairs or replacement, then QR will proceed with the repairs or replacement within a reasonable time after receipt by QR from the Operator of payment of the relevant amount subject to reaching agreement with any other Railway Operator using the affected part of the Nominated Network. Where the Operator pays to QR the whole of the estimated cost, QR must, upon completion of the necessary repairs or replacement, refund to the Operator any amount by which the amount paid by the Operator exceeds the actual cost and the

Operator shall pay to QR the amount by which the actual cost exceeds the amount paid by the Operator.

- (c) If within sixty (60) days after receipt of a notice from QR under Clause 18.5(a) the Operator has not given notice to QR pursuant to Clause 18.5(b) indicating that it will pay the whole, or that part requested by QR, of the cost of the necessary repairs or replacement, QR shall have the right to terminate this Agreement by giving not less than thirty (30) days notice in writing to the Operator without prejudice to any of the rights of the Parties accrued prior to the date of such termination.

18.6 Termination after extended Force Majeure Event

If by reason of a Force Majeure Event a Party (“affected Party”) is rendered unable to perform its obligations under this Agreement for a period of more than three (3) consecutive Months, the Parties must meet in an endeavour to identify any alternative viable means to provide the suspended Access Rights and failing an alternative means being agreed upon within one (1) Month of the end of the three (3) Month period the other Party may terminate this Agreement by thirty (30) days written notice to the affected Party and the provisions of this Agreement relating to termination set out in Clauses 20.4 and 20.5 apply without prejudice to any of the rights of the Parties accrued prior to the date of such termination.

19. SUSPENSION

19.1 Right of Suspension

- (a) QR may, by notice in writing to the Operator prior to or immediately following the suspension, suspend the right of the Operator to operate some or all of the Train Services upon the occurrence of any one or more of the following events or circumstances:
- (i) the Operator fails to pay when due any amount payable under this Agreement and such default continues for seven (7) days after notice from QR to the Operator of the default;
 - (ii) the Operator fails to meet or comply with:
 - (A) any of its obligations under Clauses 5, 7, 8 or 11 (with the exception of Clauses 5.1(a)(v), 7.3 and 8.6) of this Agreement and QR is of the reasonable opinion that such failure either:
 - (i) adversely affects or is likely to adversely affect the entitlements of any Railway Operator (other than the Operator) or other users of the Infrastructure (including Infrastructure Service Providers); or
 - (ii) has caused or is likely to cause an increased risk to the safety of any person or material risk to property; or
 - (B) the Train Service Description and QR is of the reasonable opinion that such failure either:
 - (i) adversely affects or is likely to adversely affect the entitlements of any Railway Operator (other than the Operator) or other users of the Infrastructure (including Infrastructure Service Providers) and that QR has sought to avoid such adverse effects by rescheduling Trains and changing Train priority in accordance with

the Network Management Principles provided that QR will not be obliged to take any action that may cause any additional cost or risk to QR or an adverse impact on any Railway Operator (other than the Operator); or

- (ii) has caused or is likely to cause an increased risk to the safety of any person or material risk to property;
- (iii) an Insolvency Event occurs in relation to the Operator;
- (iv) the Operator's Accreditation is suspended, cancelled or amended so that it cannot perform its obligations generally under this Agreement;
- (v) the Operator fails to comply with the requirements of a notice given by QR (within the reasonable time specified in that notice) requiring the Operator to cease conduct which in the reasonable opinion of QR is causing or threatening to cause Serious Environmental Harm or Material Environmental Harm;
- (vi) the Operator fails to effect or maintain the insurances required under Clause 13.2 of this Agreement and such default continues for seven (7) days after notice from QR to the Operator of the default;
- (vii) the Operator fails to establish, maintain or replace the Security Deposit as required under this Agreement and such default continues for seven (7) days after notice from QR to the Operator of the default;
- (viii) the Operator fails to provide, prior to the departure of the Train pursuant to Clause 5.5, information that is reasonably required by QR in relation to the relevant Train in accordance with Part 2 of **Schedule 10**;
- (ix) the Operator purports to Assign any of its rights or interests in this Agreement other than as permitted in this Agreement;
- (x) the Operator is in default of the due performance of any other obligation under this Agreement, and such default continues for thirty (30) days after notice from QR to the Operator of the default;
- (xi) the events or circumstances referred to in Clause 20.1(b), (c) or (f) exist.

Such suspension shall continue until such time as the Operator has remedied the relevant default and, where appropriate, taken action to prevent its recurrence.

- (b) QR may suspend the right of the Operator to operate any Train Services on the Nominated Network in the event of breach or, acting reasonably, anticipated breach of:
 - (i) any Laws relating to rail safety relevant to the operation of Train Services;
 - (ii) QR Train Control Directions given in a manner not inconsistent with the Network Management Principles;
 - (iii) Safeworking Procedures; or
 - (iv) Safety Standards,

and QR is of the reasonable opinion that such breach has caused or such anticipated breach is likely to cause, an increased risk to the safety of any person or material risk to property.

Such suspension may be effected by notice in writing prior to or immediately following the suspension and shall continue until such time as the breach is rectified or, in the event of anticipated breach, the Operator has demonstrated that it is in compliance. The Operator must ensure that upon such suspension the relevant Operator's Staff immediately ceases to perform functions on the Nominated Network until such time as the suspension is lifted by QR.

- (c) QR may suspend the operation of the Operator's Rollingstock or Rollingstock Configurations:
- (i) for actual non-compliance with applicable Laws, the authorisation under **Schedule 4** for the Rollingstock or Rollingstock Configurations involved or the Rollingstock Interface Standards specified in the Agreement where the Operator has failed to rectify such non-compliance within a reasonable period of time; or
 - (ii) for actual non-compliance or (acting reasonably) anticipated non-compliance with applicable Laws, the authorisation under **Schedule 4** for the Rollingstock or Rollingstock Configurations involved or the Rollingstock Interface Standards specified in the Agreement where such non-compliance creates a risk to the safety of any person or a material risk to property.

Such suspension may be effected by notice in writing to the Operator prior to or immediately following the suspension and shall continue until the Operator has rectified the non-compliance or, in the event of anticipated non-compliance, the Operator has demonstrated that it is in compliance.

19.2 Details of Suspension

Where QR has a right under this Clause 19 to suspend rights of the Operator, the notice of suspension given in writing by QR to the Operator must set out :

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

19.3 Effect of Suspension

- (a) The suspension of any rights does not affect or suspend any other obligation of the Operator, including the obligation to pay Access Charges under this Agreement and shall be without prejudice to QR's other rights and remedies in respect of that or any other default.
- (b) Where QR suspends some or all of the Operator's Train Services, QR will be liable to the Operator in respect of loss or damage (including damages for Consequential Loss) arising from the suspension if, and only if, no reasonable person in QR's position could have formed the view that the stated grounds for the suspension existed, provided that the Operator must use all reasonable endeavours to mitigate the loss or damage arising

from the suspension. QR shall bear the burden of establishing that a reasonable person in QR's position could have formed that view.

20. TERMINATION

20.1 Termination by QR

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

- (a) the Operator fails to pay when due any amount payable under this Agreement and such default continues for thirty (30) days after notice from QR to the Operator of the default;
- (b) the Operator fails to comply in any material respect with:
 - (i) any of its obligations under Clauses 5, 7, 8 or 11 (with the exception of Clauses 7.3 and 8.6) of this Agreement; or
 - (ii) any QR Train Control Direction within the control of the Operator, any Safeworking Procedures or Safety Standard,

and such default continues for, or the Operator has failed to take reasonable action to prevent recurrence of the default within, thirty (30) days after notice from QR to the Operator of the default;

- (c) the Operator fails to comply in any material respect with the Train Service Description and fails to demonstrate to the reasonable satisfaction of QR, within sixty (60) days after notice from QR to do so, that the Operator will consistently comply with the Train Service Description for the remainder of the Term provided that QR, acting reasonably, has determined not to vary the Train Service Description having regard to relevant factors including:
 - (i) the impact on other users of the Infrastructure (including Infrastructure Service Providers); and
 - (ii) the efficient utilisation of the Infrastructure;
- (d) an Insolvency Event occurs in relation to the Operator and such default continues for a period of sixty (60) days;
- (e) the Operator's Accreditation is suspended, cancelled or amended so that it cannot perform its obligations generally under this Agreement, and such default continues for thirty (30) days after notice from QR to the Operator of the default;
- (f) where the Environmental Protection Agency gives the Operator a direction, notice or order about the conduct of the Operator in relation to the operation of Train Services which causes or threatens to cause Serious Environmental Harm and the Operator fails, within the time:
 - (i) specified in the relevant direction, notice or order, or in any stay or other court order made in relation to such direction, notice or order; or
 - (ii) otherwise agreed to by the Environmental Protection Agency,

to

- (iii) comply with the direction, notice or order, as modified by any court order (if applicable); or
- (iv) take other measures (including, for example, agreeing to implement an environmental management program) acceptable to the Environmental Protection Agency in relation to the requirements of the direction, notice or order,

and such failure continues for thirty (30) days after notice by QR to the Operator to remedy such failure;

- (g) the Operator fails to effect or maintain the insurances required under Clause 13.2 of this Agreement and such default continues for thirty (30) days after notice from QR to the Operator of the default;
- (h) the Operator fails to establish, maintain or replace the Security Deposit as required under this Agreement and such default continues for thirty (30) days after notice from QR to the Operator of the default;
- (i) the Operator purports to Assign any of its rights or interests in this Agreement other than as permitted by this Agreement;
- (j) the Operator is in default of the due performance of any other obligation under this Agreement, and such default continues for sixty (60) days after notice from QR to the Operator of the default,

provided that QR has first exercised its corresponding right of suspension under Clause 19.1.

20.2 Termination by the Operator

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

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

20.3 Grounds for Termination to be specified

A notice of termination given under Clauses 20.1 or 20.2 must set out the grounds for the termination.

20.4 Obligations and other rights upon termination or expiration

- (a) Neither termination of this Agreement by a Party pursuant to this Clause 20 nor expiration of this Agreement prejudices:
 - (i) a Party's right to make a Claim or recover damages or avail itself of other remedies under this Agreement or at Law; or
 - (ii) either Party's rights to recover monies due to it under this Agreement.
- (b) Upon termination of this Agreement QR and the Operator shall be released from all further obligations or liabilities under this Agreement except in respect of any antecedent breach of this Agreement on their respective parts. Any liability in respect of such antecedent breach shall be limited in the manner provided in this Agreement.

20.5 Removal of Rollingstock following termination

- (a) Immediately on expiration of the Term, and as soon as practicable following termination of this Agreement for any other reason, the Operator must, at the Operator's cost, remove all of the Operator's Rollingstock from the Nominated Network.
- (b) If the Operator fails to remove the Operator's Rollingstock from the Nominated Network, QR may serve notice on the Operator demanding the removal of Rollingstock within a specified time.
- (c) If the Operator fails to remove any of the Operator's Rollingstock from the Nominated Network the subject of the notice of demand within the time specified in the notice of demand issued by QR in accordance with Clause 20.5(b), QR is entitled to remove the Rollingstock and recover the reasonable costs of removal from the Operator.
- (d) The Operator is liable, and will indemnify QR, for any costs incurred by QR in relation to any damage or obstruction caused to the Infrastructure or the Nominated Network by the Operator in removing any Rollingstock in accordance with this Clause.
- (e) The Operator shall comply with all reasonable directions issued by QR in relation to the removal of the Rollingstock in accordance with this Clause.

21. ASSIGNMENT

21.1 Assignment by QR

QR may Assign the whole or any part of its rights or obligations under this Agreement without the prior consent of the Operator provided that QR procures the Assignee to covenant with the Operator by deed to be bound by and to perform the obligations of QR under this Agreement to the extent of the rights and obligations Assigned to the Assignee. Upon the Assignee entering into that deed QR will be released and discharged from further liability under this Agreement in respect of the obligations which the Assignee has undertaken under that deed to be bound by and to perform.

21.2 Assignment by the Operator

- (a) Subject to the following provisions of this Clause 21.2, the Operator shall not Assign its rights or obligations, or any part thereof, under this Agreement without the prior written consent of QR, which consent may not be unreasonably withheld.

- (b) The Operator may, provided it is not in default in the performance or observance of any of its obligations under this Agreement, Assign the whole of its rights and obligations under this Agreement to:
- (i) a Related Body Corporate of the Operator which is Accredited to operate Train Services and is otherwise capable of performing the obligations of the Operator under this Agreement provided that the Operator shall remain liable for the performance of the duties, responsibilities and obligations assumed by the Assignee and provided however that performance by the Assignee will pro tanto discharge the Operator from liability for performance of those duties, responsibilities and obligations that are Assigned; or
 - (ii) a person other than a Related Body Corporate of the Operator with the prior written consent of QR, provided that such consent will not be unreasonably withheld if QR is satisfied that such person:
 - (A) is financially sound;
 - (B) is Accredited to operate Train Services; and
 - (C) is otherwise capable of performing the obligations of the Operator under this Agreement.
- (c) Any Assignment by the Operator of its rights or obligations under this Agreement will be conditional upon and will not take effect until the Assignee covenants with QR by deed, in such terms as QR may reasonably require, to be bound by and to perform the obligations of the Operator under this Agreement.
- (d) Except where the Operator is a company the shares in which are quoted by the Australian Stock Exchange Limited, any change in shareholding of the Operator altering the effective control of the Operator will be deemed to be an Assignment of this Agreement.
- (e) The Operator shall not:
- (i) register, record or enter in its books any transfer of any share or shares in the capital of the Operator ;
 - (ii) deal with any beneficial interest in any such share or shares;
 - (iii) issue any new share or shares; or
 - (iv) take or attempt to take any action having the effect:
 - (A) of altering the control of the Operator ; or
 - (B) that the shareholders of the Operator at the date of this Agreement together beneficially hold or control less than 51% of the voting rights of capital in the Operator,
- until the requirements of this Clause 21.2 have been complied with.

21.3 Charging

A Party (“**Chargor**”) may create a Charge over all of its rights under this Agreement in favour of a recognised financial institution (“**Chargee**”) to secure financial accommodation provided to

the Chargor in relation to its obligations under this Agreement, provided that the Chargee shall first covenant in writing in favour of the other Party (“**Non-Charging Party**”), pursuant to a deed in such terms as the Non-Charging Party may reasonably require, that in relation to the exercise of any power of sale or other right or remedy under the Charge granted to the Chargee, the Chargee and any person (including any receiver or receiver and manager or agent) claiming through the Chargee will comply with the provisions of this Clause 21 as if it were originally a party hereto, and will not exercise any power of sale of the rights and/or obligations of the Chargor under the Agreement except in accordance with this Clause 21.

22. GENERAL

22.1 Variation/Amendment

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

22.2 Confidentiality

The Parties shall comply with the provisions of the confidentiality deed set out in **Schedule 12**.

22.3 Intellectual Property

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

22.4 Entire Agreement

- (a) This Agreement, the Schedules and other documents referred to in the Schedules constitute the entire understanding and agreement between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Agreement are merged in and superseded by this Agreement and are of no force or effect whatever and no Party will be liable to any other Party in respect of those matters.
- (c) No oral explanation or information provided by any Party to another:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

22.5 Non-merger

Each representation, covenant and obligation under this Agreement continues in full force and effect until such representation, obligation or covenant is satisfied or completed.

22.6 Authority to enter into Agreement

- (a) The Parties represent and warrant to and covenant with each other that they have full power to enter into and perform their obligations under this Agreement and that this

Agreement constitutes valid and binding obligations on the Parties respectively enforceable in accordance with its terms.

- (b) If this Agreement is executed by an attorney the attorney states, by such execution, that as at the time of such execution the attorney has received no notice of the revocation of the power of attorney pursuant to which the attorney has executed this Agreement.

22.7 Interpretation not to disadvantage a Party

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

22.8 Relationship

- (a) The relationship between the Parties is entirely contractual and nothing in this Agreement creates or is to be taken to create any partnership, joint venture or relationship of employer and employee between the Parties or any of them.
- (b) This Agreement is for the exclusive benefit of the Parties and does not create any rights in any Third Parties.

22.9 Notices

(a) Form of Notice

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

(b) Method of Service

A Notice may be given by:

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

(c) Deemed Notice

A Notice is deemed given if:

- (i) personally delivered, upon delivery;
- (ii) posted to an address in Australia, three (3) days after posting;

- (iii) sent by facsimile, on the next day after being sent if following transmission the sender receives a transmission report indicating that the facsimile was sent to the addressee's facsimile number.

(d) **Addresses for Service**

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

QR:

Address: Floor 21, 127 Creek Street, BRISBANE QLD 4000

Facsimile 07 – 3235 3439

Attention: Executive General Manager, QR Network Pty Ltd

Operator

Address: [***]

Facsimile: [***]

Attention: [***]

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

22.10 Certificate

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

22.11 Costs

Subject to any express provision in this Agreement to the contrary, each Party bears its own legal and other expenses relating directly or indirectly to the preparation of, and performance of its obligations under, this Agreement.

22.12 Stamp Duty

- (a) The Operator is, as between the Parties, liable for and must duly pay all stamp duty (including any fine or penalty) on or relating to this Agreement and any document executed under or in connection with it.
- (b) If QR pays any stamp duty (including any fine or penalty) on or relating to this Agreement or any document executed under or in connection with it, the Operator must reimburse QR the amount paid upon demand.

22.13 Waiver and Exercise of Rights

- (a) A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) No failure or delay by either Party to exercise any right or remedy under this Agreement may be construed or operate as a waiver or be evidence of delay, laches or acquiescence in equity or at law in respect of such right or remedy.
- (c) A waiver or consent by any Party of any default or breach of any term of this Agreement does not constitute a waiver of succeeding defaults or breaches of the same or any other term.
- (d) A Party's election not to exercise any rights under this Agreement does not prejudice any other rights which that Party may have against the other Party arising out of any failure by the other Party to comply with this Agreement.

22.14 Computation of Time

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

22.15 Severance of invalid or illegal terms

- (a) If any term of this Agreement, or its application to any Party, person or circumstance is or becomes invalid, void, voidable or otherwise unenforceable for any reason whatsoever, then:
 - (i) that term or its application to such Party, person or circumstance is severable from this Agreement;
 - (ii) the remainder of this Agreement, excluding the severed part, remains in force and any term which includes the severed part applies to such Party, person or circumstance without reliance on the part severed; and
 - (iii) to the extent permissible by law, the Parties must agree to replace the severed term, effective from the date of severance, with a valid and enforceable term which so far as possible achieves the same purpose, object or effect as the invalid, void, voidable or otherwise unenforceable term was intended to achieve and does not cause any substantial reduction in the benefits of either Party or material re-allocation of risks between the Parties.
- (b) The Parties must act reasonably and in good faith in seeking an agreement under this Clause as to a replacement term. If the Parties cannot agree upon a replacement term, this Agreement is continued in accordance with Clause 22.15(a)(i) and (ii).

22.16 Rights Cumulative

Subject to any express provision in this Agreement to the contrary, the rights of any Party under this Agreement are cumulative and are in addition to any other rights of that Party.

22.17 Approvals and Consents

Subject to any express provision in this Agreement to the contrary, a Party may conditionally or unconditionally give or withhold any consent to be given under this Agreement.

22.18 Ownership of Land

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

- (a) is not owned or controlled by QR; and
- (b) is not land to which Subparagraph 2.1(c)(ii)(C) of QR's Access Undertaking applies and in respect of which entry is required to be given by QR under Subparagraph 2.1(c)(ii) of QR's Access Undertaking (as those provisions are amended, varied or replaced from time to time) as part of access to the Nominated Network,

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

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

22.19 Implementation of Agreement

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

22.20 Schedules

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

22.21 Governing Law and Jurisdiction

This Agreement shall be interpreted according to the Laws for the time being in force in the State and each of the Parties submits to the jurisdiction of the courts of the State and the jurisdiction of all courts competent to hear appeals therefrom and waives any right to object to any proceedings being brought in those courts.

22.22 Most Favoured Nation Status

- (a) If the Operator believes on reasonable grounds that:

- (i) QR has entered into an access agreement with another Railway Operator for a Train service that transports the same specified commodity in the same specified geographic area as a Train Service provided in accordance with this Agreement (“**Like Train Service**”); and
- (ii) the Access Charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation set out in QR’s Access Undertaking,

the Operator may provide written notification to QR which must include the reasons why the Operator considers this to be the case.

- (b) Within thirty (30) days of receipt of such notification, QR must advise the Operator:
 - (i) whether or not QR agrees that the access agreement with the other Railway Operator is for a Like Train Service and, if not, the reasons why QR considers this to be the case;
 - (ii) if QR agrees that the access agreement with the other Railway Operator is for a Like Train Service, whether or not QR agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation set out in QR’s Access Undertaking and, if not, the reasons why QR considers that the access charge applicable to the Like Train Service has not been developed in contravention of the limits on price differentiation; and
 - (iii) if QR agrees that the access charge applicable to the Like Train Service has been developed in contravention of the limits on price differentiation then within sixty (60) days of advice provided pursuant to Clause 22.22(b) QR must advise the Operator:
 - (A) whether or not QR has been able to vary the access charge applicable to the Like Train Service such that it no longer contravenes the limits on price differentiation set out in QR’s Access Undertaking; or
 - (B) if QR has not been able to vary the access charge applicable to the Like Train Service that QR agrees to the reduction of the Access Charge payable by the Operator including the amount of the proposed reduced Access Charge.
- (c) If the Operator does not agree with QR’s response to its notification, the dispute shall be referred to an expert for resolution in accordance with Clause 17.3.
- (d) If:
 - (i) another Railway Operator provides QR with notification that it believes that some or all of the Operator’s Train Services are a Like Train Service to a Train service operated by the other Railway Operator, and that the Access Charge has been developed in contravention of the limits on price differentiation set out in QR’s Access Undertaking; and
 - (ii) QR agrees that this Agreement is for a Like Train Service and that any Access Charge under this Agreement has been developed in contravention of the limits on price differentiation set out in QR’s Access Undertaking,

then QR has the right by notice to the Operator to vary the Access Charge such that it no longer contravenes the limits on price differentiation set out in QR's Access Undertaking.

EXECUTION

Executed in Queensland

SIGNED for and on behalf of)

QR NETWORK PTY LTD)

in the presence of:)

Witness

Signature

Print Name

Print Name

[the OPERATOR])

in the presence of:)

Witness

Witness

Print Name

Print Name

Note: QR will require the Operator to execute this Agreement either:

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