

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and
Consumer Act 2010 (Cth)* by Aurizon Holdings
Limited ACN 146 335 622

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1 Person giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Aurizon Holdings Limited ACN 146 335 622 on behalf of itself and its subsidiaries (together referred to as (**Aurizon**) in this Undertaking).

2 Background

The parties to the proposed acquisition

Aurizon

- 2.1 Aurizon is a publicly listed company incorporated in Australia. It is a national freight company which provides services to the mineral, industrial and agricultural industries.
- 2.2 Aurizon provides coal rail haulage services on the:
- (a) Hunter Valley and Illawarra coal systems in New South Wales (**NSW**);
 - (b) Central Queensland Coal Network, servicing Queensland's Bowen Basin coal region; and
 - (c) Collie coal system in Western Australia.
- 2.3 In addition to coal rail haulage services, Aurizon currently also transports, and/or is capable of transporting, other bulk commodities/products such as iron ore, cement, bauxite, alumina, base metals, refined metals, grain, livestock, fertiliser and dangerous goods.
- 2.4 Aurizon also operates the Central Queensland Coal Network. As the operator, its responsibilities include managing access to the network by coal haulage operators, safety, signalling and communication systems, train control, rail construction, and maintenance. Aurizon's actions as operator of the network are subject to an access undertaking approved by the Queensland Competition Authority.

One Rail

- 2.5 One Rail Australia Pty Ltd (**One Rail**) is a rail freight company consisting of:
- (a) **One Rail East Coast**: which provides coal rail haulage services in the Hunter Valley coal system in NSW to the Port of Newcastle. It also provides coal haulage services in the Mackay region of Queensland on the Central Queensland Coal Network (**Divestiture Business**); and
 - (b) **One Rail SA/NT**: which provides intermodal and bulk rail haulage services principally in the Northern Territory and South Australia (**One Rail SA/NT**). One Rail SA/NT also operates two regulated rail networks, together spanning Tarcoola in South Australia to Darwin in the Northern Territory.

Macquarie Infrastructure and Real Assets Holdings Pty Limited

- 2.6 Macquarie Infrastructure and Real Assets Holdings Pty Limited (**MIRA**) is a division of Macquarie Asset Management, the asset management arm of Macquarie Group. MIRA provides investment management services in the

infrastructure, real estate, agriculture and energy markets for institutional investors.

PGGM Infrastructure Fund

- 2.7 PGGM Infrastructure Fund (**PGGM**) is a Dutch not-for-profit cooperative pension fund service provider. PGGM provides pension management, asset management and board advisory services to pension funds, affiliated employers and their employees.

The Proposed Acquisition

- 2.8 On 21 October 2021, Aurizon entered into a sale agreement with MIRA and PGGM to acquire 100% of One Rail Australia Holdings LP, a South Australian limited partnership between various entities managed by MIRA and PGGM, which owns the entities that comprise the One Rail business (the **Proposed Acquisition**).
- 2.9 The Divestiture Business will be divested either by way of sale to a purchaser approved by the ACCC, or otherwise via a demerger to Aurizon's shareholders by way of a Court approved scheme of arrangement under Part 5.1 of the Corporations Act (**Demerger**).

The ACCC's review

- 2.10 On 6 December 2021, the ACCC commenced its consideration of the Proposed Acquisition, and this Undertaking which was offered by Aurizon at the outset of the ACCC's review.
- 2.11 The ACCC undertook market inquiries and considered information provided by the parties to the Proposed Acquisition, industry participants and others. The purpose of the ACCC's inquiries was to assess whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act.

The ACCC's competition concerns

- 2.12 The ACCC has concluded that, in the absence of this Undertaking, the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in markets for the supply of rail haulage services for coal in NSW and Queensland.
- 2.13 The supply of coal haulage rail services in NSW and Queensland is highly concentrated. Aurizon and Pacific National are the top two suppliers, with One Rail a well-established third supplier in NSW and a recent entrant (and third supplier) in Queensland that has had a notable impact on competition in that state.
- 2.14 The Proposed Acquisition would remove an important competitor for the supply of rail haulage services for coal beyond the two major suppliers of these services, Aurizon and Pacific National. Further, the ACCC considered that there were weak prospects of significant new entry into the supply of coal haulage in either NSW or Queensland.
- 2.15 The ACCC was concerned that, absent this Undertaking, Aurizon would have the incentive and ability to increase prices or decrease its service levels for rail haulage services for coal in NSW and Queensland post-acquisition.

The Undertaking remedy

- 2.16 Aurizon does not consider that the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any relevant market. However, Aurizon offered this Undertaking at the outset of the ACCC's review pursuant to section 87B of the Act in order to proactively address any potential ACCC competition concerns.
- 2.17 The objective of this Undertaking is to address the ACCC's concerns as set out above that would otherwise arise as a consequence of the Proposed Acquisition. The Undertaking aims to achieve this objective by placing obligations on Aurizon:
- (a) to ensure that the Divestiture Business is divested from Aurizon, in a way which will result in the creation or strengthening of a viable, effective, stand-alone, independent and long term competitor, including in relation to above rail coal haulage in the Hunter Valley region of New South Wales and on the Central Queensland Coal Network;
 - (b) to ensure the Divestiture Business has all the necessary associated assets and rights to compete effectively with Aurizon, including in relation to above rail coal haulage in the Hunter Valley region of New South Wales and on the Central Queensland Coal Network;
 - (c) to maintain the economic viability, marketability, competitiveness and goodwill of the Divestiture Business prior to the divestiture;
 - (d) to hold its interests in the Divestiture Business separate from its other assets and businesses pending divestiture of the Divestiture Business;
 - (e) to appoint an Approved Independent Manager to oversee the Divestiture Business from the Control Date until completion of the divestiture of the Divestiture Business; and
 - (f) to provide for the effective oversight of Aurizon's compliance with this Undertaking.

3 Commencement of this Undertaking

- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Aurizon; and
 - (b) this Undertaking so executed is accepted by the ACCC
- (the **Commencement Date**).

4 Cessation of Ongoing Obligations

Withdrawal

- 4.1 Aurizon may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

Revocation

- 4.2 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Waiver

- 4.3 The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

Survival

- 4.4 Unless and until this Undertaking is withdrawn in accordance with clause 4.1, clauses 1, 2, 3, 4, 8, 10, 11, 12, 13, 14 and 15 survive completion of the obligations in clauses 5, 6, 7, 9, Annexures 1 and 2 and Schedule 4 and Confidential Schedules 5, 6, 7 and 8.

5 Divestiture of the Divestiture Business

Divestiture

- 5.1 Aurizon must, in accordance with this Undertaking, divest, or cause the divestiture of, the Divestiture Business either by way of Demerger or by sale to an Approved Purchaser.
- 5.2 In the event that clause 9 applies, Aurizon must not authorise the Approved Divestiture Agent to divest the Divestiture Business to a purchaser other than an Approved Purchaser.
- 5.3 Aurizon must divest, or cause the divestiture of, the Divestiture Business by:
- (a) the Demerger; or
 - (b) the sale of the Divestiture Business to an Approved Purchaser, pursuant to the Approved Sale and Purchase Agreement,
- within the Initial Divestiture Period, otherwise clause 9 applies.
- 5.4 The specific obligations that apply to Aurizon in the event that divestiture occurs by way of the Demerger are contained in Annexure 1.
- 5.5 The specific obligations that apply to Aurizon in the event that divestiture occurs by way of sale of the Divestiture Business to an Approved Purchaser pursuant to the Approved Sale and Purchase Agreement are contained in Annexure 2.

6 Divestiture Business Protection

Protection of the Divestiture Business

- 6.1 From the Control Date, Aurizon must not sell or transfer its interest, or any assets comprising part of, or used in, the Divestiture Business (other than the sale of goods and services in the ordinary course of business) or make any Material Change, except in accordance with this Undertaking or (subject to the other terms of this Undertaking) as necessary to allow completion of the Proposed Acquisition.

Aurizon's obligations in relation to the Divestiture Business prior to completion of Demerger or divestiture

- 6.2 Without limiting this clause 6, Aurizon must, from the Control Date until completion of the sale or Demerger of the Divestiture Business, take all steps available to it to:
- (a) ensure that the Divestiture Business is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestiture Business at the Control Date;
 - (b) continue to provide access to working capital and sources of credit for the Divestiture Business in a manner which is consistent with the financing of the Divestiture Business before the Control Date;
 - (c) continue to provide administrative and technical support for the Divestiture Business in a manner which is consistent with the operation of the Divestiture Business before the Control Date and in accordance with any plans established before the Control Date;
 - (d) continue existing Agreements relating to the Divestiture Business with customers, suppliers and/or other third parties that are in place at the Control Date;
 - (e) renew or replace upon expiry Material Contracts for the provision of goods or services to the Divestiture Business on commercial terms favourable to the Divestiture Business;
 - (f) maintain the supply of those goods and services that are part of the Divestiture Business to existing customers in a manner consistent with the supply of those goods and services as at the Control Date;
 - (g) maintain the standard of manufacture, distribution, promotion and sale of those products which form part of the Divestiture Business as at the Control Date; and
 - (h) carry out promotion and marketing of the products which form part of the Divestiture Business in accordance with any plans established before the Control Date.
- 6.3 Aurizon must offer a call option to the Divestiture Business for a refurbished narrow gauge train set and comply with the obligations set out in Confidential Schedule 7.

Personnel of Aurizon

- 6.4 From the Control Date until completion of the sale or Demerger of the Divestiture Business, Aurizon must:
- (a) procure that East Coast Rail Management, in consultation with the Approved Independent Manager, replace any:
 - (i) Transferred Personnel; or

- (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business,

who leave or will leave the Divestiture Business before divestiture;

- (b) not terminate or vary the terms of employment or engagement (or agree to do any of those things) of any of the:

- (i) Transferred Personnel; or

- (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business,

other than for cause (such as serious breach of a Transferred Personnel's employment contract, including serious misconduct that might harm the reputation of the Divestiture Business or Aurizon, or otherwise contravene the law or give rise to a legal liability); and

- (c) not directly or indirectly procure, promote or encourage the redeployment of personnel necessary for the operation of the Divestiture Business as at the Control Date to any other business operated by Aurizon.

- 6.5 As soon as practicable after the Commencement Date, Aurizon must direct its personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with Aurizon's obligations under this Undertaking.

Aurizon's ongoing obligations in relation to the Divestiture Business

- 6.6 To the extent Aurizon has obligations in relation to the provision of transitional technical assistance or continued supply pursuant to clauses 1.7 to 1.12 in Annexure 1 and 1.7 to 1.12 in Annexure 2 of this Undertaking in relation to the Divestiture Business, Aurizon must not sell, assign, transfer, and/or licence directly or indirectly any of the assets necessary to fulfil such obligations without the prior written consent of the ACCC.

Confidential Information

- 6.7 Subject to clause 6.8, Aurizon must not, at any time from the Control Date, use or disclose any confidential information about the Divestiture Business gained through:

- (a) ownership and/or management of the Divestiture Business; or
- (b) fulfilling any obligations pursuant to this Undertaking.

- 6.8 Clause 6.7 does not apply to information that:

- (a) Aurizon requires to:
 - (i) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements;
 - (ii) carry out its obligations pursuant to this Undertaking; or

- (b) can be disclosed or used in accordance with the Approved Separation and Management Plan,

provided such information is only used for that purpose and is only disclosed to those officers, employees, contractors and advisers of Aurizon who need to know the information to carry out the permitted purpose.

7 Independent Management of the Divestiture Business

Obligation to appoint an Approved Independent Manager

7.1 Aurizon must appoint and maintain:

- (a) an Approved Independent Manager to oversee the Divestiture Business; and
- (b) an independent CEO and Board for the Divestiture Business that has the qualifications and experience necessary to manage the Divestiture Business (**East Coast Rail Management**) in accordance with Confidential Schedule 8,

from the Control Date until the completion of the sale or Demerger of the Divestiture Business in accordance with this Undertaking.

Process for approving a Proposed Independent Manager

7.2 At least 15 Business Days before the Control Date, Aurizon must provide the ACCC with a notice for a Proposed Independent Manager in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Manager Notice**), including a draft terms of appointment and a draft separation and management plan.

7.3 If clauses 7.12, 7.13 or 7.14 apply, Aurizon must provide the ACCC with a Proposed Independent Manager Notice within five Business Days after the relevant event occurs, otherwise clause 7.8 applies.

7.4 The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Manager identified in the Proposed Independent Manager Notice.

7.5 Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Manager, the factors to which the ACCC may have regard include whether the:

- (a) person named in the Proposed Independent Manager Notice or identified by the ACCC has the qualifications and experience necessary to oversee the Divestiture Business;
- (b) person named in the Proposed Independent Manager Notice or identified by the ACCC is sufficiently independent of Aurizon;
- (c) draft terms of appointment and the draft separation and management plan are consistent with this Undertaking; and
- (d) draft terms of appointment and the draft separation and management plan are otherwise acceptable to the ACCC.

Appointment of the Approved Independent Manager

- 7.6 After receiving a written notice from the ACCC of its approval of the Proposed Independent Manager, the draft terms of appointment and draft separation and management plan, Aurizon must by the Control Date:
- (a) appoint the person approved by the ACCC as the Approved Independent Manager on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

- 7.7 If:
- (a) the Approved Independent Manager has not been appointed by the Control Date;
 - (b) the Approved Independent Manager has not been appointed within 15 Business Days after the Approved Independent Manager resigns or otherwise ceases to act as the Approved Independent Manager pursuant to clause 7.12, 7.13 or 7.14; or
 - (c) the ACCC has not received a Proposed Independent Manager Notice pursuant to clause 7.3;

then clause 7.8 applies.

- 7.8 If clause 7.7 applies, the ACCC at its discretion may:
- (a) identify and approve a person as the Approved Independent Manager, including approving the draft terms of appointment of the Approved Independent Manager and the draft separation and management plan; and/or
 - (b) direct Aurizon to appoint a person who the ACCC has deemed is an Approved Independent Manager.

Obligations and powers of the Approved Independent Manager

- 7.9 Aurizon must procure that any proposed terms of appointment for the Approved Independent Manager include obligations on the Approved Independent Manager to:
- (a) maintain his or her independence from Aurizon (apart from appointment to the role of Approved Independent Manager) including not forming any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Aurizon for the period of his or her appointment;
 - (b) act in the best interests of the Divestiture Business at all times including ensuring that the Divestiture Business is managed in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestiture Business at the Control Date;

- (c) not use any confidential information gained through the oversight of the Divestiture Business other than for performing his or her functions as Approved Independent Manager;
- (d) make only those Material Changes to the Divestiture Business which the ACCC does not object to;
- (e) oversee the operation and management of the Divestiture Business to the maximum extent practicable, in a manner which is financially and operationally separate from Aurizon;
- (f) co-operate with the requests of any Approved Divestiture Agent or Approved Independent Auditor appointed pursuant to this Undertaking;
- (g) provide the following reports directly to the ACCC:
 - (i) a monthly written report regarding the implementation of and any suggested changes to the Approved Separation and Management Plan; and
 - (ii) an immediate report of any issues that arise in relation to the implementation of the Approved Separation and Management Plan or Aurizon's compliance with this Undertaking; and
- (h) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Manager pursuant to this Undertaking.

7.10 Aurizon must procure that the terms of appointment for the Approved Independent Manager provide the Approved Independent Manager with the sole authority to:

- (a) oversee the Divestiture Business according to the Approved Separation and Management Plan until the completion of the divestiture of the Divestiture Business;
- (b) provide any information requested by Aurizon pursuant to the protocol in the Approved Separation and Management Plan;
- (c) decide whether or not to provide access and the manner of such access to competitively sensitive information relating to the Divestiture Business requested by Aurizon which is not covered by the protocol in the Approved Separation and Management Plan;
- (d) renew or replace upon expiry Material Contracts and enter into new contracts for the provision of goods or services to the Divestiture Business on commercial terms favourable to the Divestiture Business;

- (e) engage, redeploy or make redundant personnel employed in the Divestiture Business as the Approved Independent Manager determines necessary; and
- (f) engage any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager.

Aurizon's obligations in relation to the Approved Independent Manager

7.11 Without limiting its obligations in this Undertaking, Aurizon must:

- (a) comply with and enforce the Approved Terms of Appointment of the Approved Independent Manager;
- (b) maintain and fund the Approved Independent Manager to carry out his or her functions, including:
 - (i) indemnifying the Approved Independent Manager for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Manager of his or her functions as the Approved Independent Manager except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Manager;
 - (ii) ensuring that the Approved Independent Manager is fully able to acquire and pay for sufficient and timely delivery of all goods and services (including from third parties) which the Approved Independent Manager considers are required by the Divestiture Business; and
 - (iii) providing and paying any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager; and
- (c) not interfere with the authority of, or otherwise hinder, the Approved Independent Manager's ability to carry out their obligations as the Approved Independent Manager, including:
 - (i) accepting (and directing its directors, contractors, managers, officers, employees and agents to accept) direction from the Approved Independent Manager as to the control, management, financing and operations of the Divestiture Business, and for the Divestiture Business to meet all legal, corporate, financial, accounting, taxation, audit and regulatory obligations;
 - (ii) providing access to the facilities, sites or operations of the Divestiture Business required by the Approved Independent Manager;
 - (iii) providing to the Approved Independent Manager any information or documents that he or she considers necessary for overseeing the management and operation of the Divestiture Business or for reporting to or otherwise advising the ACCC; and

- (iv) not requesting information or reports regarding the Divestiture Business from the personnel of the Divestiture Business except through the Approved Independent Manager; and
- (v) not appointing the Approved Independent Manager, or have any Agreements with the Approved Independent Manager, to utilise the Approved Independent Manager's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Manager ceases to act in the role of the Approved Independent Manager.

Resignation, revocation or termination of the Approved Independent Manager

- 7.12 Aurizon must immediately notify the ACCC in the event that the Approved Independent Manager resigns or otherwise stops acting as the Approved Independent Manager before the completion of the sale or Demerger of the Divestiture Business.
- 7.13 The ACCC may revoke an Approved Independent Manager's status as the Approved Independent Manager if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 7.14 The ACCC may approve any proposal by, or alternatively may direct, Aurizon to terminate the appointment of the Approved Independent Manager if in the ACCC's view the Approved Independent Manager acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

8 Independent Audit

Obligation to appoint an Approved Independent Auditor

- 8.1 Aurizon must appoint and maintain an Approved Independent Auditor to audit and report upon Aurizon's compliance with this Undertaking.

Process for approving a Proposed Independent Auditor

- 8.2 At least 15 Business Days before the Control Date, Aurizon must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Auditor Notice**), including draft terms of appointment and a draft audit plan.
- 8.3 The Independent Auditor is to be appointed for a term of two years. Within 15 Business Days of the end of the Independent Auditor's term, Aurizon must provide the ACCC with a new Proposed Independent Auditor Notice. A person who is, or who has been, the Independent Auditor is eligible for reappointment as the Independent Auditor.
- 8.4 If clauses 8.17, 8.18 or 8.19 apply, Aurizon must provide the ACCC with a Proposed Independent Auditor Notice within five Business Days after the relevant event occurs, otherwise clause 8.9 applies.
- 8.5 The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice.

- 8.6 Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
 - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of Aurizon;
 - (c) draft terms of appointment and the draft audit plan are consistent with this Undertaking; and
 - (d) draft terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

Appointment of the Approved Independent Auditor

- 8.7 After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, the draft terms of appointment and draft audit plan, Aurizon must by the Control Date:
- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

- 8.8 If:
- (a) the Approved Independent Auditor has not been appointed by the Control Date;
 - (b) the Approved Independent Auditor has not been appointed within 15 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Auditor pursuant to clause 8.17, 8.18, or 8.19; or
 - (c) the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 8.2 or 8.3;

then clause 8.9 applies.

- 8.9 If clause 8.8 applies, the ACCC at its absolute discretion may:
- (a) identify and approve a person as the Approved Independent Auditor, including approving the draft terms of appointment and draft audit plan; and/or
 - (b) direct Aurizon to appoint a person who the ACCC has deemed is an Approved Independent Auditor.

Obligations and powers of the Approved Independent Auditor

- 8.10 Aurizon must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
- (a) maintain his or her independence from Aurizon, apart from appointment to the role of Approved Independent Auditor, including not forming any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Aurizon for the period of his or her appointment;
 - (b) conduct compliance auditing according to the Approved Audit Plan;
 - (c) where requested by the ACCC, assess the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business against the factors (as relevant) in clause 2.5 of Annexure 2 of this Undertaking;
 - (d) provide the following reports directly to the ACCC:
 - (i) a scheduled written Audit Report as described in clause 8.12;
 - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
 - (iii) where requested by the ACCC, a report on the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business following an assessment under clause 8.10(c); and
 - (e) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.
- 8.11 Aurizon must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
- (a) access the facilities, sites or operations of the Divestiture Business and Aurizon's other businesses as required by the Approved Independent Auditor;
 - (b) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
 - (c) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

Compliance Audit

- 8.12 The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
- (a) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;

- (b) a full audit of Aurizon's compliance with this Undertaking;
- (c) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;
- (d) all of the reasons for the conclusions reached in the Audit Report;
- (e) any qualifications made by the Approved Independent Auditor in forming his or her views;
- (f) any recommendations by the Approved Independent Auditor to improve:
 - (i) the Approved Audit Plan;
 - (ii) the integrity of the auditing process;
 - (iii) Aurizon's processes or reporting systems in relation to compliance with this Undertaking; and
 - (iv) Aurizon's compliance with this Undertaking; and
- (g) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.

8.13 The Approved Independent Auditor is to provide an Audit Report to the ACCC and Aurizon at the following times:

- (a) within 10 Business Days after the Control Date, at which time the Audit Report is to include the results of the initial audit and any recommended changes to the Approved Audit Plan, including the Approved Independent Auditor's proposed procedures and processes for conducting the audit (**Establishment Audit**);
- (b) every month from the date of the Establishment Audit until one month after the sale or Demerger of the Divestiture Business is completed;
- (c) every three months after the date of provision of the last Audit Report pursuant to clause 8.13(b), until the ACCC confirms in writing to Aurizon that it is satisfied that Aurizon has fulfilled its obligations pursuant to this Undertaking; and
- (d) a final report due three months after the last report provided pursuant to clause 8.13(c).

8.14 Aurizon must implement any recommendations made by the Approved Independent Auditor in Audit Reports, and notify the ACCC of the implementation of the recommendations, within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.

8.15 Aurizon must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

Aurizon's obligations in relation to the Approved Independent Auditor

8.16 Without limiting its obligations in this Undertaking, Aurizon must:

- (a) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;
- (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
 - (i) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
 - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor; and
- (c) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
 - (i) directing Aurizon personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 8;
 - (ii) providing access to the facilities, sites or operations of the Divestiture Business and Aurizon's other businesses as required by the Approved Independent Auditor;
 - (iii) providing to the Approved Independent Auditor any information or documents he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
 - (iv) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
 - (v) not appointing the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

Resignation, revocation or termination of the Approved Independent Auditor

- 8.17 Aurizon must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 8.18 The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

- 8.19 The ACCC may approve any proposal by, or alternatively may direct, Aurizon to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking and/or the Approved Terms of Appointment or the Approved Independent Auditor fails to perform their role to an adequate standard.

9 Failure to divest the Divestiture Business within the Initial Divestiture Period

Divestiture of the Unsold Business

- 9.1 In the event that the Demerger of the Divestiture Business or the sale to an Approved Purchaser is not completed by the end of the Initial Divestiture Period, the Divestiture Business becomes an unsold business (**Unsold Business**) and the provisions of this clause 9 apply.

Obligation to appoint an Approved Divestiture Agent

- 9.2 From the end of the Initial Divestiture Period, Aurizon must appoint and maintain an Approved Divestiture Agent to effect the divestiture of the Unsold Business.

Process for approving a Proposed Divestiture Agent

- 9.3 At least 15 Business Days prior to the end of the Initial Divestiture Period, if the divestiture of the Divestiture Business has not been completed, Aurizon must provide the ACCC with a notice for a Proposed Divestiture Agent in the form of Schedule 3 to this Undertaking (**Proposed Divestiture Agent Notice**) including draft terms of appointment, a draft business sale agreement, and draft marketing and sale plan.
- 9.4 If clauses 9.14, 9.15 or 9.16 apply, Aurizon must provide the ACCC with a Proposed Divestiture Agent Notice within five Business Days after the relevant event occurs, otherwise clause 9.8 applies.
- 9.5 The ACCC shall have the discretion to approve or reject in writing the Proposed Divestiture Agent.
- 9.6 Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Divestiture Agent, the factors to which the ACCC may have regard include whether the:
- (a) person named in Proposed Divestiture Agent Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Divestiture Agent;
 - (b) person named in the Proposed Divestiture Agent Notice or identified by the ACCC is sufficiently independent of Aurizon;
 - (c) draft terms of appointment, draft business sale agreement and draft marketing and sale plan are consistent with this Undertaking; and
 - (d) draft terms of appointment, draft business sale agreement and draft marketing and sale plan are otherwise acceptable to the ACCC.

Appointment of the Approved Divestiture Agent

- 9.7 After receiving written notice from the ACCC of its approval of the Proposed Divestiture Agent, the draft terms of appointment, draft business sale agreement and draft marketing and sale plan, Aurizon must within two Business Days:
- (a) appoint the person approved by the ACCC as the Approved Divestiture Agent on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

- 9.8 If:
- (a) the Approved Divestiture Agent has not been appointed within 10 Business Days after the Divestiture Business becomes an Unsold Business;
 - (b) the Approved Divestiture Agent has not been appointed within 15 Business Days after the Approved Divestiture Agent resigns or otherwise ceases to act pursuant to clauses 9.14, 9.15 or 9.16; or
 - (c) the ACCC has not received a Proposed Divestiture Agent Notice pursuant to clause 9.4;

then clause 9.9 applies.

- 9.9 If clause 9.8 applies, the ACCC may, at its absolute discretion:
- (a) identify and approve a person as the Approved Divestiture Agent, including approving the draft terms of appointment of the Approved Divestiture Agent, draft business sale agreement and draft marketing and sale plan; and/or
 - (b) direct Aurizon to appoint a person who the ACCC has deemed is an Approved Divestiture Agent.

Obligations and powers of the Approved Divestiture Agent

- 9.10 Aurizon must procure that any proposed terms of appointment for the Approved Divestiture Agent include obligations on the Approved Divestiture Agent to:
- (a) divest the Unsold Business only to an Approved Purchaser, at no minimum price;
 - (b) maintain his or her independence from Aurizon, apart from appointment to the role of Approved Divestiture Agent, including not form any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Aurizon for the period of his or her appointment;
 - (c) not use any confidential information gained through the divestiture of the Unsold Business other than for performing his or her functions as Approved Divestiture Agent;
 - (d) follow the Approved Marketing and Sale Plan;

- (e) use his or her best endeavours to enter into a binding agreement for the divestiture of the Unsold Business as quickly as possible using the Approved Business Sale Agreement;
- (f) co-operate with the requests of any Approved Independent Manager or Approved Independent Auditor appointed pursuant to this Undertaking;
- (g) every 30 Business Days following appointment of the Approved Divestiture Agent, provide written reports directly to the ACCC which include:
 - (i) information regarding the implementation of the Approved Business Sale Agreement and the Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (ii) information regarding any suggested changes to any Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (iii) an account and explanation of all disbursements, fees and charges incurred by the Approved Divestiture Agent in undertaking his or her duties by month and to the date of the report;
 - (iv) a schedule of agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 9.11(d));
 - (v) the efforts made to sell the Unsold Business;
 - (vi) the identity of any advisers engaged;
 - (vii) the identity of any persons expressing interest in the Unsold Business; and
 - (viii) any other information required by the ACCC.
- (h) within 30 Business Days after the completion of the divestiture of the Unsold Business, provide a written report directly to the ACCC which includes a final accounting of:
 - (i) any moneys derived from the divestiture of the Unsold Business;
 - (ii) all disbursements, fees and charges incurred by the Approved Divestiture Agent in fulfilling his or her duties; and
 - (iii) all agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 9.11(d));
- (i) immediately inform the ACCC of:
 - (i) any issues that arise in relation to the implementation of the Approved Sale and Purchase Agreement and any Approved Marketing and Sale Plan;

- (ii) non-compliance with this Undertaking by any person named in this Undertaking;
- (iii) any offers for the Unsold Business;
- (j) accept any offer for the Unsold Business upon instruction from Aurizon given in accordance with clause 9.13(d); and
- (k) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Divestiture Agent pursuant to this Undertaking.

9.11 Aurizon must procure that any proposed terms of appointment for the Approved Divestiture Agent contain an irrevocable grant of power of attorney conferring all necessary power and authority on the Approved Divestiture Agent to:

- (a) negotiate with purchasers to divest the Unsold Business on terms considered by the Approved Divestiture Agent in his or her sole discretion to be consistent with this Undertaking and the Approved Marketing and Sale Plan;
- (b) execute any agreements with the Approved Purchaser required pursuant to clause 2.4 of Annexure 2;
- (c) upon instruction pursuant to clause 9.13(d), complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the Approved Business Sale Agreement; and
- (d) engage any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent.

9.12 Any irrevocable power of attorney granted pursuant to clause 9.11 will end upon resignation or termination of the Approved Divestiture Agent in accordance with clauses 9.14, 9.15 and 9.16, or in the event that the Unsold Business is divested in accordance with this Undertaking.

Aurizon's obligations in relation to the Approved Divestiture Agent

9.13 Without limiting its obligations in this Undertaking, Aurizon must from the end of the Initial Divestiture Period:

- (a) comply with and enforce the Approved Terms of Appointment for the Approved Divestiture Agent;
- (b) maintain and fund the Approved Divestiture Agent to carry out his or her functions, including:
 - (i) indemnifying the Approved Divestiture Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Divestiture Agent of his or her functions as the Approved Divestiture Agent except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Divestiture Agent;

- (ii) providing and paying for any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent;
 - (iii) paying such fees as are agreed between the Approved Divestiture Agent and Aurizon (but not fees contingent on the price to be obtained for the Unsold Business); and
 - (iv) if an agreement as to fees cannot be reached between the Approved Divestiture Agent and Aurizon within 15 Business Days after the end of the Initial Divestiture Period, Aurizon agrees to pay such fees as are directed by the ACCC;
- (c) not interfere with, or otherwise hinder, the Approved Divestiture Agent's ability to carry out his or her functions as the Approved Divestiture Agent, including:
- (i) directing its personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 9;
 - (ii) providing access to the facilities, sites or operations of the Unsold Business as required by the Approved Divestiture Agent; and
 - (iii) providing to the Approved Divestiture Agent any information, documents or other assistance he or she considers necessary for carrying out his or her functions as the Approved Divestiture Agent or for reporting to or otherwise advising the ACCC;
- (d) within three Business Days after receiving notice from the ACCC pursuant to clause 2.4 of Annexure 2, Aurizon must instruct the Approved Divestiture Agent to complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the documents approved by the ACCC pursuant to clause 2.4 of Annexure 2; and
- (e) other than in accordance with clause 9.13(d) of this Undertaking, not instruct the Approved Divestiture Agent to divest the Unsold Business.

Resignation, revocation or termination of the Approved Divestiture Agent

- 9.14 Aurizon must immediately notify the ACCC in the event that an Approved Divestiture Agent resigns or otherwise stops acting as an Approved Divestiture Agent before the completion of the divestiture of the Unsold Business.
- 9.15 The ACCC may revoke an Approved Divestiture Agent's status as the Approved Divestiture Agent if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 9.16 The ACCC may approve any proposal by, or alternatively may direct, Aurizon to terminate an Approved Divestiture Agent if in the ACCC's view the Approved Divestiture Agent acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

10 Notification of key dates and ACCC requests for information

- 10.1 Aurizon must notify the ACCC and each Undertaking Appointment in writing of:
- (a) the anticipated date of the Control Date, at least five Business Days before that date;
 - (b) the anticipated date of the completion of the sale or Demerger of the Divestiture Business or sale of the Unsold Business (as applicable), at least five Business Days before that date;
 - (c) the occurrence of the Control Date, within one Business Day of that date; and
 - (d) the occurrence of the completion of the sale or Demerger of the Divestiture Business or sale of the Unsold Business (as applicable), within one Business Day of that date.
- 10.2 The ACCC may direct Aurizon in respect of its compliance with this Undertaking to, and Aurizon must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce documents and materials to the ACCC within Aurizon's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 10.3 Any direction made by the ACCC under clause 10.2 will be notified to Aurizon, in accordance with clause 16.2.
- 10.4 In respect of Aurizon's compliance with this Undertaking or an Undertaking Appointment's compliance with its Approved Terms of Appointment, the ACCC may request any Undertaking Appointment to:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce documents and materials to the ACCC within the Undertaking Appointment's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 10.5 Aurizon will use its best endeavours to ensure that an Undertaking Appointment complies with any request from the ACCC in accordance with clause 10.4.
- 10.6 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 10 may be

used by the ACCC for any purpose consistent with the exercise of its statutory duties.

- 10.7 The ACCC may in its discretion:
- (a) advise any Undertaking Appointment of any request made by it under this clause 10; and/or
 - (b) provide copies to any Undertaking Appointment of any information furnished, documents and material produced or information given to it under this clause 10.
- 10.8 Nothing in this clause 10 requires the provision of information or documents in respect of which Aurizon has a claim of legal professional or other privilege.

11 Disclosure of this Undertaking

- 11.1 Aurizon and the ACCC agree that Confidential Schedules 5, 6 and 8 will remain confidential until after the completion of the sale or Demerger of the Divestiture Business or sale of the Unsold Business and, subject to this clause 11, Confidential Schedule 7 will remain confidential.
- 11.2 Aurizon acknowledges that the ACCC may provide each Undertaking Appointment with a copy of this Undertaking which includes unredacted versions of Confidential Schedules 5, 6, 7 and 8.
- 11.3 Aurizon acknowledges that the ACCC may, subject to clause 11.1:
- (a) make this Undertaking publicly available;
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
 - (c) from time to time publicly refer to this Undertaking.
- 11.4 Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;
 - (b) permitted by section 155AAA of the Act;
 - (c) necessary for the purpose of enforcement action under section 87B of the Act; or
 - (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- 11.5 Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

12 Obligation to procure

- 12.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Aurizon to take or refrain from taking some action, Aurizon will procure that Related Body Corporate to take or refrain from taking that action.

13 No Derogation

- 13.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Aurizon of any term of this Undertaking.
- 13.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Aurizon does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

14 Change of Control

- 14.1 In the event that a Change of Control is reasonably expected to occur, Aurizon must:
- (a) notify the ACCC of this expectation as soon as practicable; and
 - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Aurizon pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Aurizon in writing that a section 87B undertaking under this clause is not required.

15 Costs

- 15.1 Aurizon must pay all of its own costs incurred in relation to this Undertaking.

16 Notices

Giving Notices

- 16.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@acc.gov.au
Attention: Executive General Manager
Mergers, Exemption & Digital Division

With a copy sent to: mergersru@acc.gov.au
Attention: Director, Remedies Unit
Policy, Coordination & Remedies Branch
Mergers, Exemption & Digital Division

- 16.2 Any notice or communication to Aurizon pursuant to this Undertaking must be sent to:

Name: Tristan Barns, General Counsel, Aurizon
Address: 900 Ann Street, Fortitude Valley QLD 4006
Email Address: legal@aurizon.com.au
Fax number: N/A
Attention: Tristan Barns

With a copy sent to:

Name: Simon Cooke and Caroline Coops, Partner, King & Wood
Malesons
Address: Level 27, Collins Arch, 447 Collins Street, Melbourne VIC 3000
Email Address: simon.cooke@au.kwm.com; caroline.coops@au.kwm.com
Fax number: N/A
Attention: Simon Cooke and Caroline Coops

- 16.3 If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- 16.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

Change of contact details

- 16.5 Aurizon must notify the ACCC of a change to its contact details within three Business Days.
- 16.6 Any notice or communication will be sent to the most recently advised contact details and subject to clauses 16.3 and 16.4, will be taken to be received.

17 Defined terms and interpretation

Definitions in the Dictionary

- 17.1 A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
 - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

- 17.2 Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Annexure 1 – Demerger

1 Demerger of Divestiture Business

- 1.1 In the event that the divestiture of the Divestiture Business occurs by the Demerger as a scheme of arrangement under Part 5.1 of the Corporations Act, Aurizon must ensure:
- (a) the transfer or grant to the Divestiture Business of all Consents pursuant to clauses 1.2 to 1.4;
 - (b) the transfer of any Transferred Personnel required pursuant to clauses 1.5 to 1.6;
 - (c) compliance with any Approved Transitional Technical Assistance Agreement required pursuant to clauses 1.7 to 1.9; and
 - (d) compliance with any Approved Transitional Supply Agreement required pursuant to clauses 1.10 to 1.12.

Consents

- 1.2 Aurizon must:
- (a) obtain as expeditiously as possible, all Consents as required before completion of the Demerger of the Divestiture Business;
 - (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;
 - (c) act in good faith in its negotiations with the Divestiture Business in relation to obtaining any Consents;
 - (d) promptly pay the costs and expenses of any third party reasonably incurred in providing the Consents; and
 - (e) enter an agreement with the Divestiture Business approved by the ACCC, or vary any existing Approved Transitional Supply Agreement as required by the Divestiture Business, in relation to any goods or services that are required for the operation of the Divestiture Business which may be affected by any failure to gain a Consent.
- 1.3 If, seven Business Days before completion of the Demerger of the Divestiture Business, the Divestiture Business does not or is otherwise unable to obtain one or more Consents, then Aurizon must:
- (a) immediately provide to the ACCC in writing details of the:
 - (i) Consents that have not been obtained;
 - (ii) reasons why the Consents have not been obtained; and
 - (iii) information or material required to obtain the Consents.

- (b) continue to do everything in its power to satisfy clause 1.2 as soon as possible after the completion of the Demerger of the Divestiture Business (and until such time as clause 1.2 is satisfied).

1.4 Even if Aurizon has complied with clause 1.2(a) to 1.2(e), it remains a breach of this Undertaking if Aurizon is unable to comply with clause 5.1 within the Initial Divestiture Period by reason that one or more Consents are not obtained.

Transferred Personnel

1.5 At the option of the Approved Independent Manager, in consultation with East Coast Rail Management, Aurizon must transfer to the Divestiture Business:

- (a) all employees; and
- (b) all service providers under a contract for service;

who are, in the view of the Approved Independent Manager, in consultation with East Coast Rail Management, required for East Coast Rail Management to maintain, operate or conduct effectively the Divestiture Business and who consent to the transfer of their employment or contract for service to the Divestiture Business (**Transferred Personnel**).

1.6 When fulfilling its obligations under clause 1.5, Aurizon must:

- (a) encourage all Transferred Personnel to remain with the Divestiture Business, including offering incentives based on industry practice;
- (b) not directly or indirectly discourage any Transferred Personnel from any obligations to provide services to the Divestiture Business;
- (c) effective on the date of the Demerger of the Divestiture Business, release the Transferred Personnel from any obligations to provide services to Aurizon;
- (d) effective on the date of the Demerger of the Divestiture Business, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the Divestiture Business or Unsold Business; and
- (e) not procure, promote or encourage the transfer of any of the Transferred Personnel from the Divestiture Business to Aurizon for a period of 12 months after the completion of the Demerger of the Divestiture Business.

Technical Assistance

1.7 At the option of the Approved Independent Manager, in consultation with East Coast Rail Management, Aurizon must supply to the Divestiture Business, under an Approved Transitional Technical Assistance Agreement, any Technical Assistance that is required by East Coast Rail Management in order to operate the Divestiture Business.

- 1.8 Aurizon must ensure that any Approved Transitional Technical Assistance Agreement, and any renewal or extension of an Approved Transitional Technical Assistance Agreement, provides for the supply of Technical Assistance:
- (a) on a transitional basis for a period that is nominated by the Approved Independent Manager and approved in writing by the ACCC; and
 - (b) at cost and otherwise on arm's length terms.
- 1.9 To avoid doubt, Aurizon must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Technical Assistance Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Technical Assistance Agreement, the ACCC will have regard to the criteria set out in clauses 1.7 and 1.8.

Transitional Supply Agreements

- 1.10 At the option of the Approved Independent Manager, in consultation with East Coast Rail Management, Aurizon must ensure the continued supply by Aurizon to East Coast Rail Management, under an Approved Transitional Supply Agreement, of any goods or services that are required by the Divestiture Business in order for the Divestiture Business to be maintained as a viable, effective, stand-alone, independent and long-term competitor, including in relation to the supply of rail haulage services for coal in NSW and Queensland.
- 1.11 Aurizon must ensure that any Approved Transitional Supply Agreement and any renewal or extension of an Approved Transitional Supply Agreement:
- (a) is for a reasonable transitional period, to be nominated by the Approved Independent Manager and approved in writing by the ACCC;
 - (b) provides for the supply of the included goods and services at cost price; and
 - (c) is on such terms other than price which are no less favourable to the Divestiture Business than arm's length terms.
- 1.12 To avoid doubt, Aurizon must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Supply Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Supply Agreement, the ACCC will have regard to the criteria set out in clauses 1.10 and 1.11.

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Annexure 2 – Sale of Divestiture Business

1 Sale of Divestiture Business

- 1.1 In the event that the divestiture of the Divestiture Business occurs by the sale of the Divestiture Business to an Approved Purchaser, pursuant to the Approved Sale and Purchase Agreement, Aurizon must ensure:
- (a) the transfer or grant to Approved Purchaser of all Consents pursuant to clauses 1.2 to 1.4;
 - (b) the transfer of any Transferred Personnel required pursuant to clauses 1.5 to 1.6;
 - (c) compliance with any Approved Transitional Technical Assistance Agreement required pursuant to clauses 1.7 to 1.9; and
 - (d) compliance with any Approved Transitional Supply Agreement required pursuant to clauses 1.10 to 1.12.

Consents

- 1.2 Aurizon must:
- (a) obtain or assist the Approved Purchaser to obtain as expeditiously as possible, all Consents as required before completion of the sale of the Divestiture Business;
 - (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;
 - (c) act in good faith in its negotiations with an Approved Purchaser in relation to obtaining any Consents;
 - (d) promptly pay or procure that an Approved Purchaser pays the costs and expenses of any third party reasonably incurred in providing Consents; and
 - (e) enter an agreement with the Approved Purchaser approved by the ACCC, or vary any existing Approved Transitional Supply Agreement as required by an Approved Purchaser, in relation to any goods or services that are required for the operation of the Divestiture Business which may be affected by any failure to gain a Consent.
- 1.3 If, seven Business Days before completion of the sale of the Divestiture Business, an Approved Purchaser does not or is otherwise unable to obtain one or more Consents, then Aurizon must:
- (a) immediately provide to the ACCC in writing details of the:
 - (i) Consents that have not been obtained;
 - (ii) reasons why the Consents have not been obtained; and

- (iii) information or material required to obtain the Consents.
 - (b) continue to do everything in its power to satisfy clause 1.2 as soon as possible after the completion of the sale of the Divestiture Business (and until such time as clause 1.2 is satisfied).
- 1.4 Even if Aurizon has complied with clause 1.2 to 1.3, it remains a breach of this Undertaking if Aurizon is unable to comply with clause 5.1 within the Initial Divestiture Period by reason that one or more Consents are not obtained.

Transferred Personnel

- 1.5 At the option of an Approved Purchaser, Aurizon must transfer to the Approved Purchaser:
 - (a) all employees; and
 - (b) all service providers under a contract for service;who are, in the view of the Approved Purchaser, required for the Approved Purchaser to maintain, operate or conduct effectively the Divestiture Business and who consent to the transfer of their employment or contract for service to the Approved Purchaser (**Transferred Personnel**).
- 1.6 When fulfilling its obligations under clause 1.5, Aurizon must:
 - (a) encourage all Transferred Personnel to remain with the Divestiture Business, including offering incentives based on industry practice;
 - (b) not directly or indirectly discourage any Transferred Personnel from any obligations to provide services to the Divestiture Business;
 - (c) effective on the date of the sale of the Divestiture Business, release the Transferred Personnel from any obligations to provide services to Aurizon;
 - (d) effective on the date of the sale of the Divestiture Business, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the Divestiture Business or Unsold Business; and
 - (e) not procure, promote or encourage the transfer of any of the Transferred Personnel from the Approved Purchaser to Aurizon for a period of 12 months after the completion of the sale of the Divestiture Business.

Technical Assistance

- 1.7 At the option of the Approved Purchaser, Aurizon must supply to the Approved Purchaser, under an Approved Transitional Technical Assistance Agreement, any Technical Assistance that is required by the Approved Purchaser in order to operate the Divestiture Business.

- 1.8 Aurizon must ensure that any Approved Transitional Technical Assistance Agreement, and any renewal or extension of an Approved Transitional Technical Assistance Agreement, provides for the supply of Technical Assistance:
- (a) on a transitional basis for a period that is nominated by the Approved Purchaser and approved in writing by the ACCC; and
 - (b) at cost and otherwise on arm's length terms.
- 1.9 To avoid doubt, Aurizon must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Technical Assistance Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Technical Assistance Agreement, the ACCC will have regard to the criteria set out in clauses 1.7 and 1.8.

Transitional Supply Agreements

- 1.10 At the option of an Approved Purchaser, Aurizon must ensure the continued supply by Aurizon to the Approved Purchaser, under an Approved Transitional Supply Agreement, of any goods or services that are required by the Approved Purchaser in order for the Approved Purchaser to be maintained as a viable, effective, stand-alone, independent and long-term competitor, including in relation to the supply of rail haulage services for coal in NSW and Queensland.
- 1.11 Aurizon must ensure that any Approved Transitional Supply Agreement and any renewal or extension of an Approved Transitional Supply Agreement:
- (a) is for a reasonable transitional period, to be nominated by an Approved Purchaser and approved in writing by the ACCC;
 - (b) provides for the supply of the included goods and services at cost price; and
 - (c) is on such terms other than price which are no less favourable to the Approved Purchaser than arm's length terms.
- 1.12 To avoid doubt, Aurizon must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Supply Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Supply Agreement, the ACCC will have regard to the criteria set out in clauses 1.10 and 1.11.

2 Process for approving a proposed purchaser

Potential purchasers

- 2.1 Aurizon must provide the ACCC and Approved Independent Auditor with:
- (a) the identity of any person who expresses an interest in acquiring the Divestiture Business;
 - (b) the status of negotiations with each person; and
 - (c) a copy of each person's offer to acquire the Divestiture Business, where relevant;
- at the following times:
- (d) as soon as possible following the Commencement Date for those persons who express interest before the Commencement Date;
 - (e) after the Commencement Date, within 10 Business Days of each person expressing the interest and/or providing an offer;
- regardless of whether the person subsequently withdraws or is declined.

Provision of a notice for a Proposed Purchaser

- 2.2 To seek ACCC approval for a Proposed Purchaser, Aurizon or the Approved Divestiture Agent must provide the ACCC with a notice in the form prescribed in Schedule 2 to this Undertaking (**Proposed Purchaser Notice**), including a draft sale and purchase agreement, a draft transitional technical assistance agreement (where required by the Proposed Purchaser), and a draft transitional supply agreement (where required by the Proposed Purchaser).
- 2.3 The Proposed Purchaser Notice must be provided to the ACCC at least 20 Business Days prior to the end of the Initial Divestiture Period.

Approval of a Proposed Purchaser after the Commencement Date

- 2.4 The ACCC shall have the discretion to approve or reject in writing the Proposed Purchaser identified in the Proposed Purchaser Notice, which includes consideration of:
- (a) the draft sale and purchase agreement attached to the Proposed Purchaser Notice;
 - (b) any draft transitional technical assistance agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 1.7 and 1.8; and
 - (c) any draft transitional supply agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 1.10 and 1.11.
- 2.5 Without limiting the ACCC's discretion, in making the decision pursuant to clause 2.4, the factors to which the ACCC may have regard include whether the:

- (a) draft sale and purchase agreement is consistent with this Undertaking;
- (b) Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
- (c) Proposed Purchaser is independent of Aurizon;
- (d) Proposed Purchaser is of good financial standing;
- (e) Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
- (f) Proposed Purchaser is able to conduct the Divestiture Business effectively; and
- (g) divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including in relation to the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser.

2.6 The ACCC may revoke an Approved Purchaser's status as the Approved Purchaser if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Schedule 1 – Dictionary and interpretation

1. Dictionary

ACCC means the Australian Competition and Consumer Commission.

Act means the *Competition and Consumer Act 2010* (Cth).

Agreements means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

Approved Audit Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

Approved Business Sale Agreement means the standard form contract for the divestiture of the Unsold Business which has been approved by the ACCC in accordance with the terms of this Undertaking.

Approved Divestiture Agent means the person approved by the ACCC and appointed under clause 9 of this Undertaking.

Approved Independent Auditor means the person approved by the ACCC and appointed under clause 8 of this Undertaking.

Approved Independent Manager means the person approved by the ACCC and appointed under clause 7 of this Undertaking.

Approved Marketing and Sale Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Divestiture Agent will market and effect the divestiture of the Unsold Business.

Approved Purchaser means the person approved by the ACCC under clause 2 of Annexure 2 of this Undertaking.

Approved Sale and Purchase Agreement means the contract approved by the ACCC in accordance with the terms of this Undertaking, by which Aurizon will divest the Divestiture Businesses to the Approved Purchaser and Approved Purchaser will acquire the Divestiture Business from Aurizon.

Approved Separation and Management Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Manager will:

- a) separate the Divestiture Business from any business to be retained by Aurizon; and
- b) oversee the Divestiture Business independently of Aurizon and any retained business.

Approved Transitional Supply Agreement means any agreement, for the supply of goods or services (other than Technical Assistance) by Aurizon to the Divestiture Business, approved by the ACCC in accordance with the terms of this Undertaking.

Approved Transitional Technical Assistance Agreement means any agreement, for the supply of Technical Assistance by Aurizon to the Divestiture Business, approved by the ACCC in accordance with the terms of this Undertaking.

Approved Terms of Appointment means the terms of appointment for the Approved Independent Manager, Approved Independent Auditor or Approved Divestiture Agent, as applicable, as approved by the ACCC in accordance with the terms of this Undertaking.

Associated Entity has the meaning given by section 50AAA of the Corporations Act.

Audit Report has the meaning given to it in clause 8.12 of this Undertaking.

Aurizon means the entity referred to in clause 1.1 of this Undertaking.

Business Day means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

Change of Control means:

- the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Aurizon to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- the sale or transfer of any assets necessary, or which may be necessary, to enable Aurizon to continue to comply with this Undertaking in its entirety.

Commencement Date means the date described in clause 3.1 of this Undertaking.

Control Date means the date on which the Proposed Acquisition is completed.

Consents means any Government Consents or Third Party Consents.

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

Divestiture Business means the items described in Schedule 4 to this Undertaking.

East Coast Rail Management is defined in clause 7.1 of this Undertaking.

Entities Connected has the meaning given by section 64B of the Corporations Act.

Establishment Audit has the meaning given to it in clause 8.13(a) of this Undertaking.

Government Consents means any consents from any government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Business.

Holding Company has the meaning given by section 9 of the Corporations Act.

Initial Divestiture Period is defined in Confidential Schedule 5 to this Undertaking.

Material Change means any change to the structure, attributes, extent or operations of the Divestiture Business or product or service sold by a Divestiture Business that may affect, or impact on, the competitiveness of the Divestiture Business.

Material Contract means any Agreement that is necessary for the operation of the Divestiture Business.

One Rail means One Rail Australia Pty Ltd ACN 079 444 296.

Proposed Acquisition is defined in clause 2 of this Undertaking.

Proposed Divestiture Agent means a person named in a Proposed Divestiture Notice.

Proposed Divestiture Agent Notice has the meaning given to it in clause 9.3 of this Undertaking.

Proposed Independent Auditor means a person named in a Proposed Independent Auditor Notice.

Proposed Independent Auditor Notice has the meaning given to it in clause 8.2 of this Undertaking.

Proposed Independent Manager means a person named in a Proposed Independent Manager Notice.

Proposed Independent Manager Notice has the meaning given to it in clause 7.2 of this Undertaking.

Proposed Purchaser means a person named in a Proposed Purchaser Notice.

Proposed Purchaser Notice has the meaning given to it in clause 2.2 of Annexure 2 of this Undertaking.

Public Mergers Register means the ACCC's public register of merger clearances, available at www.accc.gov.au.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at www.accc.gov.au.

Related Bodies Corporate has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

Related Entities has the meaning given to it by section 9 of the *Corporations Act 2001* (Cth).

Related Parties has the meaning given to it by section 228 of the *Corporations Act 2001* (Cth).

Subsidiary has the meaning given by section 9 of the Corporations Act.

Technical Assistance includes advising on technical knowledge documentation, supporting the Divestiture Business or the Approved Purchaser on acquiring specific assets necessary for the ongoing conduct of the Divestiture Business, providing staff with suitable experience and skills to assist and/or advice on technical issues, assisting in training for the Divestiture Business' or the Approved Purchaser's staff, and providing guidance on regulatory and legal aspects relating to the transfer of or application for licences.

Third Party Consents means any Consent from any entity that is not a government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Business.

Transferred Personnel has the meaning given to it in clause 1.5 of Annexure 1 and 1.5 of Annexure 2 of this Undertaking.

Undertaking is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

Undertaking Appointment means the Approved Independent Manager, the Approved Independent Auditor or the Approved Divestiture Agent, as applicable.

Unsold Business has the meaning given to it in clause 9.1 of this Undertaking.

2. Interpretation

- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
 - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
 - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
 - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
 - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
 - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
 - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
 - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
 - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
 - (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
 - (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
 - (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
 - (m) material not forming part of this Undertaking may be considered to:

- (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
- (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, Aurizon will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
- (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
 - (ii) a party includes its successors and permitted assigns; and
 - (iii) a monetary amount is in Australian dollars.

Schedule 2 – Proposed Purchaser Notice Form

This form sets out the information required by the ACCC in relation to a Proposed Purchaser.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

1. Method of Delivery to the ACCC

The completed form with requested documents attached may be provided to the ACCC using the following method:

Email

Subject line: Proposed Purchaser Notice – Aurizon section 87B Undertaking to the ACCC

Address: mergers@accc.gov.au

Attention: Executive General Manager – Mergers, Exemption and Digital Division

With an email copy sent to:

Address: mergersru@accc.gov.au

Attention: Director, Remedies Unit, Policy, Coordination, & Remedies Branch,
Mergers, Exemption and Digital Division

2. Information Required

The ACCC requires the following information in order to assess a Proposed Purchaser.

2.1 Proposed Purchaser details:

- (a) Name of the Proposed Purchaser;
- (b) Address;
- (c) Contact name;
- (d) Telephone number;
- (e) Other contact details.

2.2 A submission containing the following information:

- (a) a description of the business carried on by the Proposed Purchaser including the locations in which the Proposed Purchaser carries on its business;
- (b) details of the Proposed Purchaser's experience in the relevant market(s);
- (c) the names of the owner(s) and the director(s) of the Proposed Purchaser;

(d) details of any of the following types of relationships between Aurizon and the Proposed Purchaser or confirmation that no such relationship exists whether within Australia or outside of Australia:

- (i) Aurizon and the Proposed Purchaser are Associated Entities;
- (ii) Aurizon is an Entity Connected with the Proposed Purchaser;
- (iii) the Proposed Purchaser is an Entity Connected with Aurizon;
- (iv) Aurizon and the Proposed Purchaser are Related Entities;
- (v) Aurizon and the Proposed Purchaser are Related Parties;
- (vi) any Related Party, Related Entity or Entity Connected with Aurizon is a Related Party, Related Entity or Entity Connected with the Proposed Purchaser;
- (vii) Aurizon and the Proposed Purchaser have a contractual relationship or had one within the past three years, other than those attached to this form;
- (viii) the Proposed Purchaser is a supplier of Aurizon or has been in the past three years;
- (ix) Aurizon is a supplier of the Proposed Purchaser or has been in the past three years; and
- (x) any other relationship between Aurizon and the Proposed Purchaser that allows one to affect the business decisions of the other;

(e) a section addressing the following factors, including any information adverse to the Proposed Purchaser, in the power, possession or control of Aurizon:

- (i) whether the draft sale and purchase agreement is consistent with this Undertaking;
- (i) whether the Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
- (ii) whether the Proposed Purchaser is of good financial standing;
- (iii) whether the Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
- (iv) whether the Proposed Purchaser is able to conduct the Divestiture Business effectively;
- (v) whether the divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including any relationships (including but not limited to shareholding interests, other proprietary interests, contracts, arrangements or understandings) between the Proposed Purchaser and other entities in a relevant market, and the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser; and

- (vi) any other matters that may affect the Proposed Purchaser's capacity or ability to acquire or operate the Divestiture Business, such as outstanding legal action or disputes.

2.3 Please also attach to this form:

- (a) the finalised draft of the sale and purchase agreement for approval by the ACCC in accordance with this Undertaking.
- (b) the finalised draft of any transitional technical assistance agreement for approval by the ACCC in accordance with this Undertaking.
- (c) the finalised draft of any transitional supply agreement for approval by the ACCC in accordance with this Undertaking.
- (d) any documents required to support the information provided by Aurizon pursuant to this form.

Schedule 3 – Undertaking Appointment Form

This form sets out the information required by the ACCC in relation to proposed appointment of the following positions under the Undertaking:

- Independent Manager;
- Independent Auditor; or
- Divestiture Agent

(the **Undertaking Appointment**).

This form is to be used for each of the above appointments.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

1. Method of Delivery to the ACCC

The completed form with requested documents attached may be provided to the ACCC using the following method:

Email

Subject line: Proposed [only include relevant Undertaking Appointment i.e. Independent Manager/Independent Auditor/Divestiture Agent] Notice – Aurizon section 87B Undertaking to the ACCC

Address: mergers@acc.gov.au

Attention: Executive General Manager – Mergers, Exemption and Digital Division

With an email copy sent to:

Address: mergersru@acc.gov.au

Attention: Director, Remedies Unit, Policy, Coordination & Remedies Branch, Mergers, Exemption and Digital Division

2. Information Required

The ACCC requires the following information in order to assess a proposed Independent Manager, Independent Auditor or Divestiture Agent (i.e. the relevant Undertaking Appointment).

2.1 Proposed Undertaking Appointment details:

- (a) the name of the Proposed Undertaking Appointment; and
- (b) the name of the proposed Undertaking Appointment's employer and contact details including:
 - (i) Address;
 - (ii) Contact name;

- (iii) Telephone number;
- (iv) Other contact details.

2.2 A submission containing the following information:

- (a) details of the Undertaking Appointment's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking;
- (b) the names of the owner(s) and the director(s) of the Undertaking Appointment's employer;
- (c) details of any of the following types of relationships between Aurizon and the Undertaking Appointment or the Undertaking Appointment's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
 - (i) Aurizon and the Undertaking Appointment's employer are Associated Entities;
 - (ii) Aurizon is an Entity Connected with the Undertaking Appointment's employer;
 - (iii) The Undertaking Appointment's employer is an Entity Connected with Aurizon;
 - (iv) Aurizon and the Undertaking Appointment's employer are Related Entities;
 - (v) Aurizon and the Undertaking Appointment's employer are Related Parties;
 - (vi) any Related Party, Related Entity or Entity Connected with Aurizon is a Related Party, Related Entity or Entity Connected with the Undertaking Appointment;
 - (vii) Aurizon and the Undertaking Appointment or the Undertaking Appointment's employer have a contractual relationship or had one within the past three years, other than those attached to this form;
 - (viii) the Undertaking Appointment's employer is a supplier of Aurizon or has been in the past three years;
 - (ix) Aurizon is a supplier of the Undertaking Appointment's employer or has been in the past three years; and
 - (x) any other relationship between Aurizon and the Undertaking Appointment or the Undertaking Appointment's employer that allows one to affect the business decisions of the other;
- (d) details of any existing or past contractual relationships between the Undertaking Appointment or the Undertaking Appointment's employer and the ACCC within the past three years.

2.3 A document outlining the terms of appointment for the proposed Undertaking Appointment. This should identify the basis on which fees will be paid, including disclosure of any proposed performance-based fees.

3. Specific Information required for Undertaking Appointments

The ACCC requires the below information in relation to the relevant Undertaking Appointment.

Proposed Independent Auditor

- 3.1 A finalised draft audit plan for the Divestiture Business, drafted by the Proposed Independent Auditor and outlining (to the extent possible) the Proposed Independent Auditor's plans in regard to the Establishment Audit and the Audit Report.

Proposed Divestiture Agent

- 3.2 The finalised draft business sale agreement drafted by the Proposed Divestiture Agent in consultation with Aurizon. The draft business sale agreement is to provide for the divestiture of the Unsold Business.
- 3.3 The Proposed Divestiture Agent's draft marketing and sale plan for the Unsold Business.

Proposed Independent Manager

- 3.4 The finalised draft separation and management plan for the Divestiture Business detailing the measures and timing to be implemented by Aurizon and the Approved Independent Manager in order to fulfil Aurizon's and the Approved Independent Manager's obligations pursuant to this Undertaking. This plan is to be drafted by the Proposed Independent Manager in consultation with Aurizon to achieve the objectives of the Undertaking including:
- (a) the intended mode of operation of the Divestiture Business until completion of its divestiture;
 - (b) separation measures to ensure the Divestiture Business is operated in a manner which is financially and operationally separate from Aurizon, including the:
 - (i) separation of the books and records of the Divestiture Business from those of Aurizon;
 - (ii) severance of the Divestiture Business's participation in any private shared information technology networks, to the extent possible without compromising the viability of the Divestiture Business;
 - (iii) implementation of specific electronic, information and physical security measures to maintain the confidentiality of any competitively sensitive information of the Divestiture Business; and
 - (iv) severance of arrangements to share personnel and plant between the Divestiture Business and any businesses to be retained by Aurizon, to the extent possible without compromising the viability of the Divestiture Business;
 - (c) details of contracts for the provision of goods or services to the Divestiture Business which will expire after the completion of the Demerger or divestiture of the Divestiture Business to the Approved Purchaser and the

actions which will be taken to ensure they are replaced, renewed and/or renegotiated on commercial terms favourable to the Divestiture Business;

- (d) personnel planning to maintain appropriate personnel levels and ensure that the Divestiture Business has access to all personnel necessary to operate the Divestiture Business;
- (e) any Material Changes to the Divestiture Business required in order to fulfil Aurizon's and the Approved Independent Manager's obligations pursuant to the Undertaking;
- (f) the cooperation required from the Independent Manager with Aurizon in relation to the divestiture of the Divestiture Business, including:
 - (i) the activities to be conducted by the Independent Manager that are necessary for the effective operation of the Divestiture Business, having regard to the nature of the Divestiture Business (including the extent to which the Divestiture Business already has a management structure in place prior to the proposed acquisition that will be retained during the hold separate period);
 - (ii) the method by which due diligence information, site visits and personnel interviews by and to prospective purchasers of the Divestiture Business will be managed;
 - (iii) the method by which the Independent Manager and Aurizon will preserve the confidentiality of the Divestiture Business's competitively sensitive information; and
 - (iv) a protocol whereby the Approved Independent Manager can provide any information requested by Aurizon without disclosing the details of the Divestiture Business's competitively sensitive information.

Schedule 4 – Divestiture Business

1. Divestiture Business

The Divestiture Business shall comprise the following entities and all assets, contracts, personnel, and goodwill held by these entities:

- (a) NHK Pty Ltd, a wholly owned subsidiary of Aurizon and the entity which will hold the interests in the Divestiture Business from the Control Date and will be demerged in the event the Divestiture Business is divested by way of demerger;
- (b) One Rail Australia (NSW) Pty Limited;
- (c) One Rail Australia (Queensland) Pty Limited; and
- (d) One Rail Australia (FLA) Pty Limited which wholly owns:
 - (i) One Rail Australia (FLACS) Pty Limited; and
 - (ii) One Rail Australia (FLACH) Pty Limited.

2. Assets of Divestiture Business

Without limiting clause 1 of this Schedule 4, the assets of the Divestiture Business include the following:

(a) Locomotives

Locomotive Class	Number
GWU (C44ACi model)	11 (running numbers GWU 001 – 011)
XRN (C44ACi model)	30 (running numbers XRN 001 – 030)
2200	1 (running number 2216)
GWN (GT42CU ACe model)	5 (running number GWN 1 – 5)
GT46C ACe model	4

(b) Wagons

Wagons Class	Number
PHWH	38
PHYH	176
PHEH	680
AHAH / AHBH	310
AHCN	264

(c) **Facilities**

Land, leases or the right to use land associated with the facilities of the Divestiture Business listed in the table below. Details of the leases are contained in clause 1 of Confidential Schedule 6.

Facility	Interest
Carrington Maintenance Facility	Lease
Mayfield Depot and Office	Lease
Pymble (Sydney) Office	Lease
Mackay (Paget) Maintenance Facility	Lease
Sarina Depot and Office	Lease

(d) **Spare parts**

Spare component (C44 locomotives)	Number
Bogies	2
Engines	4
Traction motor assemblies	12
Turbochargers	2

(e) **Other assets**

The plant, equipment, machinery, furniture, fixtures and fittings to the extent owned or leased by the Divestiture Business, and/or used or held for use by the Divestiture Business including:

- (i) fixed plant and equipment;
- (ii) motor vehicles;
- (iii) safety equipment;
- (iv) monitoring equipment; and
- (v) office equipment.

(f) **Licenses for information technology systems**

The existing information technology systems currently used by the Divestiture Business.

Description
Enterprise Resource Management System
Payroll
Asset Management
Fatigue Management
Locomotive Monitoring
Web & Mobile Incident Reporting
Learning Management System
Travel
Cyber Security
Rostering and Time Capture
Rollingstock Monitoring
Forward Planning
End User Computing
Mobile Device Management
Location Monitoring of Assets

The system names of the relevant information technology systems are described in clause 2 of Confidential Schedule 6.

(g) **Contracts**

- (i) Agreements with third parties for the acquisition of goods or services associated with the Divestiture Business, including fuel supply and facilities agreements;
- (ii) Material customer contracts related to the supply of services by the Divestiture Business, including rail haulage agreements; and
- (iii) Licences, approvals, consents, rights, registrations, permits, certificates and other authorisations necessary for the operation of the Divestiture Business, including access agreements for rail networks.

The relevant contracts are listed in clause 1 of Confidential Schedule 6.

(h) **Intellectual property**

Intellectual property rights that are owned by the entities listed in clause 1 of this Schedule 4, including the trademarks, registered business names, logos, brands, designs, copyright and rights to use those things.

(i) **Employees**

All employees and personnel of the entities listed in clause 1 of this Schedule 4 and all Transferred Personnel.

(j) **Business records**

All business records, including data, books and customer records, necessary for the Divestiture Business.

Confidential Schedule 5

Confidential Schedule 6

Item	Description	Quantity	Unit Price	Total Price
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Confidential Schedule 7

Confidential Schedule 8
