

Draft decision

Aurizon Network's 2017 Standard User Funding Agreement Draft Amending Access Undertaking (UT4 SUFA DAAU)

August 2017

We wish to acknowledge the contribution of the following staff to this report:

QCA SUFA team

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SUBMISSIONS

Closing date for submissions: 15 September 2017

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Therefore submissions are invited from interested parties concerning its assessment of Aurizon Network's 2017 Standard User Funding Agreement draft amending access undertaking (UT4 SUFA DAAU). The QCA will take account of all submissions received within the stated timeframes.

Submissions, comments or inquiries regarding this paper should be directed to:

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Confidentiality

In the interests of transparency and to promote informed discussion and consultation, the QCA intends to make all submissions publicly available. However, if a person making a submission believes that information in the submission is confidential, that person should claim confidentiality in respect of the document (or the relevant part of the document) at the time the submission is given to the QCA and state the basis for the confidentiality claim.

The assessment of confidentiality claims will be made by the QCA in accordance with the *Queensland Competition Authority Act 1997*, including an assessment of whether disclosure of the information would damage the person's commercial activities and considerations of the public interest.

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A confidentiality claim template is available on request. We encourage stakeholders to use this template when making confidentiality claims. The confidentiality claim template provides guidance on the type of information that would assist our assessment of claims for confidentiality.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at our Brisbane office, or on the website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact us on (07) 3222 0555.

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EXECUTIVE SUMMARY

The Standard User Funding Agreement (SUFA) is a suite of pro forma agreements designed to provide a credible alternative for parties—other than Aurizon Network—to finance the costs of railway expansions in the central Queensland coal network (CQCN) in order to meet access seekers' capacity requirements and facilitate increased access to the CQCN.

The Queensland Competition Authority's (QCA) draft decision is to refuse to approve Aurizon Network's UT4 SUFA DAAU, which was submitted for the purpose of incorporating a SUFA into Aurizon Network's 2016 access undertaking (UT4). This draft decision document sets out the reasons for our position and the way in which we consider it is appropriate to amend the UT4 SUFA DAAU, so that it can achieve what we consider will be an appropriate SUFA framework, having regard to the assessment criteria in s. 138(2) of the QCA Act, that is workable, credible and bankable.

Background

The SUFA framework allows parties, other than Aurizon Network, to fund capacity expansions to the CQCN in order to meet access seeker's capacity requirements.

The need for a SUFA stems from what industry stakeholders described during our review of the 2010 access undertaking (UT3) as concerns about Aurizon Network's unwillingness to fund network expansions at the regulated rate of return.

Three successive draft amending access undertakings (DAAUs) were submitted by Aurizon Network under UT3, seeking to incorporate a SUFA in the undertaking. The last of these was the 2013 SUFA DAAU.

Aurizon Network, the Queensland Resources Council (QRC) and other stakeholders made significant investments in developing the framework, with compromises being made on both sides of the negotiation. However, it was clear from submissions received in respect of the 2013 SUFA DAAU that Aurizon Network and other CQCN stakeholders were unable to develop an effective SUFA framework.

Given the importance placed on the SUFA framework by stakeholders, we considered it prudent at that stage to undertake a further considered review of the SUFA framework, with a view to determining what changes were necessary, or possible, to produce a workable, bankable and credible SUFA.

During that assessment process, we undertook considerable consultation with industry participants including Aurizon Network. We recognised that, despite the cooperative approach taken by Aurizon Network and the other CQCN stakeholders, a number of issues remained, which they had not been able to resolve in the context of the assessment criteria outlined in section 138(2) of the QCA Act.

Our final decision on the 2013 SUFA DAAU (UT3 SUFA final decision) sought to transform the SUFA into a relatively conventional construction and financing structure, to allow for more common allocation of risks and as many financing options and potential participants as possible. Our goal was to ensure that any expanding access seeker could consider the SUFA as a viable option to an Aurizon Network-funded expansion.

The SUFA framework proposed in the UT3 SUFA final decision reflected a number of key principles, including that the framework should:

- ensure roles and responsibilities are clearly defined and that risk, and the consequence thereof, are allocated to the party that controls the risk

- simplify the construction process through the expansion process, preapproval process and construction contract, and accepted Aurizon Network was best placed to take responsibility for and control of construction of the SUFA infrastructure
- provide security over, and certainty in respect of, cash flows and allow for third party financing.

Our assessment of the 2013 SUFA DAAU overlapped with the separate process of approving the replacement undertaking for UT3 (referred to as the UT4 process). However, before the intent of the 2013 SUFA DAAU process (that is, incorporating the SUFA suite of agreements into UT3) could be realised, the UT4 process concluded with the approval of Aurizon Network's 2016 access undertaking (UT4).

Complying with the UT4 requirement for Aurizon Network to submit a SUFA DAAU to us, Aurizon Network submitted the 2017 SUFA DAAU on 11 January 2017 (UT4 SUFA DAAU).

UT4 SUFA DAAU

Aurizon Network said that its UT4 SUFA DAAU submission reflects the lessons from the substantial engagement process undertaken during UT3, and that it has accepted the majority of the QCA's policy positions in the UT3 SUFA final decision.

However, Aurizon Network's UT4 SUFA DAAU also included positions that differed from those in the UT3 SUFA final decision. According to Aurizon Network, these were made in order to align the SUFA with UT4 provisions; to improve the workability of the SUFA framework; and to address certain positions that Aurizon Network was not prepared to volunteer and that would be beyond the power of the QCA to require.

The QRC and Pacific National, in their submissions, expressed the view that the QCA should not approve Aurizon Network's UT4 SUFA DAAU.

Our view in this draft decision is that Aurizon Network's proposed SUFA DAAU has the effect of unreasonably shifting the allocation and management of risk in the SUFA-funded model in Aurizon Network's favour and, as a result of the proposed changes, its proposed SUFA framework is not appropriate having regard to the assessment criteria in section 138(2) of the QCA Act.

We are conscious of the need for the SUFA framework to provide a genuine alternative to facilitate CQCN expansions in instances when Aurizon Network will not expand the CQCN at the regulated rate of return. We consider that if a genuine alternative is not provided, an ineffective SUFA framework may result, which may reinforce perceptions regarding Aurizon Network's monopoly power.

We are maintaining our position in the UT3 SUFA final decision on most matters, and on others we have proposed amendments, as set out in this draft decision document. We consider the SUFA framework in this draft decision provides an effective alternative finance and construction package that is appropriate having regard to the assessment criteria in section 138(2) of the QCA Act and provides for access seekers to achieve their capacity requirements.

Below is a summary of our position on key matters identified by Aurizon Network in its submission.

Capacity warranty

Our draft decision is to refuse to approve Aurizon Network's proposal and to maintain the UT3 SUFA final decision that Aurizon Network is obliged to achieve the agreed or determined capacity associated with an expansion, and is further obliged to rectify and/or pay liquidated damages for failing to meet that obligation.

The key driver for an expansion of the CQCN is that the CQCN is capacity-constrained. Access seekers may seek an expansion to overcome the constraints and if Aurizon Network chooses to not invest in the

expansion at the regulated rate of return, they may enter into a SUFA and fund (or facilitate the financing of) the expansion. Any uncertainty over the level of increased capacity to be delivered by an expansion will act as a barrier to an access seeker pursuing a SUFA, as the delivery of capacity to a large extent defines whether the investment in a SUFA by the access seeker constitutes an efficient use of its resources. Further, a capacity obligation from Aurizon Network is likely to improve the SUFA as a financing tool because it provides assurance about the deliverables.

We maintain our view that Aurizon Network, as constructor, should be obliged to deliver the agreed or determined capacity and that it is in a superior position to manage, and be responsible for, the risk of failing to deliver the capacity.

Credit exposure during construction phase

Our draft decision accepts Aurizon Network's concern that it would face a trade credit exposure in the event of a SUFA trust payment default during construction of the SUFA infrastructure.

Our draft decision improves upon the 'front end payment mechanism' to Aurizon Network (that is, the prepayment by the SUFA trustee under the pro forma form of the construction contract), which was proposed in the UT3 SUFA final decision.

In the SUFA framework in the UT3 SUFA final decision, preference unit holders (PUHs), except those who satisfied the credit policy requirements set out in the subscription and unit holders deed (SUHD), were required to provide security to the SUFA trustee in the form of a bank guarantee. We have considered further the interplay of the provision of bank guarantees under the SUHD and the construction contract to ensure that both the SUFA trustee and Aurizon Network benefit from that security.

In this draft decision, we consider it appropriate that all the PUHs should provide, through the SUFA trustee, guarantees including in respect of Aurizon Network's peak termination exposure—that is, the estimated maximum amount due to Aurizon Network under the construction contract if it is terminated due to default by the SUFA trustee. The provision of guarantees to Aurizon Network, together with the prepayment mechanism, addresses Aurizon Network's concerns in respect of its trade credit exposure.

We acknowledge this means that all PUHs, even those who satisfy the credit policy requirements detailed in the UT3 final decision, will be required to provide guarantees. However, we consider that this will not act as a barrier to third party financing. In our view, this position does not materially affect the bankability of the SUFA.

Our draft decision proposal appropriately balances the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's legitimate business interests, including its interests as constructor.

Determination of construction contract schedules by the QCA

Our draft decision is to refuse to approve Aurizon Network's proposal that the QCA should make its determination in accordance with the applicable market practice in the Australian construction industry

Our view is that a dispute about schedules to the SUFA construction contract is a dispute regarding access and that division 5 of Part 5 of the QCA Act will apply. Any access determination under that division would be made taking into account (among other things) the access provider's legitimate business interests and investment in the facility; the public interest, including the benefit to the public in having competitive markets; the value of the service to access seekers; and the operational and technical requirements necessary for the safe and reliable operation of the facility.

Consequential loss on termination of the Infrastructure Lease

Our draft decision is to refuse to accept Aurizon Network's proposal which, among other things, has the effect that Aurizon Network will not be liable to the SUFA trustee for losses (including consequential loss) if the Infrastructure Lease were terminated due to Aurizon Network's cause.

We maintain our position in the UT3 SUFA final decision relating to consequential loss liability if the Infrastructure Lease is terminated due to a party's cause. In particular, if the Infrastructure Lease is terminated due to Aurizon Network cause, Aurizon Network may be liable for all losses of the SUFA trustee (including consequential loss).

Acceleration of rent payments

Our draft decision is to refuse to approve Aurizon Network's proposal that, in the event of its insolvency, it is required to pay rent to the SUFA trustee on the same basis that applied before the insolvency event occurred.

We consider it appropriate that the SUFA trustee should be entitled to claim rent on an accelerated basis in the event of Aurizon Network's insolvency or in the event of termination of the Infrastructure Lease due to Aurizon Network's breach.

We acknowledge that the SUFA-funded expansion model and the Aurizon Network-funded expansion model are unequal, in that the SUFA-funded model starts off in a fundamentally disadvantaged position. This is because the sole income of the SUFA trustee—the rental cash flows—is dependent upon Aurizon Network's actions and the SUFA trustee cannot control those actions but only has contractual rights in respect of them. Therefore, the SUFA framework needs to have in place appropriate mechanisms (such as acceleration of rental payments) to redress this imbalance.

We remain of the view that acceleration is necessary in the event of Aurizon Network's insolvency in order to maximise the SUFA trustee's rights in such a situation, particularly given that other creditors will also be seeking recovery of their debts.

Dispute about amending the standard SUFA template

Our draft decision is to refuse to approve Aurizon Network's proposal to not provide for a dispute resolution process where parties fail to agree on amendments required to the standard SUFA template to give effect to a financing option proposed by SUFA investors.

We maintain our position that the SUFA framework should allow for as many types of financing as possible, but should not direct what type of financing must be used, in order to not unduly restrict users' ability to obtain finance as efficiently as possible to enable them to fund expansions to meet their access requirements.

Our draft decision is that the SUFA template should be able to be amended through negotiations by the SUFA parties to give effect to a specific type of finance and financing structure, and any disagreement should be subject to a binding dispute resolution. In our view, a dispute relating to amending SUFA standard template documents is a dispute regarding access and division 5 of Part 5 of the QCA Act will apply. We consider it necessary to amend UT4 to provide for a dispute resolution process in this respect.

Rental arrangements

Our draft decision maintains the position we stated in the UT3 SUFA final decision, which is that it is not appropriate for part of the SUFA rental streams to be attributable to Aurizon Network in the form of an operating and performance risk allowance (OPRA).

Our draft decision also refuses to approve Aurizon Network's proposed process for setting SUFA rental streams in the event that the CQCN becomes undeclared, on the grounds the proposal provides undue discretion to Aurizon Network to impose a rental payment profile unduly balanced in its favour.

We remain of the view that it is open to us to consider a DAAU that contains arrangements that may apply beyond the duration of the declaration of the service.

If the regulatory regime continues to apply for the term of the SUFA, SUFA investors have a legitimate expectation to recover, within a reasonable timeframe, the value of their investment. We consider a post-deregulation rental arrangement should seek to preserve this expectation, so as to enable a workable, bankable and credible SUFA framework whilst the CQCN is regulated.

Our view remains that the SUFA documents should adopt a specific dispute resolution process that provides an expert panel with adequate power to determine an appropriate rent calculation methodology that achieves the post-deregulation SUFA rental objectives as set out in this draft decision.

Credit exposure during the SUFA's operational phase

Our draft decision refuses to approve Aurizon Network's proposal that Aurizon Network may set off any amount due to it by the SUFA trustee against amounts payable to the SUFA trustee.

We remain of the view that a SUFA framework that offers genuine financing choice for expansions in the CQCN is not compatible with full set-off rights for Aurizon Network. Our draft decision maintains the view we held in the UT3 SUFA final decision, which is that set-off should only relate to the rent adjustment mechanism.

We are satisfied that appropriate mechanisms are in place to address Aurizon Network's concerns about any credit risk it might face in the operational phase of a SUFA transaction.

Cost of expansion claim

In its UT4 SUFA DAAU submission, Aurizon Network has claimed that aspects of the UT3 SUFA final decision imposed a 'cost of expansion' on Aurizon Network and 'the QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any expansion'.

We acknowledge that we cannot make an access determination that has the effect of requiring Aurizon Network to pay some or all of the costs of extending the network. However, we can make an access determination that may require Aurizon Network to extend the network, including among other requirements, if another party pays the costs of extending the network. The SUFA framework is designed to do just that—that is, to be a suite of standard pro forma agreements to facilitate financing options as alternatives to Aurizon Network funding rail infrastructure expansions in the CQCN.

We consider that the intent of the QCA Act is not for Aurizon Network to entrench its position as a monopoly provider of the declared service, nor to provide Aurizon Network with the ability to use its monopolist position to pass on risk associated with the roles and responsibilities it undertakes in the context of the SUFA framework. Our view is Aurizon Network is responsible for its actions and the consequences thereof with respect to the roles and responsibilities it has under the SUFA framework; as such, Aurizon Network should be liable for failing to meet its contractual obligations.

Submissions invited

The QCA Act and UT4 (under which this DAAU has been submitted) do not require us to issue a draft decision. Nonetheless, we have chosen to issue a draft decision to allow stakeholders an opportunity to comment on our position as we proceed towards making a decision on this DAAU.

We recognise that, although the SUFA suite of agreements is complicated, many of the issues raised in this DAAU and considered in this draft decision have previously been considered and discussed by all stakeholders (including Aurizon Network) during our assessments of the SUFA DAAUs submitted under UT3.

Therefore, for a timely decision-making process, we seek submissions in writing to this draft decision by 5 pm on 15 September 2017. We will consider all submissions received by us within this timeframe.

In accordance with the QCA Act, we may make a decision without taking into account late submissions, or other information provided by stakeholders after the stated deadline. Where stakeholders provide late submissions or other information, they should also provide a detailed explanation as to why it would be reasonable for us to have regard to the late information.

THE ROLE OF THE QCA – TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory authority which promotes competition as the basis for enhancing efficiency and growth in the Queensland economy.

The QCA's primary role is to ensure that monopoly businesses operating in Queensland, particularly in the provision of key infrastructure, do not abuse their market power through unfair pricing or restrictive access arrangements.

Task, timing and contacts

On 11 January 2017, Aurizon Network submitted the 2017 Standard User Funding Agreement (SUFA) draft amending access undertaking (DAAU) (UT4 SUFA DAAU) to the QCA for approval.

The submission of the UT4 SUFA DAAU satisfies Aurizon Network's obligation under clause 8.8.3(a) of Aurizon Network's 2016 access undertaking (UT4) to submit a SUFA DAAU within three months of UT4 approval date of 11 October 2016.

The QCA must consider the proposed UT4 SUFA DAAU in accordance with clause 8.8.3 of UT4, which sets out the process for stakeholder submissions and the consequence in the event the QCA agrees or disagrees with the UT4 SUFA DAAU. In addition to that UT4 process, the assessment process for a DAAU under division 7 of Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act) applies.

On 18 January 2017, we commenced an investigation into the UT4 SUFA DAAU. We published the DAAU on our website and invited stakeholders to make submissions. Two submissions were received.

Key dates

In accordance with section 147A(2) of the QCA Act, the QCA must use its best endeavours to decide whether to approve, or refuse to approve, the UT4 SUFA DAAU within six months, excluding any day when submissions are sought.

In accordance with those requirements, the six-month period commenced on 13 April 2017 and is scheduled to expire on 20 November 2017.

Meeting this timetable will depend on the scope and complexity of issues raised by stakeholders in response to this draft decision, as part of the consultation and submission phases.

Submissions

We invite written submissions on this draft decision. Submissions must be received by no later than 5 pm on 15 September 2017. We will consider all submissions received within this timeframe.

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1 INTRODUCTION

While Aurizon Network Pty Ltd (Aurizon Network) is the sole owner and operator of the central Queensland coal network (CQCN), it is under no legislative obligation to fund railway expansions in its own network.

If Aurizon Network decides not to fund an expansion, access seekers require options to enable expansion and growth of the CQCN.

The Standard User Funding Agreement (SUFA) is a suite of pro forma agreements designed to provide an alternative arrangement that allows parties—other than Aurizon Network—to finance the costs of railway expansions in the CQCN in order to meet access seekers' capacity requirements and facilitate increased access to the CQCN.

Progressing the suite of SUFA pro forma agreements has been complex, and has involved collaboration primarily between Aurizon Network, QRC and the QCA.

1.1 Why is a SUFA needed?

The context

Aurizon Network¹ is the access provider of a declared service for the purposes of Part 5 of the QCA Act. The declared service is 'the use of a coal system for providing transportation by rail' (as defined under s. 250 of the QCA Act).² The relevant infrastructure to which the declared service relates is collectively referred to in this draft decision as the 'central Queensland coal network' (CQCN).

As a result of this declaration, Aurizon Network (as the access provider of a declared service) is obliged to negotiate an access agreement with an access seeker for the use of its rail network. In doing so, Aurizon Network must negotiate in good faith and must make all reasonable efforts to satisfy the reasonable requirements of an access seeker.³

The CQCN has witnessed substantial expansion in the past decade in order to meet demand for increased access to the service to satisfy demand for increased railings for coal exports. While Aurizon Network has made significant investments in expanding the network, it has also said that, as a publicly listed company, it should not be obliged to expand the network.⁴

Indeed, Aurizon Network's position throughout the 2010 access undertaking approval process was that it would only undertake significant expansions of the CQCN if it considered it commercially viable to do so. At that time, coal project proponents wanted access to what was described by Aurizon Network as 'a capacity constrained network in need of expansion'. The mining industry was concerned about protracted access negotiations, and the potential for Aurizon Network to seek returns higher than regulated returns or to not invest at all.⁵

¹ Aurizon Network was formerly known as QR Network.

² A 'coal system' means rail transport infrastructure (a 'facility' under section 70 of the QCA Act) that is part of the Blackwater system, Goonyella system, Moura system or Newlands system, plus direct or indirectly connected rail transport infrastructure owned or operated by Aurizon Network, plus extensions built on or after 30 July 2010 owned or operated by Aurizon Network, as defined in s. 250 of the QCA Act.

³ QCA Act, ss. 99–101.

⁴ QCA 2010, QR Network's 2010 DAU, final decision, September, p. 2.

⁵ QCA 2010, QR Network's 2010 DAU, final decision, September, pp. 1–2.

It was in this context that the 2010 access undertaking (UT3) included an obligation on Aurizon Network to develop a Standard User Funding Agreement (SUFA) to enable access seekers to fund expansions where Aurizon Network could not (or would not) fund an expansion.

Related provisions of the QCA Act

The QCA Act envisages that negotiations for access to a declared service will end in either the successful conclusion of an access agreement or in a QCA dispute resolution process.⁶

Thus, if Aurizon Network and an access seeker cannot agree on the terms for Aurizon Network to expand the network to meet an access seeker's access requirements in the face of insufficient capacity, either party can bring the access dispute for arbitration under the QCA Act.

The QCA Act stipulates that in arbitrating an access dispute, the QCA cannot make an access determination that would have the effect of requiring Aurizon Network to pay some or all of the costs of extending the network.⁷

Nonetheless, the QCA has the power to make an access determination that may require Aurizon Network to either permit the extension of the network, or extend the network (including among other requirements, if another party pays the costs of extending the network).⁸

Therefore, it is evident that when an access seeker cannot agree with Aurizon Network's terms for expanding the network, the QCA Act envisages development of a mechanism for expanding the network to meet the access seeker's access requirements, but with the limitation that Aurizon Network cannot be required to fund the costs of expanding the network.

It is also relevant that the mechanism should seek to promote efficient investment in the CQCN, and as a result promote effective competition in related markets, to be consistent with the object of Part 5 of the QCA Act, which is:

to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.⁹

SUFA in relation to the access undertaking

The QCA Act requires that an access undertaking must include provisions, among others, to prevent an access provider from unfairly differentiating between access seekers in negotiating access agreements.¹⁰ These provisions were introduced in 2010 when Aurizon's vertically integrated above- and below-rail coal business was privatised.¹¹

The QCA Act also provides that an undertaking may include terms relating to extending the network.¹²

In accordance with these provisions, our view has been that all expansions of the network (whether funded by Aurizon Network or another party) should take place under the auspices of an access undertaking to provide certainty about the standard terms on which CQCN expansions will take place and access to the infrastructure will be granted, and to ensure

⁶ QCA Act, ss. 99–101, 111–127D.

⁷ QCA Act, s. 119(2)(c).

⁸ QCA Act, ss. 118(1)(d), 119(5)(c).

⁹ QCA Act, s. 69E.

¹⁰ QCA Act, ss. 100(2), 137(1A).

¹¹ *Motor Accident Insurance and Other Legislation Amendment Act 2010*, Act No. 32 of 2010.

¹² QCA Act, s. 137(2)(g).

fairness to all access seekers. Further, the standard terms should provide a credible backstop position from which access seekers can choose to either negotiate alternative terms for access or adopt the standard terms.¹³

Aurizon Network and other stakeholders also share the view that an access undertaking should provide for a framework for users to fund expansions if they are unwilling to accept Aurizon Network's proposed terms and conditions.¹⁴

Accordingly, the 2010 access undertaking (UT3) we approved provided for the development of:

- (a) a SUFA—to provide an alternative arrangement that allows parties—other than Aurizon Network—to finance railway expansions in the CQCN needed to meet access seekers' access requirements; and
- (b) an expansion process—to provide a transparent step-by-step approach to the development and construction of an expansion project, from the concept stage to project delivery.

Together these elements aimed to provide for flexibility in the financing of expansions, and a transparent and timely construction process. Our view was that the two elements needed to work effectively if they were to address Aurizon Network's monopoly in expanding the network and to encourage efficient investment to meet access seekers' capacity requirements.

1.2 Developing the SUFA

The process of developing the SUFA has been lengthy, reflecting the complexity of the underlying issues. During the UT3 regulatory period, a number of different iterations of a SUFA model were proposed and considered.

1.2.1 First generation SUFA—the 2011 SUFA DAAU¹⁵

The first generation SUFA consisted of a participation agreement and a construction agreement. The agreements focused on Aurizon Network as the constructor of infrastructure, and access seekers/holders making monthly payments to Aurizon Network during construction.

This model was unacceptable to stakeholders due to tax implications (and resulting cost)—a particular concern was that this SUFA structure resulted in higher taxation costs than would be the case if Aurizon Network financed the project. This meant a SUFA framework of this form did not provide a competitive financing alternative to an Aurizon Network-funded model.

1.2.2 Second generation SUFA—the 2012 and 2013 SUFA DAAUs¹⁶

The second generation SUFA proposed by Aurizon Network was developed based on a trust structure.

The trust structure theoretically assisted in resolving the tax issues identified with the first generation SUFA. In this framework, preference unit holders (PUHs) in a SUFA trust commit the

¹³ The QCA Act provides that an access agreement can have terms that are inconsistent or different from those in an access undertaking (s. 168).

¹⁴ QCA 2010, QR Network's 2010 DAU, final decision, September, p. 2.

¹⁵ Aurizon Network (then QR Network) submitted the 2011 SUFA DAAU in December 2010 and withdrew it in April 2012.

¹⁶ The second generation SUFA broadly comprised the 2012 SUFA DAAU, which was submitted in December 2012 and withdrawn in July 2013; and the subsequent updated 2013 SUFA DAAU, which was submitted in July 2013, and in respect of which the QCA published a final decision in June 2016.

funds required to develop an infrastructure project in return for rights to a future rental cash flow. PUHs do not have ownership rights over the infrastructure constructed under the SUFA trust.

Under this framework, it was anticipated that primarily larger mining companies would be able to fund a SUFA project off-balance-sheet. It was acknowledged that smaller mining companies may lack sufficient funding or reserves to do so and may find it difficult to finance an expansion under this model.

Both Aurizon Network and the QRC made significant investments in developing that framework. However, it was clear from stakeholder submissions that Aurizon Network and the other stakeholders were not able to develop an effective SUFA framework that would be suitable for all access seekers.

Given the importance placed on a SUFA framework by stakeholders, we reviewed the SUFA framework in the 2013 SUFA DAAU to determine what changes would produce a workable, bankable and credible SUFA.

1.2.3 Repositioning of the SUFA

We engaged Grant Samuel as financial advisors and investigated whether the 2013 SUFA DAAU framework was workable, bankable and credible, in the following context:

- **Workable**—the SUFA documents achieve the intended outcome and can be executed by all parties without negotiation if necessary (i.e. they are sufficiently clear and certain and provide an appropriate allocation of risk).
- **Bankable**—third party financing (that has recourse only to the SUFA assets and rights) can be obtained to finance the SUFA. This requires a high level of confidence that the expected returns will be delivered and that the asset will be appropriately operated and maintained over its life cycle. If the SUFA is not financeable through third party debt and equity markets, its utility is limited to those users with the financial capacity to absorb the risk associated with the SUFA.
- **Credible**—the SUFA structure does not create such risks and uncertainties for users and potential financiers, or overlay such unnecessarily high transaction, tax or finance costs on an expansion project, that the SUFA can never be a credible alternative to Aurizon Network undertaking the expansion itself.¹⁷

Grant Samuel advised the 2013 SUFA DAAU was neither workable nor bankable. It also advised the financing structure would not be attractive to third party financing, and therefore was not considered credible in its submitted form.

Grant Samuel worked with our legal advisors, Clayton Utz, to propose amendments allowing for the SUFA framework to become workable, bankable and credible.

1.2.4 UT3 SUFA final decision approach

The assessment process up to the UT3 SUFA final decision¹⁸ was undertaken with considerable consultation with industry participants including Aurizon Network.¹⁹ Despite the cooperative

¹⁷ Grant Samuel 2014, p. 2.

¹⁸ QCA 2016, Aurizon Network's 2013 Standard User Funding Agreement Draft Amending Access Undertaking, final decision, June.

approach taken across the industry, a number of matters remained unresolved—construction and revenue certainty were the two most pivotal matters.

The UT3 SUFA final decision built on the considerable work undertaken by Aurizon Network and the other stakeholders and sought to transform the SUFA into a more conventional construction and financing structure to allow for as many financing options and potential participants as possible. Our goal was to ensure that any expanding access seeker could consider the SUFA as a viable option to an Aurizon Network-funded expansion.

The SUFA framework proposed in the UT3 SUFA final decision reflected a number of key principles, as set out below.

Roles and risk allocation

We considered it appropriate that risks, and the consequences thereof, are allocated to the party that controls the risk. We were of the view that allocating risks in such a manner reduces the likelihood of costs being incurred in an imprudent and inefficient manner. This is because the party most capable of mitigating a risk will have the incentive to manage it, if it carries the risk. Therefore, allocating risk in this manner is consistent with the intent of the object of Part 5 of the QCA Act.²⁰

Infrastructure expansion and capacity

An expansion of the CQCN is undertaken for the purpose of increasing the capacity of the declared service. The infrastructure built as a result of an expansion project is not the end in itself and the infrastructure of itself does not define whether the expansion is ‘fit-for-purpose’. We considered that the capacity created by the infrastructure is a better indicator of whether the expansion is fit-for-purpose because it is the demand for this service that necessitates the expansion. Indeed, assessment of the capacity implications of an infrastructure expansion project is a key element in our determination of the prudence of the associated capital expenditure.²¹

Further, any access seeker that develops a business case that requires an increase in the capacity of the declared service does so on the expectation that the investment will provide it with a certain level of capacity over the lifespan of the investment. It is the delivery of this capacity that to a large extent defines whether the investment the access seeker is preparing to undertake constitutes an efficient use of resources.

In the context of the SUFA framework we considered that risk/reward associated with an expansion not being/being fit-for-purpose should sit with the party that has the role of contractor/constructor. This is because that party is best able to control and/or mitigate such risk.

Construction, expansion process and preapproval

We considered changes were required to the 2013 SUFA DAAU to:

- provide a more conventional construction contracting structure

¹⁹ In May 2014, we released a position paper on the 2013 SUFA DAAU along with a set of term sheets and Grant Samuel's report; in October 2014, we released our draft decision accompanied by drafts of the 12 standardised agreements; in February 2016, we sought comments on SUFA rental calculation examples; in April 2016 we released a position paper on the post-deregulation rental regime; and in June 2016 we published our final decision on the 2013 SUFA DAAU. In total, we received 25 stakeholder submissions.

²⁰ QCA Act, s. 69E.

²¹ 2016 access undertaking, Schedule E.

- provide greater certainty about the expansion capacity to be delivered by a SUFA project, as access seekers require capacity to meet their access requirements, not infrastructure
- provide greater certainty about the treatment of capital costs, particularly for inclusion in the regulatory asset base (RAB).

Construction

Aurizon Network wanted control over the construction of a SUFA project, as it considered it was best placed to manage construction risk for assets on its own network; it was obliged to ensure system integrity over the whole of the network including SUFA assets; and it was responsible for health and safety management of the network including SUFA assets.

The industry view was that SUFA funders should have a high degree of input into the construction process because funders bear the economic cost of uncertainty about project deliverables, including capacity risk.

The UT3 SUFA final decision simplified the construction process and provided clarity over the control of construction and certainty of deliverables.

We accepted Aurizon Network's position that it should control the construction of SUFA projects. We considered that was necessary, as Aurizon Network will operate and maintain the CQCN, including SUFA infrastructure. We also considered that industry's requirements could be met through the expansion process and by requiring certainty of deliverables under the construction contract.

In addition, we considered the SUFA framework should provide a more conventional construction contracting structure (than the structure suggested in the 2013 SUFA DAAU) with Aurizon Network being responsible for the deliverables to SUFA participants, as would be the case in any standard construction arrangement.

Accordingly, we required Aurizon Network to provide transparent, up-front commitments regarding scope, standard, cost and time to complete. In addition, we considered that Aurizon Network, as constructor of the asset as well as infrastructure planner and operator of the rail network, was in a superior position to deliver, and be accountable for delivering, an agreed range of capacity outcomes.

Expansion process

For our approach to be effective, we suggested that the expansion process needs to be capable of delivering feasibility studies to a level of accuracy required to provide credible up-front commitments regarding scope, standard, cost, time to complete and capacity delivery, to satisfy the needs of Aurizon Network and funders.²²

Introducing an effective expansion process and providing Aurizon Network with control over the construction of SUFA projects allows the risk associated with construction and capacity delivery to be allocated to Aurizon Network.

Our view was that the expansion process should be able to provide a reliable estimate of the construction costs for a capital project, as the proportion of construction costs that goes into the RAB forms the basis for the rental stream for a SUFA project. Consequently, we considered that clarity and certainty surrounding the outcome of the expansion process were critical to users and potential third party funders.

²² An expansion process was then being developed as part of the 2016 access undertaking (UT4).

Preapproval process

We proposed clarifying the preapproval process and making it transparent, whereby we would approve prudent capital expenditure for inclusion in the RAB prior to the SUFA project commencing.²³

We considered a preapproval process will provide greater certainty to all relevant parties that the prudent and efficient capital expenditure associated with the expansion will be included in the RAB, and reduce optimisation risk for users and financiers.

We also considered that for the benefits of preapproval to be realised, it needed to be incentive-compatible with a well-functioning expansion process. Consequently, we considered that preapproval should only apply once the feasibility study process has been completed and a set of up-front commitments agreed. This strengthens the incentives to engage in the expansion process appropriately.

Security and certainty over rental cash flows

The SUFA trust finances the construction of SUFA infrastructure to be integrated into the relevant CQCN railway system. Upon completion, the ownership of the infrastructure is transferred to Queensland Treasury Holdings Pty Ltd (QTH). The infrastructure is then leased to the SUFA trust and subleased to Aurizon Network for Aurizon Network to operate and maintain as the sole operator of the CQCN.

This framework is designed so that PUHs commit the funds required to expand the infrastructure that will ultimately be owned by QTH, and subsequently maintained and operated by Aurizon Network. In return for this, PUHs receive, via the SUFA trust, rent from Aurizon Network for its use of the SUFA infrastructure, which is the SUFA trust's sole income during the operational phase. The payment of rent is effected through access holders paying some, or all, of their access charges to the SUFA trustee as directed by Aurizon Network under their access agreements (the 'directions to pay').

Effectively, although the SUFA trust has an ownership interest in the physical infrastructure funded by PUHs, the SUFA trustee has no control over the use of the physical infrastructure or the ability to generate income from it other than through Aurizon Network. The SUFA trustee's sole operational phase income—rental cash flow—is dependent upon Aurizon Network's actions and the SUFA trustee only has contractual rights in respect of it.

Therefore, our view was that credible contractual constraints on Aurizon Network were required to provide security and certainty over rental cash flows, which was critical to the SUFA being perceived by user funders as credible, workable and bankable and to encourage third party financing. We considered the SUFA framework needed to have in place appropriate mechanisms to protect the SUFA trustee's contractual rights against non-compliance by Aurizon Network with its contractual obligations in the SUFA documents, in order to redress the imbalance between SUFA funders and Aurizon Network in a SUFA-funded model.

Accordingly, we required the SUFA framework should, among other things:

- provide mandatory distribution of rental cash flows
- limit Aurizon Network's right to adjust rental cash flows to monthly over- and under-payment of rents ('set-off')

²³ In our assessment of the 2013 SUFA DAAU, we noted that while the option of preapproval existed since the 2006 access undertaking, it had not been used.

- provide the SUFA trustee with security over the contractual rights that effect payment of the rental cash flows²⁴, and enable the SUFA trustee to enforce the security when cash flows could be jeopardised by Aurizon Network's actions or upon the occurrence of certain events affecting Aurizon Network (for example, Aurizon Network's insolvency)
- provide certainty over the rental stream in the event of a change in the regulatory environment
- make Aurizon Network liable for consequential loss of the SUFA trustee if Aurizon Network causes termination of the Infrastructure Lease.

We considered that the above measures presented risk to Aurizon Network, but that Aurizon Network could choose to avoid these risks by opting to fund the expansion at the regulated rate of return. This may not be the business choice Aurizon Network would prefer in the context of the SUFA framework. However, our view was that it represented a credible and reasonable business choice for Aurizon Network, which was compatible with its legitimate business interests, when considered in the context of developing an effective SUFA framework to allow parties—other than Aurizon Network—to finance CQCN expansions when Aurizon Network would not invest at the regulated weighted average cost of capital (WACC).

Tax

The UT3 SUFA final decision reflected a workable tax position. We observed that there are decisions regarding the tax treatment of a SUFA over which we have no jurisdiction, but which are necessary for an effective SUFA framework.

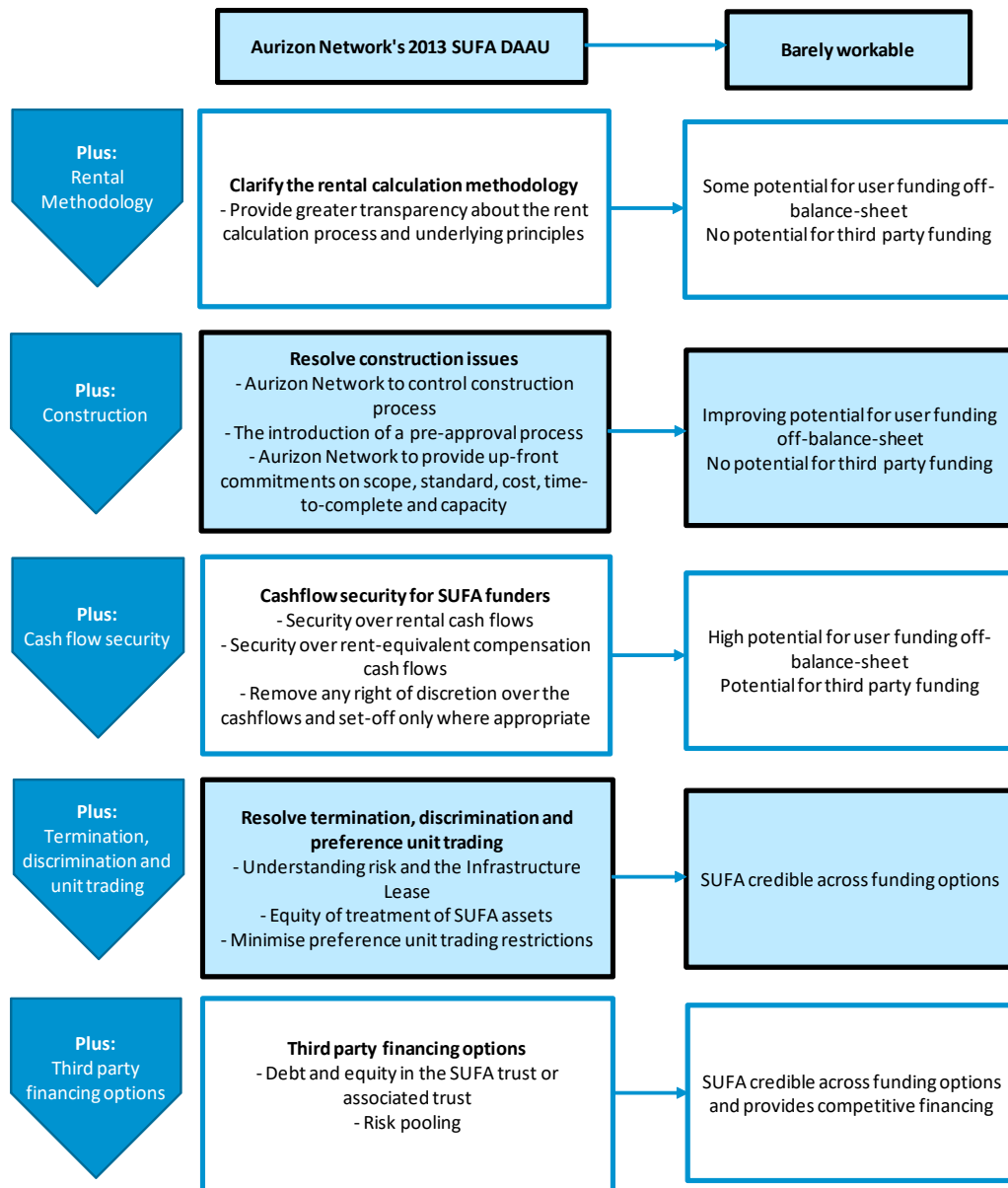
In particular, statutory severance by the Queensland Government and favourable tax rulings from the Australian Tax Office (ATO) are needed if the SUFA arrangements are to be tax efficient. Our view was that obtaining such permissions/rulings is ultimately the responsibility of Aurizon Network and SUFA funders.

A stylised summary of the UT3 SUFA final decision approach is provided in Figure 1.

The above is a brief summary of some of the key principles and positions in the UT3 SUFA final decision and does not represent our fully considered views and positions on all aspects of the SUFA framework. For that, interested parties should refer to the discussion and analysis in the UT3 SUFA final decision.

²⁴ We note Aurizon Network had been averse to granting security in favour of the SUFA trustee over the physical SUFA infrastructure. Further, such a security mechanism would not have been appropriate, given the integrated nature of the CQCN. Therefore, we proposed granting the SUFA trustee security over the directions to pay, which are the SUFA trustee's only contractual rights that generate income.

Figure 1 UT3 SUFA final decision proposals to obtain a workable, bankable and credible SUFA



1.3 2013 SUFA DAAU and UT4

The 2013 SUFA DAAU was submitted to us for consideration as an amendment to UT3.

The intent was to incorporate an approved suite of SUFA agreements into UT3 and then duplicate that suite of agreements into the undertaking that would have replaced UT3.

Our assessment of the 2013 SUFA DAAU overlapped with the separate process of approving the replacement undertaking of UT3 (referred to as the UT4 process). Our final decision in respect of the 2013 SUFA DAAU (released in June 2016) anticipated that UT4 could be approved before the intent of the 2013 SUFA DAAU process of incorporating the SUFA suite of agreements into UT3 could be realised. Indeed, the UT4 process concluded with the approval of Aurizon Network's 2016 access undertaking (UT4) on 11 October 2016.

Nonetheless, Aurizon Network recognised the need to retain and incorporate into UT4 the work undertaken in developing the suite of SUFA agreements under UT3. We agreed with Aurizon

Network's comments. Accordingly, UT4 included a requirement for Aurizon Network to submit to us, within three months of the UT4 approval date:

- a proposed SUFA (based on the SUFA developed and submitted to us for approval under UT3 and taking into account the UT3 SUFA final decision in respect of that document), and
- a DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary.²⁵

1.4 UT4 SUFA DAAU

Aurizon Network submitted the UT4 SUFA DAAU on 11 January 2017, which satisfies Aurizon Network's obligation under UT4 to submit to us a SUFA DAAU within three months of the UT4 approval date of 11 October 2016.

1.4.1 Structure of the pro forma SUFA documents

The structure of the pro forma SUFA documents in the UT4 SUFA DAAU, which comprises 12 interconnected template agreements involving nine parties, remains unchanged from the UT3 SUFA final decision. Figure 2 summarises the purpose of the relevant pro forma SUFA agreements and the roles played by various parties.

²⁵ 2016 access undertaking (UT4), cl. 8.8.3(a).

Figure 2 Pro forma SUFA arrangement—parties involved and applicable agreements

		Queensland Treasury Holdings	Aurizon Holdings	Aurizon Network	Trustee	Preference unit holder	Access Seeker	State of Queensland	Facility Agent	Financier
The SUFA Trust										
Trust Deed (TD)	- Establishes the SUFA Trust with Aurizon Network as ordinary unit holder, permits the issue of preference units and appoints the SUFA Trustee			Yes	Yes					
Subscription and Unit Holders Deed (SUHD)	- Prevails over subscription process for preference units - Establishes the operational rules of the SUFA Trust whilst there are unredeemed preference units - Prevails over the Trust Deed if there is a conflict - Establishes that each preference unit holder will provide various tax indemnities.			Yes	Yes	Yes				
Project Delivery and Land Access										
Construction Contract (Construction Agreement and Formal Instrument of Agreement, CA & FIA)	- Aurizon Network is contracted to design and construct the extension by a designated date for practical completion in order to deliver an expansion infrastructure project.			Yes	Yes					
Rail Corridor Agreement (RCA)	- Provides a licence to the SUFA Trustee so that it can have the extension infrastructure built on Aurizon Network land and identifies the terms and conditions associated with this right			Yes	Yes					
Leasing, Ownership and Rent										
Extension Infrastructure Head-lease (EIHL)	- Establishes the ownership and leasing terms and conditions for the SUFA asset between QTH, the SUFA Trust and Aurizon Network	Yes		Yes	Yes					
Extension Infrastructure Sub-lease (EISL)	- Establishes the sub-leasing terms and conditions for the SUFA asset between the SUFA Trust and Aurizon Network - Contractually defines the rental terms and conditions for Aurizon Network to pay rent to the SUFA Trust			Yes	Yes					
Access Rights and Tax Indemnity										
Extension Project Agreement (EPA)	- 'Wrapper Document' setting out common terms and conditions - Provides an overview of the key obligations between Aurizon Network, the SUFA Trustee and the Preference Unit Holders - Establishes which parties will be entering into a linked access agreement			Yes	Yes	Yes	Yes			
Access Agreement Specific Terms Deed (AASTD)	- The access seeker and Aurizon Network agree to enter into an access agreement to secure access rights to Aurizon Network's infrastructure (including extension infrastructure)			Yes	Yes		Yes			
Agreement Termination and SUFA Asset Disposal										
Integrated Network Deed (IND)	- Governs the circumstances and process by which the QTH may dispose of SUFA assets following termination of the Infrastructure Lease - Governs the disposition of any disposal proceeds if a disposal occurs	Yes		Yes	Yes			Yes		
Performance Standards										
Deed Poll Guarantee (DPG)	- Provides guarantees to QTH on Aurizon Network and the SUFA Trustee's performance of their obligations under the EIHL and IND - Indemnifies QTH against any losses it may incur due to a default or delay in the performance of these obligations		Yes							
Security										
Specific Security Agreement (SSA)	- Provides security over amounts paid under the direction to pay and the direction to pay undertakings.			Yes	Yes					
Financing Side Deed (FSD)	- Provides consent for and regulates any security to be provided by the SUFA Trustee to third party financiers.	Yes		Yes	Yes			Yes	Yes	Yes

1.4.2 Aurizon Network's UT4 SUFA DAAU position

Aurizon Network said that its UT4 SUFA DAAU submission accepted the majority of the QCA's policy positions in the UT3 SUFA final decision, including:

- the trust based structure
- Aurizon Network as the constructor of SUFA infrastructure
- the funding party not required to hold or obtain access rights
- unrestricted preference unit trading.²⁶

Aurizon Network observed that, to the extent its proposed positions matched those in the UT3 SUFA final decision, the QCA had already considered those positions in its previous decisions.²⁷

Aurizon Network said that its UT4 SUFA DAAU submission also included positions that differed from those in the UT3 SUFA final decision. The key matters on which the UT4 SUFA DAAU proposed different positions relate to:

- whether Aurizon Network should be obliged to provide a capacity warranty as the constructor of the expansion infrastructure
- Aurizon Network's credit exposure to the SUFA trustee under the construction contract
- the determination of construction contract schedules by the QCA
- the consequential loss liability of each party to a SUFA transaction to one another
- the acceleration of rental payments to the SUFA trustee in the event of Aurizon Network's insolvency
- binding dispute resolution for modifications to the SUFA template
- the rental arrangement following deregulation
- Aurizon Network's credit exposure during the SUFA's operational phase.²⁸

Additionally, Aurizon Network's submission included a table of other matters where its UT4 SUFA DAAU submission proposed changes to the UT3 SUFA final decision.²⁹

1.5 Stakeholders' submission on the UT4 SUFA DAAU

The QRC and Pacific National made submissions on the UT4 SUFA DAAU.³⁰ Below is a high-level summary of their submissions.

The QRC's preferred view was that the QCA should not accept any change to the user funding documents from its UT3 SUFA final decision, because the issues raised in Aurizon Network's UT4 SUFA DAAU submission have been previously raised and considered.

The QRC's alternative view was to:

²⁶ Aurizon Network, sub. 2, p. 3.

²⁷ Aurizon Network, sub. 2, p. 4.

²⁸ Aurizon Network, sub. 2, pp. 10–27.

²⁹ Aurizon Network, sub. 2, pp. 30–51.

³⁰ QRC, sub. 29; Pacific National, sub. 28.

- accept about one-third of Aurizon Network's proposed changes, including changes to the SUFA trustee's right to seek information under the head lease and Aurizon Network's tax process obligation in respect of approved SUFA template
- reject about two-thirds of the proposed changes, including Aurizon Network's proposals to not provide a capacity warranty as the constructor (also rejected by Pacific National); require the SUFA trustee to provide a bank guarantee during construction; limit circumstances for consequential loss liability; not accelerate rental payments in the event of Aurizon Network's insolvency; and set off any amount due to it from the SUFA trustee against rents payable to the SUFA trustee.

1.6 Our draft decision approach

The UT4, under which this SUFA DAAU has been submitted, requires Aurizon Network to take into account the UT3 SUFA final decision in developing a SUFA. Accordingly, to the extent this UT4 SUFA DAAU incorporates policy positions and drafting of the UT3 SUFA final decision and stakeholders did not object to them, we consider those positions remain appropriate and refer to the analysis in the UT3 SUFA final decision.

This draft decision focuses on matters where Aurizon Network has proposed positions different from the UT3 SUFA final decision and considers stakeholders comments in respect of them.

This draft decision is structured as follows:

- Chapter 2 sets out the legislative assessment criteria we have applied in considering the UT4 SUFA DAAU.
- Chapters 3 to 7 consider the key matters on which the UT4 SUFA DAAU proposed different positions to the UT3 SUFA final decision:
 - Chapter 3: Construction principles and construction contract
 - Chapter 4: Security and bankability
 - Chapter 5: Third party financing
 - Chapter 6: Rental arrangements
 - Chapter 7: Termination of infrastructure lease
- Appendix A considers the other amendments proposed in the UT4 SUFA DAAU that are not considered in Chapters 3 to 7.
- Appendix B is our proposed mark-ups of the UT4 SUFA DAAU documents (i.e. SUFA template documents and required amendments to UT4 to give effect to SUFA).

2 LEGISLATIVE FRAMEWORK

This chapter sets out how we have interpreted and applied the statutory framework in making our draft decision on the UT4 SUFA DAAU under the QCA Act.

2.1 Part 5 of the QCA Act

Part 5 of the QCA Act establishes an access regime to provide a legislated right for third parties to acquire services that are provided using significant infrastructure that is owned by a monopoly service provider.

The Explanatory Notes to the Queensland Competition Authority Bill 1997 stated:

The underlying rationale of creating third party access rights to significant infrastructure is to ensure that competitive forces are not unduly stifled in industries which rely upon a natural monopoly at some stage in the production process, especially where ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations ...

...

The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.³¹

2.2 Assessment approach

On 11 January 2017, Aurizon Network submitted the UT4 SUFA DAAU, which satisfies Aurizon Network's obligation under clause 8.8.3(a) of UT4 to submit a SUFA DAAU within three months of the UT4 approval date of 11 October 2016.

The QCA must consider the proposed UT4 SUFA DAAU in accordance with clause 8.8.3 of UT4, which sets out the process for stakeholder submissions and the consequence in the event the QCA agrees or disagrees with the UT4 SUFA DAAU. In addition to the process outlined in UT4, the assessment process for a DAAU under division 7 of Part 5 of the QCA Act applies.

In accordance with those requirements, the QCA invited stakeholder submissions on the DAAU. The QRC and Pacific National made submissions, which were considered in making this draft decision.

The QCA must consider whether it is appropriate to approve the DAAU having regard to each of the matters mentioned in section 138(2) of the QCA Act.

On the basis of that assessment, if the QCA:

- approves the DAAU, then in accordance with clause 8.8.3(c) of UT4, the QCA must give notice to Aurizon Network and relevant stakeholders of its approval, specifying a date upon which the proposed amendments will take effect; or
- refuses to approve the DAAU, then in accordance with clause 8.8.3(d) of UT4, the QCA must notify Aurizon Network and relevant stakeholders of the reasons for its disagreement; and

³¹ Explanatory Notes to the *Queensland Competition Authority Bill 1997*, pp. 3–4.

the QCA may commence the process under division 7 of Part 5 of the Act, including sections 139 and 141 of the Act, to seek and subsequently impose amendments to the proposed SUFA in the way the QCA considers appropriate to enhance the workability of the document.

We acknowledge that we are not permitted to refuse to approve the UT4 SUFA DAAU simply because we consider a minor and inconsequential amendment should be made to the DAAU.³²

The remainder of this chapter sets out how we have applied the criteria listed in section 138(2) of the QCA Act, in making our draft decision on the UT4 SUFA DAAU.

2.3 Section 138(2) of the QCA Act

The list of statutory factors in section 138(2) of the QCA Act are set out in Box 1.

Box 1: Section 138(2) of the QCA Act

The Authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following —

- (a) the object of this part;*
- (b) the legitimate business interests of the owner or operator of the service;*
- (c) if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;*
- (d) the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- (e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;*
- (f) the effect of excluding existing assets for pricing purposes;*
- (g) the pricing principles mentioned in section 168A;*
- (h) any other issues the authority considers relevant.*

Section 138(2) of the QCA Act is drafted as a simple list, with the language of the section imposing no requirement for any particular item to be regarded as more significant than the others; therefore, no one factor is given primacy over another.

'Appropriate'

The QCA Act requires us to determine whether it is appropriate to approve a DAAU having regard to each of the matters listed in section 138(2) of the QCA Act. The use of the term 'appropriate' in the QCA Act is one of wide import.

Our task is to consider whether the DAAU is 'appropriate' by reference to all the statutory factors, including their application and relative weighting.

Aurizon Network has submitted that 'the question is whether the DAAU is appropriate—not what access undertaking would be more appropriate, or most appropriate—having regard to each of the Section 138(2) Factors'. Aurizon Network further stated that 'in the context of this UT4 SUFA DAAU, which seeks to put into place a standard-form 'safe harbour' framework for expansion projects that will vary in scope and nature, there is no single appropriate approach to transaction documentation for such projects, let alone to standard-form documents intended to operate as a 'safe harbour' framework.¹³³

³² Sections 138(5) and (6) of the QCA Act.

³³ Aurizon Network, sub. 2, p. 5.

The QCA agrees that it is required to consider whether the UT4 SUFA DAAU is 'appropriate' by reference to all the statutory factors. The QCA also agrees that a standard form of SUFA may not be fit-for-purpose for all expansion projects. Therefore, we would need to consider whether it is appropriate to approve a SUFA DAAU that does not allow the underlying funding framework to be fit-for-purpose for all expansion projects, having regard to each of the matters in section 138(2). Indeed, Chapter 5 of this draft decision considers, in particular, the issue of the SUFA being flexible to allow for different types of financing but not directing the type of financing that should be used.

In considering whether it is appropriate to approve the UT4 SUFA DAAU, we are not compelled to approve a DAAU that is the least onerous and restrictive, from the perspective solely of the regulated business. We are required to determine whether it is 'appropriate' to approve the UT4 SUFA DAAU by reference to the factors in section 138(2) of the QCA Act, which is a wider focus than the perspective of the regulated business.

The QCA has adopted this approach in this draft decision.

'Have regard to'

In making our decision on whether it is appropriate to approve the UT4 SUFA DAAU, we must have regard to the factors in section 138(2) of the QCA Act.

The phrase 'have regard to' has been interpreted by Australian courts as requiring the decision-maker to take into account the matters to which regard is to be had as an element in making the decision.

As discussed further below, the QCA regards each factor as a fundamental consideration (in the sense of being a central element in the deliberative process).

'Weight'

The factors listed in section 138(2) of the QCA Act, considered in light of the provisions of the UT4 SUFA DAAU, may (and indeed often will) give rise to competing considerations which need to be weighed in deciding whether it is appropriate to approve the DAAU. Some of the factors to which the QCA must have regard favour different conclusions.

Some examples of possible tensions are:

- between the legitimate business interests of the owner or operator of the service (s. 138(2)(b) of the QCA Act), and the interests of persons who may seek access to the service (s. 138(2)(e) of the QCA Act)
- between the effects of excluding existing assets for pricing purposes (s. 138(2)(f) of the QCA Act), and including a return on investment commensurate with the regulatory and commercial risks involved (ss. 138(2)(g) and 168A(a) of the QCA Act).

In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.³⁴ We consider that this approach applies here.

³⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

2.3.1 Object of Part 5

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act when deciding whether it is appropriate to approve a DAAU.

The object of Part 5 of the QCA Act is set out in section 69E:

The object of this part is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

The SUFA framework is specifically concerned with promoting the financing of efficient investment in the CQCN in order to meet the capacity requirements of access seekers.

An expansion of the CQCN is undertaken for the purpose of increasing the capacity of the declared service. Therefore, the delivery of this capacity to a large extent defines whether the investment the access seeker is preparing to undertake constitutes an efficient use of resources. This is because, for example, the efficiency implications of an expansion that was expected to deliver an additional 100 units of declared service capacity for a given cost could be materially different to the efficiency implications if the expansion only delivers an additional 75 units of declared service capacity for the same cost. Therefore, among the key properties of efficient investment are that the underlying investment delivers capacity at least cost and is not wasteful.

Furthermore, to promote efficient investment, the risks, and the consequences thereof, should be allocated to the party who controls the risk. Allocating risks in such a manner reduces the likelihood of costs being incurred in an imprudent and inefficient manner.

From this perspective, up-front commitments regarding the deliverables of an expansion project: scope, standard, cost, time to complete and capacity, are key to promoting efficient investment in the network. The confidence provided by the SUFA framework in the delivery of these commitments will allow as many financing options for, and potential participants to, a SUFA as possible to promote access to the facility.

A wider participation of financiers and choice of financing alternatives is more likely to enable the most efficient financing option for a particular expansion, thereby ensuring that access charges trend towards, or are at, the efficient level. As a result, competition in upstream and downstream markets is promoted due to the absence of inefficient access charges acting as a barrier to entry.

2.3.2 Legitimate business interests of Aurizon Network

Section 138(2)(b) of the QCA Act requires us to have regard to the legitimate business interests of the owner or operator of the service, in this case Aurizon Network. As the owner and operator are the same entity, the QCA's consideration of section 138(2)(b) also covers section 138(2)(c).

'Legitimate business interests' is not a defined term under the QCA Act.

Aurizon Network has legitimate business interests across a range of areas, including:

- a balanced risk position in the allocation of contractual risks and liabilities as between Aurizon Network and access seekers/holders and not carrying risks it is unable to manage or control
- recognition of its role as the infrastructure planner and operator of the network
- safe operation of the facility and maintaining network integrity

- not being required to pay some or all of the costs of expanding the network.

2.3.3 Public interest

Section 138(2)(d) of the QCA Act requires the QCA to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The term 'public interest' is not defined in the QCA Act. We also note that any assessment of the public interest will be shaped by the context in which it is being assessed.

Against this background, we consider that, amongst other things, consideration of the public interest is strongly related to the object of the third party access regime being met. We consider the efficient expansion of the CQCN is a necessary requirement to meet the object of the QCA Act's third party access regime. Further, efficient expansion of the CQCN requires, amongst other things, efficient financing.

In this context, we consider the development of an effective SUFA framework that provides competition to any Aurizon Network-funded expansion proposal to be in the public interest. It provides a wider participation of financiers and choice of financing alternatives, which is more likely to enable the most efficient financing option for a particular expansion.

2.3.4 Interests of persons who may seek access

Section 138(2)(e) of the QCA Act requires us to have regard to the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the services are adversely affected.

For the avoidance of doubt, we consider that section 138(2)(e) of the QCA Act encompasses the interests of access seekers or potential access seekers. We also consider that the rights of existing access holders are relevant under section 138(2)(h) of the QCA Act, to the extent they are not also access seekers under section 138(2)(e).

Access seekers demand for network capacity triggers an expansion if there is insufficient network capacity. In the context of developing an effective SUFA framework, it is relevant that the associated expansion meets access seekers' capacity requirements.

2.3.5 Effect of excluding existing assets for pricing purposes

Section 138(2)(f) of the QCA Act requires the QCA to have regard to the effect of excluding assets for pricing purposes.

In order to promote efficient investment in the network, only prudent and efficiently incurred capital expenditure associated with a SUFA project should be included in the regulatory asset base (RAB). The return on and of capital associated with this aspect of the RAB is part of the rental stream received by SUFA funders. If an element of the capital expenditure incurred during the construction of the SUFA project is not considered to have been prudently and efficiently incurred, it is excluded from the RAB, and the SUFA trustee (effectively the SUFA funders) bears that optimisation risk.

It is therefore relevant that the SUFA framework provides SUFA funders with confidence that the capital costs of a SUFA project will meet the prudence and efficiency requirements for RAB inclusion. That confidence will allow a wider participation of financiers and choice of financing alternatives, which increases the likelihood of the financing cost of the expansion being priced efficiently, which in turn promotes efficient investment.

2.3.6 Pricing principles in section 168A of the QCA Act (s. 138(2)(g))

Section 138(2)(g) of the QCA Act requires the QCA to have regard to the pricing principles in section 168A of the QCA Act.

The pricing principles in relation to the price of access to a service are that the price should:

- (a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) allow for multi-part pricing and price discrimination when it aids efficiency; and
- (c) not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and
- (d) provide incentives to reduce costs or otherwise improve productivity.

The UT4 SUFA DAAU does not include explicit pricing proposals. We note expansion pricing framework is included in UT4 and stakeholders did not raise it in this DAAU process. Therefore, we have considered s. 168A, but it is of limited relevance to our consideration of this SUFA DAAU.

2.3.7 Any other relevant matters

Section 138(2)(h) of the QCA Act allows the QCA to have regard to any other issues it considers relevant.

In broad terms, in addition to the matters above, we consider the following matters relevant:

- whether the SUFA framework is workable, bankable and credible
- the interests of other parties
- sections 118 and 119 of the QCA Act
- the negotiate–arbitrate principle

A workable, bankable and credible SUFA framework

We consider our assessment of the UT4 SUFA DAAU should include having regard to whether the SUFA framework is workable, bankable and credible, which we describe in this context as follows:

- **Workable**—the SUFA documents achieve the intended outcome and can be executed by all parties without negotiation if necessary (i.e. they are sufficiently clear and certain and provide an appropriate allocation of risk).
- **Bankable**—third party financing can be obtained to fund SUFA. This requires a high level of confidence that the expected returns will be delivered and that the asset will be appropriately operated and maintained over its life cycle. If the SUFA is not financeable through third party debt and equity markets, its utility is limited to those users with the financial capacity to absorb the risk associated with the SUFA. That means, other users are excluded from being part of the process to fund expansion to meet their access requirements, which limits their ability to access the network and adversely affects competition among users.
- **Credible**—the SUFA structure does not create such risks and uncertainties for users and potential financiers, or overlay such unnecessarily high transaction, tax or finance costs on

an expansion project, that the SUFA can never be a credible alternative to Aurizon Network undertaking the expansion itself.

Our view is that a SUFA framework that meets these criteria aligns with the object of Part 5 of the QCA Act. This is because it promotes efficient investment and allows as many financing options for, and potential participants to, a SUFA as possible to promote access, which in turn increases the likelihood of the financing cost of the expansion being priced efficiently.

The interests of other parties

Section 138(2)(e) of the QCA Act requires that we have regard to the interests of access seekers when considering whether to approve or refuse to approve Aurizon Network's UT4 SUFA DAAU.

We also consider it appropriate to account for the interests of the following when considering whether to approve, or refuse to approve, Aurizon Network's UT4 SUFA DAAU:

- access holders, as they may be impacted by the SUFA framework
- SUFA financiers, as a bankable SUFA framework should be capable of attracting third party financing
- QTH, the State of Queensland and Aurizon Holdings, as they are signatories to certain SUFA agreements.

Sections 118 and 119 of the QCA Act

As set out in Chapter 1 of this draft decision, the need for a SUFA stemmed from industry concerns about Aurizon Network's unwillingness to fund network expansions at the regulated rate of return. Rather than the QCA separately making a determination in response to each access dispute that may arise from an access seeker not agreeing with Aurizon Network's terms for expanding the network, the SUFA framework seeks to provide baseline funding arrangements and set the responsibilities of parties involved (including Aurizon Network).

We note Aurizon Network has said, in its UT4 SUFA DAAU submission, that aspects of the QCA's UT3 SUFA final decision impose a 'cost of expansion' on Aurizon Network and 'the QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any expansion'.³⁵

We acknowledge that we cannot make an access determination that would have the effect of requiring Aurizon Network to pay some or all of the costs of extending the network.³⁶

However, we can make an access determination that may require Aurizon Network to extend the network, including among other requirements, if another party pays the costs of extending the network.³⁷ The SUFA framework is designed to do just that—to be a suite of standard pro forma agreements to facilitate financing options as alternatives to Aurizon Network funding rail infrastructure expansions in the CQCN.

We consider that sections 118 and 119 of the QCA Act are not intended for Aurizon Network to entrench its position as a monopoly provider of the declared service, nor to provide Aurizon Network with the ability to use its monopolist position to pass on risks associated with the roles and responsibilities it undertakes in the context of the SUFA framework. Our view is Aurizon

³⁵ Aurizon Network, sub. 2, pp. 9, 11.

³⁶ QCA Act, s. 119(2)(c).

³⁷ QCA Act, s. 119(5)(c).

Network is responsible for its actions and the consequences thereof with respect to the roles and responsibilities it has under the SUFA framework.

Where Aurizon Network has questioned the QCA's power to impose a position from the UT3 SUFA final decision, we have discussed that position in the relevant chapter of this draft decision.

Negotiate–arbitrate model and primacy of commercial negotiations

The QCA Act's third party access regime incorporates a 'negotiate–arbitrate model'. That is, parties should endeavour to negotiate a mutually beneficial outcome before resorting to arbitration.

Consistent with this model, the access undertaking and standard access agreement seek to provide certainty through the provision of a set of terms and conditions on which Aurizon Network will provide access, which eliminates the need to develop these arrangements separately with each access seeker. Further, the terms and conditions can be adopted in the absence of alternative arrangements being acceptable to all parties through commercial negotiation.

An appropriate balance across the terms and conditions of the access undertaking and standard access agreement needs to be achieved, in order for the access undertaking and standard access agreement to provide a credible backstop position from which access seekers can choose to either negotiate alternative terms for access or adopt the standard access agreement.

We consider that the SUFA documentation should, to the extent practicable, seek to achieve a similar goal. In effect, the access undertaking and the SUFA documentation should seek to achieve a credible position from which it is possible for prospective SUFA funders to negotiate alternative terms or to adopt the standard pro forma SUFA documentation.

We are also of the view that the pro forma SUFA documentation should aim to be 'stand-alone' from a technical legal perspective. The interaction of SUFA with the access undertaking and standard access agreement seeks to focus on aspects of risk allocation, whilst ensuring the holistic SUFA framework provides for effective dispute mechanisms, accountability and transparency to the extent practicable.

3 CONSTRUCTION PRINCIPLES AND CONSTRUCTION CONTRACT

The construction contract sets out the baseline terms and conditions for the construction of SUFA projects. The form of the construction contract is intended to limit negotiation in respect of the construction contract to its schedules and annexures. The schedules and annexures are project-specific and dependent on the outcome of the feasibility study as well as, if relevant, the outcome of the dispute mechanism. The purpose of limiting the scope of negotiation to the schedules and annexures is to balance the bargaining power of Aurizon Network, as the sole supplier of the declared service and the constructor of SUFA infrastructure, with the interests of the SUFA trustee. However, to ensure that the construction contract is credible, it must provide a suitable risk, reward and liability framework between the SUFA trustee and Aurizon Network, and greater certainty about the SUFA project deliverables.

Our draft decision in respect of the pro forma SUFA construction contract provides that:

- *Aurizon Network should be obliged to deliver a certain capacity and be liable for its failure to do so*
- *the SUFA trust should provide Aurizon Network with guarantees in respect of Aurizon Network's peak termination cost*
- *disputes relating to completing the construction contract schedules are access disputes and should be resolved in accordance with the provisions of the QCA Act*
- *PUHs and access seekers should have access, through the SUFA trustee, to the pricing information underpinning adjustments to the construction contract.*

We consider our draft decision appropriately balances the interests of all parties.

Overview

The construction contract included in Aurizon Network's UT4 SUFA DAAU is based on the one included in the UT3 SUFA final decision. To the extent the UT4 SUFA DAAU construction contract contains positions that are consistent with the UT3 SUFA final decision construction contract and stakeholders did not object to them, we consider those positions remain appropriate and refer to the analysis in chapters 6 and 7 of the UT3 SUFA final decision.³⁸

However, the UT4 SUFA DAAU contains positions on the construction contract of a SUFA that are different from the UT3 SUFA final decision. Aurizon Network has also proposed amending Parts 8 and 11 of UT4 to give effect to the SUFA documents included in its UT4 SUFA DAAU. The key positions and changes are summarised in Table 1 and discussed in sections 3.1 to 3.4. The other positions raised by Aurizon Network, as well stakeholders' comments in respect of them, are summarised and considered in Appendix A of this draft decision.

³⁸ QCA UT3 SUFA final decision, pp. 61–118.

Table 1 Construction contract—summary of key positions

<i>UT3 SUFA final decision</i>	<i>UT4 SUFA DAAU proposal</i>	<i>Stakeholders' comments</i>	<i>QCA draft decision</i>
Capacity warranty			
Aurizon Network is to provide a capacity warranty as part of its general warranties under the construction contract.	The construction contract does not include a capacity warranty nor liquidated damages in respect of its breach.	Both the QRC and Pacific National require that the capacity warranty remain.	See section 3.1
Credit exposure on construction contract			
The SUFA trustee, as the construction contract's principal, is not required during the construction contract's term to provide Aurizon Network with a bank guarantee.	The SUFA trustee, as the construction contract's principal, is required to provide a bank guarantee during the construction contract's term.	The QRC does not accept that a bank guarantee should be provided.	See section 3.2
Determination of construction contract schedules by the QCA			
The expansion process under the undertaking then in force for the SUFA should provide for a dispute resolution mechanism, through which disputes can be referred under the undertaking to a third party expert or the QCA for a binding determination.	The QCA should make its determination in accordance with the then applicable market practice in the Australian construction industry, as detailed in dispute guidance provisions that relate to construction contract disputes and are to be included in UT4.	The QRC objected to the standard proposed by Aurizon Network for assessment of a dispute on that basis.	See section 3.3
Availability of pricing information			
Aurizon Network will share pricing information with the SUFA trustee when required. Subject to certain restrictions, the SUFA trustee may share that information with other parties, including the PUHs and the access seekers.	The SUFA trustee should not share the pricing information with the PUHs or access seekers. Sharing of information with other relevant parties is restricted further.	The QRC does not agree that pricing information should be restricted in the way proposed by Aurizon Network.	See section 3.4

3.1 Capacity warranty

3.1.1 Background

The form of construction contract in the UT3 SUFA final decision:

- specified that the construction contractor was to deliver a 'required expansion capacity'
- provided a minimum amount of capacity which was to be delivered. This 'minimum capacity change' was the consequential increase in capacity and was determined as a percentage of the 'required expansion capacity'.

It was anticipated that the required expansion capacity and minimum capacity change would be negotiated or, absent agreement, determined by the QCA.³⁹

Under that form of construction contract, if Aurizon Network (as construction contractor) failed to deliver the minimum capacity change, Aurizon Network was to undertake rectification works to deliver the minimum capacity change. Further, if Aurizon Network failed to deliver the minimum capacity change after a further two attempts to rectify, then, to avoid further delay if the SUFA trustee (as principal) so required, liquidated damages for failure to deliver the minimum capacity change were payable by Aurizon Network to the SUFA trustee, subject to a cap. If Aurizon Network delivered the minimum capacity change but failed to deliver the required expansion capacity, Aurizon Network could attempt to rectify the capacity shortfall or pay the agreed liquidated damages to the SUFA trustee, subject to a cap. The rate of liquidated damages was to be negotiated or, absent agreement, determined by the QCA.⁴⁰

Interested parties may refer to our more detailed analysis in respect of the capacity obligation in the UT3 SUFA final decision.⁴¹

3.1.2 Aurizon Network's SUFA DAAU proposal

In the UT4 SUFA DAAU, Aurizon Network proposed that the SUFA template should not include a capacity warranty on four separate grounds, each of which was, in Aurizon Network's view, sufficient on its own to justify not including the warranty.⁴²

The four grounds raised by Aurizon Network are:

- UT4 already addresses capacity shortfalls.
- A mandatory capacity warranty is against the interests of access seekers and Aurizon Network.
- Aurizon Network should not be required to provide a capacity warranty of a scope imposed on it by a binding dispute resolution.
- The QCA has no power to impose rectification and/or liquidated damages payment obligations.⁴³

UT4 already addresses capacity shortfalls

Aurizon Network said that, as a SUFA expansion would be subject to the capacity shortfall rectification obligations in UT4, it would be inappropriate for a SUFA transaction to have alternative capacity shortfall rectification obligations.⁴⁴

Further, Aurizon Network was of the view that as, under the SUFA model, the construction contractor would be bearing the risk of a capacity shortfall, the SUFA project funding model would be unfairly favoured over the Aurizon Network-funded project funding model at the time of selection by access seekers.⁴⁵

³⁹ QCA UT3 SUFA final decision, p. 89.

⁴⁰ QCA UT3 SUFA final decision, p. 89.

⁴¹ QCA UT3 SUFA final decision, pp. 66–67, 87–90.

⁴² Aurizon Network, sub. 2, p. 19.

⁴³ Aurizon Network, sub. 2, pp. 10–11.

⁴⁴ Aurizon Network, sub. 2, p. 10.

⁴⁵ Aurizon Network, sub. 2, pp. 10–11.

A mandatory capacity warranty is against the interests of access seekers and Aurizon Network

Aurizon Network is of the view that Aurizon Network and the access seekers might negotiate between:

- an option with a higher capital cost but with higher certainty of achieving capacity
- an option with a lower capital cost but with less certainty of achieving capacity.

Aurizon Network said that imposing the capacity warranty with liquidated damages would mean that Aurizon Network is far less likely to offer the second option, as it would be facing an unacceptable risk profile, depriving the access seekers of choice.⁴⁶

Further, Aurizon Network would be unwilling to warrant in respect of the second option, as Aurizon Network:

would be knowingly and deliberately making a false representation, and doing so may constitute 'misleading and deceptive conduct in trade or commerce' under the Competition and Consumer Act 2010 (Cth).

Capacity warranty of a scope imposed by binding dispute resolution

Aurizon Network did not accept that it should be required to provide a capacity warranty in respect of a scope imposed on it by a binding dispute resolution. This was because the determined scope may be, in Aurizon Network's opinion, an inadequate scope, which may result in Aurizon Network facing an adverse risk profile and making a false representation.⁴⁷

The QCA has no power to impose rectification and/or liquidated damages payment obligations.

Aurizon Network said that imposing rectification works or liquidated damages on Aurizon Network for a capacity shortfall amounts to Aurizon Network bearing the costs of the expansion, which is not permitted under the QCA Act.⁴⁸

3.1.3 Stakeholders' comments

Both Pacific National and the QRC disagreed with the removal of the capacity warranty.

Pacific National's explanation was that:

Aurizon Network has full control over the scope, cost and deliverable outcomes of any capacity expansions. Therefore any capacity shortfall resulting from a capacity expansion should have been able to be avoided by Aurizon Network during the planning, construction and implementation phases of any capacity expansion project. Given this Aurizon Network should be held accountable to correct the capacity shortfall (and bear the full cost of the capacity correction depending on the reason for the capacity shortfall).⁴⁹

The QRC stated:

It is not appropriate that Aurizon Network provides no warranty whatsoever in respect of capacity given that a key factor of any Extension Works are that they fulfil the capacity requirements of the Principal and the Principal's project. Aurizon Network's amendments mean that the Principal will have no recourse against Aurizon Network where the completed extension works fail to meet the Principal's capacity requirements.

It is standard market practice for a contractor to provide a warranty in relation to fitness for purpose in a construction contract of this nature. In relation to the works to be carried out under

⁴⁶ Aurizon Network, sub. 2, p. 11.

⁴⁷ Aurizon Network, sub. 2, p. 11.

⁴⁸ Aurizon Network, sub. 2, pp. 11–12.

⁴⁹ Pacific National, sub. 28, p. 2.

the Construction Contract a principal would expect that the works in question would deliver the capacity being sought.⁵⁰

3.1.4 QCA analysis and draft decision

Our draft decision includes a form of construction contract under which Aurizon Network is obliged to achieve an agreed or determined capacity, and is further obliged to rectify and/or pay liquidated damages for failing to meet that obligation.

We are conscious of the need for the SUFA framework to provide a genuine alternative to facilitate CQC expansion in instances when Aurizon Network will not expand the CQC at the regulated WACC. We consider that an ineffective SUFA framework may merely reinforce perceptions regarding Aurizon Network's monopoly power. In our view, the SUFA framework detailed in this draft decision provides an effective alternative finance and construction package for access seekers. A key part of that package is the construction contract which, in order to be effective, must provide certainty about project deliverables, including capacity.

The four grounds raised by Aurizon Network are extremely pertinent to the effectiveness of the construction contract. In our view, they are discrete. We discuss each of these below.

UT4 already addresses capacity shortfalls.

In analysing the appropriateness of an access seeker (and its funders) relying on the capacity shortfall rectification obligations in UT4 to address capacity shortfalls, we have identified three key issues which demonstrate that the processes in UT4 are not appropriate to manage delivery of capacity under the SUFA arrangements. The key issues are:

- The party who bears capacity risk is not the party who controls it.
- The party who bears optimisation risk is not the party that can manage optimisation risk.
- The extent to which parties are able to enliven, and enforce, the relevant provisions of UT4.

Capacity risk

Although UT4 addresses capacity shortfalls⁵¹, it addresses them in the context of compression, priority for access to the next expansion and the party who must fund an expansion for an Aurizon Network shortfall (defined as the capacity shortfall that occurs as a result of a reduced scope agreed by the parties). It does not ensure that the capacity required by access seekers is actually delivered.

The key driver for an expansion of the CQC is that it is capacity-constrained. Access seekers may seek an expansion to overcome the constraints and may enter into a SUFA and fund (or facilitate the financing of) the expansion, if Aurizon Network chooses to not invest in the expansion at the regulated WACC.

If an access seeker were to rely on the capacity shortfall mechanism in UT4 in respect of a user funded expansion (i.e. a SUFA), it would have no certainty that:

- its required capacity (which it has funded) would be delivered; or
- it would be compensated for its loss suffered if that required capacity is not delivered, despite having funded an expansion intended to deliver that capacity.

⁵⁰ QRC, sub. 29, p. 12.

⁵¹ See clause 8.9.3 of UT4.

These risks have no bearing on Aurizon Network under that mechanism and are therefore not relevant to Aurizon Network's funding decision. However, these risks are relevant to an access seeker's funding decision, as the lack of certainty over the SUFA-funded expansion's deliverables will influence that decision.

Optimisation risk

Aurizon Network has made it clear that it must be the constructor in all expansions (irrespective of funding source).⁵² Whilst there is no choice in constructor, the party funding an expansion (be it Aurizon Network or access seekers) faces the risk that costs of expansion associated with a capacity shortfall may not all be included in the RAB. This may arise due to the QCA deeming that some of the costs are inefficient when taking into account the capacity that has been achieved by the relevant expansion. However, the ability to manage this risk of optimisation is different for Aurizon Network and access seekers.

In case of an Aurizon Network-funded expansion, there is an advantage for Aurizon Network in achieving the required capacity, as this supports its argument that the expansion was efficient for the purposes of including the costs of expansion in the RAB. Further, Aurizon Network, as an access provider, a funder and a constructor, is able to internalise the risk of optimisation and is in a position to manage it. In summary, Aurizon Network is incentivised to ensure the cost of an Aurizon Network-funded expansion is included in the RAB.

Where an access seeker funds the expansion, Aurizon Network is not disadvantaged if it does not achieve the required capacity, unless due to its default or negligence. The risk of optimisation lies with the access seeker, despite Aurizon Network, as constructor, being in a better position to manage that risk. This means there is little incentive for Aurizon Network to ensure all costs of the access-seeker-funded expansion are included in the RAB.

Enlivening and enforcing the capacity shortfall provisions in UT4

A key part of an investment decision in a SUFA will be how the increased capacity will be created and the form and contents of the contractual mechanisms put in place to support that creation. The relevant contract in a SUFA project is the construction contract, detailing the risk/reward/liability framework for the construction program.

If Aurizon Network fails to deliver the capacity under the construction contract but does not then comply with its obligations under UT4 in respect of a capacity shortfall following an expansion, there are no clear rights of enforcement for a SUFA trustee (or the access seeker) or any clear path to obtaining damages for its loss suffered as a result of Aurizon Network's failure.⁵³

Consequently, the construction contract should not only specify the scope, required capacity and contract sum, but should also specify the consequences of failure by a party to meet its obligations.

In the QCA's opinion, these features are essential for the credibility, workability and bankability of a SUFA project. Access seekers (and their boards and funders) will expect the construction contract terms and conditions to be comprehensive and will look to the contractual certainty the contract provides. They would not expect to deal with a failure of a party to meet its obligations under the construction contract through exercising the relevant access seekers'

⁵² See Part 8.2.1(l)(ii) of UT4.

⁵³ Noting that s. 152 of the QCA Act may apply if there has been an access determination in respect of the construction contract in question.

rights under the QCA Act to enforce UT4 as against Aurizon Network. They would also not expect to be required to undertake a risk analysis of the efficacy of such regulatory rights. These expectations are of particular importance, given that the construction period under a SUFA may span different regulatory periods with different undertakings.

Summary

Any uncertainty over the level of increased capacity delivered by an expansion will act as a barrier to an access seeker pursuing a SUFA, as the delivery of capacity to a large extent defines whether the investment in a SUFA by the access seeker constitutes an efficient use of its resources.⁵⁴ Although capacity shortfalls are addressed in UT4, they are not addressed in a manner that is suitable for a SUFA. Capacity shortfalls in a SUFA project must therefore be addressed through the SUFA construction contract.

A mandatory capacity warranty is against the interests of access seekers and Aurizon Network.

Aurizon Network refers to the trade-off between scope and certainty. In the QCA's view, there is no difference in either of the options suggested by Aurizon Network for the access seeker, as in neither case is Aurizon Network offering an obligation in respect of capacity. This is the case even if the access seeker pays a higher price for the increased certainty of achieving a higher capacity. Effectively, Aurizon Network wants to offer access seekers the same contractual rights, no matter which option they choose.

Further, in our view, Aurizon Network has misidentified the trade-off that a party will accept. A party may accept a lower capacity obligation for a lower price. It is not conceivable how this would be against the interests of an access seeker; it is in the interests of access seekers that there is flexibility. The trade-off also offers flexibility to Aurizon Network—Aurizon Network has the choice to fund at regulated WACC and be subject to the capacity shortfall obligations under UT4, or not to fund at regulated WACC and be subject to the capacity shortfall mechanism under the construction contract.

We note Aurizon Network's comments in respect of 'misleading and deceptive conduct' and the 'fit-for-purpose warranty'.⁵⁵ Our draft decision addresses this issue through a new clause 2.2(b) of the construction contract. The effect of this new clause is that Aurizon Network is obliged to achieve the capacity outcome, with its failure to achieve that capacity is dealt with through the rectification and liquidated damages regime, but Aurizon Network does not warrant the capacity.

Aurizon Network should not be required to provide a capacity warranty of a scope imposed on it by a binding dispute resolution.

Aurizon Network's reasoning under this argument is very similar to its arguments in respect of a mandatory capacity warranty. The QCA's analysis (above) and draft decision (below) apply to this argument.

The QCA has no power to impose rectification and/or liquidated damages payment obligations.

As detailed in the UT3 SUFA final decision, we are of the view that requiring Aurizon Network to rectify capacity shortfalls or pay liquidated damages to achieve the required expansion capacity is not inconsistent with sections 118 and 119 of the QCA Act. In our view, carrying out rectification works and/or the payment of liquidated damages are not costs of expansion but

⁵⁴ QCA UT3 SUFA final decision, p. 13.

⁵⁵ Aurizon Network, sub. 2, p. 43, item CA2.

are the liability that Aurizon Network incurs as a result of failing to meet its contractual obligations as constructor in respect of capacity.

Our reasoning remains the same as detailed in the UT3 SUFA final decision, namely that the required expansion capacity and minimum capacity change are negotiated between the contractor (Aurizon Network) and the principal (representing the SUFA funders) as part of the construction contract underpinning the SUFA project. As such, they are associated with defining the project-specific terms and conditions applying to the SUFA project and the subsequent risk/liability/reward framework agreed upon. Further, it is our view that the SUFA trustee bears the costs of the expansion through its payment of the contract sum.

[QCA draft decision](#)

The QCA considers that Aurizon Network, as the constructor, should be obliged to deliver an agreed or determined capacity change. Further Aurizon Network should be obliged to rectify and/or pay liquidated damages for failing to achieve that capacity change.

Our proposal for the parties to negotiate the required capacity change and minimum capacity change and its associated liquidated damages levels, combined with a binding dispute resolution in the absence of agreement, appropriately balances the interests of SUFA funders (access seekers and/or third party financiers) with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). As Aurizon Network will be contractually obliged in respect of the capacity change and minimum capacity change, it is not necessary for Aurizon Network to warrant in respect of the capacity outcome. This is in Aurizon Network's interests as contractor and is in its legitimate business interests (ss. 138(2)(b) and (h) of the QCA Act).

Our proposal that the mechanics for failure to achieve the required capacity change and minimum capacity change be dealt with between the parties contractually under the construction contract, and not through UT4, also appropriately balances the interests of SUFA funders (access seekers and/or third party financiers) with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

We also consider that our approach supports efficient investment in the CQCN and, in turn, the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act).

Further, a capacity obligation from Aurizon Network is likely to improve the SUFA as a financing tool, because it provides certainty about the deliverables. This aligns with the object of Part 5 of the QCA Act, and is in the public interest and in the interest of access seekers (ss. 138(2)(a), (d) and (e) of the QCA Act).

Summary of draft decision 3.1

- (1) The UT4 SUFA DAAU should be amended such that:
 - (a) the construction contract imposes contractual obligations on Aurizon Network in respect of capacity
 - (b) the EPA, SUHD and Trust Deed provide for Aurizon Network's obligations relating to capacity; including the SUFA trustee's, the PUHs' and the access seekers' remedies for Aurizon Network's failure to meet those obligations.
- (2) The SUFA trustee should have recourse to Aurizon Network through the SUFA documentation if a capacity shortfall occurs.

3.2 Credit exposure in respect of the construction contract

Background

Instead of requiring the SUFA trustee to provide security to Aurizon Network, the UT3 SUFA final decision provided for an advance payment to Aurizon Network, as the constructor, in the construction contract. Our reasoning for this was that the provision of security to Aurizon Network would cause SUFA funders to provide security to both Aurizon Network and the SUFA trustee, resulting in an unnecessary barrier to entry to participation in the construction phase of a SUFA transaction.⁵⁶

Aurizon Network UT4 SUFA DAAU proposal

Aurizon Network was concerned that, absent credit support from the SUFA trustee for its financial obligations under the construction contract, Aurizon Network would face a 'material trade exposure' in the event that the SUFA trust experiences a corporate failure whilst construction is underway.⁵⁷

The following were provided as reasons why this trade exposure would arise:

- There is a significant time gap between Aurizon Network incurring costs and Aurizon Network being paid.
- Aurizon Network must implement a 'show cause' and suspension process before it can terminate the construction contract for non-payment by the SUFA trustee.
- Following termination of the construction contract, Aurizon Network will bear extra costs from the consequential early termination of subcontractor and supplier contracts.⁵⁸

Aurizon Network was of the view that the SUFA trust is not creditworthy, as it is a "'pass-through" entity of no financial substance', and that entering into the construction contract without trade credit protection from the SUFA trust would be against Aurizon Network's legitimate business interests.⁵⁹

Further, Aurizon Network argued a cost of expansion would arise where the construction contract was terminated due to non-payment by the SUFA trustee, such cost being Aurizon

⁵⁶ QCA UT3 SUFA final decision, p. 108.

⁵⁷ Aurizon Network, sub. 2, p. 13.

⁵⁸ Aurizon Network, sub. 2, p. 13.

⁵⁹ Aurizon Network, sub. 2, p. 14.

Network's credit loss of the net construction contract revenue amounts due to it, but not received following the termination.⁶⁰

Aurizon Network offered to bear such cost of any credit loss 'if and only if' the construction contract provided that the SUFA trustee provide a bank guarantee as specified in the Aurizon Network's UT4 SUFA DAAU form of construction contract.⁶¹

Aurizon Network stated its treatment in the UT4 SUFA DAAU was that 'the [SUFA] trustee, as [construction contract] principal, is required to provide a bank guarantee in respect of the estimated maximum amount due to Aurizon Network under the [construction contract] if it is terminated due to the principal's default'.⁶²

Stakeholder comments

The QRC rejected the provision of a guarantee by the SUFA trustee under the construction contract, on the grounds that:

- it was not market standard
- Aurizon Network has significant protection under the SUHD in relation to the credit position of the SUFA trust.⁶³

QCA analysis and draft decision

We note the QRC's concerns in respect of the provision of guarantees by the SUFA trust to Aurizon Network under the construction contract. However, we also recognise the legitimate business interests of Aurizon Network in ensuring that it is protected against a SUFA trust payment default. This draft decision pro forma SUFA construction contract requires the SUFA trust to provide Aurizon Network with guarantees in respect of the estimated maximum amount due to Aurizon Network under the construction contract if it is terminated due to the principal's default (such amount being the 'peak termination cost'). Further, the construction contract provides that Aurizon Network may only have recourse to such guarantees if the construction contract is terminated due to the SUFA trustee's (as principal) default and the SUFA trustee consequently fails to pay amounts as required by the construction contract.

We note that Aurizon Network has not mentioned in its submission the 'front end payment mechanism', which is the prepayment by the SUFA trustee provided for under the UT3 SUFA final decision pro forma form of the construction contract. As detailed by Aurizon Network in its submission to the UT3 SUFA draft decision, such mechanism:

- keeps Aurizon Network approximately 'cash flow neutral' on a prospective basis over the construction period
- addresses Aurizon Network's need for working capital.⁶⁴

In our view, a 'front end payment mechanism' mitigates:

- the time gap between Aurizon Network incurring costs and being paid

⁶⁰ Aurizon Network, sub. 2, p. 14.

⁶¹ Aurizon Network, sub. 2, p. 14.

⁶² Aurizon Network, sub. 2, p. 14.

⁶³ QRC, sub. 29, p. 13, item 3.

⁶⁴ Aurizon Network submission to the QCA's UT3 SUFA draft decision, p. 18.

- the time gap between a SUFA trustee payment default and Aurizon Network terminating the construction contract for that default.

However, we also recognise that the 'front end payment mechanism' as provided for in the UT3 SUFA final decision permits the SUFA trustee to retain five per cent of each monthly progress payment under the construction contract until the SUFA trustee has recouped that prepayment.⁶⁵

In order to further mitigate the time gaps between payment and recovery highlighted by Aurizon Network, we propose that the prepayment only be deducted from the final progress payments under the construction contract (instead of from each monthly progress payment). This is provided for in clause 36.1(f) of the UT4 SUFA draft decision pro forma construction contract.

Our key concern in the UT3 SUFA final decision in respect of security was to avoid a situation where SUFA funders provided security to both the SUFA trustee (under the SUHD) and Aurizon Network under the construction contract, which would in effect amount to double security. We considered that this would create unnecessary barriers to participation in the construction phase of a SUFA transaction.⁶⁶

In light of Aurizon Network's concerns, we have considered further the interplay of the provision of bank guarantees under the SUHD and the construction contract to ensure that both the SUFA trustee and Aurizon Network benefit from security. We propose that the security provided by a PUH is capped at the total subscription amount for that PUH, and is divided into two types of bank guarantees. The first type will be for part of that PUH's subscription obligations, and the second for its share of the peak termination cost. In summary, we propose the following for the provision of bank guarantees:

- Each PUH provides two forms of bank guarantees, which in aggregate are equal in value to that PUH's subscription obligations under the SUHD.
- One form of bank guarantee will be in respect of that PUH's subscription obligations under the SUHD (although it will not be for the full value of its subscriptions obligations, given the cap and split between two forms of bank guarantee).
- The other form of bank guarantee will in aggregate be equal to the PUH's share of the peak termination cost under the construction contract ('peak termination bank guarantee').
- The SUFA trustee assigns the peak termination bank guarantees to Aurizon Network.
- Aurizon Network may use the peak termination guarantees for payment of peak termination cost if the SUFA trustee fails to pay amounts due under the construction contract following its termination due to the SUFA trustee's default.

The template SUHD includes consequential amendments for the above positions. We acknowledge that this will mean that all PUHs, even those who satisfy the credit policy set out in schedule 6 of the SUHD of the UT3 SUFA final decision, will be required to provide guarantees. However, based on expert advice, we understand that this will not act as a barrier to third party financing. We also note that parties may choose to vary this position when negotiating a user funding arrangement.

⁶⁵ QCA UT3 SUFA final decision construction contract, clause 36.1(f)(ii).

⁶⁶ QCA UT3 SUFA final decision, p. 108.

In the template construction contract, Aurizon Network may call on the bank guarantees where the construction contract has been terminated due to the SUFA trustee's default and the SUFA trustee fails to pay sums that are due and payable under clauses 38.10 (termination) and 39B (pre-termination work).

We are of the view that our position in respect of the bank guarantees and the prepayment under the construction contract addresses Aurizon Network's concerns in respect of its trade credit exposure.

Our draft decision proposals above in respect of Aurizon Network's trade credit exposure appropriately balance the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

We also consider our approach supports the workability, bankability and credibility of the SUFA framework, which in our view is consistent with the object of Part 5 of the QCA Act, particularly in promoting efficient investments in the CQCN. This is because it seeks to provide alternative funding options. Efficient investments in the CQCN are in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Summary of draft decision 3.2

The UT4 SUFA DAAU should be amended such that:

- (1) under the construction contract, the prepayment under it may only be deducted from the final progress payments
- (2) the construction contract provides for the provision of peak termination guarantees, as detailed above
- (3) the SUHD and the conditions precedent under the EPA reflect these positions.

3.3 Determination of construction contract schedules by the QCA

Background

In the UT3 SUFA final decision, we considered that the expansion process should provide for a dispute resolution mechanism, through which disputes could be referred under the undertaking to a third party expert or the QCA for a binding determination. This mechanism should be sufficiently comprehensive to cover all possible disputes that could arise during the expansion process, including in relation to the completion of schedules in the SUFA documentation.⁶⁷ We also considered that the amendments required for UT3 were not an immediate priority and would likely be superseded by the UT4 process.⁶⁸ In particular, we rejected Aurizon Network's proposal in its 2013 SUFA DAAU submission that:

a consistent with market practice' principle should be incorporated into the access undertaking's expansion process to govern the formulation of the construction agreement.⁶⁹

Our reasoning for this rejection was based on the following:

⁶⁷ QCA UT3 SUFA final decision, p. 70.

⁶⁸ QCA UT3 SUFA final decision, pp. 32–33.

⁶⁹ QCA UT3 SUFA final decision, p. 83.

- The expansion process seeks to provide transparency regarding the development of an expansion project and the outputs expected from that project, which is not directly related to a SUFA transaction or the pro forma SUFA construction contract.
- The criteria for the inclusion of capital expenditure into the RAB relates to its prudence and efficiency, not it being 'consistent with market practice'.⁷⁰

The UT4 final decision⁷¹, which followed the UT3 SUFA final decision, included, at clauses 8.2.2 and 11.1.5 of UT4, the relevant dispute mechanism for determination of the construction contract schedules.

Aurizon Network's SUFA DAAU proposal

In its submission, Aurizon Network accepted the referral to determination of disputes relating to the completion of schedules to the template construction contract; however, it disagreed that it should be in accordance with the existing dispute mechanism in UT4. Instead, Aurizon Network proposed that the determination by the QCA be made in accordance with 'the then applicable market practice in the Australian construction industry'⁷², with a proposed method for determining the applicable market practice at clause 11.1.5(h) of the UT4 SUFA DAAU.

Aurizon Network's reasons were that:

- The QCA's reasoning in its UT3 SUFA final decision was not soundly based, as:
 - Part 8.2.2 of UT4 governs the determination of SUFA schedules in the event of a dispute (including the construction contract schedules)⁷³
 - RAB inclusion is a matter for SUFA investors and the SUFA trust, and should not affect the pricing of the SUFA trust's contracts with other service providers.⁷⁴
- Aurizon Network may incur net costs arising from its entry into a SUFA construction contract if its costs under that agreement exceeded its revenues under that agreement.⁷⁵

Stakeholders' comments

The QRC objected to the standard proposed by Aurizon Network. Its grounds of objection were:

- The expert's role should be to make a determination according to prudent industry practices, not by a mandated reference to midpoints.
- It is not appropriate to benchmark against a government-owned corporation; the benchmark should instead have regard to a prudent and diligent private infrastructure owner.⁷⁶

QCA analysis and draft decision

The QCA's draft decision is to reject Aurizon Network's proposal to add clause 11.1.5(h) in UT4 under its UT4 SUFA DAAU.

⁷⁰ QCA UT3 SUFA final decision, p. 85.

⁷¹ QCA 2016, Aurizon Network's Amended 2014 draft access undertaking, final decision, October (UT4 final decision).

⁷² Aurizon Network, sub. 2, p. 15.

⁷³ Aurizon Network, sub. 2, p. 16.

⁷⁴ Aurizon Network, sub. 2, p. 16.

⁷⁵ Aurizon Network, sub. 2, p. 16.

⁷⁶ QRC, sub. 29, p. 3, item 6.

The UT4 SUFA DAAU provides that disputes over the completion of schedules in a SUFA document are not disputes for the purposes of division 5 of Part 5 of the QCA Act—that is, they are not disputes in respect of which an 'access dispute notice' may be given under the QCA Act. The QCA therefore assumes Aurizon Network's understanding is that a dispute requiring a determination for completing the schedules to the SUFA construction contract is not a dispute to which division 5 of Part 5 of the QCA Act will apply.

In the QCA's view, a dispute relating to the completion of schedules of the SUFA documents, as well as disputes regarding the variation of the SUHD and Trust Deed for the purposes of financing, are disputes regarding access, and that division 5 of Part 5 of the QCA Act will apply (also see section 1.1 of this draft decision). As this is the case, the existing clause 11.1.5(c)(i) of UT4, which provides for a dispute determination in accordance with division 5 of Part 5 of the QCA Act would apply; so no amendments to clause 11.1.5 of UT4 are required.

Any access determination under that division of the QCA Act would be made taking into account (among other things) the access provider's legitimate business interests and investment in the facility; the public interest, including the benefit to the public in having competitive markets; the value of the service to access seekers; and the operational and technical requirements necessary for the safe and reliable operation of the facility.⁷⁷

We are also proposing amendments to clarify that the reference of a dispute relating to the schedules of a SUFA in clauses 8.2.2 and 11.1.1 of UT4 also includes an annexure of a SUFA document.⁷⁸ This draft decision therefore amends the relevant references to 'schedules' to include 'annexures' of a SUFA document, which improve the workability of the SUFA.

Summary of draft decision 3.3

The UT4 SUFA DAAU should be amended such that:

- (1) Aurizon Network's proposed amendments to clause 11.1.5 of UT4 are not accepted
- (2) references in clauses 8.2.2 and 11.1.1 of UT4 to schedules of a SUFA document include its annexures.

3.4 Availability of pricing information

Background

In the UT3 SUFA final decision, we considered:

- Information regarding the lump sum cannot be disclosed, unless required by the QCA.
- Information regarding provisional sums, discretionary variations and adjustment events can be disclosed to the SUFA trustee, acting in the role of the principal.
- The SUFA trustee may disclose information regarding provisional sums, discretionary variations and adjustment events to the PUHs and access seekers defined under the EPA.

⁷⁷ QCA Act, s. 120.

⁷⁸ For instance, both the FIA and the General Conditions of contract for design and construction, which constitute the construction contract, include annexures in respect of which a dispute may arise.

- The independent certifier can request pricing information to enable it to carry out the independent certifier services.⁷⁹
- Our view was that PUHs and the access seekers should have access to, through the SUFA trustee, the pricing information underpinning adjustments to the contract sum and discretionary variations. This was because the PUHs and the access seekers are the parties ultimately liable for the adjustments, and requiring the SUFA trustee to scrutinise the adjustments and discretionary variations would mean that it is no longer passive. Overall, we felt that access to such pricing information would be a legitimate expectation of PUHs and access seekers.

Aurizon Network UT4 SUFA DAAU proposal

In its UT4 SUFA DAAU, Aurizon Network accepted much of the UT3 SUFA final decision in respect of pricing information. However, Aurizon Network is seeking certain restrictions on sharing pricing information, as follows:

- The SUFA trustee can only disclose pricing information relating to provisional sums or the amount of any adjustment to the contract sum in respect of an adjustment event to the SUFA trustee's employees or agents on a need-to-know basis.
- Pricing information will be shared with the QCA, when requested in writing, provided that the QCA has entered into a confidentiality undertaking.
- Pricing information should not be provided to the PUHs or access seekers.⁸⁰

Aurizon Network's reasoning is that subcontractors would prefer that their unit rates, which would be included in pricing information, be kept confidential from SUFA investors (including the PUHs) and access seekers. Aurizon Network submitted that if such pricing information was made available to the SUFA investors (including the PUHs) and access seekers, it would make the contractors less likely to submit tenders for work from such parties, or the pricing in the tenders would be higher.

Stakeholder comments

The QRC rejected the changes proposed by Aurizon Network. In the QRC's view:

- The matters referred to do not contain price-sensitive information.
- The information in question can only be used for a very limited purpose.
- Aurizon Network's proposal unduly prohibits the principal from disclosing such information where there is a reasonable reason for such disclosure.
- Limiting disclosure as suggested by Aurizon Network would hamper the administration of the construction contract.⁸¹

QCA analysis and draft decision

Our draft decision is to refuse to accept Aurizon Network's proposed clause 8.7 of the construction contract in the Aurizon Network UT4 SUFA DAAU.

⁷⁹ QCA UT3 SUFA final decision, p. 111.

⁸⁰ Aurizon Network, sub. 2, pp. 44– 45, item CA5.

⁸¹ QRC, sub. 29, p. 13, item 3.

We disagree with Aurizon Network's comments about the breadth of disclosure of pricing information for adjustments in the construction industry. In the construction industry, the party ultimately responsible for paying the contractor will insist upon full disclosure of all relevant pricing information in assessing any adjustment claim. The restrictions sought in respect of the SUFA trustee are also potentially inconsistent with its obligations as a trustee in respect of providing information to the PUHs.⁸²

The issues raised were also discussed in our final decision on the 2013 SUFA DAAU.⁸³ We remain unpersuaded by Aurizon Network's arguments. Stakeholders are referred to our reasoning on these issues in that final decision.

We consider our draft decision proposal in respect of clause 8.7 of the construction contract appropriately balances the interests of access seekers and prospective SUFA funders with Aurizon Network's business interests as the contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). We also consider that it promotes efficient investment in the CQCN, which is in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act) and supports the object of Part 5 of the QCA Act (ss. 69E of the QCA Act).

Further, as stated in our final decision on the 2013 SUFA DAAU, we consider that our statutory obligations in respect of confidential information provide appropriate protections to Aurizon Network's legitimate business interests.⁸⁴

Summary of draft decision 3.4

The UT4 SUFA DAAU should be amended such that:

- (1) Aurizon Network's proposed amendments to clause 8.7 of the construction contract are not accepted
- (2) the drafting from the UT3 SUFA final decision in respect of the disclosure of pricing information be reinstated.

⁸² See, for instance, clauses 16.4 and 16.5 of the UHD of the UT4 SUFA draft decision.

⁸³ QCA UT3 SUFA final decision, pp. 109–112.

⁸⁴ See sections 187, 207 and 239 of the QCA Act.

4 SECURITY AND BANKABILITY

Third party financing is a central element of a workable, bankable and credible SUFA. Providing secure, stable and predictable cash flows during the operational stage of a SUFA will allow for the SUFA framework to attract third party financing.

Aurizon Network's UT4 SUFA DAAU contains provisions that would increase uncertainty over the cash flows to the SUFA trustee and, by extension, PUHs.

Our draft decision maintains the position from the UT3 SUFA final decision that:

- the definition of default events in the Specific Security Agreement (SSA) should capture actions Aurizon Network may take to jeopardise the cash flows*
- the SSA should provide for an acceleration of rent in the event of Aurizon Network's insolvency or in the event of termination of the Infrastructure Lease due to Aurizon Network's default*
- set-off should be applied only in the context of the rent adjustment mechanism.*

Overview

On the security and bankability aspects of a SUFA framework, Aurizon Network's UT4 SUFA DAAU contains a number of positions that are consistent with the UT3 SUFA final decision. These include:

- providing a Specific Security Agreement (SSA), which establishes a security interest over the cash flows that are due to the SUFA trustee
- requiring the SUFA trustee to make distributions to PUHs if there are sufficient funds
- removing the SUFA trustee's obligation to withhold distributions if required by Aurizon Network (as the ordinary unit holder).

Given stakeholders did not object to these positions, and noting the positions are unchanged from the UT3 SUFA final decision, we consider these positions remain appropriate and refer interested parties to the analysis in the UT3 SUFA final decision.⁸⁵

However, the UT4 SUFA DAAU also contains positions relating to the security and bankability aspects of a SUFA that are different from the UT3 SUFA final decision. These positions and stakeholders' comments are summarised in Table 2.

⁸⁵ QCA UT3 SUFA final decision, pp. 123–132.

Table 2 Security and bankability—summary of key positions

<i>UT3 SUFA final decision</i>	<i>UT4 SUFA DAAU proposal</i>	<i>Stakeholders' comments</i>	<i>QCA draft decision</i>
Events of default (Specific Security Agreement)			
The SSA includes four events of default—reflecting events that may jeopardise cash flows to the SUFA trustee.	Aurizon Network proposed to include its insolvency as the sole event of default in the SSA.	The QRC did not accept the proposal.	See section 4.1
Acceleration of rental payments			
If Aurizon Network becomes insolvent, it is required to pay rent on an accelerated basis.	If Aurizon Network becomes insolvent, it is required to pay rent on the same basis that applied before the insolvency event occurred.	The QRC did not accept the proposal.	See section 4.2
Credit exposure during operational phase (set off)			
Aurizon Network may set off rental adjustments against amounts payable to the SUFA trustee.	Aurizon Network may set off any amount due to it by the SUFA trustee against amounts payable to the SUFA trustee.	The QRC did not accept the proposal.	See section 4.3

4.1 Events of default

Background

In the UT3 SUFA final decision we considered that, for the SUFA to be considered workable, bankable and credible, it is fundamental that security is provided over the rental cash flows due from Aurizon Network to the SUFA trustee for the use of the SUFA-funded assets.

Such security was considered necessary because although receiving rents is the sole income of the SUFA trustee, the SUFA trustee is not in control of the rent receipts—Aurizon Network's non-compliance with its contractual obligations under the EISL could jeopardise the rental cash flows to the SUFA trustee. Accordingly, our view was that the SUFA trustee should be provided security over its sole income—the rental cash flow. We limited the security to the rental cash flows, taking into account Aurizon Network's legitimate business interests.

Hence, the SSA was included in the suite of pro forma SUFA agreements—as an agreement between the SUFA trustee as the secured party and Aurizon Network as the grantor of security over the 'direction to pay amounts'⁸⁶ and 'direction to pay undertakings'⁸⁷—which allows security to be taken over the cash flows.⁸⁸

⁸⁶ 'Direction to pay amounts' are the amounts of access charges Aurizon Network directs access holders under access agreements to pay to the SUFA trustee (and, in the absence of a direction to pay, all the access charges to the trustee).

⁸⁷ 'Direction to pay undertakings' are the undertakings access holders give to Aurizon Network to pay the direction to pay amounts.

⁸⁸ The SSA also seeks to secure any rent-equivalent compensation cash flows and detriment amounts the SUFA trustee would be entitled to if the EHL and the sublease granted under the EISL were terminated due to Aurizon Network's cause.

We considered it appropriate for the security to be enforceable when cash flows could be jeopardised by Aurizon Network's actions or upon the occurrence of certain events affecting Aurizon Network.⁸⁹

The SSA included four such events of default—that is, events where Aurizon Network:

- (1) becomes insolvent
- (2) does not nominate further access agreements to be subject to the direction to pay when required under the EISL
- (3) does not pay a 'detriment amount' to the SUFA trustee
- (4) grants non-permitted security over, or disposes of, its right to receive the direction to pay amounts and its interest in the direction to pay undertakings, without the SUFA trustee's consent.

Aurizon Network's SUFA DAAU proposal

In the UT4 SUFA DAAU, Aurizon Network reiterated its 2013 SUFA DAAU proposal for the SSA to include its insolvency as the sole event of default. Aurizon Network said the other three events of default from the UT3 SUFA final decision were inappropriate, as they were included 'as if Aurizon Network were the borrower under a structured finance transaction, whereas Aurizon Network is not a borrower under the SUFA model'.⁹⁰

Aurizon Network said including those default events could adversely affect its ability to raise new debt facilities; its ability to stay in good standing in existing or new debt facilities; and the cost of those debt facilities. Aurizon Network said that may result in it bearing additional cost which it did not volunteer to assume.⁹¹

Stakeholders' comments

The QRC did not accept the proposal on default events in the UT4 SUFA DAAU. The QRC said Aurizon Network's proposed arrangements for events of default are not 'commercial, reasonable or bankable' and it is not appropriate that the only event of default under the SSA is an insolvency event.⁹²

QCA analysis and draft decision

Our draft decision is to refuse to accept Aurizon Network's proposal, and retain the events of default from the UT3 SUFA final decision, adding to that list the event of the termination of Infrastructure Lease due to Aurizon Network's cause. We consider our proposal improves the workability, bankability and credibility of SUFA.

In arriving at our draft decision, we considered that the SUFA framework is designed to allow parties—other than Aurizon Network—to finance CQCN expansions when Aurizon Network considers the regulated WACC an insufficient return on its capital (i.e. Aurizon Network does not want to invest at the regulated WACC).

As noted above, we consider that, for the SUFA to be considered bankable and credible, it is fundamental that security is provided over the rental cash flows due from Aurizon Network to

⁸⁹ QCA UT3 SUFA final decision, pp. 123–124.

⁹⁰ Aurizon Network, sub. 2, p. 42.

⁹¹ Aurizon Network, sub. 2, pp. 42–43.

⁹² QRC, sub. 29, p. 26.

the SUFA trustee, and that the SUFA trustee can enforce the security upon the occurrence of certain default events.

Aurizon Network has argued that the default events, other than its insolvency, may impact its ability to raise debt and may result in it bearing additional cost. In this context, it is relevant to emphasise that the underlying amount in question—the rent—is the SUFA trustee's contractual entitlement and not Aurizon Network's. In the event of a default event (as defined in the SSA), the SUFA trustee would take control of the mechanisms (i.e. direction to pay amounts and the direction to pay undertakings) through which it receives the rent; the SUFA trustee taking control does not change the SUFA trustee's contractual entitlement, and Aurizon Network's non-entitlement, to the rent. We consider Aurizon Network should be able to proactively explain this to its financiers.

Effectively, the default events relate to actions Aurizon Network takes that may jeopardise the rental cash flows to the SUFA trustee. Our view is that security should be enforceable upon the occurrence of such events, because a SUFA trustee or PUH has no control over the actions of Aurizon Network in the operational phase of a SUFA transaction, despite the fact that these actions can have implications for their sole operational phase income, which is the rental streams. We also consider those default events are intended to encourage Aurizon Network to not engage in behaviour that may jeopardise the cash flows and are reasonable.

Further, the additional event of default relating to a termination of the Infrastructure Lease due to Aurizon Network's cause is reasonable, as it also intends to encourage appropriate behaviour on the part of Aurizon Network, and it provides the SUFA trustee with protection in respect of a matter over which it has no control.

In summary, we consider our position regarding the definition of default events appropriate, having regard to the factors in section 138(2) of the QCA Act. Our position improves the workability, bankability and credibility of the SUFA framework. This is because the proposed definition of default events in the SSA reflects the intention to provide security over cash flows that are due to the SUFA trustee, which will provide assurance to SUFA funders that a SUFA trust has adequate security over the relevant cash flows. Barriers to participation in a SUFA transaction are therefore reduced. This, in turn, would allow as many financing options for, and potential participants to, a SUFA as possible, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(a), (d), (e) and (h) of the QCA Act).

Summary of draft decision 4.1

The UT4 SUFA DAAU SSA should retain the definition of default events from the UT3 SUFA final decision SSA and add the event of the termination of Infrastructure Lease due to Aurizon Network's default.

See clause 5 in UT4 SUFA DAAU SSA mark-up in Appendix B.

4.2 Acceleration of rental payments

Background

The UT3 SUFA final decision SSA required that, if Aurizon Network became insolvent, the future rents payable by Aurizon Network to the SUFA trustee will be immediately due. We considered

it necessary to accelerate the payment of rents to maximise the SUFA trustee's rights in such a situation, particularly given that other creditors will also be seeking recovery of their debts.⁹³

Aurizon Network's SUFA DAAU proposal

In the UT4 SUFA DAAU, Aurizon Network's position is that there should be 'no acceleration of rent under any SUFA template document under any circumstance'.⁹⁴ Aurizon Network proposed that in the event of its insolvency it will be liable to pay rent on the basis that applied before the insolvency occurred.

In its submission, Aurizon Network commented as follows:

- The SUFA model should not place SUFA investors in a 'privileged position so that their downside risk is protected by Aurizon Network in the event of its insolvency', noting that the same protection was not available to Aurizon Network in respect of an expansion it funds.
- The concept of acceleration in Australian business practice was only used in respect of financial indebtedness, and was not applied to trade arrangements such as leases or agreements for the supply of goods or services.
- Acceleration provided a 'double dip' remedy to the SUFA trustee at Aurizon Network's expense—as the Integrated Network Deed provides that, if Aurizon Network's base Infrastructure Lease terminates, the SUFA trustee is entitled to receive from QTH its share of the net proceeds from disposal of the CQCN.
- Paying accelerated rent or accelerated secured money was a cost of expansion, which the QCA cannot impose on Aurizon Network under the QCA Act.⁹⁵

Stakeholders' comments

The QRC did not accept Aurizon Network's proposal to remove the concept of acceleration in the event of Aurizon Network's insolvency.⁹⁶

QCA analysis and draft decision

Our draft decision is to refuse to accept Aurizon Network's proposal. We consider it appropriate that the SUFA trustee should be entitled to claim rent on an accelerated basis in the event of Aurizon Network's insolvency or in the event of termination of the Infrastructure Lease due to Aurizon Network's cause. We consider our proposal improves the workability, bankability and credibility of SUFA.

In arriving at our draft decision, we considered that the SUFA framework is designed to allow parties—other than Aurizon Network—to finance CQCN expansions when Aurizon Network would not invest at the regulated WACC. We also considered the sole income of the SUFA trustee and, by extension, PUHs, is the rent from Aurizon Network for its use of the SUFA infrastructure.

We remain of the view that acceleration is necessary in the event of Aurizon Network's insolvency in order to maximise the SUFA trustee's rights in such a situation, particularly given that other creditors will also be seeking recovery of their debts. Allowing for acceleration

⁹³ QCA UT3 SUFA final decision, p. 124.

⁹⁴ Aurizon Network, sub. 2, p. 19.

⁹⁵ Aurizon Network, sub. 2, pp. 19–20.

⁹⁶ QRC, sub. 20, p. 26.

ensures the SUFA trustee benefits from further rights to protect its rental streams, notwithstanding the insolvency.

Furthermore, as discussed in Chapter 7, we consider the SUFA trustee (effectively the PUHs) should be able to claim for the loss of future revenues in the event of a termination of the Infrastructure Lease caused by Aurizon Network. We consider the concept of acceleration should also apply in that event, in order to allow the SUFA trustee (effectively the PUHs) to be able to make that claim, and our proposed drafting of clause 6.1 in the SSA provides for this.

Assessment of Aurizon Network's proposal

Aurizon Network argued that the SUFA model unduly favoured SUFA investors in the event of Aurizon Network's insolvency.

We acknowledge that the SUFA-funded expansion model and the Aurizon Network-funded expansion model are unequal. As outlined in Chapter 1, the SUFA-funded model starts off in a fundamentally disadvantaged position. This is because the sole income of the SUFA trustee—the rental cash flows—is dependent upon Aurizon Network's actions and the SUFA trustee cannot control those actions but only has contractual rights in respect of receiving rent. Therefore, the SUFA framework needs to have in place appropriate mechanisms (such as acceleration of rental payments) to redress this imbalance. These are required, in particular, to protect the SUFA trustee's contractual rights against non-compliance by Aurizon Network in respect of its contractual obligations in the SUFA documents.

Aurizon Network said that we have misunderstood the concept of acceleration in the context of Australian business practice. However, we consider acceleration of rent is fundamental to making the SUFA framework bankable and credible from a SUFA funder's perspective.

The underlying reason for our position is that, as detailed above, the sole income of the SUFA trustee (effectively the PUHs) is the rent from Aurizon Network for its use of the SUFA infrastructure. Although the SUFA trustee has an ownership interest in the physical infrastructure funded by PUHs, the SUFA trustee cannot prevent the use of the physical infrastructure even if Aurizon Network is not complying with its obligation to pay rent in respect of it. The SUFA trustee faces the risk of potentially losing its sole income due to an event (Aurizon Network's insolvency and/or termination of the Infrastructure Lease) that is caused by Aurizon Network and in respect of which the SUFA trustee has no control. Therefore, it is fundamental to SUFA investors that they have the potential to claim for their full loss, where that loss is Aurizon Network's fault.

Aurizon Network argued that acceleration provided a 'double dip' remedy to the SUFA trustee at Aurizon Network's expense. However, we are of the view this is a matter that should be dealt with at the time between the SUFA trustee and Aurizon Network's creditors, should such a 'double dip' occur.

We do not agree with Aurizon Network that paying accelerated rent is a cost of expansion. Our view is the SUFA trustee's right to accelerate rent arises as a result of a failure by Aurizon Network of its contractual obligations. We also do not consider the QCA Act intends to provide Aurizon Network with the ability to use its position as a monopoly provider of the declared service to pass on risks arising from its failure to perform the roles and responsibilities it undertakes in the context of the SUFA framework. Our view is Aurizon Network is responsible for its actions and the related consequences with respect to the roles and responsibilities it has under the SUFA framework.

Conclusion

In summary, we consider acceleration of rent is an appropriate mechanism that would allow the SUFA trustee to mitigate its potential loss of rents from Aurizon Network, where that loss is caused by Aurizon Network. To the extent possible, we consider Aurizon Network having liability for all losses of the SUFA trustee due to Aurizon Network's default offsets the fact that other parties to a SUFA transaction have no control over Aurizon Network's actions in the operational phase of a SUFA transaction.

Further, we consider such assurance supports a workable, bankable and credible SUFA framework that seeks to encourage financing choice for expansions in the CQCN. In this context, we are of the view it aligns with the objective of efficient investment in the CQCN, thereby supporting the object of the third party access regime in the QCA Act and the public interest (ss. 138(2)(a) and (d) of the QCA Act).

Summary of draft decision 4.2

The UT4 SUFA DAAU SSA should provide for the secured money (net present value of future rental cash flows) to be immediately due and payable on demand in the event of Aurizon Network's insolvency or termination of the Infrastructure Lease due to Aurizon Network's default.

See clause 6.1 in the UT4 SUFA DAAU SSA mark-up in Appendix B.

4.3 Credit exposure during operational phase (set-off)

Background

In the UT3 SUFA final decision, we did not consider it appropriate for Aurizon Network to set off against rents payable any amount that it considered would be due to it from the SUFA trustee.

We had said that providing full set-off rights would increase uncertainty and volatility in SUFA rental streams (or rent-equivalent compensation cash flows), and make it harder for third party financiers to meet their own commitments based on incoming rental cash flows.⁹⁷

Nevertheless, the UT3 SUFA final decision did accept Aurizon Network's proposed rent adjustment mechanism, which sought to address the monthly over- and under-payments of rent. We considered it reasonable for the SUFA trustee to bear a proportion of the cash flow risk associated with the actual payment of access charges, given monthly access charge receipts were likely to be sufficiently stable.⁹⁸

Aurizon Network's SUFA DAAU proposal

Aurizon Network retained its 2013 SUFA DAAU position and proposed to set off all amounts due to it from the SUFA trustee against its rental payments to the SUFA trustee.⁹⁹

Aurizon Network said the SUFA trustee was obliged to pay it amounts during SUFA's operational phase, should various contingencies arise. Aurizon Network said that the SUFA trust was not a creditworthy entity at any point over the life cycle of a SUFA transaction, and said that it

⁹⁷ QCA UT3 SUFA final decision, p. viii.

⁹⁸ QCA UT3 SUFA final decision, p. 126.

⁹⁹ Aurizon Network, sub. 2, p. 26.

required either a full set-off right or a bank guarantee to address its credit risk to the SUFA trustee.¹⁰⁰

Aurizon Network said it was unreasonable that it should be expected to continue to pay the SUFA trust the full rental amount when the SUFA trust was not complying with its own payment obligation to Aurizon Network, adding that:

It is not Aurizon Network's role to be a contingent financier of the SUFA trust so that it [the SUFA trust] can obtain more favourable terms from its third party financiers.¹⁰¹

Aurizon Network said the limited set-off approach in the UT3 SUFA final decision could result in it bearing costs in excess of the costs that would apply under its proposed full set-off approach, and stated that it did not volunteer to bear those additional costs.¹⁰²

Stakeholders' comments

The QRC did not accept Aurizon Network's proposed full set-off approach. The QRC said that rent was the SUFA trust's sole revenue stream and security of entitlement to rent was fundamental to making the SUFA structure bankable, noting that 'financed structures do not permit set-off against the revenue stream'. The QRC also observed that the issue of set-off had been previously considered extensively, noting that 'advisors have clearly explained that Aurizon Network having a set-off right is not workable'.¹⁰³

QCA analysis and draft decision

Our draft decision is to refuse to approve Aurizon Network's proposed full set-off arrangement.

In arriving at our draft decision we are conscious of the need for the SUFA framework to provide a genuine alternative to finance CQCN expansions when Aurizon Network will not invest at the regulated WACC. We consider that if this is not the case, the presence of an ineffective SUFA framework may merely reinforce perceptions regarding Aurizon Network's monopoly power.

We remain of the view that a SUFA framework that offers genuine financing choice for expansions in the CQCN is not compatible with full set-off rights for Aurizon Network. Our draft decision maintains our view from the UT3 SUFA final decision that set-off should only relate to the rent adjustment mechanism.¹⁰⁴

Assessment of Aurizon Network's proposal

We disagree with Aurizon Network's claim that the SUFA trust/trustee is not creditworthy.

We consider it useful to reflect first on the purpose of the SUFA trust and the role it plays in a SUFA transaction. Our view is a SUFA trust exists for reasons of tax efficiency, and that the SUFA trustee is a passive entity that undertakes administrative tasks which, during a SUFA's operational phase, would be primarily associated with the transfer of cash flows between Aurizon Network and PUHs.

The sole income of the SUFA trust and, by extension, PUHs is the rental cash flows. Aurizon Network's claim that the SUFA trust is not creditworthy effectively indicates that these rental cash flows have little value, which in our view is not correct. We consider the intrinsic value of

¹⁰⁰ Aurizon Network, sub. 2, pp. 26–27.

¹⁰¹ Aurizon Network, sub. 2, pp. 26–27.

¹⁰² Aurizon Network, sub. 2, pp. 26–27.

¹⁰³ QRC, sub. 29, p. 6.

¹⁰⁴ See QCA UT3 SUFA final decision, pp. 126–130.

these rental cash flows (which are secured) would enable the SUFA trust to obtain finance itself including, if required, to meet a liability. Therefore, we consider Aurizon Network's claim regarding the creditworthiness of the SUFA trust/trustee untenable.

In the context of non-rental immaterial payment obligations¹⁰⁵ that could arise in the operational phase, we continue to be of the view that a standard invoicing and payment approach should be adopted. We consider such an approach will allow the SUFA trustee (representing the PUHs) to challenge Aurizon Network's claims prior to Aurizon Network receiving payment (which would not be the case under set-off). Our view is this would ensure Aurizon Network's claims are legitimate, whilst also keeping the SUFA rental stream as stable and predictable as possible.

In the context of non-rental material amounts, we remain of the view that operational issues which may cause material cash impacts on the CQCEN are dealt with through undertaking mechanisms that provide for tariff variations in response to specific events (i.e. through mechanisms of endorsed variation events and review events). We expect Aurizon Network to use these mechanisms that are available to it.

Furthermore, in respect of tax liability, the tax indemnity in clause 17 of the Subscription and Unit Holders Deed (SUHD) means that Aurizon Network has direct access to PUHs to recover any such liability. Given our view about the SUFA trust's ability to raise finance, there is no clear reason to presume that those parties who have knowingly accepted the tax indemnity as part of a SUFA transaction would not cover any liability arising from this obligation. We are also of the view the PUHs should be afforded the opportunity to challenge, if they so wish, an Aurizon Network claim under the tax indemnity, prior to payment. We consider this particularly pertinent, given the impact set-off could have on rental streams in the context of a lump-sum liability.

In any event, tax rulings to be sought from the Australian Taxation Office and Queensland Office of State Revenue on the standardised suite of pro forma SUFA agreements, combined with an appropriate form of statutory severance, should minimise the risk of a tax liability. In light of this, we consider Aurizon Network's exposure to a SUFA trust liability for an immediate lump sum tax payment is a low-probability event.

Therefore, we are satisfied there are appropriate mechanisms in place to address Aurizon Network's concerns about a credit risk, if any, it might face in the operational phase of a SUFA transaction.

By contrast, we remain of the view that Aurizon Network's proposed full set-off approach could, in the case of low-probability material amount events, potentially result in SUFA rental streams being reduced to the point where there are insufficient distributions to cover the principal and interest due to financiers. Our view is the potential for such an outcome is not compatible with a SUFA framework that provides a predictable and stable rental cash flows, which is necessary to attract third party financing for a workable, bankable and credible SUFA arrangement. Therefore, we remain of the view that Aurizon Network's proposed set-off approach has material implications for the bankability and credibility, and hence the effectiveness, of the SUFA framework.

¹⁰⁵ These amounts would be in respect of clauses 3.7(e) and 3.7(h) of the EISL, which respectively relate to interest payable and correction of errors relating to detriment amounts.

Summary

Overall, we have had regard to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act) as well as the need for the SUFA framework to be workable, bankable and credible. We consider the SUFA framework has to provide a genuine alternative to an Aurizon Network financing proposal, and note our view that Aurizon Network's proposals regarding full set-off compromise this. Although our preference is for certainty over rental streams, we maintain our position to apply set-off only for the rent adjustment mechanism.

Our draft decision supports the workability, bankability and credibility of the SUFA framework. We consider our draft decision is consistent with the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act). This is because it seeks to reduce barriers to participation in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(a), (d), (e) and (h) of the QCA Act).

Summary of draft decision 4.3

The UT4 SUFA DAAU EISL should only allow for set-off adjustments related to the rent adjustment mechanism, not for any other adjustments.

See clauses 7.4 and 7.6 in the UT4 SUFA DAAU EISL mark-up in Appendix B.

5 THIRD PARTY FINANCING

The SUFA framework should enable potential SUFA funders to obtain finance as efficiently as possible, including access to third party financing. Given this, the SUFA framework should allow for parties to determine the type of financing for a SUFA on a case-by-case basis, as long as the potential investors are willing to pursue a specific type of financing with the associated risks.

However, Aurizon Network's UT4 SUFA DAAU does not include a binding dispute resolution process for when parties fail to agree on amendments to the standard SUFA template that may be required to give effect to a financing option proposed by SUFA investors.

Our draft decision is that any disagreement on amendments required to the SUFA template for a specific type of finance should be subject to a binding dispute resolution. We consider this would encourage balanced, effective, and credible negotiation, and incentivise Aurizon Network to not unreasonably disagree with the financing choice.

Overview

Aurizon Network's UT4 SUFA DAAU adopts a number of policy positions contained in the UT3 SUFA final decision that relate to third party financing. These positions are:

- The parties to a SUFA transaction (i.e. Aurizon Network and potential SUFA investors) should be able to negotiate amendments to SUFA template agreements to permit specific types of third party financing.
- The Financing Side Deed (FSD) should be a part of the suite of SUFA documents. The FSD is designed to provide consent for and regulate any security provided by a SUFA trustee to third party financiers, and accounts for the interests of Queensland Treasury Holdings, the State of Queensland and Aurizon Network with respect to this security. The FSD submitted as part of the UT4 SUFA DAAU is as provided in the UT3 SUFA final decision.¹⁰⁶

Given stakeholders did not object to these positions, and noting they are unchanged from the UT3 SUFA final decision, we consider these positions remain appropriate and refer to the analysis in the UT3 SUFA final decision.¹⁰⁷

However, outside of the above positions, Aurizon Network's UT4 SUFA DAAU does not include a binding dispute resolution process for determining a dispute between Aurizon Network and potential SUFA investors, should they not agree on amendments required to the standard SUFA template to give effect to a financing option proposed by SUFA investors.¹⁰⁸ This position is different from the one contained in the UT3 SUFA final decision, and is considered in this chapter.

5.1 Binding dispute resolution for third party financing

Background

According to the UT3 SUFA final decision, the SUFA template should not place undue restrictions on a SUFA funder's ability to obtain equity and debt as efficiently as possible. Our

¹⁰⁶ Aurizon Network, sub. 14.

¹⁰⁷ QCA UT3 SUFA final decision, pp. 159–163.

¹⁰⁸ Aurizon Network, sub. 2, pp. 21–22; QCA UT3 SUFA final decision, pp. 161–162.

view was that the SUFA template should be able to be amended via negotiations by the SUFA parties to permit as many types of financing as possible. Furthermore, we considered that any disagreement between Aurizon Network and potential SUFA investors on amendments required to the standard SUFA template to give effect to a specific type of finance should be subject to a binding dispute resolution. We considered that a binding dispute resolution process would discourage Aurizon Network from unreasonably disagreeing with the type of finance and financing structure proposed by potential SUFA investors, and allow for the possibility of the most efficient form of financing for SUFA projects.¹⁰⁹

Aurizon Network's SUFA DAAU proposal

Aurizon Network did not accept that a disagreement between it and potential SUFA investors over modifications required to the standard SUFA template should be subject to a binding dispute resolution process.¹¹⁰

Aurizon Network said that treating such disagreements as a dispute for the purpose of a binding dispute resolution process:

- was contrary to the long-established practice of Aurizon Network's access undertakings establishing 'safe harbour' standard templates for access and other commercial agreements
- was different from UT4, which expressly provided that a dispute over the proposed modification of the terms of the SUFA template (once approved) was not a dispute for the purpose of UT4's dispute resolution process
- was against Aurizon Network's legitimate business interests—the dispute resolution process was available to access seekers and not to Aurizon Network, and thereby provided only access seekers an opportunity to seek a better position than was available to them under the standard template
- may result in Aurizon Network incurring costs that would constitute a cost of that expansion, which the QCA Act does not permit the QCA to impose on Aurizon Network.¹¹¹

Aurizon Network said the UT4 SUFA DAAU proposed to retain the dispute resolution arrangements of UT4, which in effect meant that if Aurizon Network disagreed with proposed amendments to the standard SUFA template to give effect to a specific type of finance, that disagreement will not be a dispute under UT4, and will therefore not be subject to UT4's binding dispute resolution process.¹¹²

Stakeholders' comments

Stakeholders did not comment on this proposal.

QCA analysis and draft decision

Our draft decision is that the SUFA template should be able to be amended through negotiations by the SUFA parties to allow for as many types of financing as possible, and any disagreement on amendments required to the SUFA template for a specific type of finance should be subject to a binding dispute resolution.

¹⁰⁹ QCA UT3 SUFA final decision, pp. 161–162.

¹¹⁰ Aurizon Network, sub. 2, pp. 21–22.

¹¹¹ Aurizon Network, sub. 2, pp. 21–22.

¹¹² Aurizon Network, sub. 2, pp. 22; UT4, cl. 11.1.1(b).

Our position is that the SUFA framework should not preclude specific types of financing—such as the SUFA trust obtaining finance itself and the SUFA trust not being restricted from issuing units to third party finance entities. In other words, the SUFA framework should allow for as many types of financing as possible, but should not direct what type of financing must be used. We consider this flexibility of financing option improves the bankability of the SUFA framework and allows for the possibility of an efficient form of financing for SUFA projects on a case-by-case basis, thereby supporting efficient investment in the CQCN (s. 138(2)(a) of the QCA Act).

To enable a flexible SUFA framework, our position is that any amendment required to the standard SUFA template agreements to give effect to a specific type of finance and financing structure should be negotiated between Aurizon Network and potential investors. We also consider that Aurizon Network should be incentivised to not unreasonably disagree with the type of finance and financing structure proposed by potential SUFA investors. Therefore, we consider a dispute resolution process appropriate in circumstances where parties fail to agree on amendments to the SUFA template to enable specific types of financing and financing structure.

If there were no access to a binding dispute resolution process—as proposed by Aurizon Network in the UT4 SUFA DAAU—Aurizon Network could effectively refuse any type of finance not specifically contemplated by the pro forma SUFA agreements without having its reasoning subject to scrutiny. We do not consider this is appropriately balanced, because it could unduly restrict a SUFA funder's ability to obtain equity and debt as efficiently as possible. In our view, such an outcome creates barriers to participation in the financing of expansions in the CQCN, which would exclude certain users from seeking to fund expansions to meet their access requirements, which has the potential to conflict with the object of the third party access regime and is not in the public interest (ss. 138(2)(a) and (d) of the QCA Act).

Further, it is not in the interests of access seekers or third party financiers (ss. 138(2)(e) and (h) of the QCA Act), because they may not be clear why Aurizon Network is unwilling to adopt their proposals or why they are not afforded the opportunity to have their concerns mitigated. In our view this undermines a workable, bankable and credible SUFA framework.

By contrast, recourse to binding dispute resolution provides a process that Aurizon Network can participate in, and which gives Aurizon Network the opportunity to provide a compelling case as to any genuine reason(s) it has for refusing to adopt a specific form of financing. For that reason, we do not agree with Aurizon Network that the dispute process was not available to it. Indeed, we see no reason why, given Aurizon Network's monopoly position, its opinion should not be assessed as part of a dispute resolution process.

We do not agree with Aurizon Network that the dispute resolution process might result in Aurizon Network bearing the cost of an expansion. In our view, a dispute relating to amending standard SUFA template documents is a dispute regarding access and that division 5 of Part 5 of the QCA Act will apply (also see sections 1.1 and 3.3 of this draft decision). As such, any access determination under that division would be constrained in that the determination must be consistent with section 119 of the QCA Act which, among other things, prohibits the QCA from requiring an access provider to pay some or all of the costs of an expansion (s. 119(2)(c)). That would serve to protect the legitimate business interests of Aurizon Network as the operator of the network (s. 138(2)(b) of the QCA Act).

For these reasons, we consider UT4 SUFA DAAU should be amended, so that any disagreement in relation to amendments required to the SUFA template for a specific type of finance is subject to a binding dispute resolution.

Effectively, the SUFA only comes into play if Aurizon Network's funding position—either to fund the expansion at the regulated rate of return or to propose access conditions—is unlikely to be acceptable to access seekers, and access seekers consider that alternative forms of financing, which Aurizon Network has not proposed, may be a more efficient way forward.

We consider our position would incentivise Aurizon Network to not unreasonably disagree with the type of financing and financing structure, and encourage a balanced, effective and credible negotiation.

Against this background, we consider our suggested approach allows for the possibility of the most efficient form of financing for SUFA projects on a case-by-case basis, thereby supporting efficient investment in the CQCN. In turn, we consider this supports the object of the third party access regime, and is in the public interest, the interests of access seekers and third party financiers (ss. 138(2)(a), (d), (e) and (h) of the QCA Act). It also aligns with the interests of access holders and the legitimate business interests of Aurizon Network, to the extent that neither party necessarily benefits from inefficient investment in the CQCN (ss. 138(2)(b) and (h) of the QCA Act).

Summary of draft decision 5.1

The UT4 SUFA DAAU should allow for financing choice to be subject to binding dispute resolution.

See clauses 8.2.2 and 11.1.1(b) in the UT4 DAAU mark-up in Appendix B.

6 RENTAL ARRANGEMENTS

Rent paid by Aurizon Network is the sole income of the SUFA trustee and, by extension, preference unit holders (PUHs), during the operational phase of a SUFA. For SUFA assets to attract funding from access seekers and third parties, it is critical that there is clear and transparent information about the rental arrangements over the life of SUFA assets.

Aurizon Network's UT4 SUFA DAAU retained from the 2013 SUFA DAAU the concept of an operating and performance risk allowance (OPRA) for rental arrangements in the regulated environment; and the post-deregulation rental mechanism, albeit with the addition of a dispute resolution process.

Our draft decision proposes to remove the concept of an OPRA from the SUFA template.

Our draft decision refuses to approve Aurizon Network's proposed drafting for setting and determining SUFA rental streams in the event that the CQCN becomes undeclared. We have proposed amendments to meet the anticipated expectation of prospective SUFA funders that they will be able to recover the value of any investment made during the period when the CQCN is declared, if regulation ceases to apply.

Overview

Aurizon Network's UT4 SUFA DAAU adopts a number of positions contained in the UT3 SUFA final decision that relate to SUFA rental arrangements.¹¹³ These positions are:

- Under the Extension Infrastructure Sub-Lease (EISL), the SUFA trustee subleases the SUFA infrastructure to Aurizon Network, and in return, Aurizon Network is required to pay rent to the SUFA trustee.
- The EISL sets out a 'direction to pay' mechanism for 'linked' access agreements¹¹⁴, under which all access charges under those agreements are paid to the SUFA trustee, other than to the extent that Aurizon Network otherwise directs.¹¹⁵
- The objective underpinning the rental calculation in the scenario where the CQCN is regulated is based on the concept of the system allowable revenue.
- The EISL adopts the approach that a party could seek to vary the rent calculation methodology if the methodology is considered to not achieve the rental objective, followed by a binding dispute resolution in case of disagreement between the parties.

Given stakeholders did not object to these positions, and noting the positions are consistent with the UT3 SUFA final decision, we consider those positions remain appropriate and refer interested parties to the analysis in the UT3 SUFA final decision.¹¹⁶

¹¹³ For background information on rental arrangements see the UT3 SUFA final decision (pp. 35–39 of Chapter 5).

¹¹⁴ Linked access agreements are either extension access agreements (i.e. access agreements signed as part of a SUFA transaction) or access agreements nominated by Aurizon Network to be subject to direction to pay undertakings.

¹¹⁵ QCA UT3 SUFA final decision, pp. 35–39.

¹¹⁶ QCA UT3 SUFA final decision, pp. 35–58.

However, the UT4 SUFA DAAU also contains positions relating to SUFA rental streams that are different from the UT3 SUFA final decision. These positions and stakeholders' comments are summarised in Table 3 and considered in sections 6.1 and 6.2 below.

Table 3 SUFA rental arrangements—summary of key positions

<i>UT3 SUFA final decision</i>	<i>UT4 SUFA DAAU proposal</i>	<i>Stakeholders' comments</i>	<i>QCA draft decision</i>
Rental arrangement in the regulated environment—Operating and performance risk allowance (OPRA)			
Removed OPRA from the SUFA template, which Aurizon Network had proposed as a deduction to SUFA rents to compensate itself for providing railway manager services associated with SUFA assets. ¹¹⁷	OPRA included in the SUFA template and its value to be determined periodically by the QCA.	The QRC did not accept the inclusion of an OPRA. ¹¹⁸	See section 6.1
Rental arrangement in the unregulated environment			
Proposed a process for determining post-deregulation SUFA rental stream including a set of objectives to be met by a post-deregulation rental mechanism and a binding dispute resolution process.	The QCA does not have the power to decide on post-deregulation rental mechanism; proposed a post-deregulation rent calculation methodology and a dispute resolution process.	The QRC did not accept Aurizon Network's proposed rent calculation methodology, but accepted the dispute resolution process.	See section 6.2

6.1 Operating and performance risk allowance (OPRA)

Background

The UT3 SUFA final decision refused to approve Aurizon Network's proposed inclusion of an OPRA in the SUFA template.¹¹⁹

Aurizon Network had then proposed that a proportion of the rental payment attributable to the SUFA trustee should be transferred to Aurizon Network in the form of an OPRA, in return for Aurizon Network operating and maintaining the infrastructure associated with a SUFA transaction.

We considered that a SUFA infrastructure would attract regulated operating and maintenance cost allowances, which will reflect any objectively justified changes in cost or risk to Aurizon Network resulting from operating the SUFA infrastructure. Given that, our view was that it was unclear what additional cost or risk Aurizon Network was seeking to recover through an OPRA.

Aurizon Network's SUFA DAAU proposal

Aurizon Network's UT4 SUFA DAAU retains its 2013 SUFA DAAU proposal to provide for an OPRA, as a deduction to the SUFA rental streams.¹²⁰

¹¹⁷ QCA UT3 SUFA final decision, p. 205.

¹¹⁸ QRC, sub. 29, p. 7.

¹¹⁹ QCA UT3 SUFA final decision, pp. 201–205.

Aurizon Network said that the SUFA split the roles of investor, revenue recipient, project developer and operator/maintainer, that are combined when Aurizon Network funds an expansion. A split of the roles required splitting both the aggregate risk and aggregate reward, and it was 'more likely that some of the risks that relate to investment are allocated to Aurizon Network without the associated transfer of reward'.¹²¹

Aurizon Network accepted that the nature and extent of such uncompensated risks were unknown, and sought the flexibility within the SUFA framework to allow for it to be compensated in the form of an OPRA for such risks. Aurizon Network proposed for the QCA to determine periodically the value (if any) of an OPRA.¹²²

Stakeholders' comments

The QRC did not consider it appropriate that Aurizon Network retain any OPRA. The QRC said that an OPRA made the rent calculation inexact, and provided Aurizon Network with a benefit that it would not have received in the absence of user funding.¹²³

QCA analysis and draft decision

Our draft decision is that it is not appropriate for part of the SUFA rental streams to be attributable to Aurizon Network in the form of an OPRA.

Aurizon Network has proposed to deduct from SUFA rental streams an OPRA, as a compensation mechanism for 'unknown' risks relating to a SUFA investment that Aurizon Network argues it might be allocated with no commensurate allocation of reward. It seems to us that the OPRA is effectively a fee in excess of the regulated operating allowance for the SUFA asset.

If Aurizon Network is referring to the risks associated with operating and maintaining the infrastructure associated with a SUFA transaction, we remain of the view that the existing regulatory framework already adequately addresses Aurizon Network's risks associated with managing the CQCN (including SUFA infrastructure), to the extent this is appropriate and efficient. For example:

- Aurizon Network is provided operating and maintenance allowances that seek to reflect efficient costs of providing the railway manager services. These allowances, amongst other things, provide for Aurizon Network to adopt operational practices to mitigate its operational risks (to the extent practical and efficient) and cover Aurizon Network's self-insurance costs.
- The access undertaking contains a number of provisions (e.g. the review event and endorsed variation event) that provide for Aurizon Network to recover costs relating to the operation of the CQCN—costs incurred as a result of specific events that are otherwise not reflected in reference tariffs.

It is unclear why Aurizon Network is seeking a fee in excess of the regulated allowances for operating an asset in which it would not invest at the regulated WACC.

We are of the view that the proposed OPRA mechanism would make the SUFA rental streams unpredictable and uncertain, affecting the credibility and bankability of the SUFA. Accordingly,

¹²⁰ Aurizon Network, sub. 2, pp. 38–40.

¹²¹ Aurizon Network, sub. 2, p. 39.

¹²² Aurizon Network, sub. 2, pp. 39–40.

¹²³ QRC, sub. 29, p. 7.

our draft decision is that the concept of an OPRA should be removed from the SUFA template documents.

In coming to this view, we have considered all of the section 138(2) criteria. In particular, we have had regard to Aurizon Network's legitimate business interest (s. 138(2)(b) of the QCA Act). Further, we consider the OPRA, through seeking to appropriate some of the rental stream attributable to the SUFA trustee and PUHs, reduces the attractiveness of the SUFA framework to access seekers and third party financiers. In this sense, it acts as a barrier to participation, whilst the SUFA framework seeks to reduce such barriers. The reduction of such barriers, in turn, would allow as many financing options for, and potential participants to, a SUFA as possible, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, and the interests of access seekers and access holders (ss. 138(2)(a), (d), (e) and (h) of the QCA Act).

Rent calculation examples

The UT3 SUFA final decision had proposed to include, in the SUFA documents, the rent calculation examples and associated write-ups that were released on our website during our consideration of the 2013 SUFA DAAU.¹²⁴

Those examples and write-ups sought to provide transparency about the rent calculation methodology, in the context of the then prevailing regulatory regime, and were for illustrative purposes only.

In the absence of any comment by Aurizon Network and stakeholders in this process, we are of the view that those examples and associated write-ups remain valid, and incorporate our draft decision to remove an OPRA.

Summary of draft decision 6.1

The UT4 SUFA DAAU should:

- (1) have all references to an OPRA removed from the suite of pro forma SUFA documents and the rental example documents/spreadsheets
- (2) include, for illustrative purposes only, the rent calculation examples and associated write-ups, which have been re-released on our website with this draft decision.

6.2 Rental arrangements in the unregulated environment

Background

The UT3 SUFA final decision refused to approve Aurizon Network's then proposed post-deregulation rental arrangement, as we considered it provided Aurizon Network undue discretion to impose a rental payment profile that was unduly balanced in its favour.¹²⁵

We proposed the following three-stage process:

- Aurizon Network should provide SUFA trustees with an indication of the post-deregulation rental approach, which should meet the following objectives:

¹²⁴ QCA UT3 SUFA final decision, pp. 38–40.

¹²⁵ QCA UT3 SUFA final decision, pp. 49–50.

- The SUFA rental stream should clearly link to both the asset value of the SUFA assets and below-rail assets in the CQCN generally.
- A time dimension should be specified for the period over which SUFA rental streams should be paid.
- An appropriate balance should be sought between the predictability and certainty of SUFA rental streams and the uncertainty of market conditions.¹²⁶
- Discussion/negotiation should take place between Aurizon Network and the SUFA trustees on accepting the initial proposal or an alternative arrangement.
- If agreement is not reached, a binding dispute resolution process should be followed, involving independent experts.

In its UT4 SUFA DAAU submission, Aurizon Network said the UT3 SUFA final decision treatment of post-deregulation rental arrangement was inappropriate.¹²⁷

Based on our understanding of Aurizon Network's submission, we have identified three issues for our consideration:

- (a) the QCA's jurisdiction relating to post-deregulation rental streams
- (b) Aurizon Network's proposed post-deregulation rental mechanism
- (c) the dispute resolution process.

The QCA's jurisdiction

Aurizon Network's SUFA DAAU proposal

Aurizon Network stated that the QCA did not have the power to make decisions and to impose any rental arrangement that related to periods beyond the period of the CQCN's declaration.¹²⁸

Stakeholders' comments

The QRC did not comment on the QCA's jurisdiction in relation to rental payments following deregulation. Nevertheless, the QRC in general did not support Aurizon Network's position in relation to the scope of the QCA's power under the QCA Act.¹²⁹

QCA analysis and draft decision

We remain of the view that it is open to us to consider a DAAU that contains arrangements that may apply beyond the duration of the declaration of the service.

Relevantly, the current CQCN declaration, as it applies under section 250 of the QCA Act, is due to expire in September 2020. If a SUFA was entered into before this date, then, considering the significant nature of the SUFA-funded infrastructure, the associated investments would be long-term arrangements, which would continue to apply after that date. We consider this to be a relevant factor under section 138(2)(h) of the QCA Act; that is, in deciding whether to approve or not approve the UT4 SUFA DAAU, we are required to have regard to the arrangements that would apply if the CQCN declaration expired, to ensure the SUFA is workable, bankable and credible.

¹²⁶ QCA UT3 SUFA final decision, pp. 55–58.

¹²⁷ Aurizon Network, sub. 2, p. 23.

¹²⁸ Aurizon Network, sub. 2, p. 24.

¹²⁹ QRC, sub. 29, pp. 27–29.

In the particular context of SUFA rental arrangements, we consider that an appropriate level of certainty and predictability for rental cash flows over the life of a SUFA transaction is critical to developing a workable, bankable and credible SUFA framework. It is relevant for us to consider whether the rental arrangements proposed for a period when the CQCN is no longer declared would unduly compromise the certainty and predictability of SUFA rental cash flows. If that were likely, then those arrangements would create a barrier to participating in a SUFA transaction in the period during which the CQCN is a declared service, which would not promote efficient investment in the declared service as per the object of Part 5 of the QCA Act (s. 69E).¹³⁰

Post-deregulation rental mechanism

Aurizon Network's SUFA DAAU proposal

Aurizon Network said the UT3 SUFA final decision treatment would result in a high level of uncertainty about the rental payment stream, as the post-deregulation rental objectives set out in that decision were not specific in nature.¹³¹

Aurizon Network argued that, by contrast, its proposed post-deregulation rental mechanism (set out in Part 2, Schedule 1 of the UT4 SUFA DAAU EISL) would provide a higher level of certainty about the rental payment stream, as that mechanism was more specific in nature.

Aurizon Network retained its 2013 SUFA DAAU position and proposed that, following CQCN deregulation, the SUFA trustee would be paid a share¹³² of 'capital revenue' attributable to each 'section'.¹³³

Aurizon Network defined 'capital revenue' as the sum of:

- actual access revenue earned from access agreements, and
- 'notional access revenue', where access is provided as part of a commercially integrated transportation services (CITS) agreement,¹³⁴

less Aurizon Network's operating and maintenance expenditure for that section.

Aurizon Network defined 'notional access revenue' as the lesser of:

- the access revenue that would have been allowable to Aurizon Network in respect of that section had the regulatory regime in place immediately before deregulation continued to apply; and
- the revenue received by Aurizon Network for the provision of the CITS in that section less the costs¹³⁵, other than below-rail costs, incurred by Aurizon Network in providing the CITS.

¹³⁰ QCA UT3 SUFA final decision, pp. 48–49.

¹³¹ Aurizon Network, sub. 2, p. 23.

¹³² Under Aurizon Network's proposal, the share of capital revenue paid to the trustee would be on the basis that would have applied had the regulatory regime continued to apply at the time that Aurizon Network earned that capital revenue (UT4 SUFA DAAU EISL, Schedule 1, Part 2, cl. 2.3).

¹³³ A 'section' (under UT4 SUFA DAAU EISL) refers to the rail infrastructure between two points where Aurizon Network provides a customer with access. SUFA infrastructure could be part of a section.

¹³⁴ The UT4 SUFA DAAU EISL indicates that in the unregulated environment, Aurizon Network's customers would either have an access agreement, which relates solely to the provision of below-rail access, or a CITS agreement, which relates to a bundled set of services comprising below-rail and other transportation services.

Aurizon Network said its post-deregulation rental mechanism was intended to ensure that 'following deregulation Aurizon Network pays rental to the SUFA trustee that is equal to the return earned on the assets funded by the SUFA trustee'.¹³⁶

Stakeholders' comments

The QRC said that Aurizon Network's proposal would result in minimising the SUFA trust's revenue and maximising Aurizon Network's revenue, post-deregulation. The QRC's view was that Aurizon Network's proposal did not comply with the UT3 SUFA final decision.¹³⁷

QCA analysis and draft decision

Our draft decision is to refuse to approve Aurizon Network's proposed post-deregulation rental mechanism. We have proposed amendments so the UT4 SUFA DAAU EISL provides certainty over post-deregulation SUFA rental arrangements and assures prospective SUFA funders that any investment made in the period during which the CQCN is regulated will be treated reasonably in the context of a post-deregulation environment.

Assessment of Aurizon Network's proposal

Aurizon Network's proposed post-deregulation rental arrangement is unchanged from what it proposed in the 2013 SUFA DAAU EISL, and which was considered in the UT3 SUFA final decision.

Our view is, as before, that Aurizon Network's proposal would allow an integrated Aurizon entity to decide the return on SUFA assets through defining 'capital revenue' and therefore SUFA rental streams, where capital revenue effectively is a residual figure once the integrated Aurizon entity has accounted for all other costs. We consider that Aurizon Network's proposed rental arrangement would provide a vertically integrated Aurizon entity with complete discretion over the revenue it attributed to below-rail services and that it (Aurizon Network) would have a strong incentive to reduce the returns on below-rail assets within its portfolio, if that resulted in lower cash outflows in terms of SUFA rental streams.¹³⁸

We maintain our view that Aurizon Network's proposal does not provide SUFA funders with certainty and predictability over rental cash flows, in the event the CQCN declaration expires or is revoked. We consider this proposal compromises the workability, bankability and credibility of the SUFA framework, in the period during which the CQCN is declared.

Proposed amendments

Our view is that a post-deregulation rental approach should provide prospective SUFA funders with sufficient confidence about the return of the value of their investment within an appropriate timeframe, and assure them that investments they make in the period the CQCN is regulated will be treated reasonably in a post-deregulation environment. Such a framework will provide a workable, bankable and credible SUFA framework, whilst the CQCN is declared.

¹³⁵ Aurizon Network referred to these costs as 'determined other transportation costs', and defined them as the costs incurred by Aurizon (the integrated Aurizon entity) in providing services other than the below-rail service (under a CITS) that Aurizon would have avoided had it not provided those other services, including operating and administrative costs, and an appropriate allowance for the capital costs (depreciation and return on assets) (UT4 SUFA DAAU EISL, Schedule 1, Part 2, cl. 2.2).

¹³⁶ Aurizon Network, sub. 2, p. 23.

¹³⁷ QRC, sub. 29, p. 7.

¹³⁸ QCA UT3 SUFA final decision, pp. 44–45, 49–52.

On this basis, we accept Aurizon Network's argument that a lower level of certainty over the post-deregulation rental is against 'the [SUFA] trustee's interests'¹³⁹, with the understanding that the SUFA trustee is a passive entity, whereas PUHs are the parties that provide funding and receive, through the SUFA trustee, rental payments.

We view the following guiding principles from the UT3 SUFA final decision still as a reasonable starting point for developing an alternative approach:

- Investors in heavy-infrastructure industries generally only consider investing if they are sufficiently confident of the return of the value of their investment within an appropriate timeframe. This is the case regardless of whether the industry is regulated or not.
- SUFA funders have a legitimate expectation that if the CQCN declaration expires or is revoked, they will receive a suitable return attributable to their investment, subject to prevailing market conditions.
- The regulatory process prior to the CQCN declaration expiring or being revoked would, based on the regulatory principles and assumptions in place at that time, be capable of identifying a notional benchmark SUFA rental stream that would ensure SUFA funders recoup the value of their investment.¹⁴⁰

In developing an alternative post-deregulation rental approach, it is relevant to consider that a SUFA is necessary to provide a genuine financing alternative when Aurizon Network considers the regulated WACC an insufficient return on its capital (i.e. when it would not invest at the regulated WACC). It is also fundamental to consider that the sole income of the SUFA trustee and PUHs during a SUFA's operational phase is the rent paid by Aurizon Network.

In the event the CQCN is no longer declared, an integrated Aurizon entity would have a monopoly position over SUFA rental streams, in the absence of credible constraints. We consider a post-deregulation rental approach should account for this outcome; otherwise, the SUFA framework, within the period the CQCN is declared, is unlikely to be bankable.

Our view is if the regulatory regime continues to apply for the term of the SUFA, SUFA investors will have a legitimate expectation to recover, within a reasonable timeframe, the value of their investment. We consider a post-deregulation rental calculation method should seek to preserve this expectation, to enable a workable, bankable and credible SUFA framework whilst the CQCN is regulated.

Given these considerations, our view is the following post-deregulation rental objectives should be adopted:

- We maintain our view that the SUFA rental stream in the unregulated environment must be stable and predictable whilst taking into account the prevailing market conditions in the unregulated environment.
- The SUFA rental stream in the unregulated environment should be such that its present value is equal to the value of the SUFA assets in the RAB as at the end of the declaration period, with the present value discounted at a rate appropriate for the prevailing market conditions in the unregulated environment (instead of the objective stated in the UT3 SUFA final decision that the SUFA rental stream should clearly link to both the value of the SUFA assets and below-rail assets in the CQCN generally).

¹³⁹ Aurizon Network, sub. 2, p. 24.

¹⁴⁰ QCA UT3 SUFA final decision, pp. 52–54.

- The timeframe over which SUFA investors recover the remaining value of their investment in the unregulated environment should provide for a stable and predictable rental stream taking into account the prevailing market conditions in the unregulated environment (instead of the objective stated in the UT3 SUFA final decision that a time dimension should be specified for the period over which SUFA rental streams should be paid).

We anticipate that the access regulator at the time would produce guidance on the appropriate discount rate and time period.

We consider our alternative approach provides certainty that, in the unregulated environment, SUFA investors would be able to recover the value of their investments within a reasonable timeframe. At the same time, the details of the rental calculation methodology including the key parameters of the discount rate and the timeframe would need to be agreed by the parties or determined through a binding dispute resolution. We consider our suggested approach provides assurance to SUFA investors that they will be able to recover the value of their investment within a reasonable timeframe and receive a reasonable return attributable to their investment, which is not the case with Aurizon Network's proposal. Therefore, our suggested approach seeks to reduce barriers to participating in a SUFA transaction in the period where the CQCN is a declared service.

In summary, our view is, once it becomes apparent the CQCN declaration will expire or be revoked, either party—that is, Aurizon Network or the SUFA trustee, on behalf of PUHs—can seek to vary the rent calculation methodology if they consider it necessary to make it (the methodology) consistent with the objectives set out above.

The parties will have a defined period of time in which to agree on a variation, and if that proves unsuccessful, a binding dispute resolution process will apply (see below).

Dispute resolution process

Aurizon Network's SUFA DAAU proposal

The UT4 SUFA DAAU EISL includes a process to resolve disputes between the SUFA trustee and Aurizon Network about changes to the rent calculation methodology required to reflect Aurizon Network's proposed rental objective (the rental mechanism considered above).¹⁴¹

Under Aurizon Network's proposal, the SUFA trustee and Aurizon Network will each appoint an expert to determine, if the rent calculation methodology fails to achieve the rental objective, the variations (if any) required so the rent calculation methodology achieves the rental objective; and the date the variations will take effect.

The UT4 SUFA DAAU EISL provides that the parties will assist both experts, including providing information as requested by an expert, and facilitate consultation between the experts before they make their separate determination.

If the two experts make identical determinations, the rent calculation methodology will be effected as determined by them. Otherwise, a further expert (the deciding expert) will be appointed to determine which of the two experts' determinations most closely achieves the rental objective, which will be binding.

¹⁴¹ UT4 SUFA DAAU EISL, cl. 9.8.

Stakeholders' comments

The QRC accepted Aurizon Network's proposed dispute resolution process, although it observed that Aurizon Network's drafting was cumbersome.¹⁴²

QCA analysis and draft decision

Our draft decision is to refuse to approve Aurizon Network's proposed post-deregulation dispute resolution process. We have proposed amendments so the UT4 SUFA DAAU EISL provides an effective dispute resolution process for determining an appropriate and reasonable SUFA rental stream in the post-deregulation period.

Assessment of Aurizon Network's proposal

Our view is Aurizon Network's proposed dispute resolution mechanism would be ineffective in determining an appropriate SUFA rental stream. This is because the dispute would be determined on the basis of Aurizon Network's proposed post-deregulation rental objective, which is itself unreasonable, as discussed above.

We also have several concerns with Aurizon Network's proposed dispute resolution process. There is no assurance the two experts appointed by the parties will make their respective determination based on the same set of information—each expert may request parties to produce information but is not required to share that information with the other expert. Further, the experts are not required to consult with each other; rather, the parties have to facilitate a consultation between the experts.

We also consider Aurizon Network's proposal that the SUFA trustee and integrated Aurizon entity each appoint an expert without the agreement of the other party would create a perception of bias and would not provide parties with confidence about the experts' determinations.

We foresee the two experts would most likely make determinations that are not identical. Thus, there is a high likelihood the deciding expert would be appointed to make a determination; so the process (of having two experts) to reach that final stage is unnecessary.

Further, under Aurizon Network's proposal, the deciding expert is required to select between the two experts' determinations. Our view is this limits the scope of dispute resolution, as it does not allow the deciding expert to consider an alternative SUFA rental stream that may be appropriate and reasonable.

Proposed amendments

Our view is the dispute resolution framework associated with the development of post-deregulation SUFA rental streams is critical to the credibility, bankability and workability of the SUFA framework, in both the period when the CQCN is declared and the post-deregulation period.

Given the significance of any such dispute, our view is that experts with suitable and complementary skills will be required to determine an appropriate SUFA rental stream that achieves the post-deregulation rental objectives as set out above. Therefore, we remain of the view that the dispute resolution should be undertaken with a panel of three independent experts that satisfy the requirements for an expert set out in the Extension Project Agreement (EPA), to the extent relevant. Each panel member must be appointed by agreement between

¹⁴² QRC, sub. 29, p. 6.

the parties and, failing agreement, nominated by the President of the Resolution Institute in Australia.

We believe that if the dispute resolution process is to be effective and perceived to be effective, the process has to provide the expert panel with adequate power. We consider the expert panel will need to have access to an integrated Aurizon entity's information, to the extent the panel consider it relevant for their decision-making remit.¹⁴³

The expert panel will initially have six months to reach a decision. This period can be extended by agreement of the relevant parties, or if the panel considers it requires further information or time to reach a decision.

The SUFA trustee, on behalf of PUHs, and Aurizon Network, on behalf of an integrated Aurizon entity, can each submit a single proposal to the expert panel for consideration. The panel will be required to consider a party's proposal, if any, and determine an appropriate rent calculation methodology that achieves the post-deregulation SUFA rental objectives as set out above. The determination by the expert panel will be binding and similar to the process set out in the EPA, allowing for an expert panel rather than an individual expert. In its determination, the expert panel must have regard to the guidance provided by the access regulator in respect of the appropriate discount rate and timeframe for rent payable in a post-deregulation environment.

Conclusion

Our alternative approach for determining the post-deregulation SUFA rental streams is as follows:

- Either party can seek to vary the rent calculation methodology so that it achieves the following objectives:
 - The present value of SUFA rental streams in the unregulated environment should be equal to the value of the SUFA assets in the RAB as at the end of the declaration period, with the present value discounted at a rate appropriate for the prevailing market conditions in the unregulated environment.
 - The timeframe over which SUFA investors recover the remaining value of their investment in the unregulated environment should be appropriate for the prevailing market conditions in the unregulated environment.
 - An appropriate balance should be sought between the predictability and stability of SUFA rental streams and the market conditions in the unregulated environment.
- Discussion/negotiation should take place between the parties on agreeing to an appropriate variation to the rent calculation methodology.
- If agreement is not reached, a binding dispute resolution process should be followed, involving a panel of independent experts.

We consider our approach, whilst not defining the SUFA rental streams in the post-deregulation period, will provide certainty and assurance to prospective SUFA funders that if they invest in a SUFA transaction whilst the CQCN is declared, a robust process will be adhered to, to determine SUFA rental streams that will result in the recovery of the residual value of the SUFA assets in a post-deregulation environment.

¹⁴³ QCA UT3 SUFA final decision, pp. 56–57.

In the context of the period when the CQCN is declared, we consider a SUFA framework that provides for our proposed process would result in a workable, bankable and credible SUFA, unlike Aurizon Network's proposal. Our view is it provides greater clarity of process and assurance, thereby seeking to reduce barriers to participation in a SUFA transaction. This, in turn, would allow as many financing options for, and potential participants to, a SUFA as possible, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, and the interests of access seekers and access holders (ss. 138(2)(a), (d), (e) and (h) of the QCA Act).

Also, in the above approach, the QCA does not seek to impose a rental stream in a post-deregulation environment. As such, we consider our approach has regard to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act). The post-deregulation rental stream depends on agreement between the relevant parties or a binding dispute resolution. The outcome of the dispute resolution process depends upon the proposals put forward and the extent to which experts in the relevant fields consider them a reasonable mechanism to achieve the post-deregulation rental objectives.

Summary of draft decision 6.2

The UT4 SUFA DAAU EISL should be amended to:

- (1) include the post-deregulation SUFA rental objectives as set out above
- (2) reflect the dispute resolution process in the post-deregulation environment as outlined above.

See clause 9.8 and Item 2, Schedule 1 in the UT4 SUFA DAAU EISL mark-up in Appendix B.

7 TERMINATION OF INFRASTRUCTURE LEASE

There are a number of ways in which the suite of infrastructure leases involved in a SUFA transaction can terminate. If there is uncertainty around the termination risks, the SUFA framework is less attractive to potential participants (and is therefore not effective as a funding option). This is because the risks faced by prospective SUFA funders and preference unit holders (PUHs) with respect to recovering all or part of their investment if a termination event occurs will not be properly determined.

Aurizon Network's UT4 SUFA DAAU does not make Aurizon Network liable for consequential loss of the SUFA trustee if Aurizon Network causes termination of the Infrastructure Lease.

Our draft decision maintains the position in the UT3 SUFA final decision that Aurizon Network should be subject to liability for the consequential loss of the SUFA trustee if Aurizon Network is responsible for the termination of the Infrastructure Lease.

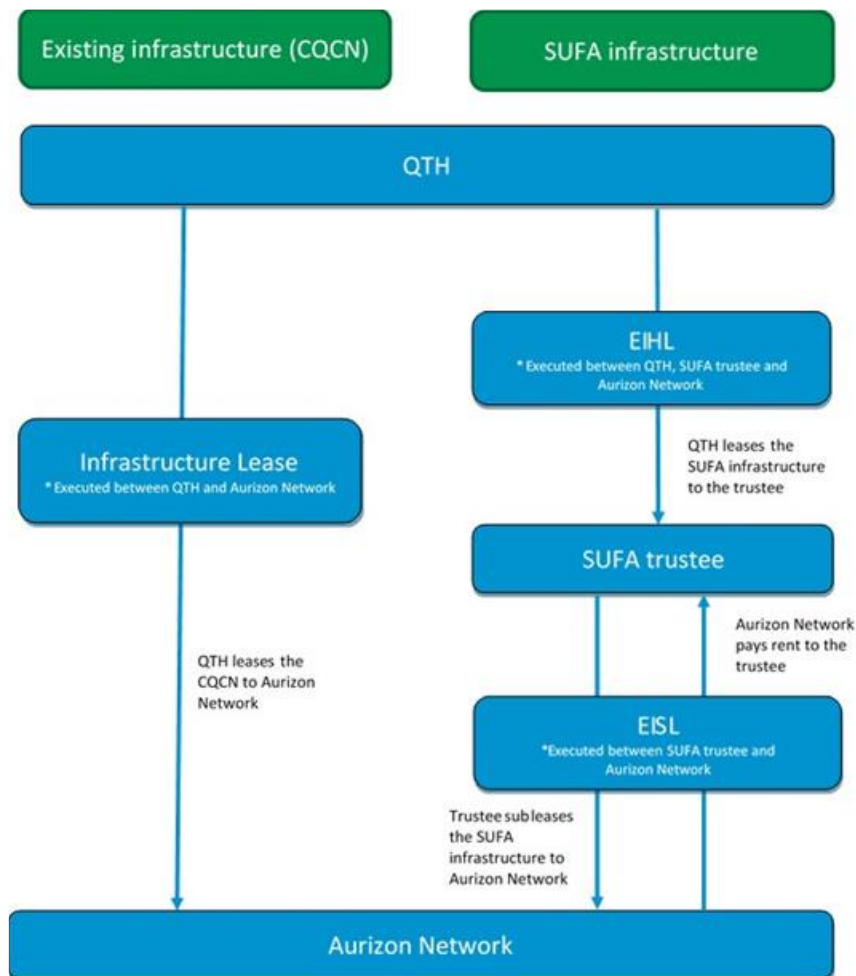
Overview

The infrastructure leases relevant to a SUFA transaction are:

- Aurizon Network's infrastructure lease with QTH (Infrastructure Lease or Base Lease)¹⁴⁴
- the Extension Infrastructure Head-Lease (EIHL)
- the Extension Infrastructure Sub-Lease (EISL).

Figure 3 outlines the leasing framework for a SUFA transaction.

¹⁴⁴ The infrastructure lease with QTH applies to existing infrastructure on the CQCN (other than two sections of the North Coast Line, which form part of the CQCN, in respect of which Queensland Rail Limited (QR) is the infrastructure lessor). Although our draft decision focuses on the infrastructure lease with QTH, it also applies to the infrastructure lease with QR to the extent relevant.

Figure 3 The SUFA leasing framework

The Infrastructure Lease relates to the existing infrastructure operated by Aurizon Network, not the SUFA infrastructure, which is covered under the EIHL and EISL. Nevertheless, the EIHL and EISL rely on the Infrastructure Lease being in force. Therefore, if the Infrastructure Lease terminates, the EIHL and EISL will automatically terminate.

Given the interrelated aspects of these leases, the circumstances in which these leases may terminate and the possible implications of termination for a SUFA transaction are relevant to a SUFA investor.

Aurizon Network's UT4 SUFA DAAU contains a number of positions on termination risks in the SUFA framework that are consistent with the UT3 SUFA final decision. These include:

- Aurizon Network must provide a redacted version of the Infrastructure Lease (subject to the lessor's consent) to potential SUFA funders during negotiation of a SUFA agreement to enable them to have sight of the termination aspects of the Infrastructure Lease.
- Where the EIHL terminates, but the Infrastructure Lease remains on foot, the sublease within the EISL will terminate and the SUFA infrastructure will be absorbed by the Infrastructure Lease. The SUFA trustee will be entitled to a rent-equivalent cash flow as compensation in lieu of rent; plus a detriment amount (if Aurizon caused termination of the EIHL) or less a detriment amount (if the SUFA trustee caused termination of the EIHL).
- Aurizon Network must grant security in respect of the rent-equivalent compensation cash flows and any detriment amounts payable by Aurizon Network to the SUFA trustee.

Given stakeholders did not object to these positions, and noting they are consistent with the UT3 SUFA final decision, we consider these positions remain appropriate and refer to the analysis in the UT3 SUFA final decision.¹⁴⁵

However, Aurizon Network's UT4 SUFA DAAU contains a position relating to consequential loss liability for termination of the Infrastructure Lease that is different from the one in the UT3 SUFA final decision. The matter is considered in this chapter.

7.1 Termination of the Infrastructure Lease

Background

If the Infrastructure Lease is terminated, the CQCN infrastructure assets revert to the control of QTH, on behalf of the State of Queensland. Termination of the Infrastructure Lease also results in the automatic termination of the EIHL and EISL, which rely on the Infrastructure Lease being in force.

The UT3 SUFA final decision considered in particular the situation where the Infrastructure Lease is terminated due to default by Aurizon Network. The UT3 SUFA final decision was that Aurizon Network should compensate the SUFA trustee for all losses (including consequential loss) if termination of the Infrastructure Lease is caused by Aurizon Network.¹⁴⁶

Aurizon Network's SUFA DAAU proposal

Aurizon Network did not support the UT3 SUFA final decision position. Rather, Aurizon Network proposed, in respect of a termination of the Infrastructure Lease, for the SUFA trustee's sole entitlement to be its right to receive a disposal distribution payment from QTH under the Integrated Network Deed, and no non-State party to have liability to any other such party.¹⁴⁷

Aurizon Network stated that CQCN investors earn the same returns and should therefore be subject to the same risks, adding that it did not accept the concept that one investor (Aurizon Network) may be liable to bear the consequential loss of another investor (the SUFA trustee).¹⁴⁸

Aurizon Network acknowledged that it was in a better position than the SUFA trustee to control the risk of a termination of the Infrastructure Lease. In that context, Aurizon Network stated that it agreed with the QCA's general principle of liability that 'the party that controls the risk should generally carry the risk', but only if another general principle that 'the party bearing the risk receives suitable compensation for doing so', also applied. Nonetheless, Aurizon Network said it did not volunteer 'to bear the cost that could arise from assuming the QCA-proposed consequential loss liability for a Base Lease termination.'¹⁴⁹

Stakeholders' comments

The QRC did not accept Aurizon Network's proposal to not have a liability clause that related to circumstances that gave rise to the termination of the Infrastructure Lease.¹⁵⁰

¹⁴⁵ QCA UT3 SUFA final decision, pp. 133–145.

¹⁴⁶ QCA UT3 SUFA final decision, pp. 140–143.

¹⁴⁷ Aurizon Network, sub. 2, p. 18.

¹⁴⁸ Aurizon Network, sub. 2, p. 17.

¹⁴⁹ Aurizon Network, sub. 2, p. 17.

¹⁵⁰ QRC, sub. 29, p. 22.

QCA analysis and draft decision

Our draft decision is to refuse to accept Aurizon Network's proposal and to maintain our position in the UT3 SUFA final decision relating to consequential loss liability in the event the Infrastructure Lease is terminated due to a party's cause.

We consider that the SUFA framework is designed to allow parties—other than Aurizon Network—to finance CQCN expansions when Aurizon Network considers the regulated WACC an insufficient return on its capital (i.e. it would not invest at the regulated WACC). We also consider the sole income of the SUFA trustee (and, by extension, the PUHs) is the rent from Aurizon Network for its use of the SUFA infrastructure.

In this context, it is relevant to consider that only Aurizon Network is required to comply with the obligations of the Infrastructure Lease, and a termination of the Infrastructure Lease caused by Aurizon Network will result in the SUFA trustee losing its sole income. The SUFA trustee has no control over Aurizon Network's actions in this regard.

Under Aurizon Network's proposal, the SUFA investors' sole income—rental cash flow—for funding expansions in CQCN (when Aurizon Network would not invest at the regulated WACC), will be jeopardised by Aurizon Network causing termination of the Infrastructure Lease, but Aurizon Network will not be liable for its actions. We consider this would significantly impede the bankability of a SUFA framework.

We note Aurizon Network considers it is best able to manage the risk of default of the Infrastructure Lease and it would be motivated by its own business interests to avoid such a default. Given this, our view is that the risk of termination is low. However, the SUFA trustee is not able to manage the possibility of Aurizon Network's actions terminating the Infrastructure Lease or to mitigate the loss the SUFA trustee would suffer as a result. Therefore, we consider the SUFA trustee should be compensated if such a termination event occurs.

Aurizon Network argued that its proposal treated all investors in the CQCN equally. This argument does not recognise that the SUFA trustee cannot manage the risk of Aurizon Network's non-compliance with the CQCN Infrastructure Lease. It can therefore be said that all investors are not being treated equally, and it is relevant that this aspect is taken into account in developing a viable SUFA framework.

We consider the potential for Aurizon Network to cause termination of the Infrastructure Lease is a risk for the SUFA trustee and not for Aurizon Network, who controls its own actions; therefore, Aurizon Network should carry that risk. We also consider that rewarding Aurizon Network for risks it controls, which could have an adverse effect on another party, is inefficient and imprudent.

Our view is that for a SUFA to be bankable, it is fundamental that PUHs have the potential to claim for loss of future revenues, where that loss is Aurizon Network's fault. Therefore, we consider it appropriate that Aurizon Network is liable for all losses of the SUFA trust (including consequential loss) in the event of a termination of the Infrastructure Lease where Aurizon Network has caused that termination. For that reason, we consider the consequential loss obligation on Aurizon Network is a liability for its default and not a cost of expansion.

Our draft decision aligns with the interests of PUHs throughout the life of the SUFA transaction (s. 138(2)(h) of the QCA Act). We consider that Aurizon Network having liability for all losses of the SUFA trustee (including consequential loss) offsets the fact that the non-Aurizon Network parties to a SUFA transaction have no control over whether Aurizon Network's actions will lead to termination of the Infrastructure Lease and the consequences this may have.

Further, we consider this liability regime supports a workable, bankable and credible SUFA framework that seeks to encourage financing choice for expansions in the CQCN. In this context, we are of the view it aligns with the objective of efficient investment in the CQCN, thereby supporting the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act).

We also consider that for Aurizon Network to take action that results in termination of the Infrastructure Lease would be counter to Aurizon Network's legitimate business interests, given Aurizon Network's view that it would be motivated by its own business interests to avoid a default of the Infrastructure Lease (s. 138(2)(b) of the QCA Act).

We have maintained our position from the UT3 SUFA final decision on the matters of the QTH terminating the Infrastructure Lease, the Infrastructure Lease expiring, and the SUFA trustee causing Aurizon Network to breach a provision of the Infrastructure Lease.

Table 4 summarises our view on termination events and liability outcomes with respect to termination of the Infrastructure Lease. In summary, we have sought to allocate termination risks and liabilities in relation to the Infrastructure Lease to the party best able to manage each of those risks.

Table 4 Termination and expiration of the Infrastructure Lease

<i>Event</i>	<i>Outcome</i>	<i>Liability</i>
QTH terminates the Infrastructure Lease	Both the EIHL and the EISL terminate. QTH does not have the right to require the removal of SUFA infrastructure.	QTH will pay the SUFA trustee a share of the disposal amount (QTH having first deducted its costs).
The Infrastructure Lease expires	Both the EIHL and the EISL terminate. QTH has the right to require the removal of SUFA infrastructure.	QTH will pay the SUFA trustee a share of the disposal amount based on the fair market value of the network.
Aurizon Network breaches a provision of the Infrastructure Lease	The Infrastructure Lease may terminate. If it does, both the EISL and the EIHL terminate. Aurizon Network may be liable to the SUFA trustee for damages, as Aurizon Network is liable for its actions.	QTH will pay the SUFA trustee a share of the disposal amount. In addition, Aurizon Network may be liable for all losses of the SUFA trustee (including consequential loss if the Infrastructure Lease is terminated).
SUFA trustee causes Aurizon Network to breach a provision of the Infrastructure Lease	The Infrastructure Lease may terminate. If it does, both the EISL and the EIHL terminate. The SUFA trustee may be liable to Aurizon Network for damages, as the SUFA trustee is liable for its actions.	QTH will pay the SUFA trustee a share of the disposal amount. The SUFA trustee may be liable for all losses of Aurizon Network (including consequential loss if the Infrastructure Lease is terminated due to the SUFA trustee's fraud, gross negligence or wilful default). The SUFA trustee's liability is capped at the assets of the SUFA trust. Practically, that means the SUFA trustee's liability is capped to the amount it receives from QTH.

Summary of draft decision 7.1

The UT4 SUFA DAAU should provide for Aurizon Network to be subject to liability for the consequential loss of the SUFA trustee if Aurizon Network is responsible for the termination of the Infrastructure Lease.

See clause 7.2 in UT4 SUFA DAAU EPA mark-up in Appendix B.

APPENDIX A: OTHER MATTERS IN RELATION TO UT4 SUFA DAAU

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
1. Extension Project Agreements					
Clause 1.1 - limb (b) of "Consequential Loss"	Addition to limb (b) of "Consequential Loss".	No non-State party should be liable for consequential loss to any other such party, except to the extent that a SUFA document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss. ¹⁵¹	The QRC does not accept these amendments, as they are not appropriate. ¹⁵²	The QCA accepts Aurizon Network's amendment; however, further drafting for clarification is required.	The amendment suggested by Aurizon Network is consequential to Aurizon Network's amendments to clause 10(a) of the Rail Corridor Agreement. Stakeholders should refer to the QCA's reasoning in respect of the amendments to that clause.
Clause 1.1 - limb (k) of "Consequential Loss"	Addition to limb (k) of "Consequential Loss".	No non-State party should be liable for consequential loss to any other such party, except to the extent that a SUFA document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss.	The QRC does not accept this amendment, as it is not appropriate. ¹⁵³	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA documents.
Clause 1.1 - "RAB Inclusion Submission"	Addition of "RAB Inclusion Submission". ¹⁵⁴	Consequential amendment for revisions to EPA clause 3.1. See comments below in respect of	The QRC does not accept this amendment. ¹⁵⁵	The QCA does not accept this amendment.	See the QCA's reasoning in respect of clause 3.1 of the EPA below.

¹⁵¹ Aurizon Network, sub. 2, pp. 17–18.

¹⁵² QRC, sub. 29, p. 19, item 2.

¹⁵³ QRC, sub. 29, p. 19, item 2.

¹⁵⁴ Aurizon Network, sub. 2, pp. 32–34, item EPA3.

¹⁵⁵ QRC, sub. 29, p. 19, item 1.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
		that clause.			
Clause 2.1, former condition precedent 5	Deletion of condition precedent in the EPA relating to Office of State Revenue correspondence.	This condition precedent not required, as condition precedent 1 (in the EPA) requires statutory severance to be in place. Once severance has occurred, it is unlikely that stamp duty will be payable. In addition, the Office of State Revenue is not empowered to bind itself. ¹⁵⁶	The QRC does not accept this amendment. An understanding of the duty position in relation to the transaction documents is an important factor to be taken into account before the arrangements come into effect. ¹⁵⁷	The QCA does not accept this amendment.	This condition precedent is for the benefit of both the SUFA trustee and Aurizon Network. Depending on the circumstances at the time, the SUFA trustee (and Aurizon Network) may require the benefit of this condition precedent. If it is no longer needed, the parties may agree to delete it. It should also be noted that the parties may waive it.
Clause 2.1, new condition precedent 5	Amendment to provide for QCA preapproval in respect of the prudence and efficiency of the capital expenditure of the expansion.	There is no mechanism in UT4 for the QCA to approve an extension. ¹⁵⁸	The QRC accepts this amendment. ¹⁵⁹	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 2.1, new condition precedent 7	Amendment to requiring the provision of security, and payment of the advance payment, under the construction contract. ¹⁶⁰	None given.	The QRC does not accept this change. As detailed below, the QRC does not agree with the provision of security under the construction contract. In the QRC's view, it is not appropriate that the payment of the advance payment is a	The QCA does not accept this amendment.	The construction contract provides that the security is to be provided, and the advance payment paid, 10 business days after the satisfaction of the conditions precedent under the construction contract. Not making this amendment retains the credibility and workability of

¹⁵⁶ Aurizon Network, sub. 2, p. 32, item EPA1.

¹⁵⁷ QRC, sub. 29, p. 19, item 3.

¹⁵⁸ Aurizon Network, sub. 2, p. 32, item EPA2.

¹⁵⁹ QRC, sub. 29, p. 19, item 3.

¹⁶⁰ Aurizon Network, sub. 18, clause 2.1.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
			condition precedent under the EPA as the construction contract provides for it to be paid 10 business days after satisfaction of the conditions precedent under the EPA. ¹⁶¹		the SUFA documents.
Clause 3.1	In respect of the initial RAB inclusion submission, Aurizon Network has a process obligation to make such a submission, the substantive element of which is prepared by the SUFA trustee and included without change by Aurizon Network.	The form of Aurizon Network's obligations in respect of both the initial RAB inclusion of the project costs, and their retention in the RAB, in the form of the EPA that was part of the UT3 SUFA final decision is against Aurizon Network's legitimate business interests, and also against the public interest. ¹⁶²	<p>The QRC does not accept these changes.</p> <p>The amendments to this clause mean that Aurizon Network will not be held to an acceptable standard in respect of making the RAB inclusion submission and its interactions with the access regulation in these circumstances. Clear obligations in this area are a key bankability concern.</p> <p>Aurizon Network is lodging with the QCA a RAB submission on behalf of the SUFA trustee. The SUFA trustee should be able to seek comfort in the fact that this clause sets out quite clearly the behaviour and principles that are to apply to Aurizon Network when acting in this capacity.</p> <p>Further, the QRC considers that Aurizon Network should be required to provide copies of:</p>	<p>The QCA accepts Aurizon Network's amendments, other than the deletion of clause 3.1(b).</p> <p>The QCA accepts the QRC's proposal in respect of the provision of the submission and correspondence.</p>	<p>The QCA's reasoning in respect of RAB submissions in its UT3 SUFA final decision still applies, nonetheless, the QCA agrees that it is reasonable for Aurizon Network to not be required to act in the best interests of the SUFA trust, given sufficient other protections are included in the clause. Stakeholders are referred to the UT3 SUFA final decision.¹⁶⁴</p> <p>Retaining clause 3.1(b) (as amended) improves the workability and credibility of the EPA as it provides certainty in respect of the RAB (including submissions in respect of it).</p> <p>In respect of the retention of project costs in the RAB, we do not understand why it would be in Aurizon Network's commercial interests to seek the removal of project costs from the RAB. The obligation to retain them in the RAB is in</p>

¹⁶¹ QRC, sub. 29, p. 20, item 4.

¹⁶² Aurizon Network, sub. 2, pp. 32–34, item EPA3.

¹⁶⁴ QCA, UT3 SUFA final decision, pp. 189–199.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
			<ul style="list-style-type: none"> proposed correspondence and submissions to the SUFA trustee for review at least 10 Business Days before the submission is proposed to be lodged with the QCA; and all correspondence between Aurizon Network and the QCA in connection with the inclusion of the Capital Costs and the Construction Interest on the Capital Costs into the RAB to the SUFA trustee.¹⁶³ 		all parties' legitimate interests.
Clause 4.3(a)	Amendment of applicability of the AASTD to the definitions of gross negligence and wilful default. ¹⁶⁵	None given.	<p>The QRC does not accept this amendment.</p> <p>The QRC queries whether references to Gross Negligence and Wilful Misconduct should include where these matters occur under the terms of the AASTD after the termination or expiry of such Deed.¹⁶⁶</p>	The QCA accepts this amendment.	<p>This amendment improves the credibility and workability of the SUFA documents.</p> <p>The QCA does not agree with the QRC's comments, as the user should rely on its rights under its access agreement.</p>
Clause 5.1(a)	Addition of Rent Calculation Methodology Dispute to clause 5.1(a). ¹⁶⁷	None given.	The QRC accepts this amendment. ¹⁶⁸	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 5.9	Disputes must be notified by a	Three years is unreasonable	The QRC does not accept this	The QCA accepts this	In respect of the QRC's

¹⁶³ QRC, sub. 29, p. 20, item 5.

¹⁶⁵ Aurizon Network, sub. 18, clause 4.3.

¹⁶⁶ QRC, sub. 29, p. 21, item 6.

¹⁶⁷ Aurizon Network, sub. 18, clause 5.1.

¹⁶⁸ QRC, sub. 29, p. 21, item 7.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
	party within 12 months of that party becoming aware of the occurrence of the event or circumstances giving rise to the dispute.	and 12 months is an ample period of time for a party to consider the circumstances giving rise to the dispute and decide whether or not to notify a dispute. Aurizon Network does not understand the apparent internal inconsistency between the QCA's view as timings of disputes in the EPA and the construction contract. ¹⁶⁹	amendment. As audits are carried out on a yearly basis, the time bar of 12 months creates a risk that claims will be extinguished before the audit determines the full extent of the relevant issue. ¹⁷⁰	amendment.	comments, if the audit is the time when a party becomes aware of the event or circumstance, then there will be a 12-month period in which to notify the dispute. If a party is aware of an event or circumstance, but needs an audit to confirm, the party can preserve its position by raising a dispute prior to the audit. The QCA considers 12 months is a reasonable time period. This amendment improves the credibility and workability of the SUFA documents.
Clause 7.2	Amendments to provide that no non-State party to a SUFA transaction is liable for consequential loss to any other such party, except and to the extent that a SUFA document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss.	None given.	The QRC does not accept these amendments. In the QRC's view, the amendments to the consequential loss exclusions are not appropriate as there are no instances in which a party is liable for consequential loss except as expressly provided under a transaction document.	The QCA does not accept these amendments.	In the QCA's view, clause 7.2, as proposed by the QCA, provides a credible and workable position in relation to consequential loss. Stakeholders should note that the QCA's consideration of consequential loss in chapter 16 of the UT3 SUFA final decision is still relevant to the QCA's view. Stakeholders are also referred to chapter 7 of this draft decision.
2. Subscription and Unit Holders Deed					
Clause 2.5(a)(iv)	Deletion of reference to	Aurizon Network does not	The QRC does not accept these	The QCA accepts these	This is a risk which the PUHs

¹⁶⁹ Aurizon Network, sub. 2, pp. 34–35, item EPA4.

¹⁷⁰ QRC, sub. 29, p. 21, item 8.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
	'materiality'	<p>volunteer to assume the risk of incurring any cost disadvantage below the threshold of a material advantage if a SUFA trust is wound up other than in accordance with the transaction documents, as it may lead to additional cost being borne by Aurizon Network.</p> <p>It is not Aurizon Network's role to subsidise a SUFA transaction.¹⁷¹</p>	<p>amendments, as it creates a threshold that is not appropriate in these circumstances given the impact on the SUFA trust and potentially gives Aurizon Network unreasonable and unintended bargaining power in respect of the good faith negotiations that the parties must enter into to agree a process in respect of the winding up of the SUFA trust.¹⁷²</p>	amendments.	should take into account when deciding to fund a SUFA and, ultimately, bear the risk of. The amendment improves the credibility of the SUHD.
Clause 18.1(c)	The SUFA trustee shall pay all stamp duty payable in relation to the issue of the ordinary unit.	<p>This stamp duty only arises because of the applicable SUFA transaction. The party(ies) seeking to enter a user funding transaction (represented in the SUHD by the SUFA trustee) should be allocated responsibility to pay all costs associated with establishing a user funding transaction, including any stamp duty associated with the issue of the ordinary unit. It is not Aurizon Network's role to subsidise the establishment of a SUFA transaction.¹⁷³</p>	<p>The QRC does not accept this amendment.</p> <p>The SUFA trustee should only be liable for stamp duty payable on the issue of the ordinary unit. It is not appropriate that the SUFA trustee is liable for all stamp duty in relation to the ordinary unit.¹⁷⁴</p>	<p>The QCA accepts this amendment.</p> <p>We do not agree with the QRC's comment as the ordinary unit is only issued because there is a need for the SUFA trust.</p>	<p>This is a cost which the PUHs should take into account when deciding to fund a SUFA and, ultimately, bear the stamp duty cost. The amendment improves the credibility of the SUHD.</p>

¹⁷¹ Aurizon Network, sub. 2, p. 35, item UHD1.

¹⁷² QRC, sub. 29, p. 10, item 1

¹⁷³ Aurizon Network, sub. 2, pp. 35–36, item UHD2.

¹⁷⁴ QRC, sub. 29, p. 10, item 3.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
3. Extension Infrastructure Sub-Lease					
Clause 1.1 - "CITS"	Amendment to "CITS"	None given.	The QRC accepts these changes. ¹⁷⁵	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 1.1 - "CITS Provider"	Deletion of "CITS Provider"	None given.	The QRC accepts these changes. ¹⁷⁶	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 1.1 - "Other Transportation Costs "	Amendment to "Other Transportation Costs"	None given.	The QRC accepts these changes. ¹⁷⁷	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 3.5	Amendments to clause 3.5. ¹⁷⁸	None given.	None given.	The QCA accepts these amendments.	This amendment improves the credibility and workability of the SUFA documents.
Clauses 4.12(a)(i), (ii)	Aurizon Network does not assume any insurance obligation to the SUFA trustee in respect of non-SUFA infrastructure.	Aurizon Network is of the view that it would be commercially unreasonable and inconsistent with good business practice for Aurizon Network to assume insurance compliance obligations to the SUFA trustee in respect of the non-SUFA infrastructure, which are assets in which the SUFA trustee has no insurable interest. ¹⁷⁹	The QRC accepts these changes. ¹⁸⁰	The QCA does not accept these amendments.	Whilst the SUFA trustee has no insurable interest, it is interested in ensuring that the non-SUFA infrastructure is insured. This is because the rent is derived from the access charges for the network. The insurance right for the SUFA trustee adds a layer of protection for its income stream.

¹⁷⁵ QRC, sub. 29, p. 5, item 1.

¹⁷⁶ QRC, sub. 29, p. 5, item 1.

¹⁷⁷ QRC, sub. 29, p. 5, item 1.

¹⁷⁸ Aurizon Network, sub. 20, clause 3.5.

¹⁷⁹ Aurizon Network, sub. 2, pp. 36–37, item EISL1.

¹⁸⁰ QRC, sub. 29, p. 5, item 2.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
					Retaining the UT3 SUFA final decision drafting assists in the maintaining the bankability, credibility and workability of SUFA.
Clause 4.12(b)	The insurance policy documentation requirements on Aurizon Network shall only apply if and to the extent that they are in accordance with good insurance industry practice, and they are permitted by law at the time at which those requirements are due to be discharged.	A SUFA will have a multi-decade life. Aurizon Network is unaware of the nature of insurance policy documentation practice 30, 20 or even 10 years hence. Accordingly Aurizon Network's EISL obligation to meet these insurance policy documentation requirements should only apply to the extent that they are consistent with good insurance industry practice at the relevant time. ¹⁸¹	The QRC accepts these changes. ¹⁸²	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
Clause 4.12(c)	Amendments for internal clause cross-referencing. ¹⁸³	None given.	The QRC accepts these changes. ¹⁸⁴	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
Clause 4.12(e)	The SUFA trustee may only exercise its insurance rights under this clause following a successful dispute process.	The SUFA trustee's rights in respect of insurance under the UT3 SUFA final decision would confuse and concern insurance providers, if exercised without having been disputed and the	The QRC does not accept these changes. The SUFA trustee should have the right to effect insurance where Aurizon Network fails to do so. The SUFA trustee should	The QCA does not accept Aurizon Network's amendments. The QCA proposes amendments to the UT3 SUFA final decision form of this clause.	The SUFA trustee's right to purchase the insurance only arises where QTH requires the insurance to be maintained. Aurizon Network can manage the risk of QTH requiring this.

¹⁸¹ Aurizon Network, sub. 2, pp. 36–37, item EISL1.

¹⁸² QRC, sub. 29, p. 5, item 2.

¹⁸³ Aurizon Network, sub. 20, clause 4.12(c).

¹⁸⁴ QRC, sub. 29, p. 5, item 2.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
		SUFA trustee being successful in that dispute. ¹⁸⁵	not be constrained in these circumstances by first having to comply with the dispute resolution process to determine whether Aurizon Network has in fact failed to maintain the relevant policy of insurance. This is not a usual or prudent approach. ¹⁸⁶		The SUFA trustee should not face the risk of non-insurance whilst the dispute resolution process is ongoing. The QCA amendments improve the bankability and credibility of the SUFA.
Clause 5.3	<p>If Aurizon Network is required under its then applicable Access Undertaking to make available a condition based assessment in respect of the CQCN, Aurizon Network will make available within five business days a further condition-based assessment that specifically identifies the Total Extension Infrastructure to the SUFA trustee.</p> <p>If Aurizon Network ceases to be regulated, Aurizon Network will provide the SUFA trustee upon deregulation and each four years thereafter a condition based assessment, provided that the SUFA trustee reimburses all of the reasonable costs incurred by Aurizon Network in preparing</p>	While Aurizon Network is regulated, it should only be required to prepare an assessment where it is required to do so by its then applicable access undertaking. Following deregulation Aurizon Network has no regulatory arrangement for the recovery of the costs of preparing either of the two assessments. Should the SUFA trustee wish to receive them, it should reimburse Aurizon Network for the costs of preparing them. ¹⁸⁷	The QRC only commented in respect of clause 5.3(c) and did not accept it. In the QRC's view, the costs of a condition based assessment report would be recovered elsewhere under Aurizon Network's revenue. ¹⁸⁸	<p>The QCA accepts Aurizon Network's amendments to clause 5.3(a) and the new clause 5.3(c).</p> <p>The QCA has amended clause 5.3(b).</p>	These amendments improve the credibility and workability of the SUFA documents.

¹⁸⁵ Aurizon Network, sub. 2, pp. 36–37, item EISL1.

¹⁸⁶ QRC, sub. 29, p. 5, item 3.

¹⁸⁷ Aurizon Network, sub. 2, pp. 37–38, item EISL2.

¹⁸⁸ QRC, sub. 29, p. 5, item 4.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
	that assessment.				
Clause 8.3(j)	Amendment to clause 8.3(j)	None given.	The QRC accepts these changes. ¹⁸⁹	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
Clause 8.4 (f)	Amendment to clause 8.4.	The Excess Payment definition is intended to capture the lesser of the amounts determined in clause 8.4(e)(i) and (ii). Such circumstances should be addressed in the EISL. ¹⁹⁰	The QRC accepts these changes. ¹⁹¹	The QCA accepts Aurizon Network's amendment; however, further clarification drafting is required.	These amendments improve the credibility and workability of the SUFA documents.
Clause 15.1(b)(ii)	While SUFA infrastructure is leased to Aurizon Network, it has a reasonable endeavours obligation to be accredited as rail infrastructure manager for railway operations in respect of that infrastructure.	Aurizon Network does not volunteer to assume an accreditation obligation to the SUFA trustee in respect of rail infrastructure in which the SUFA trustee has no lease or economic interest. ¹⁹²	None given.	The QCA does not accept this amendment.	As the rent is derived from the access charges for the network, the SUFA trustee has an interest in ensuring that Aurizon Network is accredited for the non-SUFA infrastructure. The original drafting from the UT3 SUFA final decision improves the bankability and credibility of the SUFA.
Schedule 2	Amendments to update for UT4.	None given.	The QRC accepts these changes. ¹⁹³	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.

¹⁸⁹ QRC, sub. 29, p. 6, item 6.

¹⁹⁰ Aurizon Network, sub. 2, p. 36, item EISL3.

¹⁹¹ QRC, sub. 29, p. 6, item 7.

¹⁹² Aurizon Network, sub. 2, p. 36, item EISL4.

¹⁹³ QRC, sub. 29, p. 7, item 13.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
4. Extension Infrastructure Head Lease					
Clause 7.2	Aurizon Network is to provide the SUFA trustee with a copy of any information provided to QTH in response to its request under this clause. The SUFA trustee has no right to request information under this clause.	The SUFA trustee's rights under the UT3 SUFA final decision form of this clause was inconsistent with the fundamental nature of the SUFA model and could result in an unreasonable and uncompensated administrative burden for Aurizon Network. ¹⁹⁴	The QRC accepts these changes. ¹⁹⁵	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
Clause 20.1(a)(ii)	Amendment to clause 20.1(a)(ii).	None given.	The QRC accepts this change. ¹⁹⁶	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
5. Rail Corridor Agreement					
Clause 10(a)	The indemnity applies in respect of claims from, or loss incurred by, the SUFA trustee to, a third party.	In the absence of this modified treatment, should contamination occur in or on the Extension Land and it is not caused by the SUFA trustee (or its officers, agents, etc.), Aurizon Network would be liable for consequential loss liability to the SUFA trustee and would therefore be taking risk over the quantum of rent payable to the SUFA trustee. This amendment protects the SUFA trustee from contamination claims made by	The QRC does not accept these changes. Limiting the contamination indemnity given by Aurizon Network to claims from a third party or from any Losses incurred by the SUFA trustee to a third party is not appropriate in the context of the arrangements. ¹⁹⁸	The QCA accepts Aurizon Network's amendment however further drafting for clarification is required.	In the QCA's view, as partially supported by the QRC's argument, Aurizon Network should also indemnify the SUFA trustee from any claims Aurizon Network may have against the SUFA trustee under the Rail Corridor Agreement (save as provided in the clause). This is a fair allocation of risk and the amendments improve the credibility and workability of the SUFA documents.

¹⁹⁴ Aurizon Network, sub. 2, p. 40, item EIHL1.

¹⁹⁵ QRC, sub. 29, p. 4, item 1.

¹⁹⁶ QRC, sub. 29, p. 4, item 2.

¹⁹⁸ QRC, sub. 29, p. 8, item 1.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
		third parties, and retains the EPA as the prevailing SUFA document that addresses Aurizon Network's liability to the SUFA trustee in respect of losses by itself, access seekers and preference unit holders. ¹⁹⁷			
6. Access Agreement Specific Terms Deed					
Generally	The AASTD has been brought into line with the approved forms of access agreements under UT4.	Some provisions of the form of the AASTD that is part of the UT3 SUFA FD need to be modified to reflect the UT4 forms of access agreements. ¹⁹⁹	The QRC accepts these changes. ²⁰⁰	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
Schedule 1, Part 2, item 9(a)(iii)	The trigger event for the take-or-pay payment obligation to commence is set out in item 9(a) of Part 2 of schedule 1 of the AASTD. Each of three specified conditions must be addressed for the trigger event to occur. The issue at stake is about the third condition, namely the non-completion of the 'Connecting Infrastructure'. That third condition is met when Aurizon Network is not satisfied that the Connecting Infrastructure has been	Aurizon Network considers that the third condition is met in all circumstances when the Connecting Infrastructure is not completed except when Aurizon Network is in default (of its obligation in respect of the Connecting Infrastructure). The risk of timely completion of the Connecting Infrastructure is best allocated to the Access Seeker. ²⁰¹	The QRC does not accept these changes. The QRC considers that the access seeker should not be liable to pay Take or Pay charges if the reason that the Connecting Infrastructure and other enhancements have not been completed is not due to the acts or omissions of the access seeker. ²⁰²	Subject to minor clarifications in the drafting, the QCA has retained its position from the UT3 SUFA final decision.	The QCA agrees with the QRC's comment and notes that this reflects the UT3 SUFA final decision. The UT3 SUFA final decision was credible, workable and in the best interests of the parties and this remains the case with the revised drafting.

¹⁹⁷ Aurizon Network, sub. 2, pp. 40–41, item RCA1.

¹⁹⁹ Aurizon Network, sub. 2, p. 41, item AASTD1.

²⁰⁰ QRC, sub. 29, p. 24, items 1–6.

²⁰¹ Aurizon Network, sub. 2, pp. 41–42, item AASTD1.

²⁰² QRC, sub. 29, p. 25, item 7.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
	completed, and the reason for that 'non-completion' is not primarily attributable to any default by Aurizon Network in the performance of its legally binding obligations in respect of the Connecting Infrastructure.				
7. Construction Agreement and Formal Instrument of Agreement					
Clause 1.1 - "force majeure event"	Train or motor vehicle accidents are now force majeure events.	None given.	None given.	The QCA does not accept this amendment.	Where force majeure events are expressly listed, it is rare for train and motor vehicle accidents to be listed. Typically the contractor takes the risk for such events and will be covered by insurance. Further, Aurizon Network should be covered by its contractual arrangements with the train operator. The amendment negatively impacts on the credibility of the SUFA documents.
Clause 1.1 - "insolvency event"	Amendment to definition of "insolvency event"	For consistency with the corresponding definition in the EISL template. ²⁰³	None given.	The QCA does not accept this amendment.	This definition, as amended, is not correct in the instance where it is used in the construction contract. The amendment negatively impacts on the credibility of the SUFA documents.
Clause 8.4	Construction documents,	Railways are built on-site	The QRC accepts these	The QCA accepts Aurizon	This amendment, as varied by

²⁰³ Aurizon Network, sub. 2, p. 43, item CA1.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
	including those relating to the manufacture of off-site works under the contract, will be available on site until practical completion and then for a period of seven years at an office of the contractor in Brisbane. The construction documents will not be available at other locations.	where they are required. Sometimes these locations are remote. In nearly all circumstances there are no permanent buildings in the location of the works. Neither the SUFA trustee nor Aurizon Network is likely to have offices or staff located on site following practical completion. The SUFA trustee will have better access to documents located in Brisbane and can request access to them and review them prior to any site visit. ²⁰⁴	changes. ²⁰⁵	Network's amendment.	the QCA, improves the credibility and workability of the SUFA documents.
Clause 8.5(a)(i)	Modified to reflect the parties' rights and obligations under the other SUFA template documents.	The confidentiality obligation should take into account the existence of the SUFA transaction as a whole. ²⁰⁶	The QRC accepts these changes. ²⁰⁷	The QCA accepts Aurizon Network's changes.	This amendment improves the credibility and workability of the SUFA documents.
Clause 11.2	Changes in legislative requirements are treated as adjustment events, even if such changes were reasonably anticipated before the date of the construction contract.	No risk contingency in respect of future changes to legislative requirements will be included in the contract sum. ²⁰⁸	The QRC accepts these changes. ²⁰⁹	The QCA accepts Aurizon Network's position; however, has not included the amendment to clause 11.2(a)(iv) as it is not necessary.	This amendment improves the credibility and workability of the SUFA documents.
Clause 23.1	Deletion of the Aurizon	The EISL has separate	The QRC does not accept these	The QCA accepts Aurizon	In respect of the QRC's

²⁰⁴ Aurizon Network, sub. 2, p. 44, item CA3.

²⁰⁵ QRC, sub. 29, p. 13, item 4.

²⁰⁶ Aurizon Network, sub. 2, p. 44, item CA4.

²⁰⁷ QRC, sub. 29, p. 13, item 5.

²⁰⁸ Aurizon Network, sub. 2, p. 46, item CA6

²⁰⁹ QRC, sub. 29, p. 13, item 7.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
	Network's insurance obligations relating to the operation of trains over the extension infrastructure during the construction period.	insurance requirements in respect of the running of trains. It is not necessary for the construction contract to address such requirements. ²¹⁰	changes as the insurances taken out under the EISL would not necessarily cover any damage to the works as defined under the construction contract. ²¹¹	Network's deletion.	comment, the QCA notes that clause 9.1 of the EIHL would also apply which would protect the SUFA trustee in the instances the QRC refers to. This amendment improves the credibility and workability of the SUFA documents.
Clause 24.2	Where the Aurizon Network provides a notice under clause 35A.2(a) of the construction contract in respect of a latent condition, that notice will be taken to have satisfied the written statement requirement under clause 24.2 of the construction contract.	There should not be a requirement to make a claim under clause 35A.2(a) of the construction contract in order to satisfy the written statement requirement under clause 24.2 of the construction contract. ²¹²	None given.	The QCA does not accept this amendment.	<p>Firstly, this is a minor issue as Aurizon Network will need to make a claim under clause 35A.2(a) of the construction contract in any case. Accordingly, this change has no consequence and is unnecessary.</p> <p>Further, the QCA does not agree with this proposition. The information required by a clause 24.2 statement cuts across both the notification and claim requirements of clause 35A of the construction contract. Merely issuing a notice will not provide all the information required by clause 24.2 of the contract.</p> <p>Not making this amendment protects the credibility and workability of the SUFA documents.</p>

²¹⁰ Aurizon Network, sub. 2, p. 46, item CA7.

²¹¹ QRC, sub. 29, p. 14, item 8.

²¹² Aurizon Network, sub. 2, pp. 46–47, item CA8.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
Clause 25A(a)(i)	Deletion of part of Aurizon Network's obligations in respect of contamination.	The contamination obligation in the UT3 SUFA final decision form of the construction contract imposes an exceedingly onerous standard that would result in a very high cost of delivering the works, which would not be in the business interests of the access seekers. ²¹³	The QRC does not accept this deletion, as it results in an unacceptable level of responsibility for Aurizon Network in relation to site contamination and related matters. ²¹⁴	The QCA accepts Aurizon Network's deletion.	The QCA does not fully understand the QRC's comments as Aurizon Network must still comply with legislative requirements. In the QCA's view, the clause (as amended) provides a fair allocation of risk. This amendment improves the credibility and workability of the SUFA documents.
Clause 33.9	Amendment to clarify the intention of the clause.	Clause 33.9(a): changed to expressly provide that Aurizon Network can claim a mark-up for overheads and profit. Clause 33.9(b): to clarify that Aurizon Network should not be able to recover twice for the same loss. ²¹⁵	The QRC does not accept these changes. In the QRC's view, where an extension of time for a compensable cause has been issued, the damages payable to Aurizon Network should not include a mark-up for profit and overhead. This is not a usual position. ²¹⁶	Clause 33.9(a): The QCA accepts Aurizon Network's amendment. Clause 33.9(b): The QCA does not accept Aurizon Network's amendment.	Clause 33.9(a): This amendment improves the credibility and workability of the SUFA documents. Clause 33.9(b): The QCA does not agree with Aurizon Network's interpretation of the intent of the clause. This clause is dealing with the situation where a compensable cause and a different adjustment event overlap. To the extent of any overlap, Aurizon Network can only claim for the adjustment event. Not making this amendment retains the credibility and workability of the SUFA documents.
Clauses 35.3, 35.4	Clause 35.4 moved to	None given.	The QRC does not accept these	The QCA does not accept these	Aurizon Network has not

²¹³ Aurizon Network, sub. 2, p. 47, item CA9.

²¹⁴ QRC, sub. 29, p. 14, item 9.

²¹⁵ Aurizon Network, sub. 24, p. 42, clause 33.9.

²¹⁶ QRC, sub. 29, p. 15, item 13.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
and 35A.4(c)	subclause 35A.4(c) and is only applicable to adjustment events, not discretionary variations as well. Consequential amendment to clause 35.3. ²¹⁷		changes. The principles that the independent certifier is to have regard to should be the same whether or not an adjustment event or a discretionary variation is being considered. ²¹⁸	amendments.	provided a compelling reason for the amendments. Further: <ul style="list-style-type: none"> • There are no assessment criteria for discretionary variations under clause 35. • The express statement that the assessment of extension of times was subject to clause 33 was not repeated. Not making these amendments protects the credibility and workability of the SUFA documents.
Clause 35A.2	Notification of an adjustment event by Aurizon Network is only required within 14 days of Aurizon Network of becoming aware of it (or ought to have been aware), with a follow-up notice 42 days later and every 28 days thereafter	The original drafting created a time bar despite a lack of knowledge by Aurizon Network of an adjustment event. Aurizon Network said that 42 and 28 days were more reasonable and practicable. ²¹⁹	The QRC does not accept these changes, as the extensions to timings were not appropriate and the inclusion of awareness may delay communication between the parties. ²²⁰	The QCA accepts the inclusion of a reference to Aurizon Network's knowledge (or deemed knowledge). However, in the QCA's view, the time period suggested by Aurizon Network are too long. The QCA has provided for shorter time periods.	This amendment improves the credibility and workability of the SUFA documents.
Clauses 35A.4(a) and (b)	Amendments to enable the independent certifier to submit an interim determination where the adjustment event or its effects continue beyond the	Amended to enable the Independent Certifier to submit an interim determination where the adjustment event or its effects	The QRC does not accept these changes. The principles that the independent certifier is to have regard to should be the same whether or not an	The QCA does not accept these amendments.	Aurizon Network has not provided a compelling reason for the amendments has been given. Further: <ul style="list-style-type: none"> • The intent of the

²¹⁷ Aurizon Network, sub. 16, clauses 35.3 and 35.4.

²¹⁸ QRC, sub. 29, p. 15, item 14.

²¹⁹ Aurizon Network, sub. 2, p. 47, item CA10.

²²⁰ QRC, sub. 29, p. 16, item 15.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	Stakeholders' submissions	QCA draft decision	QCA reasoning
	42-day period. New clause 35A.4(b) added to provide for ongoing events, the original direction is an "interim determination" and the updated determinations after the updated claims are submitted is a final determination.	continue beyond the 42-day period. ²²¹	adjustment event or a discretionary variation is being considered. ²²²		<p>amendments made by Aurizon Network was already covered by the existing drafting.</p> <ul style="list-style-type: none"> • The need to designate all but the final direction as "interim determinations" does not seem to serve any purpose. • The new drafting does not cater for the fact there might be multiple update claims and multiple updated determinations. <p>Not making these amendments protects the credibility and workability of the SUFA documents.</p>
Clause 36.1(a)	Deletion of superfluous wording.	None given.	None given.	The QCA accepts this amendment.	This amendment improves workability.
Clause 36.1(b)	Inclusion in payments claims of the 'cost of plant and materials not incorporated into the works.	It is customary under design and construction contracts in the Australian market for procurement to constitute part of the works, and for principals to make payments to contractors in respect of procurement activities. ²²³	The QRC does not accept these changes. In the QRC's view, it is not appropriate as payment for unfixed work creates a security risk. This risk can be managed by Aurizon Network agreeing similar terms with its subcontractors. ²²⁴	The QCA accepts Aurizon Network's position.	This amendment improves credibility and workability.

²²¹ Aurizon Network, sub. 2, p. 47, item CA10.

²²² QRC, sub. 29, p. 16, item 16.

²²³ Aurizon Network, sub. 2, pp. 47–48, item CA11.

²²⁴ QRC, sub. 29, p. 16, item 17.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
Clause 38.4	The SUFA trustee may only terminate the construction contract if, within 30 days of its suspension of payment, Aurizon Network has neither remedied its breach nor, if the breach is not capable of remedy, made other arrangements to the reasonable satisfaction of the SUFA trustee.	Aurizon Network should be provided with a reasonable period to show cause, following suspension of payment, before the SUFA trustee may terminate the construction contract for Aurizon Network's default. ²²⁵	The QRC does not accept these changes. In the QRC's view, if, following a suspension, the contractor is provided with an opportunity to show reasonable cause, remedy the breach or make other arrangements, then each of these matters should be to the reasonable satisfaction of the SUFA trustee. ²²⁶	The QCA does not accept these amendments.	The combination of clauses 38.2, 38.3 and 38.4 as provided for in the final decision form of construction contract for the 2013 SUFA DAAU provides a balanced termination methodology for both parties. Not making these amendments protects the credibility and workability of the SUFA documents and is in the interests of the parties.
Clause 38.12	Aurizon Network proposed amendments to when compensation payable to the SUFA trustee is payable Such compensation amount shall be the SUFA trustee's sole entitlement from Aurizon Network in respect of the construction contract's termination.	The amendments take into account the method for including assets in the RAB under UT4. The purpose of this compensation mechanism is to require Aurizon Network to make a liquidated damages-style compensation payment to the SUFA trustee in respect of its loss due to 'contractor-caused' termination. For clarity it should be established that Aurizon Network has no other liability in respect of that termination. ²²⁷	The QRC does not accept these changes. It is not appropriate in all instances to include clause 38.12(d) such that the compensation payment is the SUFA trustee's sole entitlement to compensation arising from the termination of the construction contract. ²²⁸	The QCA accepts Aurizon Network's position; however, considers that the trigger for the calculation of the compensation payment should be upon some or all of the expended contract sum being submitted for inclusion in the RAB.	These amendments provide clarity to the termination process, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.

²²⁵ Aurizon Network, sub. 2, p. 48, item CA13.

²²⁶ QRC, sub. 29, p. 16, item 18.

²²⁷ Aurizon Network, sub. 2, p. 48, item CA14.

²²⁸ QRC, sub. 29, p. 17, item 19.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
Clause 41.4	Process for appointing an expert has been amended for consistency with the process in clause 5.3(a) of the EPA.	Consistency with the EPA. ²²⁹	The QRC accepts these changes. ²³⁰	The QCA accepts these amendments.	These amendments provide clarity, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.
Clauses 43.1(b)(iv)(A) and 43.2(a)(vii)	The carve-out to the limitation for liability of loss no longer includes the gross negligence, wilful default of Aurizon Network or damage to the work under the construction contract. ²³¹	Amended for consistency with typical market provisions regarding limitation of liability	The QRC does not accept these changes as they are not appropriate. ²³²	Other than for the carve-out for the work under the construction contract, the amendments not accepted.	The carve-out for the work under the construction contract is a reasonable allocation of risk. This amendment improves credibility and workability. The QCA does not agree with the other amendments as they result in an inappropriate allocation of risk. Not making these amendments protects credibility and workability and is in the interests of the parties.
Annexure A, Items 7B and 7C	'Hard-wiring' of the quantum of the Advance Payment and the Advance Deduction Amount.	To provide clarity. ²³³	The QRC does not accept these changes. ²³⁴	The QCA accepts Aurizon Network's position.	These amendments provide clarity, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.
Annexure A, Item	The liability cap is not 'hard-	This is a matter for commercial	The QRC does not accept these	The QCA does not accept this	In the QCA's view, the liability

²²⁹ Aurizon Network, sub. 24, clause 41.4.

²³⁰ QRC, sub. 29, p. 17, item 20.

²³¹ Aurizon Network, sub. 24, clauses 43.1 and 43.2.

²³² QRC, sub. 29, p. 17, items 21 and 22.

²³³ Aurizon Network, sub. 2, pp. 49–50, item CA15.

²³⁴ QRC, sub. 29, p. 18, item 23.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
37	wired'.	negotiation or subject to determination in accordance with the 'consistent the market practice' principle. ²³⁵	changes. ²³⁶	amendment.	cap should be 'hard-wired' at the contract sum as Aurizon Network should be liable for replacing the whole of the works where that is required. Not making these amendments protects the credibility and workability of the SUFA documents and is in the interests of the parties.
FIA signing clause	Aurizon Network to sign under s. 127 of the Corporations Act.	This position is consistent with Aurizon Network's standard corporate practice on the execution of legal documents of this nature. ²³⁷	None given.	The QCA accepts these amendments.	These amendments provide clarity, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.
8. Integrated Network Deed					
Clause 19.1	Amendments to clauses 19.1(a) and 19.1(b) ²³⁸	None given.	The QRC accepts these changes. ²³⁹	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.
9. UT4					
Clause 8.8.1(a)(iv)	Amendment of clause 8.8.1(a)(iv) ²⁴⁰	None given.	None given.	The QCA accepts this amendments.	This amendment improves the credibility of SUFA.
Clause 8.8.1(a)(vi)(B)	Amendment of clause 8.8.1(a)(vi)(B) ²⁴¹	None given.	The QRC accepts these changes. ²⁴²	The QCA accepts this amendment.	This amendment improves the credibility of SUFA.

²³⁵ Aurizon Network, sub. 2, p. 50, item CA16.

²³⁶ QRC, sub. 29, p. 18, item 23.

²³⁷ Aurizon Network, sub. 2, p. 51, item FIA1.

²³⁸ Aurizon Network, sub. 12, clause 19.1

²³⁹ QRC, sub. 29, p. 23, item 1.

²⁴⁰ Aurizon Network, sub. 3, clause 8.8.1(a)(iv).

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
Clause 8.8.1(b)	Aurizon Network is only required to "request" the State to enter into a User Funding Agreement. ²⁴³	None given.	The QRC does not accept these changes. In the QRC's view, it is not enough to just request. ²⁴⁴	The QCA does not accept this amendment.	As the relationship with the State is between Aurizon Network and the State (and not with the SUFA trustee or the Preference Unit Holders), Aurizon Network is best placed to progress matters with the State. This amendment negatively impacts the credibility of SUFA.
Clause 8.8.3	Deletion of former clauses 8.8.3(a) to (d).	Aurizon Network's obligation under clause 8.8.3(a) has been satisfied. ²⁴⁵	The QRC accepts these changes. ²⁴⁶	The QCA does not accept this amendment.	Since our draft decision is to refuse to approve the UT4 SUFA DAAU, the process referred to in these clauses is still underway.
Clause 8.8.3(d)	New clause 8.8.3(d) providing for Aurizon Network and the QCA to cooperate in seeking statutory severance from the State of Queensland in respect of user funded expansions. ²⁴⁷	None given.	The QRC accepts this change. ²⁴⁸	The QCA has accepted this amendment in part and has clarified the QCA's role.	A process for statutory severance improves the credibility of SUFA. However, in the QCA's view, Aurizon Network must seek the statutory severance with reasonable assistance from the QCA.
Clause 8.8.4	Aurizon Network shall seek binding guidance as to the key	The most appropriate 'product' to be sought from the QCA is	The QRC accepts these changes. ²⁵⁰	The QCA accepts these amendments.	These amendments improve the credibility of SUFA.

²⁴¹ Aurizon Network, sub. 3, clause 8.8.1(a)(vi)(B).

²⁴² QRC, sub. 29, p. 3, item 1.

²⁴³ Aurizon Network, sub. 3, clause 8.8.1(b).

²⁴⁴ QRC, sub. 29, p. 3, item 2.

²⁴⁵ Aurizon Network, sub. 2, p. 7.

²⁴⁶ QRC, sub. 29, p. 3, item 3.

²⁴⁷ Aurizon Network, sub. 3, clause 8.8.3(d).

²⁴⁸ QRC, sub. 29, p. 3, item 4.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>Stakeholders' submissions</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>
	tax outcomes of a notional user funding transaction based on the Standard User Funding Agreement, with a streamlined approach from that in the UT3 SUFA final decision.	'binding guidance'. Aurizon Network considers that the UT3 SUFA final decision proposal is unworkable. Aurizon Network considers that the matters to be addressed in the application for binding guidance should be specified in general terms, so as to provide flexibility to address all key tax issues that arise during the course of the application process. ²⁴⁹			
Clause 12.1	Amendments to definitions ²⁵¹	None given.	The QRC accepts these changes. ²⁵²	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.

²⁵⁰ QRC, sub. 29, p. 3, item 5.

²⁴⁹ Aurizon Network, sub. 2, p. 51, item AU1.

²⁵¹ Aurizon Network, sub. 3, clause 12.1.

²⁵² QRC, sub. 29, p. 3, items 7 and 8.

APPENDIX B: UT4 SUFA DAAU MARK-UPS

Our proposed mark-ups of the UT4 SUFA DAAU documents (listed below) are attached separately.

(1) QCA mark-up of the following pro forma SUFA agreements:

- Trust Deed (TD)
- Subscription and Unit Holders Deed (SUHD)
- Construction Contract (Construction Agreement and Formal Instrument of Agreement, CA and FIA)
- Rail Corridor Agreement (RCA)
- Extension Infrastructure Sub-Lease (EISL)
- Extension Project Agreement (EPA)
- Access Agreement Specific Terms Deed (AASTD)
- Specific Security Agreement (SSA)

(2) QCA mark-up of amendments required to UT4 to give effect to SUFA.

In this draft decision, we have not proposed amendments to the following pro forma SUFA documents submitted by Aurizon Network in the UT4 SUFA DAAU; hence they are unchanged:

- Integrated Network Deed (IND)
- Extension Infrastructure Head-Lease (EIHL)
- Financing Side Deed (FSD)

APPENDIX C: LIST OF STAKEHOLDERS' SUBMISSIONS

Table 5 Submissions received by the QCA

<i>Number</i>	<i>Stakeholder</i>	<i>Submission item</i>	<i>Date</i>
1	Aurizon Network	UT4 SUFA DAAU cover letter	January 2017
2	Aurizon Network	Covering submission	January 2017
3	Aurizon Network	Schedule 2, UT4—marked up	January 2017
4	Aurizon Network	Subscription and Unit Holders Deed—marked up	January 2017
5	Aurizon Network	Subscription and Unit Holders Deed—clean	January 2017
6	Aurizon Network	Trust Deed—marked up	January 2017
7	Aurizon Network	Trust Deed—clean	January 2017
8	Aurizon Network	Specific Security Agreement—marked up	January 2017
9	Aurizon Network	Specific Security Agreement—clean	January 2017
10	Aurizon Network	Rail Corridor Agreement—marked up	January 2017
11	Aurizon Network	Rail Corridor Agreement—clean	January 2017
12	Aurizon Network	Integrated Network Deed—marked up	January 2017
13	Aurizon Network	Integrated Network Deed—clean	January 2017
14	Aurizon Network	Financing Side Deed—marked up	January 2017
15	Aurizon Network	Financing Side Deed—clean	January 2017
16	Aurizon Network	Design and Construct Contract—marked up	January 2017
17	Aurizon Network	Design and Construct Contract—clean	January 2017
18	Aurizon Network	Extension Project Agreement—marked up	January 2017
19	Aurizon Network	Extension Project Agreement—clean	January 2017
20	Aurizon Network	Extension Infrastructure Sub-Lease—marked up	January 2017
21	Aurizon Network	Extension Infrastructure Sub-Lease—clean	January 2017
22	Aurizon Network	Extension Infrastructure Head Lease—marked up	January 2017
23	Aurizon Network	Extension Infrastructure Head Lease—clean	January 2017
24	Aurizon Network	Construction Agreement—marked up	January 2017
25	Aurizon Network	Construction Agreement—clean	January 2017
26	Aurizon Network	Access Agreement Specific Terms Deed—marked up	January 2017
27	Aurizon Network	Access Agreement Specific Terms Deed—clean	January 2017
28	Pacific National	Pacific National submission re: AN 2017 SUFA DAAU	April 2017
29	QRC	2017 SUFA DAAU QRC Submission	April 2017

REFERENCES

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— 2014a, *Aurizon Network's 2013 Standard User Funding Agreement DAAU*, position paper, May.

— 2014b, *Aurizon Network's 2013 Standard User Funding Agreement DAAU*, draft decision, October.

— 2016a, *Aurizon Network's 2013 SUFA DAAU: Rental streams if the CQCN is not a declared service*, position paper, April.

— 2016b, *Aurizon Network's 2013 Standard User Funding Agreement Draft Amending Access Undertaking*, final decision, June.

ACRONYMS

AASTD	Access Agreement Specific Terms Deed
Aurizon Holdings	Aurizon Holdings Ltd
Aurizon Network	Aurizon Network Pty Ltd (formerly known as QR Network Pty Ltd)
ATO	Australian Tax Office
CITS	Commercially integrated transportation services
cl., cls.	clause, clauses
CQCN	central Queensland coal network
DAU	Draft Access Undertaking
DAAU	Draft Amending Access Undertaking
EIHL	Extension Infrastructure Head Lease
EISL	Extension Infrastructure Sub-Lease
EPA	Extension Project Agreement
FSD	Financing Side Deed
FIA	Formal Instrument of Agreement
IND	Integrated Network Deed
OPRA	Operating and performance risk allowance
PUH	Preference unit holder
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i>
QR	Queensland Rail
QRC	Queensland Resources Council
QTH	Queensland Treasury Holdings
RAB	Regulatory asset base
RCA	Rail Corridor Agreement
s., ss.	section, sections
SSA	Specific Security Agreement
SUFA	Standard User Funding Agreement
SUHD	Subscription and Unit Holders Deed
UT3	Aurizon Network's 2010 access undertaking
UT4	Aurizon Network's 2016 access undertaking
WACC	Weighted average cost of capital