

Final decision

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

December 2017

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

QCA SUFA team

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EXECUTIVE SUMMARY

The Standard User Funding Agreement (SUFA) is a suite of template agreements designed to provide a credible mechanism 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) final decision is to refuse to approve Aurizon Network's UT4 SUFA DAAU. This final 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 Queensland Competition Authority Act 1997 (the QCA Act).

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 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 accept Aurizon Network was best placed to take responsibility for and control of construction of the SUFA-funded 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 template agreements into UT3) could be realised, the UT4 process concluded with the approval of Aurizon Network's 2016 access undertaking (UT4).

As required by UT4, Aurizon Network submitted the UT4 SUFA DAAU on 11 January 2017 (that is, within 3 months of the approval of UT4), comprising:

- (a) a proposed SUFA template; and
- (b) a DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary.

UT4 SUFA DAAU and QCA's draft decision

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 changes were made in order to align the SUFA template with UT4 provisions; to improve the workability of the SUFA framework; and to address certain positions that Aurizon Network claimed would impose a cost of expansion on it and would be beyond the power of the QCA to require.

In our draft decision published in August 2017, we considered refusing to approve the UT4 SUFA DAAU. Our view in the draft decision was that the UT4 SUFA DAAU had the effect of unreasonably shifting the allocation and management of risk in the SUFA-funded model in Aurizon Network's favour. Our draft decision dismissed Aurizon Network's claim that aspects of our position on SUFA imposed a 'cost of expansion' on Aurizon Network.

We received submissions on our draft decision from Aurizon Network, Pacific National, the QRC and Queensland Treasury Holdings (QTH), which we have considered in making this final decision.

Final decision

Our final decision is to refuse to approve Aurizon Network's UT4 SUFA DAAU. Our view is that Aurizon Network's UT4 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.

This final 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. In respect of key matters identified by Aurizon Network in its UT4 SUFA DAAU submission and considered in our draft decision, we have modified our draft decision position on five matters, and maintained our draft decision position in respect of six matters. We consider that the SUFA template and the amendments to UT4, which form part of this final decision document provide a SUFA framework which is appropriate having regard to the assessment criteria in section 138(2) of the QCA Act.

Below is a summary of our final decision position on the key matters identified by Aurizon Network in its submission and considered in our draft decision.

Obligation to deliver capacity

Our final decision modifies our draft decision position.

In our draft decision we considered refusing to approve Aurizon Network's proposal that it should not be obliged to deliver capacity. Our draft decision was that Aurizon Network should be obliged to achieve the agreed or determined capacity associated with an expansion, and should further be obliged to rectify and/or pay liquidated damages for failing to meet that obligation.

We have considered Aurizon Network's concern raised in its submission on our draft decision. In particular, we have considered the adverse consequences for Aurizon Network if it is required to remedy a capacity shortfall that results from a scope determined by the QCA in a dispute process. Our final decision is:

- Where Aurizon Network is constructing to its own scope and standard, Aurizon Network should rectify the capacity shortfall and/or pay liquidated damages in respect of the failure to deliver the capacity associated with that scope and standard.
- Where Aurizon Network is constructing to a QCA determined scope and standard, Aurizon Network should not be obliged to rectify a capacity shortfall and/or pay liquidated damages to the extent that shortfall is due to the QCA determined scope and standard.

Our final decision 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.

Credit exposure during construction phase

Our final decision maintains our draft decision position, to which we have added an amendment to provide clarification.

Our draft decision provided that all preference unit holders (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).

Our final decision maintains our draft decision and also clarifies that Aurizon Network may draw on the security in the event of a non-payment by the SUFA trustee of any amounts due under the construction contract. This amendment is consistent with the intent of our draft decision.

Determination of construction contract schedules by the QCA

Our final decision maintains our draft decision position. We refuse to approve Aurizon Network's proposal in the UT4 SUFA DAAU that the QCA should make its determination regarding construction contract schedules in a dispute in accordance with applicable market practice in the construction industry.

We remain of the view 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. Aurizon Network's proposed amendments to the dispute resolution process in UT4 are not appropriate or necessary.

Availability of pricing information

Our final decision modifies our draft decision position. We accept Aurizon Network's proposal that the SUFA trustee should not share pricing information with the PUHs. We are satisfied that Aurizon Network's

proposal to make available pricing information to the SUFA trustee, the SUFA trustee's expert adviser, the financiers' expert adviser and the independent certifier, will protect the interests of PUHs.

However, our final decision maintains our draft decision that disclosure of pricing information to the QCA should not be subject to a confidentiality agreement. We remain of the view that the QCA Act provisions protect Aurizon Network's interests in terms of safeguarding its confidential information.

Events of default and acceleration of rental payments

Our final decision modifies our draft decision position in respect of the events of default. Our decision is to remove the events of default relating to Aurizon Network failing to nominate further access agreements, failing to pay a detriment amount, and creating a conflicting interest without the SUFA trustee's consent. Although these events have the effect of jeopardising the rental cash flows to the SUFA trustee, we acknowledge the mechanism of the SUFA trustee enforcing security upon the occurrence of these events may not permit the SUFA trustee to remedy the commercial problem it faces. However, in order to address the fundamental concern — that is, non-payment of rent due to Aurizon Network's actions in respect of those events — we have introduced a new event of default which may trigger acceleration. That is, where the SUFA trustee has terminated the extension infrastructure sub-lease (EISL) due to Aurizon Network's non-payment of rent or insolvency, Aurizon Network's obligation to pay the rent is accelerated.

Our final decision maintains the draft decision position 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.

Credit exposure during SUFA's operational phase (set-off)

Our final decision modifies our draft decision position.

Our draft decision considered refusing 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 considered that set-off should only relate to the rent adjustment mechanism — that is, to the monthly over and under payments of rent.

We have modified our draft decision position taking into account Aurizon Network's comments on our draft decision and considering the provisions in the form of EISL in Aurizon Network's UT4 SUFA DAAU submission. Our final decision is to accept Aurizon Network's proposal. We consider that it is appropriate to apply set-off, not only in the context of the rent adjustment mechanism but also in respect of other amounts due when that amount is agreed by parties or determined through dispute resolution.

We are satisfied Aurizon Network's proposal addresses our concerns, as it would allow the SUFA trustee (representing the PUHs) to challenge Aurizon Network's claims prior to Aurizon Network setting off any amount against the rental stream. However, we have proposed amendments to this proposal to provide a mechanism for the SUFA trustee to recover, through variation in regulated tariffs, amounts it paid on account of a change in law or change in taxes.

Dispute about amending the SUFA template

Our final decision modifies our draft decision position.

Our draft decision considered refusing to approve Aurizon Network's proposal as we considered 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 not readily permitted under the SUFA template, and any disagreement should be subject to a binding dispute resolution.

We are satisfied that the protections in UT4 provide an opportunity to address shortcomings in the SUFA template (including that the template may preclude a specific type of financing) when the template is practically tested. Those protections include Aurizon Network being required to act reasonably and in good faith in negotiating amendments to the SUFA template, and the mechanism permitting the review and amendment of the SUFA template.

Our final decision is to accept Aurizon Network's proposal that any disagreement on amendments required to the SUFA template for a specific type of finance should not be subject to binding dispute resolution, subject to clarifying that this does not preclude a dispute about whether Aurizon Network has acted reasonably and in good faith, as already required by Part 8 of UT4.

Rental arrangements

Our final decision maintains our draft decision position 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 final decision also maintains our draft decision position to refuse to approve Aurizon Network's proposed process for setting SUFA rental streams in the event that the CQCN becomes undeclared. 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.

Our final decision maintains our draft decision approach that in the event the CQCN becomes undeclared, the rent calculation methodology should permit the SUFA funders to recover, within a reasonable timeframe, the residual value of their investment made during the period when the CQCN is declared, and receive a reasonable return attributable to their investment taking into account the prevailing market conditions in the unregulated environment. Our view remains that the SUFA template should adopt a specific dispute resolution process that provides an expert panel with adequate power to determine an appropriate rent calculation methodology that achieves this post-deregulation SUFA rental objective.

Consequential loss on termination of the Infrastructure Lease

Our final decision maintains our draft decision position. We refuse to accept Aurizon Network's proposal which does not make Aurizon Network liable for consequential loss of the SUFA trustee if the Infrastructure Lease is terminated due to Aurizon Network's cause.

We maintain our position that Aurizon Network should be subject to liability for the loss (including consequential loss) of the SUFA trustee if the Infrastructure Lease is terminated due to Aurizon Network's acts, omissions or insolvency. Our final decision clarifies that the SUFA trustee's loss is capped at the value of the SUFA assets in the regulatory asset base at termination.

Cost of expansion claim

In its UT4 SUFA DAAU submission, Aurizon Network 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 facilitate financing options as alternatives to Aurizon Network funding rail infrastructure expansions in the CQCN.

Our view is Aurizon Network is responsible for its actions and the consequences of those actions with respect to the roles and responsibilities it has under the SUFA framework. As such, our view is that Aurizon Network should be liable for failing to meet its contractual obligations.

We are satisfied that the SUFA framework in the final decision is in accordance with the QCA Act.

THE ROLE OF THE QCA — TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory body 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) in accordance with its obligation under clause 8.8.3(a) of the 2016 access undertaking (UT4) to submit, within three months of the UT4 approval date of 11 October 2016, a:

- (a) proposed SUFA template; and
- (b) DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary.

The QCA is required to consider the 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.

We commenced an investigation into the UT4 SUFA DAAU on 18 January 2017, and published Aurizon Network's submission on our website and invited stakeholders to make submissions. Two stakeholders made submissions on Aurizon Network's proposal.

We released our draft decision on 10 August 2017. Four stakeholders made submissions on our draft decision.

This document represents our final decision in respect of the UT4 SUFA DAAU.

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1 INTRODUCTION

Although 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 template 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 agreements has been complex, and has involved collaboration primarily between Aurizon Network, the 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 final 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

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.

Aurizon Network to seek returns higher than regulated returns for an expansion or to not invest in expansions at all.⁵

It was in this context that the 2010 access undertaking (UT3) included an obligation on Aurizon Network to develop a 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 pay 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, should 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 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

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

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).

In accordance with these provisions, the QCA's 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 fairness to all access seekers. Further, the standard terms should provide a credible backstop position from which access seekers can choose to either adopt the standard terms or negotiate alternative terms for access.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, UT3 provided for the development of:

- 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
- 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.

The aim of these two elements was 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 the 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.

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.

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, with the trust contracting directly with the constructors of the expansion and Aurizon Network project managing the tender and construction process. It also featured the stapling of access rights to ownership of preference units.

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 committed the 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 the direct contracting, project management and stapling structure, it was anticipated that primarily larger mining companies would be able to fund a SUFA project off-balance-sheet. It was acknowledged that under this model smaller mining companies may lack sufficient funding or reserves to do the same and may find it difficult to finance an expansion.

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 template 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

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.

¹⁷ Grant Samuel 2014, p. 2.

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 to enable 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 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 alternative 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

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

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.

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 the risk and reward associated with an expansion not being or being fit-for-purpose should sit with the party that has the role of construction 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
- 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
- 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
- obliged to ensure system integrity over the whole of the network including SUFA assets
- responsible for health and safety management of the network including SUFA assets.

The industry view was that users and SUFA funders should have a high degree of input into the construction process because they 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-funded 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 direct contracting and project management structure suggested in the 2013 SUFA DAAU), as would be the case in most standard construction arrangements.

Accordingly, we required Aurizon Network to provide transparent, up-front commitments regarding scope, standard, cost and time to complete. 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, 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, we considered that clarity and certainty surrounding the outcome of the expansion process were critical to users and potential third party funders.

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 a SUFA project commencing.²³

We considered a preapproval process would provide greater certainty to all relevant parties that the prudent and efficient capital expenditure associated with the expansion would be included in the RAB, reducing 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-funded infrastructure to be integrated into the relevant CQCN railway system. Upon completion, the ownership of the infrastructure is transferred to QTH.²⁴ 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-funded infrastructure (with the rent being the SUFA trust's sole income). 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

²² An expansion process was then being developed as part of the UT4.

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.

²⁴ QTH (on behalf of the State of Queensland) owns the infrastructure constituting the CQCN, which is leased by QTH to Aurizon Network under an infrastructure lease. QTH is a party to certain SUFA template documents (see Figure 2), and execution of those documents will be subject to negotiation with, and a decision by, QTH on a transaction-by-transaction basis.

the ability to generate income from it other than through Aurizon Network. The SUFA trustee's sole income—that is, 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 template. We considered that was necessary 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')
- Provide the SUFA trustee with security over the contractual rights that effect payment of the rental cash flows²⁵, 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 (e.g. 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.

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.

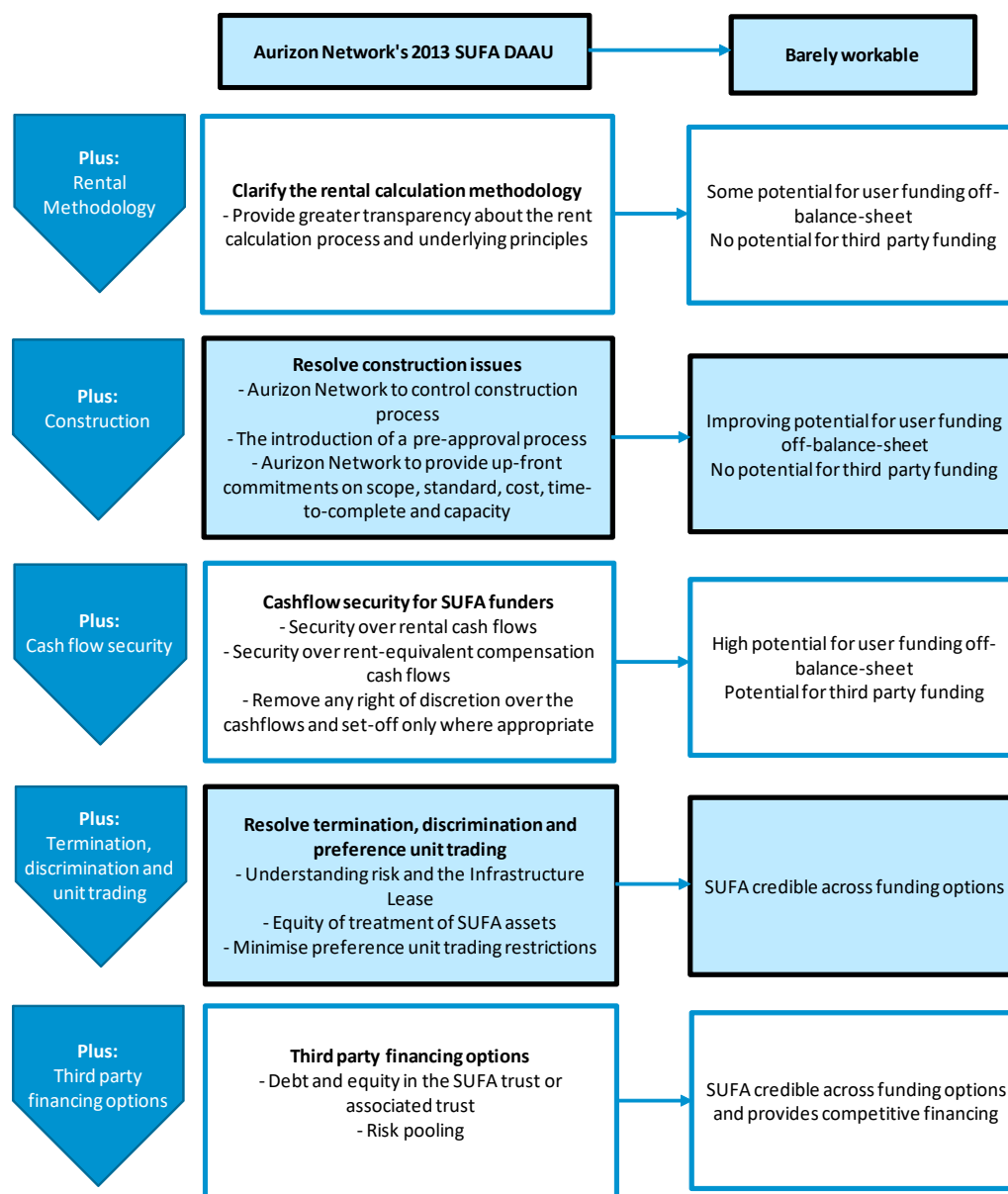
In particular, statutory severance by the Queensland Government and favourable tax rulings from the Australian Tax Office (ATO) are needed if the SUFA arrangements are to be tax efficient. Our view was that obtaining such permissions/rulings is ultimately the responsibility of Aurizon Network and SUFA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

²⁵ We note Aurizon Network had been averse to granting security in favour of the SUFA trustee over the physical SUFA-funded 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 SUFA template 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 SUFA template 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)
- a DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary.²⁶

1.4 UT4 SUFA DAAU

Aurizon Network submitted the UT4 SUFA DAAU on 11 January 2017, in accordance with its 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 SUFA template

The structure of the SUFA template in the UT4 SUFA DAAU, which comprises 12 interconnected template agreements involving nine parties, is consistent with the UT3 SUFA final decision. Figure 2 summarises the purpose of the relevant SUFA template agreements and the roles played by various parties.

²⁶ 2016 access undertaking (UT4), cl. 8.8.3(a).

Figure 2 SUFA template agreements—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-funded infrastructure
- the funding party not required to hold or obtain access rights
- unrestricted preference unit trading.²⁷

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.²⁸

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.²⁹

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.³⁰

1.5 Stakeholders' submission on the UT4 SUFA DAAU

The QRC and Pacific National made submissions on the UT4 SUFA DAAU.³¹

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.

²⁷ Aurizon Network, sub. 2, p. 3.

²⁸ Aurizon Network, sub. 2, p. 4.

²⁹ Aurizon Network, sub. 2, pp. 10–27.

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

³¹ QRC, sub. 29; Pacific National, sub. 28.

The QRC's alternative view was to:

- 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 QCA draft decision

Our draft decision, released on 10 August 2017, was to refuse to approve Aurizon Network's UT4 SUFA DAAU.

In our draft decision we considered that, to the extent the policy positions and drafting in UT4 SUFA DAAU were consistent with those in the UT3 SUFA final decision and stakeholders did not object to them, those positions remain appropriate. Accordingly, the focus in our draft decision was on matters where Aurizon Network proposed positions that differed from the UT3 SUFA final decision and on stakeholders' comments in respect of those positions.

Our view in the draft decision was that Aurizon Network's proposed SUFA DAAU had 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, Aurizon Network's proposed SUFA framework was not appropriate having regard to the assessment criteria in section 138(2) of the QCA Act.

In respect of the key matters identified by Aurizon Network in its submission, our draft decision was as follows:

- **Obligation to achieve capacity outcome**—we considered refusing to approve Aurizon Network's proposal that it was not obliged to deliver capacity as the constructor of SUFA assets. We maintained our view in 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.
- **Aurizon Network's credit exposure during construction phase**—we accepted 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-funded infrastructure. Our draft decision improved upon the 'front end payment mechanism'³² to Aurizon Network that was proposed in the UT3 SUFA final decision, and considered it appropriate for SUFA funders to provide, through the SUFA trustee, guarantees including in respect of Aurizon Network's peak termination exposure.³³
- **Determination of construction contract schedules**—we considered refusing to approve Aurizon Network's proposal that the QCA should make its determination in accordance with

³² The front end payment mechanism refers to the prepayment by the SUFA trustee under the construction contract template.

³³ Peak termination exposure refers to the estimated maximum amount due to Aurizon Network under the construction contract if it is terminated due to default by the SUFA trustee.

the applicable market practice in the Australian construction industry. Our draft decision was 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.

- **Acceleration of rental payments**—we considered refusing to approve Aurizon Network's proposal that there should be no acceleration of rent to the SUFA trustee under any circumstance. Our draft decision was 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.
- **Credit exposure during SUFA's operational phase (set-off)**—we considered refusing to approve Aurizon Network's proposal that Aurizon Network may set off any amount due to it by the SUFA trustee against rents payable to the SUFA trustee during SUFA's operational phase. Our draft decision maintained the view we held in the UT3 SUFA final decision that set-off should only relate to the rent adjustment mechanism.
- **Dispute about amending the SUFA template**—we considered refusing to approve Aurizon Network's proposal to not provide for a dispute resolution process where parties fail to agree on amendments to the SUFA template that are required to give effect to a financing option proposed by SUFA investors. Our draft decision was 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.
- **Rental arrangements**—our draft decision was 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 considered refusing to approve Aurizon Network's proposed process for setting SUFA rental streams in the event that the CQCN becomes undeclared. Our view remained that the SUFA template should provide 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 our draft decision.
- **Consequential loss on termination of the Infrastructure Lease**—we maintained our position in the UT3 SUFA final decision that if the Infrastructure Lease is terminated due to Aurizon Network cause, Aurizon Network may be liable for the SUFA trustee's loss (including consequential loss).
- **Cost of expansion claim**—we dismissed Aurizon Network's claim that aspects of our position on SUFA imposed a 'cost of expansion' on Aurizon Network, which was not permitted by the QCA Act. Our view was that Aurizon Network should be liable for failing to meet its contractual obligations associated with the roles and responsibilities it undertakes in the context of the SUFA framework.

We considered the SUFA framework in our draft decision provided an effective alternative finance and construction package that was appropriate, having regard to the assessment criteria in section 138(2) of the QCA Act.

1.7 Stakeholders' submission on the QCA's draft decision

We received four submissions on our draft decision from Aurizon Network, Pacific National, the QRC and QTH.³⁴

Aurizon Network acknowledged that the draft decision substantially addressed its concerns relating to its credit exposure during construction. However, Aurizon Network did not agree with the draft decision in relation to the other key matters including relating to Aurizon Network being obliged to deliver agreed or determined capacity as the constructor, acceleration of rental payments and binding dispute resolution for modifications to the SUFA template. On such matters, Aurizon Network reiterated its DAAU position and articulated its specific concerns with the QCA's position and submitted cogent arguments to explain the adverse effect the QCA's position would have on its legitimate business interests.

Pacific National and the QRC generally supported the draft decision. However, the QRC expressed concerns with aspects of the draft decision including in relation to SUFA funders providing guarantees to Aurizon Network during the construction phase and Aurizon Network's obligation to deliver capacity.

QTH expressed in-principle support for a SUFA template that would maintain and protect the integrity of the CQCN and its interests (on behalf of the State of Queensland) under the Infrastructure Lease. QTH stated that it will be reviewing the transaction documents for any specific SUFA project from that perspective before deciding whether to execute them.

1.8 Collaborative submission period

In their response submission on the draft decision, Aurizon Network and the QRC expressed willingness to engage with each other to identify any common ground on any of the matters being considered by the QCA in relation to the UT4 SUFA DAAU.³⁵

Following that request, the QCA allowed an additional consultation period for stakeholders to collaborate, discuss and, where possible, provide joint submissions by 31 October 2017.

No joint submission was received from stakeholders.

Aurizon Network made a supplementary submission comprising the SUFA template documents and a form of UT4, and stated they were consistent with its response submission on the draft decision. Aurizon Network's supplementary submission has been published with this final decision.

1.9 Our final decision approach

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, we remain of the view that, to the extent the UT4 SUFA DAAU incorporates policy positions and drafting of the UT3 SUFA final decision and stakeholders did not object to them, those positions remain appropriate. Interested parties should refer to the analysis in the UT3 SUFA final decision.

This final decision document focuses on matters where the positions in this UT4 SUFA DAAU are different from those in the UT3 SUFA final decision. We have made this final decision after

³⁴ Aurizon Network, sub. 30; Pacific National, sub. 31; QRC, sub. 32; QTH, sub. 33.

³⁵ Aurizon Network, sub. 30, p. 3; QRC, sub. 32, p. 4.

considering Aurizon Network's and other stakeholders submissions, including those made on our draft decision.

This final decision follows the structure of our draft decision:

- 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 matters in the UT4 SUFA DAAU and in stakeholder submissions that are not considered in Chapters 3 to 7.
- Appendix B is our amendment to the UT4 SUFA DAAU documents (i.e. SUFA template documents and amendments to UT4) that we consider appropriate.

2 LEGISLATIVE FRAMEWORK

This chapter sets out how we have interpreted and applied the statutory framework in making our final 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.³⁶

2.2 Assessment approach

On 11 January 2017, Aurizon Network submitted the UT4 SUFA DAAU in accordance with its obligation under clause 8.8.3(a) of UT4 to submit, within three months of the UT4 approval date of 11 October 2016, a proposed SUFA template and a DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary. Aurizon Network said this submission is a voluntary DAAU under section 142 of the QCA Act.

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 submitted under section 142 of the QCA Act applies.

In accordance with those requirements, the QCA must consider whether it is appropriate to approve the UT4 SUFA DAAU having regard to each of the matters mentioned in section 138(2) of the QCA Act.

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.³⁷

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 final decision on the UT4 SUFA DAAU.

³⁶ Explanatory Notes to the *Queensland Competition Authority Bill 1997*, pp. 3–4.

³⁷ Sections 138(5) and (6) of the QCA Act.

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 factors 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 submitted that 'the question is whether the access undertaking resulting from 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 said that the QCA's approach in the UT4 SUFA draft decision was reflective of a search for a 'more' or 'most' appropriate solution, and that it was not plausible to argue that SUFA would fail in the absence of the QCA's preferred positions and would succeed if they were adopted.³⁸

Aurizon Network stated that the correct application of the 'appropriate' test was particularly important in the context of the 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. In this context, Aurizon Network reiterated that there was no single appropriate approach to transaction documentation for such projects, let alone to standard-form documents intended to operate as a 'safe harbour' framework.³⁹

The QCA agrees that it is required to consider whether the UT4 SUFA DAAU, comprising:

- (a) a proposed SUFA template; and

³⁸ Aurizon Network, sub. 2, p. 5; sub. 30, pp. 45.

³⁹ Aurizon Network, sub. 2, p. 5; sub. 30, p. 5

- (b) a DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary,

is 'appropriate' by reference to the factors in section 138(2) of the QCA Act.

The question for the QCA to consider is not whether a SUFA would fail or succeed, but whether the QCA considers it appropriate to approve the UT4 SUFA DAAU having regard to the section 138(2) factors. The QCA has approached its assessment of the UT4 SUFA DAAU from this perspective.

The QCA considers that, for example, an appropriate SUFA template is one that provides an appropriate allocation of risk and liability taking into account the various section 138(2) factors.

The QCA also agrees that the terms in a standard form of SUFA may not be fit-for-purpose for all expansion projects. In particular, we consider that the financing arrangement in the SUFA template may need to be modified to enable an efficient form of financing for SUFA projects on a case-by-case basis; that is consistent with the underlying allocation of risk and liability. Therefore, in assessing whether it is appropriate to approve the UT4 SUFA DAAU, we have considered whether this DAAU allows the SUFA funding framework to be flexible or subject to amendment to allow for different types of financing—see Chapter 5 of this final decision document.

'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.⁴⁰ We consider that this approach applies here.

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 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).

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

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

⁴⁰ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

- 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 an 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 are 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 template 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 unfairly treated if they 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 the 'workable, bankable and credible' requirement, as described above, is aligned with the object of Part 5 of the QCA Act, the public interest and the interests of access seekers, and also has regard to the effect of excluding existing assets for pricing purposes. This is because, among other things, such a framework promotes efficient investment, enables expansion to meet access seekers' capacity requirements and allows as many financing options for, and potential participants to, a SUFA as possible to promote access. Furthermore, a 'workable' SUFA provides an appropriate allocation of risk and liability that has regard to, among other factors, the legitimate business interests of Aurizon Network, interests of access seekers and the SUFA funders.

Accordingly, in our assessment of the UT4 SUFA DAAU, we have given this requirement significant weight under section 138(2)(h) of the QCA Act.

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 upon 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 final 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. It was considered that the development of SUFA, as a standard template, will provide guidance to parties in negotiating a user funding agreement. In that respect, the SUFA framework is designed to provide baseline funding arrangements and set the responsibilities of parties involved (including Aurizon Network) and would, hopefully, reduce the number of access disputes that may be required.

Aurizon Network said in its UT4 SUFA DAAU submission that aspects of the QCA's 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'.⁴¹ Aurizon Network also questioned the basis on which the QCA

⁴¹ Aurizon Network, sub. 2, pp. 9, 11.

sought to impose upon it risks that it would not assume when funding its own expansion of the network, and for which it is not otherwise compensated through regulated returns.⁴²

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.⁴³

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.⁴⁴ The SUFA framework is designed to do just that—to be a suite of standard agreements to facilitate financing options as alternatives to Aurizon Network funding rail infrastructure expansions in the CQCN.

We consider that section 119 of the QCA Act is not intended for Aurizon Network to entrench its position as a monopoly provider of the declared service. It is also not intended to provide Aurizon Network with the ability to use its monopolist position to pass on risks, which it can manage or control, associated with the roles and responsibilities it undertakes (or has chosen to undertake) 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, having regard to the section 138(2) factors.

The risks (that Aurizon Network said it would not assume when funding its own expansion and that we consider appropriate for Aurizon Network to carry) would arise due to Aurizon Network's failure to meet its contractual obligations with the other SUFA parties (e.g. Aurizon Network taking action that jeopardises rental cash flows). We consider Aurizon Network is, due to the roles and responsibilities it undertakes (or has chosen to undertake) in the context of the SUFA framework, the party most capable of managing and controlling such risks, having regard to the section 138(2) factors.

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

⁴² Aurizon Network, sub. 30, p. 6.

⁴³ QCA Act, s. 119(2)(c).

⁴⁴ QCA Act, s. 119(5)(c).

We are also of the view that the SUFA template should aim to be 'stand-alone' from a technical legal perspective. The interaction of the SUFA template 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 a SUFA project. It is intended that only the schedules and annexures of the construction contract will require negotiation. The schedules and annexures are project-specific, and dependent on the outcome of the feasibility study as well as, if relevant, the outcome of any dispute. 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-funded infrastructure, with the interests of the PUHs, access seekers and 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 certainty about the SUFA project deliverables.

In respect of the construction contract, our final decision is the same as our draft decision on the following points:

- Disputes relating to completion of schedules and annexures to the construction contract are access disputes and should be resolved in accordance with the provisions of the QCA Act.*
- The SUFA trustee should provide Aurizon Network with guarantees in respect of Aurizon Network's peak termination cost. We clarify that Aurizon Network can draw on this security in the event the SUFA trustee fails to rectify any non-payment of amounts due under the construction contract.*

However, our final decision differs from the draft decision as follows:

- Where Aurizon Network is constructing to its own scope and standard, Aurizon Network should rectify a capacity shortfall and/or pay liquidated damages in respect of the failure to deliver the capacity associated with that scope and standard.*
- Where Aurizon Network is constructing to a QCA determined scope and standard then Aurizon Network should not be required to remedy a capacity shortfall and/or pay liquidated damages to the extent that the shortfall is due to the QCA determined scope and standard (the difference between the Aurizon Network scope and standard and the QCA determined scope and standard is referred to as a scope difference in this chapter).*
- We accept Aurizon Network's position in regard to price information disclosure to parties other than the QCA. However, we maintain our draft decision that disclosure of information to the QCA should not be subject to a confidentiality agreement.*

Overview

The construction contract (i.e. the construction agreement and the formal instrument of agreement) included in Aurizon Network's UT4 SUFA DAAU adopts a number of positions contained in the UT3 SUFA final decision. These include:

- Aurizon Network constructs the SUFA-funded infrastructure.
- A conventional contractual structure is adopted where Aurizon Network is the construction contractor and the SUFA trustee (representing the SUFA funders) is the principal, and the standard SUFA construction agreement is based on the Australian Standard Construction contract (i.e. AS 4902–2000).

- Aurizon Network provides up-front commitments with respect to construction scope, standard, cost and time-to-complete (Aurizon Network did not propose up-front commitment with respect to capacity delivered).
- The construction contract is based on a contract pricing model that allows for a lump sum, provisional sums, discretionary variations and adjustment events.

Since these positions are consistent with the UT3 SUFA final decision construction contract and stakeholders did not object to them, our final decision maintains our draft decision that these positions remain appropriate and refer interested parties to the analysis in Chapters 6 and 7 of the UT3 SUFA final decision.⁴⁵

However, some positions in the UT4 SUFA DAU on specific matters relating to the construction contract of a SUFA are different from the UT3 SUFA final decision. Aurizon Network has also proposed amending Parts 8 and 11 of UT4 which affect the SUFA template. Our draft decision and stakeholders' comments on our draft decision in respect of those matters are summarised in Table 1 and addressed in sections 3.1 to 3.4 of this final decision document. The other amendments Aurizon Network proposed to the construction contract are considered in Appendix A of this final decision document.

Table 1 Construction contract—summary of key positions

<i>Summary of the draft decision</i>	<i>Aurizon Network's response</i>	<i>Other stakeholders' response</i>	<i>QCA final decision</i>
Obligation to deliver capacity			
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 SUFA template should not impose any adverse financial consequences on Aurizon Network should a capacity deficiency arise. UT4 capacity shortfall mechanism is appropriate.	The QRC and Pacific National said Aurizon Network should be obliged to deliver agreed capacity. The QRC said that obligation should exclude matters outside Aurizon Network's control.	See section 3.1
Credit exposure on construction contract			
SUFA funders to provide, through the SUFA trustee, guarantees including in respect of Aurizon Network's peak termination exposure.	Recourse to security should apply in respect of any unrectified failure to make a payment under the construction contract.	The QRC restated the view that security from the SUFA trustee for its obligations under the construction contract should not be required.	See section 3.2
Determination of construction contract schedules by the QCA			
A dispute about SUFA construction contract schedules is an access dispute, and the QCA's determination will be in accordance with division 5 of Part 5 of the QCA Act.	Incorporate a market equivalence requirement for the determination of disputes by QCA to provide certainty.	No further stakeholder comments.	See section 3.3
Availability of pricing information			

⁴⁵ QCA, UT3 SUFA final decision, pp. 61–118.

<i>Summary of the draft decision</i>	<i>Aurizon Network's response</i>	<i>Other stakeholders' response</i>	<i>QCA final decision</i>
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.	Aurizon Network prepared to provide information only to parties that need to know it and subject to confidentiality arrangements.	No further stakeholder comments.	See section 3.4

3.1 Obligation to deliver capacity

Our UT3 SUFA final decision required that Aurizon Network provide a capacity warranty as part of its general warranties under the construction contract, and obliged Aurizon Network to rectify and/or pay liquidated damages for failing to meet the warranted capacity.⁴⁶

Aurizon Network's UT4 SUFA DAAU did not include a capacity warranty nor a rectification/liquidated damages regime for failing to deliver the capacity.⁴⁷ Pacific National and the QRC disagreed with a SUFA that did not include a capacity warranty.⁴⁸

Our draft decision refused to approve Aurizon Network's proposal. We maintained our view that Aurizon Network, as the constructor of the expansion, should be obliged to deliver an agreed or determined capacity associated with that expansion, and should be obliged to rectify and/or pay liquidated damages for failing to meet that capacity obligation.⁴⁹

Stakeholders' submissions

Obligation to deliver capacity

Aurizon Network rejected the draft decision, whereas the QRC and Pacific National generally agreed with it.

Aurizon Network considered that the SUFA template should not impose any adverse financial consequences on Aurizon Network should a capacity deficiency arise. Aurizon Network submitted that the capacity shortfall mechanism in UT4 provides an effective mechanism for rectifying a capacity deficiency. Aurizon Network stated that, under UT4:⁵⁰

If Aurizon Network proposes a project scope for an expansion, that scope is documented in a User Funding Agreement and the project results in a capacity shortfall, Aurizon Network **must** rectify the implications of that capacity shortfall.⁵¹

In a more complex scenario where Aurizon Network proposes an expansion's project scope, a different scope is documented in a User Funding Agreement and the project results in a capacity shortfall,

⁴⁶ QCA UT3 SUFA final decision, pp. 66–67, 87–89.

⁴⁷ Aurizon Network, sub. 2, pp. 10–12.

⁴⁸ Pacific National, sub. 28, p. 2; QRC, sub. 29, p. 12.

⁴⁹ QCA UT4 SUFA draft decision, pp. 26–29.

⁵⁰ Aurizon Network, sub. 30, pp. 9–10.

⁵¹ Section 8.9.4(a)(ii)(A) of the form of UT4 that is part of the UT4 SUFA DD.

- the Access Seekers **may** elect to fund an Expansion to address the portion of that capacity shortfall that corresponds to the difference between the Aurizon Network-proposed scope and the contracted scope,⁵² and
- subject to the Access Seekers making that election, Aurizon Network **must** rectify the implications of that capacity shortfall to the extent that it would have occurred had the Aurizon Network-proposed scope been adopted,⁵³

so the full implications of that capacity shortfall are rectified.

Aurizon Network said that the QCA had not addressed the adverse consequences for Aurizon Network of it failing to achieve the capacity associated with a scope determined by the QCA in a dispute resolution process. Further, Aurizon Network submitted that the proposed arrangements encourage gaming by access seekers and that it would prejudice Aurizon Network's ability to meet customers' needs by impairing Aurizon Network's ability to enable access seekers to choose their optimal scope/expected capacity solution.

The QRC considered that, for a SUFA project to be bankable, it was important Aurizon Network has a clear obligation to deliver the contracted capacity (excluding matters outside Aurizon Network's control after execution of the construction contract), noting that it is market standard for a construction contractor to warrant the capacity of the work it has designed and constructed.⁵⁴ Pacific National believed that Aurizon Network should be obliged to deliver any capacity agreed through a SUFA process and be held accountable for any capacity shortfall. Pacific National also wanted assurance that existing access holders are not negatively impacted by a SUFA expansion and that any negative impacts would be addressed through the access undertaking.⁵⁵

Acknowledgement of pre-estimate of trustee's loss

Aurizon Network was not prepared to provide an acknowledgement in the construction contract that the rate of liquidated damages associated with a capacity shortfall was a genuine pre-estimate of the SUFA trustee's loss unless Aurizon Network had agreed that rate (which would not be the case where the rate of the liquidated damages had been determined by the QCA). If the rate was determined, and Aurizon Network provided the acknowledgement, Aurizon Network said that it would be making a false representation, which may constitute 'misleading and deceptive conduct in trade or commerce' under the *Competition and Consumer Act 2010* (Cth). Aurizon Network noted that the QCA had responded to similar concerns in regard to providing a capacity warranty in the construction contract, with this warranty not being included under the UT4 SUFA draft decision.⁵⁶

QCA analysis and final decision

Obligation to deliver capacity

Throughout the QCA's consideration of the UT3 and UT4 SUFA DAAUs, a key objective has been to provide certainty around expansion project deliverables, including capacity. The greater the certainty, the more credible the SUFA will be as an alternative to Aurizon Network funding.

In considering how the construction contract can provide this certainty, it is important to bear in mind that the required capacity that is to be delivered in a user funded expansion under a

⁵² Sections 8.9.3(e)(ii) and 8.9.4(a)(i)(C) of the form of UT4 that is part of the UT4 SUFA DD.

⁵³ Section 8.9.4(a)(ii)(B) of the form of UT4 that is part of the UT4 SUFA DD.

⁵⁴ QRC, sub. 32, p. 3.

⁵⁵ Pacific National, sub. 31, p. 1.

⁵⁶ Aurizon Network, sub. 30 p. 8-12.

SUFA is the outcome of an extensive expansion process involving investigation and consideration of expansion options between access seekers/funders and Aurizon Network under the expansion process in UT4. This process includes progressive refinement of the project through a number of stages: concept study; pre-feasibility study; and feasibility study. This expansion process allows for consideration of a range of project scope/capacity options with varying degrees of certainty. As noted by Aurizon Network, this process provides access seekers with options from which to choose the optimal scope/expected capacity solution in the circumstances.⁵⁷ The standard to which the expanded infrastructure is constructed will be another element considered as part of this expansion process (in this regard, the discussion below regarding scope and associated capacity also encompasses the issue of the standard of the infrastructure).

The QCA considers that the aim of this expansion process in UT4 is to develop an expansion project to a high level of detail and accuracy. It is expected that access seekers and Aurizon Network would be able to agree upon a project scope and associated target capacity at the conclusion of this expansion process and reflect that in the schedules to the construction contract if a user funded expansion under a SUFA is chosen.

As Aurizon Network is responsible for undertaking the series of concept/feasibility studies in the expansion process, the proposed scope and associated target capacity will reflect the outcome of Aurizon Network's considered assessment of expansion options that it has developed. Given this, the QCA considers that it is reasonable for Aurizon Network to be required under the construction contract to commit to deliver the target capacity that is associated with a project scope developed by Aurizon Network. If, at the end of the construction phase, there is a capacity shortfall against this target capacity, the QCA considers that Aurizon Network should be required to rectify the shortfall and/or pay liquidated damages in respect of that shortfall, as Aurizon Network has had control of the development of the project scope.

We note that Aurizon Network has acknowledged that, under UT4, if it proposes a project scope for an expansion, that scope is documented in a user funding agreement and the project results in a capacity shortfall, Aurizon Network must rectify that capacity shortfall.⁵⁸ This is consistent with stakeholder views, with Pacific National stating that Aurizon Network should be obliged to deliver any capacity agreed through a SUFA process and be accountable for a shortfall. The QRC also noted that it is market standard for a construction contractor to warrant the capacity of the work it has designed and constructed.⁵⁹

However, access seekers may not agree that a particular project scope and capacity option proposed by Aurizon Network is appropriate under the UT4 expansion process. As such, access seekers may refer a dispute to the QCA for the QCA to determine, through an access determination, a scope and associated capacity option which may differ to that proposed by Aurizon Network.

We note Aurizon Network's argument in respect of the effect different scopes and standards have upon a capacity outcome. Our view is that the capacity required to be delivered under the construction contract should reflect the scope and standard detailed in that contract.

The QCA's UT4 SUFA draft decision included a form of construction contract under which Aurizon Network is obliged to achieve determined capacity, and is required to rectify and/or pay

⁵⁷ Aurizon Network, sub. 30, pp. 10-11.

⁵⁸ Aurizon Network, sub. 30, p. 9.

⁵⁹ QRC, sub. 32, p. 3.

liquidated damages for failing to meet that obligation. The QCA has considered Aurizon Network's arguments, in particular regarding the adverse consequences for it if a QCA-determined scope results in a capacity shortfall and Aurizon Network is required to remedy the shortfall. We consider this is a legitimate concern.

Our view is that the concept of a 'scope difference' should be reflected in the construction contract, including in the rectification/liquidated damages regime for failing to deliver the capacity. This 'scope difference' is the difference between the Aurizon Network determined scope and standard, and the QCA determined scope and standard. That is, where Aurizon Network constructs to a scope, standard and associated capacity determined by the QCA, it will not be required to remedy a capacity shortfall and/or pay liquidated damages to the extent that the shortfall is due to the scope difference.

The QCA considers that this position protects Aurizon Network's legitimate business interests as it is not obliged to remedy a shortfall resulting from a scope difference. The QCA also considers this position will protect the PUHs, as the PUHs' concern will be to ensure that the capital expenditure associated with the expansion is included in the RAB. The QCA considers that any capacity shortfall against the target scope for an expansion and the reason for that shortfall (including if it was due to an error in a QCA-determined scope) will be a relevant consideration in the capital expenditure approval process.

Access seekers will have certainty that, where a SUFA project is constructed to an Aurizon Network scope and standard, Aurizon Network is obliged to deliver the capacity (subject to the rectification and liquidated damages regime) associated with that scope and standard. Access seekers also have certainty that, where there is a QCA determined scope and standard, Aurizon Network will be required to remedy a capacity shortfall (subject to the rectification and liquidated damages regime) to the extent the capacity shortfall was not due to the scope difference.

We acknowledge that, compared to the UT4 SUFA draft decision position, access seekers will have less certainty regarding capacity delivery where there is a QCA-determined scope and standard. However, given the impact on Aurizon Network's legitimate business interests where it is unable to manage capacity shortfall risk that may arise from a QCA-determined scope and standard, we consider that the liability regime outlined above appropriately balances the interests of the parties, while ensuring SUFA remains a credible alternative. In reaching this view, we have also had regard to the broader context in which a SUFA project will occur, namely, the comprehensive expansion process in UT4 which we expect will provide the best possible opportunity and incentives for various options to be investigated regarding project scope, standard and capacity.

The QCA does not believe, however, that the access undertaking is the appropriate mechanism to enforce this liability regime for a SUFA project, particularly taking into account the different interests affected in a SUFA project. We remain of the view that the construction contract should specify the consequences of a failure by a party to meet its obligations. Any party entering into a contract would expect to be able to enforce obligations under that contract, or at law, in the event of a breach. This is the appropriate mechanism to enforce a contractual breach.

We note that our approach is similar in principle to an access agreement — that is, once parties have entered into an access agreement, any breach would be enforced under that agreement and not through the access undertaking. We therefore do not believe that the SUFA trustee being required to rely on the provisions of the access undertaking to enforce a breach of the construction contract is appropriate. The consequences for a failure to meet the requirements

of the construction contract should be dealt with under, and through, the construction contract or at law. This is particularly relevant given that the construction period under a SUFA may span different regulatory periods with different undertakings which will impose uncertainty on the SUFA trustee in respect of its right of recourse if the regulatory framework and access undertaking change over time.

In summary, our final decision in relation to the obligation to deliver capacity is as follows:

- Where, following the expansion process, Aurizon Network is constructing to its own scope and standard and there is a shortfall as against the capacity associated with that scope and standard, then Aurizon Network should rectify the capacity shortfall and/or pay liquidated damages in respect of the failure to deliver the capacity associated with that scope and standard.
- Where, following the expansion process, Aurizon Network is constructing to a QCA determined scope and standard and there is a shortfall as against the capacity associated with that scope and standard, then Aurizon Network should not be required to remedy the shortfall in capacity and/or pay liquidated damages to the extent that the shortfall in capacity arises from the scope difference.

Acknowledgement of pre-estimate of trustee's loss

Aurizon Network has stated that it is not prepared to provide an acknowledgement in the construction contract that the rate of liquidated damages associated with a capacity shortfall is a genuine pre-estimate of the SUFA trustee's loss unless Aurizon Network has agreed that rate, as to do so may be a false representation. The QCA accepts this argument is consistent with our approach in the draft decision regarding Aurizon Network providing a capacity warranty in similar circumstances. Therefore, we have removed the requirement to provide an acknowledgement in the construction contract that the rate of liquidated damaged detailed in it is a genuine pre-estimate of the SUFA trustee's loss in respect of a capacity shortfall.

In summary, we consider our approach to the obligation to deliver capacity 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 investment in the CQCN. Efficient investment in the CQCN is 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). Our approach also supports the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Summary of final decision 3.1

- (1) The UT4 SUFA DAAU should be amended such that:
 - (a) The construction contract imposes the following contractual obligations on Aurizon Network in respect of capacity:
 - (i) Where Aurizon Network constructs to its scope and standard and there is a shortfall as against the capacity associated with that scope and standard, then Aurizon Network should be required to remedy the shortfall in capacity and/or pay liquidated damages in respect of the failure to deliver the capacity associated with that scope and standard.
 - (ii) where Aurizon Network constructs to a scope and standard determined by the QCA and there is a shortfall as against the capacity associated with that scope and standard, then Aurizon Network should not be required to remedy the shortfall in capacity and/or pay liquidated damages to the extent that the shortfall in capacity arises from the scope difference.
 - (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) Aurizon Network is not required to provide an acknowledgement in the construction contract that the rate of liquidated damages detailed in it is a genuine pre-estimate of the SUFA trustee's loss in respect of a shortfall in capacity.

3.2 Credit exposure in respect of the construction contract

Instead of requiring the SUFA trustee to provide security to Aurizon Network in respect of the SUFA trustee's obligations under the construction contract, the UT3 SUFA final decision provided for a 'front end payment mechanism' to Aurizon Network as constructor (i.e. a requirement for prepayment by the SUFA trustee under the construction contract). Our reasoning was that the provision of security to Aurizon Network would cause SUFA funders to provide security to both Aurizon Network (under the construction contract) and the SUFA trustee (under the SUHD), resulting in an unnecessary barrier to entry to participation in the construction phase of a SUFA transaction.⁶⁰

In the UT4 SUFA DAAU, Aurizon Network proposed that the SUFA trustee, as the principal under the construction contract, be required to provide a bank guarantee during the construction contract's term. In its supporting submission, Aurizon Network expressed concern that, absent credit support from the SUFA trustee for its financial obligations under the construction contract, Aurizon Network would face a 'material trade exposure' if the SUFA trust experiences a corporate failure whilst construction is underway.⁶¹

The QRC rejected the provision of a guarantee by the SUFA trustee under the construction contract.⁶²

Our UT4 SUFA draft decision accepted Aurizon Network's concern. Our draft decision improved upon the front end payment mechanism. Additionally, we considered it appropriate that all PUHs should provide, through the SUFA trustee, guarantees in respect of Aurizon Network's

⁶⁰ QCA UT3 SUFA final decision, p. 108.

⁶¹ Aurizon Network, sub. 2, pp. 13–14.

⁶² QRC, sub. 29, p. 13.

peak termination exposure (i.e. the estimated maximum amount due to Aurizon Network under the construction contract if it is terminated due to default by the SUFA trustee). We considered that our proposed approach would avoid the double security concern we had expressed in the UT3 SUFA final decision as well as address Aurizon Network's concerns in respect of its trade credit exposure.⁶³

Stakeholders' submissions

Aurizon Network accepted the draft decision but considered that recourse to security provision of the construction contract should also apply in respect of any unrectified failure to make a payment.⁶⁴

The QRC reiterated its view that security from the SUFA trustee for the construction contract should not be required.⁶⁵

QCA analysis and final decision

Our UT4 SUFA draft decision had proposed the following for the provision of bank guarantees:⁶⁶

- Each PUH provides two bank guarantees, which in aggregate are equal in value to that PUH's subscription obligations under the SUHD.
- One bank guarantee will be in respect of a PUH's subscription obligations under the SUHD (although it will not be for the full value of its subscription obligations, given the cap and split between two forms of bank guarantee).
- The other bank guarantee will 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.

Aurizon Network acknowledged the QCA's draft decision position, but noted that the form of the construction contract did not address non-payment by the SUFA trustee in the event of termination for convenience (i.e. where the trustee chooses to terminate).

We consider that allowing Aurizon Network to draw on the guarantee for the SUFA trustee's failure to pay any amounts due under the construction contract is reasonable, given Aurizon Network's credit exposure in these circumstances. This would include non-payment by the SUFA trustee in the event of its termination for convenience. This approach is consistent with the intent of our draft decision.

We note the QRC's view that security from the SUFA trustee for the construction contract should not be required. However, we recognise the legitimate business interests of Aurizon Network in ensuring that it is protected against a SUFA trust payment default. We consider that our final decision in respect of Aurizon Network's credit exposure under the construction contract also ensures that, from a SUFA funders' perspective, there is no double security provided. That is, our decision appropriately balances the interests of SUFA funders (access

⁶³ QCA, UT4 SUFA draft decision, pp. 31–33.

⁶⁴ Aurizon Network, sub. 30, p. 13.

⁶⁵ QRC, sub. 32, pp. 3-4.

⁶⁶ QCA, UT4 SUFA draft decision, p. 32.

seekers and/or third party financiers) with Aurizon Network's interests as contractor and its legitimate business interests (s. 138(2)(b), (e) and (h) of the QCA Act).

We 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 investment in the CQCN. This is because the SUFA framework seeks to provide alternative funding options. Efficient investment in the CQCN is 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 final decision 3.2

The UT4 SUFA DAAU should be amended such that:

- (1) The construction contract provides that:
 - (i) the prepayment under it may only be deducted from payments in respect of the final progress certificates
 - (ii) the SUFA trustee will provide peak termination guarantees, as detailed above
 - (iii) Aurizon Network may draw on the peak termination guarantees in the event of a non-payment by the SUFA trustee of any amounts due under the construction contract
- (2) The SUHD and the conditions precedent under the EPA reflect these positions.

3.3 Determination of construction contract schedules by the QCA

In the UT3 SUFA final decision, we considered that the expansion process under the access undertaking then in force should provide for a dispute resolution mechanism, through which disputes in relation to the completion of schedules in the SUFA template could be referred to a third party expert or the QCA for a binding determination. In particular, we rejected Aurizon Network's proposal that a 'consistent with market practice' principle should be included in an access undertaking's expansion process to govern the formulation of the construction contract.⁶⁷

In the UT4 SUFA DAAU, Aurizon Network accepted the referral to the QCA for the determination of disputes relating to the completion of schedules and annexures of the construction contract; however, it proposed that the determination by the QCA be made in accordance with the then applicable market practice in the Australian construction industry.⁶⁸ The QRC objected to the market practice standard proposed by Aurizon Network. In particular, the QRC considered that 'consistent with market practice' should be a general industry and prudent practices test and that the 'reference principal' should have regard to a prudent and diligent private infrastructure owner.⁶⁹

Our draft decision, in respect of the UT4 SUFA DAAU, was to refuse to approve Aurizon Network's proposal. Our view was that a dispute relating to completing the schedules of the SUFA construction contract is a dispute regarding access and that division 5 of Part 5 of the QCA

⁶⁷ QCA UT3 SUFA final decision, pp. 70, 83.

⁶⁸ Aurizon Network, sub. 2, p. 15.

⁶⁹ QRC, sub. 29, p. 3.

Act will apply. Therefore, the QCA's determination will be on the basis of factors listed in section 120 of the QCA Act.⁷⁰

Stakeholders' submissions

Aurizon Network reiterated its view that the incorporation of the market equivalence requirement in the determination of the contents of the schedules and annexures to the construction contract by the QCA in a dispute is important to provide it with certainty. Aurizon Network was concerned that, in the event of a dispute, the QCA may not appropriately price the risks controlled by Aurizon Network as construction contractor.⁷¹

QCA analysis and final decision

We maintain our view that a dispute under clause 8.2.2(a)(iii) of UT4 is a dispute regarding access and is therefore a dispute for the purpose of division 5 of Part 5 of the QCA Act. For this reason, we do not accept Aurizon Network's proposed amendments to the dispute resolution process in the UT4 SUFA DAAU, as the effect would be to take such access disputes outside the scope of division 5 of Part 5 of the QCA Act. The QCA does not believe that Aurizon Network's proposed drafting regarding its 'market equivalence' proposal in section 11.1.5 of the UT4 SUFA DAAU is appropriate or required.

Aurizon Network has expressed concern that the QCA may not appropriately consider the risks it bears as a construction contractor in making an access determination. Division 5 Part 5 of the QCA Act sets out the matters to be considered by the QCA in making an access determination. These include, among other factors, the objective of access; the access provider's legitimate business interests and investment in the facility; the direct costs to the access provider of providing access, including any costs of extension; and the pricing principles in section 168A.⁷² The QCA Act also establishes restrictions on an access determination, including that it may not require an access provider to pay some or all of the costs of extending the facility. However, the QCA may still make a determination requiring the access provider to extend the facility in certain circumstances, including where it is technically and economically feasible and consistent with the safe and reliable operation of the facility and the legitimate business interests of the access provider are protected.⁷³

We consider that these provisions of the QCA Act provide considerable protection and assurance for Aurizon Network that its legitimate business interests will be protected in any access determination. The dispute resolution provisions under division 5 of Part 5 of the QCA Act also provides a robust and transparent process for Aurizon Network and other parties to make submissions on matters in dispute, including arguments and expert evidence about contemporary market practice and how this should be determined (if relevant), to protect their interests. The QCA Act provides a mechanism to deal with the issues raised by Aurizon Network.

Importantly, this process has the flexibility of allowing the dispute parties to propose, and the arbitrator to consider, market values and outcomes for construction that prevail at the time of the dispute to the extent they are relevant. In contrast, the approach proposed by Aurizon Network locks in 'current market practice' as the primary factor in determining a dispute (compared to the range of factors the QCA would have regard to in a dispute under the QCA

⁷⁰ QCA, UT3 SUFA draft decision, pp. 34–35.

⁷¹ Aurizon Network, sub. 30, pp. 16-17.

⁷² Section 120 of QCA Act.

⁷³ Section 119 of QCA Act.

Act). It also binds the QCA in advance on how to determine contemporary market practice at the time of any future dispute. We note that it would be open to Aurizon Network at the time a dispute is notified to submit detailed arguments in line with the type of information it is seeking to incorporate in its proposed new clause 11.1.5(h) of the UT4 SUFA DAAU.

In summary, we consider:

- A dispute under clause 8.2.2(a)(iii) of the UT4 SUFA DAAU in relation to the contents of the schedules and annexures to the construction contract is a dispute regarding access and is therefore a dispute for the purpose of division 5 of Part 5 of the QCA Act.
- The relevant provisions of the QCA Act provide protection for Aurizon Network's legitimate business interests, including efficient cost recovery and ensuring Aurizon Network does not bear the costs of an expansion.
- The dispute resolution process provides a mechanism to address the concern raised by Aurizon Network as parties could submit arguments and expert evidence to protect their interest.
- It is not appropriate for the QCA to be bound in how it would consider such a dispute under the QCA Act.

The QCA therefore maintains its draft decision in relation to the determination of construction contract schedules. We consider that this 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 (s. 138(2)(b), (e) and (h) of the QCA Act). This also does not unduly constrain the QCA in the performance of its functions as an arbitrator under the QCA Act.

Summary of final 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

In the UT3 SUFA final decision, our view was that PUHs and the access seekers should have access, through the SUFA trustee, to the pricing information underpinning adjustments to the contract sum and discretionary variations. This is because the PUHs and the access seekers are the parties ultimately liable for paying these amounts, and we considered that access to such pricing information would be a legitimate expectation of PUHs and access seekers.⁷⁴

Aurizon Network's UT4 SUFA DAAU prevents disclosure of pricing information to PUHs or access seekers under any circumstance.⁷⁵

Our draft decision, in respect of the UT4 SUFA DAAU, was to refuse to approve Aurizon Network's proposal. In regard to disclosure to the QCA, we did not propose to place any constraints within the SUFA construction contract on the QCA's ability to obtain or use pricing

⁷⁴ QCA UT3 SUFA final decision, pp. 110–112.

⁷⁵ Aurizon Network, sub. 2, pp. 44–45, item CA5.

information, as this would affect the QCA's ability to perform its statutory functions.⁷⁶ We also retained our view that the SUFA trustee can disclose pricing information regarding provisional sums, discretionary variations and adjustment events to the PUHs and access seekers.⁷⁷

Stakeholders' submissions

In terms of disclosure to the QCA, Aurizon Network submitted that it faces the risk that the QCA may place pricing information in the public domain, with the result that it would be available to all construction industry participants. While noting it could claim confidentiality, Aurizon Network said that, as Aurizon Network does not control the outcome of any QCA confidentiality claim process, its only prudent course of action is to assume the information may become publicly available.

Aurizon Network was concerned the QCA's approach to the availability of pricing information to PUHs and access seekers could prejudice Aurizon Network's ability to price services to PUHs and access seekers in non-SUFA projects, as it could result in pricing information becoming widely available. Aurizon Network also said it may be indirectly affected should the proposed disclosure regime adversely affect the bidding appetite of potential sub-contractors.

Aurizon Network's position was that pricing information should be available to the SUFA trustee, the SUFA trustee's expert adviser, the financiers' expert adviser, the independent certifier and the QCA under suitable confidentiality obligations. Aurizon Network noted that it is not seeking to withhold information from SUFA parties that need it so that Aurizon Network achieves an unreasonable advantage, and that, under its proposed approach, every party with a need to know the pricing information may access it.⁷⁸

QCA analysis and final decision

There are two aspects to this issue of availability of pricing information:

- disclosure to the QCA
- disclosure to non-QCA parties.

Disclosure to the QCA

The QCA does not accept Aurizon Network's proposal that the disclosure of pricing information to the QCA should be subject to a confidentiality agreement.

The QCA relies upon the statutory provisions regarding confidential information in the QCA Act. The QCA Act sets out the statutory process for the QCA when it considers publishing material in the context of 'confidential information'. It prevents the QCA from disclosing confidential information it receives where such disclosure:

- would be likely to damage a person's commercial activities
- would not be in the public interest.⁷⁹

The QCA considers that the provisions of the QCA Act provide significant protection for Aurizon Network in terms of safeguarding its confidential information, and that these provisions are appropriate to protect Aurizon Network's legitimate business interests. We do not believe that

⁷⁶ QCA UT3 SUFA final decision, p. 111.

⁷⁷ QCA UT4 SUFA draft decision, pp. 36–37.

⁷⁸ Aurizon Network, sub. 30, p. 16-17.

⁷⁹ See sections 187, 207 and 239 of the QCA Act.

it is appropriate to place constraints within the SUFA construction contract on the QCA's ability to exercise its statutory functions under the QCA Act. We therefore maintain our draft decision that disclosure of pricing information to the QCA should not be subject to confidentiality obligations other than those provided under the QCA Act.

Disclosure to non-QCA parties

In terms of disclosure of pricing information to PUHs and access seekers, the QCA's concern in the UT4 SUFA draft decision has been that parties who are ultimately responsible for paying the construction contractor should have an appropriate level of scrutiny over any adjustment claims.⁸⁰

The QCA has considered the need to appropriately balance the interests of Aurizon Network as construction contractor and those of access seekers and prospective SUFA funders. We believe that the concern around price information transparency is an issue for PUHs, as funders ultimately bear the impact of a variation. Funders' concern would be that the variation is prudent in order to be included in the RAB. For PUHs, we consider that our objective of having an appropriate degree of transparency of price information can be achieved by other means. In particular, PUHs' interests are protected if the SUFA trustee employs technical advisers to review the information and provide advice on its suitability. We therefore accept that the extent of scrutiny provided by disclosure to the SUFA trustee, its expert adviser, the financiers' expert adviser and the independent certifier should be sufficient to allow the PUHs with an appropriate opportunity to scrutinise any adjustment claim. This also satisfies our concerns relating to the SUFA trustee's obligations to provide information to the PUHs.

PUHs are also able to request preapproval by the QCA of an adjustment. Under this process, the QCA would assess the prudence and efficiency of the adjustment claim. This provides another mechanism to protect their interests. This process also protects the interests of access seekers as ultimately prudent capital expenditure included in the RAB is reflected in access charges.

In view of the above, we have revised our draft decision regarding disclosure to non-QCA parties. We do not consider pricing information should be made available to PUHs or access seekers. We therefore accept Aurizon Network's position on the disclosure of price information to non-QCA parties. We consider that this approach to disclosure of price information provides an appropriate balance in the interests of Aurizon Network as construction contractor and its legitimate business interests and those of access seekers and PUHs, while ensuring the aim of a workable, credible and bankable SUFA is met (s. 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 (s. 138(2)(d), (e) and (h) of the QCA Act).

Summary of final decision 3.4

The UT4 SUFA DAAU should be amended such that the drafting in clause 8.7 of the QCA's UT4 SUFA final decision mark-up of the construction contract be adopted.

⁸⁰ QCA UT4 SUFA draft decision, pp. 36-37.

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 increase uncertainty over the cash flows to the SUFA trustee and, by extension, PUHs.

In respect of the security and bankability aspects of a SUFA framework, our final decision adopts the policy position in our draft decision that the Specific Security Agreement (SSA) should provide for an acceleration of rent in the event of Aurizon Network's insolvency or termination of the Infrastructure Lease due to an Aurizon Network cause.

Our final decision differs from the draft decision as follows:

- *It introduces a new event of default which may trigger acceleration—that is, where the SUFA trustee has terminated the EISL due to Aurizon Network's insolvency or non-payment of rent. It does not include the events of default whose occurrence did not permit an acceleration.*
- *It considers that set-off should apply, not only in the context of the rent adjustment mechanism but also in respect of amounts due when that amount is agreed by parties or determined through dispute resolution, and provides a mechanism for the SUFA trustee to recover amounts set-off by Aurizon Network which are recoverable (or recovered) through a reference tariff variation.*

Overview

On the security and bankability aspects of a SUFA framework, Aurizon Network's UT4 SUFA DAAU adopts a number of positions contained in the UT3 SUFA final decision. These include:

- providing a 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).

Since these positions are consistent with the UT3 SUFA final decision and stakeholders did not object to them, our final decision adopts our draft decision that these positions remain appropriate. The QCA refers interested parties to the analysis in the UT3 SUFA final decision.⁸¹

However, the UT4 SUFA DAAU also contains positions on specific matters relating to the security and bankability aspects of a SUFA that are different from the UT3 SUFA final decision. Our UT4 SUFA draft decision positions and stakeholders' comments on them are summarised in Table 2, and considered in sections 4.1 to 4.3 of this final decision document.

⁸¹ QCA UT3 SUFA final decision, pp. 123–132.

Table 2 Security and bankability—summary of key positions

<i>Summary of the draft decision</i>	<i>Aurizon Network's response</i>	<i>Other stakeholders' response</i>	<i>QCA final decision</i>
Events of default (Specific Security Agreement)			
The SSA includes five events of default, including termination of the Infrastructure Lease due to Aurizon Network's cause—reflecting events that may jeopardise cash flows to the SUFA trustee.	Rejected the draft decision and reiterated the DAAU position that the SSA should contain a single event of default—Aurizon Network's insolvency.	The QRC generally agreed with the draft decision.	See section 4.1
Acceleration of rental payments			
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.	Rejected the draft decision and reiterated the DAAU position that there should be no acceleration of rent under any template SUFA document.	The QRC generally agreed with the draft decision.	See section 4.2
Credit exposure during operational phase (set-off)			
Aurizon Network may set off only rental adjustments against amounts payable to the SUFA trustee.	Rejected the draft decision and restated the view that all amounts due to it from the SUFA trustee should be subject to set-off against its rental payments to the SUFA trustee.	The QRC generally agreed with the draft decision.	See section 4.3

4.1 Events of default

Our view in the UT3 SUFA final decision was that, for the SUFA framework 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.

Hence, the SSA was included in the SUFA template—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' and 'direction to pay undertakings'—which allows security to be taken over the cash flows.

We considered it appropriate that the security should be enforceable when cash flows are likely to be jeopardised by Aurizon Network's actions or upon the occurrence of certain events affecting Aurizon Network. The SSA in our UT3 SUFA final decision included four 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' due 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—that is, creates a conflicting interest, without the SUFA trustee's consent.⁸²

In the UT4 SUFA DAAU, Aurizon Network proposed for the SSA to include its insolvency as the sole event of default, and removed the other three events of default.⁸³ The QRC did not accept Aurizon Network's proposal.⁸⁴

Our draft decision, in respect of the UT4 SUFA DAAU, refused to approve Aurizon Network's proposal. Our draft decision retained the events of default from the UT3 SUFA final decision, and added to that list the event of the termination of the Infrastructure Lease due to Aurizon Network's cause. We maintained our view that those events relate to actions Aurizon Network may take over which the SUFA trustee has no control, which may jeopardise the rental cash flows to the SUFA trustee. Therefore, the SUFA trustee should be able to enforce security upon the occurrence of such events, as well as exercise its right to accelerate future rent in the event of Aurizon Network's insolvency or termination of the Infrastructure Lease due to an Aurizon Network cause.⁸⁵

Stakeholders' submissions

Aurizon Network rejected the draft decision and reiterated its UT4 SUFA DAAU position that events of default under the SSA, other than its insolvency, were inappropriate and unnecessary.⁸⁶

Aurizon Network made the following comments on the specific events of default in the UT4 SUFA draft decision:

- *Aurizon Network fails to nominate additional access agreements* —this event of default was unnecessary, as the EISL already includes a comprehensive mechanism to remedy it, and ineffective, as it would not address the SUFA trustee's underlying commercial problem to gain access to sufficient direction to pay streams to secure the full rent due to it.
- *Aurizon Network fails to pay amounts due* —this event of default was unnecessary as, under EISL, the trustee has contractual mechanisms to ensure it is paid amounts due by Aurizon Network, and ineffective, as it does not address the SUFA trustee's underlying commercial problem to recover non-payment of money due to it.
- *Aurizon Network creates a conflicting interest without the SUFA trustee's consent* —the most effective remedy in this event would be an obligation on Aurizon Network to promptly reverse that act, and in the absence of such an obligation, this event of default was unduly onerous on Aurizon Network.
- *Termination of Infrastructure Lease due to Aurizon Network's cause* —this event of default was unnecessary as the existing direction-to-pay arrangement will continue to operate in respect of access charges up to the 'Infrastructure Lease End Date', so the SUFA trustee does not face an increased risk of failing to receive direction to pay payments.

⁸² QCA UT3 SUFA final decision, pp. 123–124.

⁸³ Aurizon Network, sub. 2, pp. 42–43.

⁸⁴ QRC, sub. 29, p. 26.

⁸⁵ QCA UT4 SUFA draft decision, pp. 40–41.

⁸⁶ Aurizon Network, sub. 30, pp. 18–20.

Aurizon Network accepted the insolvency-related event of default. However, it was concerned that the insolvency definition in EISL would characterise as an event of default a scheme of arrangement where Aurizon Network became an independent entity as part of a corporate restructuring.⁸⁷

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's UT4 SUFA DAAU proposal. Our final decision is to:

- retain the events of default relating to Aurizon Network becoming insolvent and causing termination of the Infrastructure Lease
- remove the events of default relating to Aurizon Network failing to nominate further access agreements, failing to pay a detriment amount, and creating a conflicting interest without the SUFA trustee's consent
- add an event of default triggered by the SUFA trustee's termination of the EISL due to Aurizon Network's non-payment of rent or insolvency.

Our final decision also clarifies that the SUFA trustee may prove for a debt forming part of the 'secured money' in addition to the 'secured obligations' under the SSA in the event of an Aurizon Network insolvency. This provides further clarity as to the SUFA trustee's rights in respect of Aurizon Network's insolvency, which improves the workability, bankability and credibility of SUFA.

Our assessment

As outlined in Chapter 1, the SUFA investors (PUHs) have no control over the use of the physical infrastructure or the ability to generate income from it other than through Aurizon Network. The SUFA investors' sole income—rental cash flow—is dependent upon Aurizon Network's actions, and non-compliance by Aurizon Network with its contractual obligations in the SUFA template documents is an actual risk SUFA investors face in a user funded expansion using the SUFA model.

Therefore, our position has been to consider actions by Aurizon Network that may jeopardise the rental cash flows to the SUFA trustee as events of default, which included actions where Aurizon Network:

- fails to nominate further access agreements to be subject to the direction to pay when required under the EISL;
- fails to pay a 'detriment amount' due to the SUFA trustee under the EISL; and
- creates a security interest over the direction to pay amounts and the direction to pay undertakings, without the SUFA trustee's consent.

We have considered it appropriate to permit the SUFA trustee to enforce the security upon the occurrence of these events of default —that is, enforce its security over the 'direction to pay undertakings'⁸⁸ and the 'direction to pay amounts'.⁸⁹ Our view has been that providing the SUFA

⁸⁷ Aurizon Network, sub. 30, pp. 18–20.

⁸⁸ 'Direction to pay undertakings' are the undertakings access holders give to Aurizon Network to pay the direction to pay amounts.

trustee a right to enforce security under those default events would encourage Aurizon Network to not engage in behaviour that may jeopardise the SUFA rental stream.

However, we acknowledge Aurizon Network's argument that our proposed mechanism in the context of the three default events above may not permit the SUFA trustee to remedy the commercial problem it would face—for example, the SUFA trustee is unable to nominate access agreements to be subject to the direction to pay. Therefore, we propose to remove these three events of default.

However, the fundamental concern still remains, which is that Aurizon Network's actions in respect of those three events could frustrate rental cash flows to the SUFA trustee. Neither the SUFA trustee nor PUHs have control over Aurizon Network's actions in respect of those events, despite the fact that these events may have implications for their sole income, which is the rental stream.

Since the underlying commercial problem is non-payment of rent to the SUFA trustee, we have included an additional event of default relating to the SUFA trustee exercising its right (which it already has) under the SUFA template to terminate the EISL due to Aurizon Network's failure to pay rent for a year or Aurizon Network insolvency. In that event, we consider it is appropriate for the SUFA trustee to claim all amounts due to it on an accelerated basis (see section 4.2 of this final decision document for our consideration of acceleration rights). This event of default together with the SUFA trustee's other acceleration rights should provide the SUFA trustee with protection in respect of matters over which it has no control and may encourage appropriate behaviour on the part of Aurizon Network.

Our view on Aurizon Network's comments in respect of specific events of default is presented in Table 3.

Table 3 QCA's response to Aurizon Network's comments on the events of default

<i>Aurizon Network's comments</i>	<i>QCA view</i>
The 'nomination of additional access agreements' event of default was unnecessary as the EISL already includes a comprehensive mechanism to remedy it, and ineffective, as it would not address the SUFA trustee's underlying commercial problem to gain access to sufficient direction to pay streams to secure the full rent due to it.	We have removed these events of default. In order to address the underlying commercial problem of non-payment of rent to the SUFA trustee, we have included an additional event of default relating to the SUFA trustee terminating the EISL due to Aurizon Network's failure to pay rent for a year or insolvency, and exercising its right to claim all amounts due on an accelerated basis.
The 'Aurizon Network has not paid amounts due' event of default was unnecessary as, under EISL, the trustee has contractual mechanisms to ensure it is paid amounts due by Aurizon Network, and ineffective, as it does not address the SUFA trustee's underlying commercial problem to recover non-payment of money due to it.	
The 'no conflicting interest' event of default, which relates to Aurizon Network defaulting in performing or observing any provision of clause 4 (of the SSA) and fails to remedy that default within 10 business days of its occurrence, was unnecessary.	

⁸⁹ '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).

<i>Aurizon Network's comments</i>	<i>QCA view</i>
Should an act that is prohibited by clause 4 of the SSA occur, the most effective remedy would be for Aurizon Network to promptly reverse that act.	
Insolvency should be defined narrowly and not have the unintended consequence of treating as an event of default a scheme of arrangement where Aurizon Network becomes an independent entity as part of a corporate restructuring.	The definition of insolvency in the SSA has been amended. It is now based on the definition in the UT4 standard access agreement, and has been amended further to deal with Aurizon Network's argument about corporate restructuring.
The IND-related event of default (i.e. termination of Infrastructure Lease due to Aurizon Network's cause) is unnecessary. In the situation where the CQCN Infrastructure Lease between Aurizon Network and QTH has ended, the existing direction to pay arrangement will continue to be in place, and will continue to operate in respect of access charges charged for the access provided up to the 'Infrastructure Lease End Date'.	<p>Upon termination of Infrastructure Lease, Aurizon Network will not have the right to provide access to the CQCN infrastructure, and the EIHL and EISL will automatically terminate. Therefore, the direction to pay arrangement would be meaningless and would not protect the interests of the SUFA trustee.</p> <p>This event of default is designed to permit the SUFA trustee to accelerate the rental payments and claim for loss of its sole income—rental cash flow—where that loss is due to Aurizon Network causing termination of the Infrastructure Lease (see Chapter 7 of this final decision document).</p>

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 together with the SUFA trustee's right of acceleration in respect of those events would address the fundamental concern, i.e. non-payment of rent due to Aurizon Network's actions and 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 final decision 4.1

The form of SSA in the UT4 SUFA DAAU should:

- (1) include the events of default relating to Aurizon Network's insolvency, termination of the Infrastructure Lease due to an Aurizon Network cause and termination of the EISL due to Aurizon Network's non-payment of rent or insolvency;
- (2) not include the default events relating to Aurizon Network failing to nominate further access agreements, failing to pay a detriment amount, and creating a conflicting interest without the SUFA trustee's consent;
- (3) amend the definition of insolvency to reflect that in the UT4 standard access agreement, with further amendment to deal with Aurizon Network's solvent corporate restructuring argument; and
- (4) provide that the SUFA trustee may prove for the 'secured money' upon the insolvency of Aurizon Network.

See clauses 1.3, 5 and 6.3 in UT4 SUFA DAAU SSA mark-up in Appendix B.

4.2 Acceleration of rental payments

The UT3 SUFA final decision SSA required that, if Aurizon Network became insolvent, the future rent 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.⁹⁰

In the UT4 SUFA DAAU, Aurizon Network proposed that there should be no acceleration of rent under any circumstance.⁹¹ The QRC did not accept Aurizon Network's proposal.⁹²

Our draft decision, in respect of the UT4 SUFA DAAU, was to refuse to approve Aurizon Network's proposal. We retained our 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. Additionally, we considered acceleration of rent should also apply in the event of an Infrastructure Lease termination caused by Aurizon Network, in order to allow the SUFA trustee to claim for the loss of future rent in that event.⁹³

Stakeholders' submissions

Aurizon Network rejected the draft decision and reiterated its UT4 SUFA DAAU position that there should be no acceleration of rent under any SUFA template documents.

Aurizon Network disagreed with the QCA's view that the acceleration of rental payment would not constitute a cost of an expansion. It argued that, upon insolvency, it will have an accelerated rental payment obligation as a consequence of the SUFA expansion, which does not arise if there is no SUFA expansion; therefore, that obligation would be characterised as a cost.⁹⁴

⁹⁰ QCA UT3 SUFA final decision, p. 124.

⁹¹ Aurizon Network, sub. 2, pp. 19–20.

⁹² QRC, sub. 29, p. 26.

⁹³ QCA UT4 SUFA draft decision, pp. 42–44.

⁹⁴ Aurizon Network, sub. 30, pp.21-23.

Aurizon Network argued that the SUFA trustee's acceleration right could result in it being unable to comply with its 'negative pledge covenant'⁹⁵ under its corporate loan documentation. It also claimed that the QCA's proposed mechanism would adversely affect the interests of its debt financiers and increase their risk profile by diluting their interest in the net proceeds of the corporate failure process.

Aurizon Network considered that any SUFA model that required a fundamental change to its credit terms with corporate lenders was unacceptable, as it would place an unreasonable burden on Aurizon Network's ability to conduct normal business activities.

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposal. We maintain our view that it is appropriate that the SUFA trustee should be entitled to claim rent on an accelerated basis in the events of Aurizon Network's insolvency and termination of the Infrastructure Lease due to an Aurizon Network cause. We also consider it appropriate that the SUFA trustee should be entitled to claim rent on an accelerated basis in the event of termination of the EISL due to Aurizon Network's failure to pay rent for a year or insolvency (see section 4.1).

Our view is that an acceleration right is appropriate in those circumstances, in order to protect the SUFA trustee's rights in recovering the future rent that would have been payable but is jeopardised due to the occurrence of those events. We consider our proposal improves the workability, bankability and credibility of SUFA.

Our assessment

An acceleration right permits the SUFA trustee to establish the quantum of the amount owed to it. Without an acceleration right, the SUFA trustee only has a claim in respect of a contingent debt (the future rent payable) and faces the risk of the relevant insolvency practitioner (e.g. a liquidator or a deed administrator) assessing that a lesser amount is due to the SUFA trustee.

Aurizon Network claimed that the ultimate cause of the accelerated rental payment obligation was the SUFA expansion as it imposed this payment obligation on Aurizon Network, and not its insolvency; so the accelerated rental payment obligation was a cost of expansion. We disagree, because the payment obligation arises due to Aurizon Network's insolvency and is faced by Aurizon Network regardless of any acceleration right. As long as Aurizon Network is solvent, the payment obligation does not arise. It is therefore a cost of Aurizon Network becoming insolvent and is not a cost of expansion.

If Aurizon Network becomes insolvent, the SUFA trustee is entitled to claim the full amount of the future rent which would be payable, but for the insolvency. So, regardless of acceleration right, there is no underlying difference to the amount of the debt that is the subject of a proof. Aurizon Network's debt financiers would already be exposed to a potential dilution of their position in any event because of Aurizon Network's insolvency, and not due to acceleration. We consider Aurizon Network should be able to explain this to its debt financiers.

As outlined in Chapter 1, the SUFA-funded model starts off in a fundamentally disadvantaged position. This is because the SUFA trustee faces the risk of potentially losing its sole income—the rental cash flows—due to an event (Aurizon Network's insolvency, termination of the

⁹⁵ As per Aurizon Network, 'negative pledge credit term' refers to the practice where Aurizon Network, in its debt agreement with any given financier, does not grant security (over assets, contracts or other interests) to that financier but represents that it will not grant such security to any other financier (Aurizon Network, sub. 30, p. 21–22).

Infrastructure Lease, or termination of the EISL) that is caused by Aurizon Network and in respect of which the SUFA trustee has no control. Therefore, the SUFA framework needs to have in place appropriate mechanisms (such as acceleration of rental payments) to assure SUFA investors that they will be able to claim for their full loss, where that loss is due to Aurizon Network's cause.

Hence, 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 an Aurizon Network cause 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, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investment in the CQCN is in the public interest and the interests of access seekers and access holders (s. 138(2)(a), (d), (e) and (h) of the QCA Act).

Summary of final decision 4.2

The UT4 SUFA DAAU SSA should provide for the obligation of Aurizon Network to pay the rent to be accelerated in the event of Aurizon Network's insolvency, termination of the Infrastructure Lease due to an Aurizon Network cause, or the SUFA trustee terminating the EISL due to Aurizon Network's failure to pay rent for a year or Aurizon Network's insolvency.

See clause 6 in the UT4 SUFA DAAU SSA mark-up in Appendix B.

4.3 Credit exposure during operational phase (set off)

The UT3 SUFA final decision was that Aurizon Network may only set off rental adjustment amounts against rents payable to the SUFA trustee, which relate to the monthly over and under payments of rent. In that decision, we did not consider it appropriate for Aurizon Network to set off any other amounts.⁹⁶

In the UT4 SUFA DAAU, 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.⁹⁷ The QRC did not accept Aurizon Network's proposed full set-off approach.⁹⁸

Our draft decision, in respect of the UT4 SUFA DAAU, refused to approve Aurizon Network's proposal. We considered 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 was that set-off should only relate to the rent adjustment mechanism.⁹⁹

⁹⁶ QCA, UT3 SUFA final decision, p. 126.

⁹⁷ Aurizon Network, sub. 2, pp. 26–27.

⁹⁸ QRC, sub. 29, p. 6.

⁹⁹ QCA UT4 SUFA draft decision, pp. 45–47.

Stakeholders' submissions

Aurizon Network disagreed with the draft decision and reiterated its UT4 SUFA DAAU position to set off all amounts due to it from the SUFA trustee against its rental payments to the SUFA trustee. Aurizon Network argued:

- The SUFA trust is not creditworthy as it is a conduit entity, with minimal cash retained in the trust after monthly distributions to PUHs, and Aurizon Network has no control over whether the SUFA trustee is able to obtain finance to meet a liability.
- Payments due to Aurizon Network from the SUFA trustee are operating costs, and without incurring those costs the SUFA trustee would be unable to earn its revenue. In the event of non-payment by the SUFA trustee, Aurizon Network did not have a suspension right or a termination right, so full set-off was appropriate.
- The variation in rental cash flows will be due to the SUFA trustee's payment obligations to Aurizon Network as a service provider and not due to the set-off arrangement. Aurizon Network stated that the third party financiers should provide finance without free contingent finance from Aurizon Network.¹⁰⁰

QCA analysis and final decision

We have reconsidered our draft decision position, taking into account Aurizon Network's comments and considering the provisions in the form of EISL in Aurizon Network's UT4 SUFA DAAU submission. Our final decision is that it is appropriate to apply set-off, not only in the context of the rent adjustment mechanism but also in respect of other amounts due when that amount is agreed by parties or determined through dispute resolution. Our final decision also provides a mechanism for the SUFA trustee to recover amounts set-off by Aurizon Network which are recoverable (or recovered) through a reference tariff variation.

Concerns with Aurizon Network's proposal in UT3 SUFA DAAU process

Our concern in the UT3 SUFA final decision was that Aurizon Network's full set-off arrangement did not allow the SUFA trustee (representing the PUHs) to challenge Aurizon Network's claims prior to Aurizon Network setting off the claimed amount. We considered that would make the SUFA rental stream less predictable and stable, and adversely affect the bankability of SUFA.

We were also of the view that Aurizon Network should, through the undertaking mechanism, seek to vary the regulatory tariff to account for at least the amount of liability attributable to the SUFA-funded infrastructure that it proposed to set-off. That amount would then be refunded back through time to the PUHs as increased rent. We considered this approach would align with how Aurizon Network deals with cost impacts due to a change in law (or other significant events) for its existing business. It would provide a mechanism for the SUFA trustee to recover from users those costs that Aurizon Network would set off.

Our concern is that the absence of a recovery mechanism would expose the SUFA trustee to potentially unrecoverable costs and adversely affect the bankability of SUFA. It would also put the SUFA trustee, as an investor in the network, in a worse position than Aurizon Network, as Aurizon Network could manage the recovery of these costs (for its own investment) through seeking a variation in reference tariffs.

¹⁰⁰ Aurizon Network, sub. 30, pp. 24-26.

QCA's assessment of UT4 SUFA DAAU

We have reviewed the form of EISL in Aurizon Network's UT4 SUFA DAAU submission, which provides that set-off applies not only to the rent adjustment mechanism, but also to amounts that are either agreed by the parties or determined through dispute resolution process. That right of set-off is available to both Aurizon Network and the SUFA trustee.¹⁰¹

We consider Aurizon Network's proposal addresses our concern, as it would allow the SUFA trustee (representing the PUHs) to challenge Aurizon Network's claims prior to Aurizon Network setting off that amount against the rental stream. 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.

Aurizon Network's proposed form of EISL obliges Aurizon Network to submit reference tariff variation applications to the QCA in respect of amounts the SUFA trustee paid to Aurizon Network, which were due and payable due to a change in law or a change in taxes.¹⁰² We note, however, that Aurizon Network is not obliged to refund such amounts to the SUFA trustee if the reference tariff variation is approved. Whilst we acknowledge that the SUFA trustee may exercise its right under the EISL and seek a variation to the rent calculation methodology to have such amounts refunded, our view is that Aurizon Network should be obliged to refund such amounts. We have proposed amendments to the EISL to provide for this obligation on Aurizon Network, which we consider maintains a workable, bankable and credible SUFA framework that seeks to encourage financing choice for expansions in the CQCN.

We are of the view that Aurizon Network's proposed set off approach, together with our proposed mechanism for the SUFA trustee to recover amounts set off by Aurizon Network which are recoverable (or recovered) through a tariff variation, 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 (s. 138(2)(a) and (d) of the QCA Act). Our approach also supports the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Summary of final decision 4.3

Our final decision is to:

- (1) accept Aurizon Network's proposal to apply set off:
 - (a) in the context of the rent adjustment mechanism and
 - (b) in respect of amounts due when that amount is agreed by parties or determined through dispute resolution
- (2) amend clause 7.7 of the EISL to provide a mechanism for the SUFA trustee to recover amounts set off by Aurizon Network which are recoverable (or recovered) through a tariff variation.

¹⁰¹ Aurizon Network, sub. 20, pp. 28–29 (cls. 7.4, 7.5 and 7.6).

¹⁰² Aurizon Network, sub. 20, p. 30 (cl. 7.7). Aurizon Network's drafting applies to amounts in excess of a certain dollar amount that is blank. We consider the drafting should be amended to make it consistent with UT4, so a reference tariff variation application is to be made whenever Aurizon Network is obliged to do so under UT4.

5 THIRD PARTY FINANCING

The SUFA framework should enable potential SUFA funders to obtain finance as efficiently as possible, including to access third party financing. Given this, the SUFA framework should allow for parties to determine the type of financing to apply for a user funding arrangement on a case-by-case basis.

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

The QCA has reconsidered its draft decision on dispute resolution for alternative types of financing for a SUFA. We are satisfied that the protections in UT4 provide an opportunity to address shortcomings in the SUFA template (including that the template may preclude a specific type of financing) when the template is practically tested. Those protections include Aurizon Network being required to act reasonably and in good faith in negotiating amendments to the SUFA template and the mechanism permitting the review and amendment of the SUFA template. Our final decision is therefore to accept Aurizon Network's proposal that any disagreement on amendments required to the SUFA template for a specific type of finance should not be subject to binding dispute resolution, subject to clarifying that this does not preclude a dispute about whether Aurizon Network has acted reasonably and in good faith, as already required by Part 8 of UT4.

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 to permit specific types of third party financing.
- The Financing Side Deed (FSD) should be a part of the SUFA template. 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 QTH, 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.

Since these positions are consistent with the UT3 SUFA final decision and stakeholders did not object to them, our final decision adopts our draft decision that these positions remain appropriate (see the analysis in the UT3 SUFA final decision).¹⁰³

However, the 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 SUFA template to give effect to a financing option proposed by SUFA investors.¹⁰⁴ This matter is considered in this chapter.

¹⁰³ QCA UT3 SUFA final decision, pp. 159–163.

¹⁰⁴ QCA UT3 SUFA final decision, pp. 161–162.

5.1 Binding dispute resolution for third party financing

Our view in the UT3 SUFA final decision was that the SUFA framework should allow the SUFA parties to negotiate amendments to the SUFA template to permit alternative types of financing. We also considered that any disagreement between Aurizon Network and potential SUFA investors should be subject to binding dispute resolution to discourage Aurizon Network from unreasonably disagreeing with the type of finance and financing structure proposed by potential SUFA investors, and to allow for the possibility of the most efficient form of financing for SUFA projects.¹⁰⁵

In the UT4 SUFA DAAU submission, Aurizon Network did not accept that a disagreement between it and potential SUFA investors over modifications required to the SUFA template should be subject to a binding dispute resolution process.¹⁰⁶

Our UT4 SUFA draft decision was to refuse to approve Aurizon Network's proposal. We maintained our position that disagreement about amending the SUFA template to give effect to a specific type of finance and financing structure should be resolved by a binding dispute resolution process. Our view in the draft decision was that a dispute relating to amending SUFA template documents is a dispute regarding access, and division 5 of Part 5 of the QCA Act will apply. We considered it necessary to amend UT4 to provide for a dispute resolution process in this respect.¹⁰⁷

Stakeholders' submissions

Aurizon Network disagreed with our draft decision and restated its view that the SUFA template should be a 'safe harbour' template agreement, similar to other template agreements that form part of UT4. Aurizon Network considered that it and potential counterparties are 'locked in' to the terms of a template agreement which provides balanced terms and eliminates the need for protracted and costly negotiation. Aurizon Network's view was that if any proposed difference in terms is not agreed by Aurizon Network and potential counterparties on a commercial basis, no binding dispute resolution process should be available to determine that difference, otherwise it defeats the purpose of having the template in the first place. Aurizon Network considered that the scope of the dispute process should be restricted to a dispute over completing the schedules and annexures of the transaction documentation.¹⁰⁸

QCA analysis and final decision

The QCA's objective in seeking to ensure parties could negotiate financing arrangements that differ from those in the SUFA template is to provide flexibility of financing options and allow for as many different types of financing as possible. We consider permitting flexibility for financing options 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).

However, our concern has been that Aurizon Network could act unreasonably and refuse a type of finance or financing structure not specifically permitted by the SUFA template. This could unduly restrict a SUFA funder's ability to obtain equity and debt finance as efficiently as possible. Such an outcome creates barriers to participation in the financing of expansions in the

¹⁰⁵ QCA UT3 SUFA final decision, pp. 161–162.

¹⁰⁶ Aurizon Network, sub. 2, pp. 21–22.

¹⁰⁷ QCA UT4 SUFA draft decision, pp. 49–51.

¹⁰⁸ Aurizon Network, sub. 30, pp. 27–28.

CQCN, which would exclude certain users from seeking to fund expansions to meet their access requirements. This has the potential to conflict with the object of the third party access regime and may not be in the public interest (s. 138(2)(a) and (d) of the QCA Act).

Our position remains that parties should be able to negotiate alternative financing arrangements. However, we acknowledge that if, despite the parties acting reasonably and in good faith in negotiating amendments to the SUFA template, the parties are unable to reach agreement on alternative financing arrangements, the SUFA template provides a default form of arrangement.

In the context of our consideration of the SUFA template under UT3, we considered that a binding dispute resolution process was appropriate to discourage Aurizon Network from unreasonably disagreeing with alternative financing structures. However, we note that UT4 includes mechanisms that would address our concern.

Specifically, clause 8.8.1(a)(iv) of UT4 provides that the user funding agreement must be in the form of the SUFA template unless otherwise agreed by Aurizon Network and funders, in which case any amendments must be negotiated by both Aurizon Network and the funders acting reasonably and in good faith. Also, clause 8.2.2(a)(v) provides that access seekers/funders may dispute, among other things, whether Aurizon Network has acted reasonably or in good faith in applying Part 8 of UT4. These provisions in UT4 provide protection for SUFA funders that Aurizon Network will act reasonably and in good faith in negotiating amendments to the SUFA template that may be genuinely required by the SUFA funders to give effect to a specific form of finance.

We therefore accept that if the parties, acting reasonably and in good faith, fail to agree on amendments to the SUFA template, the terms of the proposed amendments do not give rise to a dispute under UT4. That is, we accept that a dispute regarding a party refusing to vary the terms of the SUFA template is not a dispute under clause 11.1.1(a) of UT4, subject to clarifying that this clause does not preclude a dispute about whether Aurizon Network has acted reasonably and in good faith, as already required by Part 8. We note that any disagreement over schedules and annexures to a SUFA template are already subject to binding dispute resolution.

While our aim in the draft decision was to provide flexibility for financing options for funders, we note that it is unclear at this point in time whether flexibility to permit alternative financing arrangements is likely to be a material concern in the use of the SUFA template, as the template has not yet been tested. It is also possible that alternative financing arrangements may, if the parties agree, be dealt with outside the SUFA template documents.

Additionally, we note that UT4 also includes a review and amendment mechanism which will provide an opportunity to address any identified shortcomings in the SUFA template when it is practically tested, including whether it is too restrictive in terms of the financing option it provides for.¹⁰⁹ We consider that, should any concerns be identified in future regarding the financing option available in the SUFA template, this review process provides a mechanism to address any such concerns.

Overall, we are satisfied that the provisions in UT4 regarding Aurizon Network acting reasonably and in good faith in negotiating amendments to the SUFA template, as well as the review and amendment mechanism, protect the interests of third party financiers. The QCA therefore accepts Aurizon Network's position in the UT4 SUFA DAAU that binding dispute resolution

¹⁰⁹ UT4, clause 8.8.3(e) and (f).

under UT4 should not apply to disputes about variations necessary for alternative financing arrangements, subject to clarification that this does not preclude a dispute about whether Aurizon Network has acted reasonably and in good faith in any negotiations in respect of variations. We consider this reflects the intent of the role of a standard agreement as well as the provisions of Part 8 and provides an appropriate balance between the legitimate business interests of Aurizon Network and the interests of access seekers and third party financiers.

Summary of final decision 5.1

The QCA accepts Aurizon Network's position that a dispute regarding a party refusing to vary the terms of a standard user funding agreement is not a dispute for the purpose of clause 11.1.1(a) of UT4, subject to clarifying that this does not preclude a dispute about whether Aurizon Network has acted reasonably and in good faith in respect of any negotiations in respect of such variation.

6 RENTAL ARRANGEMENTS

Rent paid by Aurizon Network is the sole income of the SUFA trustee and, by extension, the only source of a return from a SUFA for 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 proposed a post-deregulation rental mechanism, including a dispute resolution process.

In respect of the SUFA rental arrangements, our final decision, which adopts our draft decision, is as follows:

- *The concept of an OPRA be removed from the SUFA template.*
- *Aurizon Network's post-deregulation rental mechanism is not appropriate and it should be replaced with the approach proposed in our draft decision—that is, in the event the CQCN becomes undeclared, the rent calculation methodology should be such that SUFA funders recover, within a reasonable timeframe, the residual value of their investment made during the period when the CQCN is declared, and receive a reasonable return attributable to their investment, taking into account the prevailing market conditions in the unregulated environment.*

Overview

In respect of the SUFA rental arrangements, Aurizon Network's UT4 SUFA DAAU adopts a number of positions contained in the UT3 SUFA final decision.¹¹⁰ These include:

- Under the Extension Infrastructure Sub-Lease (EISL), the SUFA trustee subleases the SUFA-funded 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 agreements,¹¹¹ under which all access charges under those agreements are paid to the SUFA trustee, other than to the extent that Aurizon Network otherwise directs.
- The rental calculation methodology in the regulated environment is based on the concept of the system allowable revenue, which is applied in the calculation of reference tariffs under UT4.
- 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 the case of disagreement between the parties.

¹¹⁰ For background information on rental arrangements see the UT3 SUFA final decision (Chapter 5, pp. 35–39).

¹¹¹ 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.

Since these positions are consistent with the UT3 SUFA final decision and stakeholders did not object to them, our final decision adopts our draft decision that these positions remain appropriate.¹¹²

However, the UT4 SUFA DAAU also contains positions relating to SUFA rental arrangements that are different from the UT3 SUFA final decision. Our draft decision and stakeholders' comments on our draft decision in respect of those matters are summarised in Table 4, and considered in sections 6.1 and 6.2 of this final decision document.

Table 4 SUFA rental arrangements—summary of key positions

<i>Summary of the draft decision</i>	<i>Aurizon Network's response</i>	<i>Other stakeholders' response</i>	<i>QCA final decision</i>
Rental arrangement in the regulated environment—Operating and performance risk allowance (OPRA)			
Removed OPRA from the SUFA template, which Aurizon Network proposed as a deduction to SUFA rents to compensate itself for being allocated 'unknown' risks relating to SUFA investment.	Rejected the draft decision and reiterated its DAAU proposal that the SUFA template should include the OPRA allowance mechanism with its value determined periodically by the QCA.	The QRC generally agreed with the draft decision.	See section 6.1
Rental arrangement in the unregulated environment			
Post-deregulation rental arrangement should permit the SUFA investors to recover, within a reasonable timeframe, the residual value of their investment made during the period when the CQCN is declared, and receive a reasonable return, taking into account the prevailing market conditions. If parties disagree, a binding dispute resolution process will apply.	Rejected the draft decision and claimed that the draft decision analysis was flawed, unreasonable and contrary to its legitimate business interests. Reiterated its DAAU submission that its proposed post-deregulation rental mechanism was appropriate.	The QRC generally agreed with the draft decision.	See section 6.2

6.1 Operating and performance risk allowance (OPRA)

The UT3 SUFA final decision was to refuse to approve Aurizon Network's proposal to include an OPRA as a deduction to SUFA rents, which Aurizon Network had proposed as compensation for providing railway manager services associated with SUFA assets. We considered that a SUFA-funded piece of 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-funded infrastructure; therefore OPRA was not required.¹¹³

¹¹² QCA, UT3 SUFA final decision, pp. 35–39.

¹¹³ QCA, UT3 SUFA final decision, pp. 205.

In the UT4 SUFA DAAU, Aurizon Network reiterated its 2013 SUFA DAAU proposal to provide for an OPRA, and proposed for the QCA to determine periodically the value (if any) of an OPRA.¹¹⁴ The QRC did not consider it appropriate that Aurizon Network retain any OPRA.¹¹⁵

Our UT4 SUFA draft decision was to refuse to approve Aurizon Network's proposal. We maintained our view that it is not appropriate for part of the SUFA rental streams to be attributable to Aurizon Network in the form of an OPRA. We considered that the existing regulatory framework already adequately addresses Aurizon Network's risks associated with managing the CQCN (including SUFA-funded infrastructure). We maintained the view that the proposed OPRA would make the SUFA rental streams unpredictable and uncertain, affecting the credibility and bankability of the SUFA.¹¹⁶

Stakeholders' submissions on draft decision

Aurizon Network disagreed with our draft decision and reiterated its UT4 SUFA DAAU proposal that the OPRA allowance mechanism should be included in the SUFA template, and that its amount should be determined periodically by the QCA.¹¹⁷

Aurizon Network stated that the QCA had misunderstood its proposal, as it had never proposed to receive a fee in excess of the regulated allowances. Rather, Aurizon Network had consistently proposed that 'provision should be made in the SUFA template so that when some of the quantum of compensation (if any) for risk (if any) borne by Aurizon Network is included in the capital component, Aurizon Network can be the recipient (in economic terms) of that compensation'. Aurizon Network considered that ruling out even the possibility of reward being transferred to Aurizon Network for risk it assumed was unreasonable.¹¹⁸

Although Aurizon Network accepted that the nature and extent of such uncompensated risks were unknown, it considered that the risk it would assume arose in the following circumstances:

- The SUFA splits 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.¹¹⁹
- In the absence of an OPRA, the SUFA template will be framed on the basis of an implicit assumption that the risk allocated to Aurizon Network will correspond exactly to the regulatory operating and maintenance allowance. Aurizon Network believed this implicit assumption may turn out to be incorrect.¹²⁰
- Aurizon Network may face new risks that arise under subsequent access undertakings—these risks are by their nature 'unknown unknowns' and cannot be identified, let alone priced, now.¹²¹

¹¹⁴ Aurizon Network, sub. 2, pp. 38–40.

¹¹⁵ QRC, sub. 29, p. 7.

¹¹⁶ QCA UT4 SUFA draft decision, pp. 54–55.

¹¹⁷ Aurizon Network, sub. 30, p. 29.

¹¹⁸ Aurizon Network, sub. 30, p. 29.

¹¹⁹ Aurizon Network, sub. 2, p. 39.

¹²⁰ Aurizon Network, sub. 30, p. 29.

¹²¹ Aurizon Network, sub. 30, p. 30.

Aurizon Network said that its proposal addressed appropriately Aurizon Network's legitimate business interests and did not unfairly disadvantage any other party, noting that 'a rational potential investor in a user funding transaction would consider the OPRA risk as a small sub-set of its overall regulatory risk'.¹²²

QCA analysis and final decision

We remain of the view that it is not appropriate for part of the SUFA rental stream to be attributable to Aurizon Network in the form of an OPRA.

Aurizon Network's proposal is that the SUFA template should include the OPRA mechanism to compensate it for risk relating to SUFA investment that it would bear. In order to assess the appropriateness of Aurizon Network's proposal, it is relevant that we assess, among other things, the nature of the risk Aurizon Network claims it would bear, and consider whether Aurizon Network's proposed OPRA mechanism is appropriate to mitigate the consequence of, or address, such risk.

Aurizon Network's submission clarifies that the risk it is referring to does not correspond to the risk associated with operating and maintaining the CQCN (including SUFA-funded infrastructure), which is already addressed through the regulatory operating and maintenance allowance. Rather, the risk Aurizon Network considers it would assume is associated with:

- risk relating to investment that would arise due to the SUFA template splitting the roles of investor, revenue recipient, project developer and operator/maintainer
- new risks that Aurizon Network may face in future access undertakings.

Risk relating to investment

In the SUFA template, Aurizon Network is the constructor of SUFA assets as well as the operator/maintainer of the infrastructure (including SUFA assets), and PUHs are the SUFA investors and, through the SUFA trust, recipients of rental income.

As the constructor, Aurizon Network is compensated, through the contract sum, for the risk it bears under the construction agreement. After construction, the risk to Aurizon Network is no different to the risk it carries on the rest of the CQCN and it is compensated for that risk through the regulatory operating and maintenance allowance and through other provisions contained in the access undertaking (e.g. the review event and endorsed variation event). Therefore, the SUFA template and the access undertaking already adequately address Aurizon Network's risks associated with the roles it undertakes in the SUFA framework.

The SUFA investors (PUHs), on the contrary, have no control over the use of the physical infrastructure or the ability to generate income from it other than through Aurizon Network (see Chapter 1). The SUFA investors' sole income—rental cash flow—is dependent upon Aurizon Network's actions, and non-compliance by Aurizon Network with its contractual obligations in the SUFA template is an actual risk SUFA investors face in a SUFA-funded model. Relevantly, such risks do not arise in an Aurizon Network-funded expansion model, but they do arise in a SUFA-funded expansion model.

We acknowledge that the SUFA-funded expansion model—by splitting the roles of investor, revenue recipient, project developer and operator/maintainer—gives rise to risk relating to investment, but those are risks faced by SUFA investors and not Aurizon Network. Therefore,

¹²² Aurizon Network, sub. 30, pp. 29–30.

Aurizon Network's claim that some of the risk relating to SUFA investment may be allocated to it is unfounded.

We do not consider Aurizon Network has provided a compelling case to establish the risk relating to SUFA investment that it considers it would assume. Aurizon Network believes the assumption that the risk allocated to it in respect of a SUFA investment corresponds exactly to the regulatory operating and maintenance allowance may turn out to be incorrect. However, Aurizon Network has not provided any compelling evidence in support of its belief.

New risks arising in future

Aurizon Network has argued that it may face new risks under subsequent undertakings, which are by their nature 'unknown unknowns'. However, this characterisation does not enable us to assess, among other things, the nature of the risk Aurizon Network claims it would bear, whether that risk is attributable to the SUFA framework, and whether Aurizon Network's proposed OPRA mechanism would be appropriate to mitigate the consequence of, or address, such risk.

If Aurizon Network is referring to the risk associated with changes to the regulatory regime—for example, if a change to the revenue cap approach was contemplated—all relevant parties, including Aurizon Network and PUHs, are afforded the opportunity to be involved in the review and consultation process associated with any proposed changes to the existing regulatory regime. We consider the regulatory process appropriately addresses the interests of parties to a SUFA transaction, including Aurizon Network and prospective SUFA funders (access seekers and/or third party financiers).

Such a process will enable us to assess the nature of the risk that Aurizon Network and other parties may face, and consider what mechanism (if any) would be appropriate to mitigate the consequence of, or address, such risk.

Conclusion

We do not consider it appropriate to include an OPRA allowance mechanism in the SUFA template based on a perception by Aurizon Network that it would bear an unknown risk under the SUFA framework. Until we are able to assess the nature and the extent of the risk, we do not consider it is reasonable for us to assess whether OPRA or any other mechanism would be appropriate to mitigate the consequences of, or address, such risk.

We also note UT4 allows Aurizon Network and stakeholders to return the SUFA template to us for further review and refinement, should specific concerns be raised with respect to its credibility, workability and bankability. It would be open to Aurizon Network to use that process in the future to provide compelling evidence (if any is then available) to support its proposed OPRA mechanism.

Therefore, our final decision is that the concept of an OPRA should be removed from the SUFA template. 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 Aurizon Network's proposed OPRA mechanism, through seeking to appropriate some of the SUFA rental stream for unknown and undefined risks, 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 to 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 (s. 138(2)(a), (d), (e) and (h) of the QCA Act).

Summary of final decision 6.1

The UT4 SUFA DAAU should have all references to an OPRA removed from the SUFA template documents.

6.2 Rental arrangements in the unregulated environment

The UT3 SUFA final decision was to refuse to approve Aurizon Network's then proposed post-deregulation rental arrangement. In that decision we proposed a set of objectives that a post-deregulation rental mechanism should meet, and a process for determining post-deregulation SUFA rental streams, including a binding dispute resolution process.¹²³

Aurizon Network's UT4 SUFA DAAU submission did not accept our UT3 SUFA final decision approach of determining post-deregulation SUFA rents.¹²⁴

Based on our understanding of Aurizon Network's UT4 SUFA DAAU 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.

6.2.1 The QCA's jurisdiction

In its UT4 SUFA DAAU submission, Aurizon Network claimed 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.¹²⁵

Our draft decision, in respect of the UT4 SUFA DAAU, maintained our view that it was open to us to consider a DAAU that contains arrangements that may apply beyond the duration of the declaration of the service.¹²⁶

Stakeholders' submissions

Aurizon Network's view was that since the QCA did not seek to impose a rental stream, the QCA's preferred rental stream was not a requirement for this DAAU; therefore, the QCA should accept Aurizon Network's proposed post-deregulation rental mechanism.¹²⁷

QCA analysis and final decision

We remain of the view that, in deciding whether to approve or not approve the UT4 SUFA DAAU, it is relevant that we consider the rental arrangements that would apply if the CQCN declaration expired.

Considering the significant nature of the SUFA-funded infrastructure, the associated investments would be long-term arrangements. Therefore, a rental arrangement that assures an appropriate rental stream over the life of a SUFA transaction is critical to developing a

¹²³ QCA UT3 SUFA final decision, pp. 49–50; 55–58.

¹²⁴ Aurizon Network, sub. 2, p. 23.

¹²⁵ Aurizon Network, sub. 2, p. 24.

¹²⁶ QCA UT4 SUFA draft decision, pp. 56–57.

¹²⁷ Aurizon Network, sub. 30, p. 31.

workable, bankable and credible SUFA framework, in the period during which the CQCN is a declared service.

In the current regulatory environment, the SUFA rental calculation is defined based on the concept of the system allowable revenue, and is dependent upon parameters—for example, return on capital (regulated WACC) and return of capital (depreciation)—which are determined through the regulatory process. Furthermore, any changes to these parameters or to the regulatory framework in general, would require an extensive, transparent consultation process, and a regulatory decision would also be subject to appeal. Therefore, the regulatory regime provides a reasonable and fair process for establishing an appropriate approach to obtaining the SUFA rental stream.

Our view is that, in the event the CQCN is no longer declared, the process to determine an appropriate SUFA rental stream should also be reasonable and fair. We have assessed Aurizon Network's proposed post-deregulation rental mechanism and we do not consider it is reasonable and fair, in terms of the approach to obtaining the SUFA rental stream. Our final decision is to refuse to approve Aurizon Network's proposed post-deregulation rental mechanism (see section 6.2.2).

We do not consider it is appropriate for us to define the SUFA rental stream or to determine parameters in the post-deregulation period. Rather, our proposed amendment seeks to put in place a reasonable and fair process for determining an appropriate SUFA rental stream (see section 6.2.2). Our proposed approach permits SUFA investors to recover the residual value of their investment made during the period when the CQCN was declared, within a reasonable timeframe and with a return on investment that is appropriate for the prevailing market conditions in the unregulated environment.

6.2.2 Post-deregulation rental mechanism

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. In that decision, we proposed that a post-deregulation rental mechanism should meet the following objectives:

- 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.¹²⁸

In its UT4 SUFA DAAU submission, Aurizon Network said the post-deregulation rental objectives set out in our UT3 SUFA final decision were not specific in nature, and would create a high level of uncertainty about the rental payment stream in a post-deregulation environment. Aurizon Network's UT4 SUFA DAAU included a post-deregulation rental mechanism (PDR mechanism), which Aurizon Network claimed was more specific in nature, and would provide a high level of certainty about the SUFA rental stream.¹²⁹

¹²⁸ QCA, UT3 SUFA final decision, pp. 49–50; 55–58.

¹²⁹ Aurizon Network, sub. 2, pp. 23–25.

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.¹³⁰

In our UT4 SUFA draft decision we refused to approve Aurizon Network's PDR mechanism. Our view was that Aurizon Network's proposal was unchanged from what it proposed in the 2013 SUFA DAAU and that it provided a vertically integrated Aurizon entity with complete discretion to determine the SUFA rental streams, in the event the CQCN was no longer declared.¹³¹

Our UT4 SUFA draft decision was that the post-deregulation rent calculation methodology should be such that SUFA funders are able to recover, within a reasonable timeframe, the residual value of any investment made during the period when the CQCN is declared, and receive a reasonable return attributable to their investment, taking into account the prevailing market conditions in the unregulated environment.¹³²

Stakeholders' submissions

Aurizon Network disagreed with our draft decision and reiterated its UT4 SUFA DAAU proposal that the SUFA template should incorporate the post-deregulation rental mechanism set out in its UT4 SUFA DAAU submission.

Comment on the QCA's assessment of Aurizon Network's PDR mechanism

Aurizon Network stated that the QCA had a fundamental misunderstanding of Aurizon Network's proposal, and had made significant errors in analysing its PDR mechanism.¹³³

Aurizon Network clarified that its proposed PDR mechanism had changed from the arrangement it proposed in the 2013 SUFA DAAU, as the EISL in the UT4 SUFA DAAU modified two defined terms and deleted one defined term,¹³⁴ which were significant in the operation of its PDR mechanism. Among other things, those changes meant that the PDR mechanism related solely to revenue earned by Aurizon Network for its provision of access and commercially integrated transportation services (CITS)¹³⁵ to customers—that is, only Aurizon Network played a role in determining the return on SUFA assets. Aurizon Network explained that if there is another Aurizon entity (say Aurizon Transport Solutions) that offered an integrated transportation service and bought access from it, that entity (Aurizon Transport Solutions) played no part in deciding the return on SUFA assets, and any revenue attributed by Aurizon Transport Solutions to below-rail services was irrelevant to the PDR mechanism.¹³⁶

Aurizon Network disagreed with the QCA's draft decision as follows:

- Aurizon Network would have a strong incentive to reduce the returns on below-rail assets if that resulted in lower SUFA rental payments. Aurizon Network argued that if it were to reduce price to its customers, that 'would result in lower cashflows in terms of SUFA rental streams but it would also be contrary to Aurizon Network's financial interests'.
- Aurizon Network's proposed rental arrangement would provide it with complete discretion over the capital revenue it attributed to below-rail services. Aurizon Network argued that,

¹³⁰ QRC, sub. 29, p. 7.

¹³¹ QCA, UT4 SUFA draft decision, p. 58.

¹³² QCA, UT4 SUFA draft decision, pp. 58–60.

¹³³ Aurizon Network, sub. 30, pp. 31, 60–62.

¹³⁴ Aurizon Network amended the definition of 'CITS' and 'Other Transportation Costs', and deleted the term 'CITS provider' in the EISL it submitted as part of the UT4 SUFA DAAU.

¹³⁵ CITS relates to a bundled set of services comprising below-rail and other transportation services.

¹³⁶ Aurizon Network, sub. 30, pp. 60–62.

among other things, elements of capital revenue were matters of fact and auditable, and Aurizon Network had no discretion in assessing their quantum.¹³⁷

Comment on the QCA's draft decision post-deregulation approach

Aurizon Network considered the QCA's draft decision proposal was unreasonable and contrary to Aurizon Network's legitimate business interests. Aurizon Network presented a hypothetical scenario with the following details, to demonstrate the adverse consequences for Aurizon Network:

- Aurizon Network-funded assets in the RAB: \$4.5 billion
- SUFA trustee-funded assets in the RAB: \$0.5 billion
- remaining life of assets in RAB: 20 years
- Aurizon Network's annual post-deregulation revenue: \$45 million
- Aurizon Network's annual post-deregulation operating and maintenance expenditure: \$40 million.¹³⁸

Aurizon Network argued that in this scenario, the QCA's draft decision proposal that 'Aurizon Network should pay a cashflow stream with a present value equal to the value of the SUFA assets in the RAB as at the end of the declaration period' would result in:

- Aurizon Network paying the SUFA trustee \$0.5 billion over 20 years, equivalent to \$25 million per annum (assuming a zero percent discount rate) —that is, the SUFA trustee, which accounted for 10 percent of the RAB, would receive a positive return on its assets of \$25 million per annum.
- Aurizon Network, which accounted for 90 percent of the RAB, experiencing a net negative return on its assets of \$20 million per annum and being required to underwrite the SUFA trustee's returns.¹³⁹

Aurizon Network said it endorsed the view that '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'. However, Aurizon Network's view was that in a deregulated environment the concept of 'recovering the value of (one's) investment' was inappropriate.¹⁴⁰

QCA analysis and final decision

We remain of the view that Aurizon Network's PDR mechanism is unreasonable and unfair, in terms of the approach to obtaining the SUFA rental stream, and would materially disadvantage the interest of SUFA investors and adversely affect the bankability of the SUFA framework.

Our final decision, which retains our draft decision approach, is that amendments are required to the EISL in Aurizon Network's UT4 SUFA DAAU to assure 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.

¹³⁷ Aurizon Network, sub. 30, pp. 60–62.

¹³⁸ Aurizon Network, sub. 30, pp. 30–31.

¹³⁹ Aurizon Network, sub. 30, pp. 31.

¹⁴⁰ Aurizon Network, sub. 30, pp. 31–32.

Assessment of Aurizon Network's PDR mechanism

Our concern with Aurizon Network's proposal has been that Aurizon Network may have an incentive to downgrade the value it places on below-rail services in its product portfolio, in order to reduce SUFA rental payments.

Aurizon Network's clarification—that SUFA rental payments were dependent solely upon the revenue earned by Aurizon Network for providing access and CITS services even if another Aurizon entity offered integrated transportation service by buying access from it—further reinforces our concern.

Our view is that, in the scenario where Aurizon Network sells access to another Aurizon entity, Aurizon Network will have a strong incentive to undersell access, in order to lower cash outflows in terms of SUFA rental streams and to benefit the Aurizon Group from the saving on the SUFA rental payments.

To illustrate this, we use the simple example of a scenario where another Aurizon entity (Aurizon Transport Solutions) buys access from Aurizon Network and provides an integrated transportation service to a coal mining company at \$10 per tonne for railing 10 million tonnes of coal per year. How much portion of the \$100 million revenue earned by Aurizon Transport Solutions is transferred to Aurizon Network depends upon the access price Aurizon Network charges Aurizon Transport Solutions.

Under Aurizon Network's PDR mechanism, the access price can be below the maximum amount that would have been allowed in the Final Regulatory Regime, which effectively means Aurizon Network has the discretion to charge an access price as it sees fit.

Suppose Aurizon Network charges \$5 per tonne and, as a result, would earn access revenue of \$50 million. Under Aurizon Network's PDR mechanism, the amount of rent Aurizon Network pays the SUFA trustee depends solely upon the access revenue Aurizon Network earns, and the SUFA trustee is paid a share of the access revenue less Aurizon Network's operating and maintenance expenditure. For simplicity, suppose the SUFA trustee's share is 10 per cent and Aurizon Network's operating and maintenance expenditure is \$5 million. That would mean the rent paid to SUFA trustee is \$4.5 million (i.e. 10 per cent of \$50 million less \$5 million).

The distribution of revenue, in this simple example when Aurizon Network's access price is \$5 per tonne, is:

- \$50 million is Aurizon Transport Solutions' revenue
- \$45.5 million is Aurizon Network's revenue (including operating and maintenance expenditure)
- \$4.5 million is the SUFA rent.

Since Aurizon Network has the discretion to charge an access price as it sees fit; further suppose Aurizon Network charges Aurizon Transport Solutions \$1 per tonne access price and other elements of the example remain unchanged. The resultant distribution of revenue is:

- \$90 million is Aurizon Transport Solutions' revenue
- \$9.5 million is Aurizon Network's revenue (including operating and maintenance expenditure)
- \$0.5 million is the SUFA rent.

Thus, by charging a lower access price of \$1 per tonne instead of \$5 per tonne, the SUFA rent reduces substantially to \$0.5 million (from \$4.5 million) and the Aurizon Group's revenue

increases to \$99.5 million (from \$95.5 million). Effectively, Aurizon Network's choice of access price has the effect of shifting revenue from the SUFA trustee to the Aurizon Group.

Therefore, our view is that under Aurizon Network's proposal, Aurizon Network will have a strong incentive to charge as low an access price as possible to reduce cash outflows in terms of the SUFA rent in order to increase the Aurizon Group's revenue.

The SUFA trustee has no control over Aurizon Network's pricing for access and is unable to dispute Aurizon Network's revenue shifting pricing approach because Aurizon Network's approach would be consistent with the objectives of 'pricing of access' and 'revenue sharing' set out in the EISL that forms part of its UT4 SUFA DAAU.

We have other concerns with Aurizon Network's PDR mechanism.

When Aurizon Network itself provides a CITS, it will determine a 'notional access revenue' for the relevant section¹⁴¹ 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
- the revenue received by Aurizon Network for the provision of the CITS in that section less costs other than below-rail costs (i.e. operating and administrative costs, and an appropriate allowance for capital costs of providing transportation service other than the below-rail service), incurred by Aurizon Network in providing the CITS.

Our concerns are:

- The decision of what constitutes a section in the unregulated scenario is at the discretion of Aurizon Network. If, for instance, the CQCN, immediately prior to deregulation, was split into systems (as is the case under the existing regulatory system) the access revenue attributable to each system would be calculated. A section, however, does not need to correspond to the systems. In such circumstances, it is unclear how Aurizon Network would calculate the access revenue that would have been attributable to a section under the Final Regulatory Regime.
- The CITS revenue (if it was less than the access revenue) is a residual figure once Aurizon Network accounts for other non-below-rail costs, including return on capital and depreciation allowance associated with non-below-rail assets. Below-rail assets are not accounted for in a comparable manner, therefore, the CITS revenue attributed to below-rail services may not reflect the true value of these services to Aurizon Network's integrated business in a post-deregulation industrial structure that allows for bundling of services. The dispute resolution process would not allow the SUFA trustee to challenge Aurizon Network's approach. Aurizon Network's proposal gives no guidance as to reasonableness in terms of the value that is placed on below-rail services.
- The revenue for calculating SUFA payment, when Aurizon Network provides CITS, is the lower of actual revenue or the notional revenue that would have applied, which exposes the SUFA trustee to the downside risk with no reciprocal share of the upside gain. Aurizon Network's proposal is unduly balanced in its favour and discriminates against the interests of the SUFA investors.

¹⁴¹ A 'section' (under UT4 SUFA DAAU EISL) refers to the rail infrastructure between two points where Aurizon Network provides a customer with access. SUFA-funded infrastructure could be part of a section.

- The process of cost allocation to obtain an estimate for the CITS revenue associated with below-rail service lacks transparency.

Overall, our view is that Aurizon Network's post-deregulation rental proposal allows Aurizon Network to decide what the return on SUFA assets will be in a manner that adversely affects the interests of SUFA investors. The SUFA trustee faces significant downside risk under Aurizon Network's proposal with no control over Aurizon Network's actions and no ability to challenge those actions through dispute resolution process.

We remain concerned that Aurizon Network's proposal will provide SUFA funders with very little or no certainty over SUFA rental streams in the event the CQCN declaration expires or is revoked and that this significantly impedes the bankability of SUFA in the period when CQCN is declared.

Therefore, our final decision is to refuse to approve Aurizon Network's PDR mechanism. We also consider it appropriate to not approve the amendments Aurizon Network made to the three defined terms in the EISL that was part of our UT3 SUFA final decision, in order to prevent Aurizon Network from seeking to shift revenue from the SUFA trustee to the Aurizon Group.

Our proposed approach

Our view in the draft decision was that the post-deregulation rental arrangement should achieve 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.

Aurizon Network claims that our approach is unreasonable and will require Aurizon Network to underwrite the SUFA trustee's return on the SUFA assets. That claim is based on Aurizon Network's understanding that in our proposed approach the timeframe over which SUFA investors recover the remaining value of their investment in the post-deregulation period is fixed as per the remaining life of SUFA assets in the RAB (20 years in the example Aurizon Network presented).

Our draft decision stated:

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.

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.¹⁴²

Thus, in our proposed approach, the timeframe for SUFA investors to recover the remaining value of their investment is not fixed to the remaining life of SUFA assets in the RAB as at the end of declaration period. Rather, our view is that it should be agreed by the parties or determined through the dispute resolution process, and should be such that it provides for a stable and predictable rental stream taking into account the prevailing market conditions in the unregulated environment. Therefore, Aurizon Network's claim is unfounded.

Aurizon Network said that in a deregulated environment, the concept of 'recovering the value of (one's) investment' was inappropriate.¹⁴³

The SUFA investors (PUHs) have no control over the use of the physical infrastructure or the ability to generate income from it other than through Aurizon Network (see Chapter 1). The SUFA investors' sole income from the SUFA—rental cash flow—depends upon Aurizon Network's actions, and non-compliance by Aurizon Network with its contractual obligations in the SUFA template is an actual risk SUFA investors face in a SUFA-funded model.

In the event the CQCN is no longer declared, Aurizon Network would have a control over the SUFA rental streams. We consider a post-deregulation rental approach should provide credible constraints on Aurizon Network; otherwise, the SUFA framework, within the period the CQCN is declared, is unlikely to be bankable.

Therefore, we consider it is relevant that a post-deregulation rental approach should provide assurance to SUFA funders 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, taking into account the prevailing market conditions in the unregulated environment. Our proposed approach seeks to provide this assurance whereas Aurizon Network's proposal significantly impedes this prospect.

If Aurizon Network disagrees with our proposed approach, it would be open for Aurizon Network to negotiate an alternative arrangement (e.g. buying out SUFA assets before, at, or after the end of the declaration period).

6.2.3 Dispute resolution process

The UT3 SUFA final decision was that if Aurizon Network and the SUFA trustee (effectively, the PUHs) fail to agree on an appropriate post-deregulation rental arrangement, a binding dispute resolution undertaken with a panel of three independent experts will apply. In that decision, we required Aurizon Network to include drafting in the EISL to reflect the dispute resolution process set out in our UT3 SUFA final decision.¹⁴⁴

Aurizon Network's UT4 SUFA DAAU EISL proposed a two-stage process to resolve disputes between the SUFA trustee and Aurizon Network (the disputing parties)—the first stage involving the parties appointing their own expert and the second stage involving appointment of a further (deciding) expert if the determination by the parties' experts is not identical.¹⁴⁵ The QRC

¹⁴² UT4 SUFA draft decision, p. 60.

¹⁴³ Aurizon Network, sub. 30, p. 33

¹⁴⁴ QCA, UT3 SUFA final decision, pp. 56–58.

¹⁴⁵ UT4 SUFA DAAU EISL, cl. 9.8.

accepted Aurizon Network's proposed dispute resolution process, although it observed that Aurizon Network's drafting was cumbersome.¹⁴⁶

Our draft decision, in respect of the UT4 SUFA DAAU, was to refuse to approve Aurizon Network's proposed dispute resolution process. We considered Aurizon Network's proposal would be ineffective in determining an appropriate SUFA rental stream because the determination will be on the basis of Aurizon Network's proposed post-deregulation rental objective, which we considered was itself unreasonable. We also had several concerns with Aurizon Network's proposed two-stage dispute resolution process. Our UT4 SUFA draft decision maintained our view that the dispute resolution should be undertaken with a panel of three independent experts with adequate power to determine an appropriate rent calculation methodology that achieves the post-deregulation SUFA rental objectives as set out in our draft decision.¹⁴⁷

Stakeholders' submissions

Aurizon Network disagreed with our draft decision and restated the dispute process set out in its UT4 SUFA DAAU submission.¹⁴⁸

QCA analysis and final decision

We remain of the view that Aurizon Network's proposed dispute resolution process is not appropriate for the reasons set out in our draft decision, including:

- The dispute would be determined on the basis of Aurizon Network's proposed post-deregulation rental objective, which is itself unreasonable (see section 6.2.2).
- The parties' own experts, appointed in the first stage, are most likely to make determinations that would not be identical. There is a very high likelihood the second stage deciding expert would be appointed to make a determination, which makes the first stage of having parties appoint their own expert unnecessary.
- The deciding expert is required to select between the two experts' determinations, which 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.¹⁴⁹

We maintain our view that the dispute resolution process detailed in our UT4 SUFA draft decision is appropriate. It provides:

- dispute resolution by a panel of three independent experts with suitable and complementary skills, where each member is appointed by agreement between the parties and, failing agreement, nominated by the President of the Resolution Institute in Australia
- an expert panel with adequate power to have access to Aurizon Network's information, to the extent the panel considers it relevant for its decision-making remit
- a period of six months for the expert panel to reach a decision, which can be extended by agreement of the relevant parties, or if the panel considers it requires further information or time to reach a decision

¹⁴⁶ QRC, sub. 29, p. 6.

¹⁴⁷ QCA, UT4 SUFA draft decision, pp. 61–62.

¹⁴⁸ Aurizon Network, sub. 53, pp. 41–43.

¹⁴⁹ QCA, UT4 SUFA draft decision, p. 61.

- the panel to consider a party's proposal and determine an appropriate rent calculation methodology that achieves the post-deregulation SUFA rental objectives (see section 6.2.2). The determination by the expert panel will be binding.

Conclusion

Our proposed 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 residual value of 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 residual value of their investment in the unregulated environment—effectively, the return of capital (depreciation)—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.

Our proposed approach does not seek to impose a rental stream in a post-deregulation environment because that would be subject to the prevailing market conditions in the unregulated environment. Rather, our approach provides assurance to prospective SUFA funders that if they invest in a SUFA transaction whilst the CQCN is declared, a reasonable and fair process will be adhered to, to determine SUFA rental streams in a post-deregulation environment that will result in the recovery of the residual value of their investment.

Since our proposed approach does not impose a rental stream in a post-deregulation environment, it 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 binding dispute resolution. The outcome of the dispute resolution process depends upon the proposals put forward at that time and the extent to which experts in the relevant fields consider them a reasonable mechanism to achieve the post-deregulation rental objectives.

We consider a SUFA framework that includes our proposed approach provides 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 (s. 138(2)(a),(d),(e) and (h) of the QCA Act).

Summary of final decision 6.2

The EISL in UT4 SUFA DAAU should be amended to:

- (1) include the post-deregulation SUFA rental objectives as set out in section 6.2.2 of this final decision document.
- (2) reflect the dispute resolution process in the post-deregulation environment as outlined above.
- (3) reinstate the defined term 'CITS provider' as per the UT3 SUFA final decision, and remove the amendments Aurizon Network made to the definition of 'CITS' and 'Other Transportation Costs'.

See clauses 1.2 and 9.8, and Item 2, Schedule 1 in the UT4 SUFA DAAU EISL mark-up in Appendix B.

7 TERMINATION OF INFRASTRUCTURE LEASE

The infrastructure leases on which a SUFA transaction relies may terminate. If there is an imbalance in the allocation of risk in respect of termination events, the SUFA framework would not be attractive to potential participants (and therefore would not be effective as a funding option).

Aurizon Network's UT4 SUFA DAAU does not make Aurizon Network liable for consequential loss of the SUFA trustee if the Infrastructure Lease is terminated due to Aurizon Network's acts, omissions or insolvency.

Our final decision adopts our draft decision that Aurizon Network should be subject to liability for the loss (including consequential loss) of the SUFA trustee if the Infrastructure Lease is terminated due to Aurizon Network's acts, omissions or insolvency. Our final decision clarifies that the loss the SUFA trustee may claim is capped at the value of the SUFA assets in the RAB at termination.

Overview

The infrastructure leases relevant to a SUFA transaction are:

- Aurizon Network's infrastructure lease with QTH (Infrastructure Lease)¹⁵⁰
- Extension Infrastructure Head-Lease (EIHL)
- Extension Infrastructure Sub-Lease (EISL).

The Infrastructure Lease relates to the existing infrastructure operated by Aurizon Network but not the SUFA-funded infrastructure (which is covered under the EIHL and EISL). The EIHL and EISL rely on the Infrastructure Lease being in force. 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 that termination for a SUFA transaction are relevant to a SUFA investor.

Aurizon Network's UT4 SUFA DAAU contains a number of positions on these 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 QTH, as 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-funded infrastructure is deemed to be "Infrastructure" for the purposes of the Infrastructure Lease and is deemed to be leased by QTH to Aurizon Network on the terms of the Infrastructure Lease. The SUFA trustee will be entitled to a rent-equivalent cash flow as compensation in lieu of rent; plus a detriment

¹⁵⁰ 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 final decision focuses on the infrastructure lease with QTH, it also applies to the infrastructure lease with QR to the extent relevant.

amount (if the EIHL was terminated due to an Aurizon Network) or less a detriment amount (if the EIHL was terminated due a SUFA trustee cause).

- 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.

Since these positions are consistent with the UT3 SUFA final decision and stakeholders did not object to them, our UT4 SUFA final decision, which adopts our UT4 SUFA draft decision, is that these positions remain appropriate and refer interested parties to the analysis in the UT3 SUFA final decision.¹⁵¹

However, Aurizon Network's UT4 SUFA DAAU position in respect of Aurizon Networks liability for the consequential loss of the SUFA trustee following termination of the Infrastructure Lease differs from that in the UT3 SUFA final decision. This matter is considered in this chapter.

7.1 Termination of the Infrastructure Lease

The CQCN infrastructure assets revert to the control of QTH, on behalf of the State of Queensland, upon termination of the Infrastructure Lease. Termination of the Infrastructure Lease also results in the automatic termination of the EIHL and EISL, as those template agreements 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 was due an Aurizon Network cause.¹⁵²

Aurizon Network's UT4 SUFA DAAU proposal, among other things, provided that Aurizon Network has no liability to the SUFA trustee for the SUFA trustee's loss (including consequential loss) if the Infrastructure Lease was terminated due to an Aurizon Network's cause.¹⁵³ The QRC did not accept Aurizon Network's proposal.¹⁵⁴

Our draft decision, in respect of the UT4 SUFA DAAU, was to refuse to approve Aurizon Network's proposal. We maintained our position that if the Infrastructure Lease is terminated due to an Aurizon Network cause, Aurizon Network should be liable for the SUFA trustee's loss (including consequential loss). Effectively, our draft decision maintained our position to allocate the risk of termination of the Infrastructure Lease and the liabilities flowing from that termination to the party best able to manage that risk.¹⁵⁵

Stakeholders' submissions on draft decision

Aurizon Network did not accept the draft decision and reiterated its UT4 SUFA DAAU position that, in the event of the termination of the Infrastructure Lease for any reason, the SUFA trustee's sole entitlement is to its share of the disposal proceeds of the CQCN under the integrated network deed (IND). Aurizon Network considered that no non-State party to a SUFA transaction should be liable for consequential loss to any other such party, except and to the

¹⁵¹ QCA, UT3 SUFA final decision, pp. 133–145.

¹⁵² QCA, UT3 SUFA final decision, pp. 140–143.

¹⁵³ Aurizon Network, sub. 2, pp. 17–18.

¹⁵⁴ QRC, sub. 29, p. 22.

¹⁵⁵ QCA, UT4 SUFA draft decision, pp. 67–68.

extent that a SUFA template document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss.¹⁵⁶

QCA analysis and final decision

Our final decision is to refuse to accept Aurizon Network's proposal and to maintain our position requiring Aurizon Network to be responsible for the SUFA trustee's loss (including consequential loss) if the Infrastructure Lease is terminated due to Aurizon Network's cause.

As discussed in our draft decision, the sole income of the SUFA trustee (and, by extension, the PUHs) is the rent from Aurizon Network for its use of the SUFA-funded infrastructure. Only Aurizon Network is required to comply with the obligations of the Infrastructure Lease. If Aurizon Network causes termination of the Infrastructure Lease, the SUFA trustee will lose its sole income.

Under Aurizon Network's proposal, if the Infrastructure Lease is terminated due to Aurizon Network's cause, the following applies:

- Aurizon Network is not liable for the SUFA trustee's loss (including consequential loss).
- The SUFA trustee's (effectively, the PUHs') sole entitlement is a share of the disposal proceeds, which exposes SUFA funders to the risk of being unable to recover the value of their investment, even though termination of the Infrastructure Lease was due to an Aurizon Network cause.
- The SUFA trustee is unable to manage the risk of Aurizon Network's non-compliance with the Infrastructure Lease, or Aurizon Network's insolvency, since the SUFA trustee has no control over Aurizon Network's actions in this regard. Further, the SUFA trustee is unable to mitigate its loss (save to the extent of the receipt of its share of the disposal proceeds) if the Infrastructure Lease is terminated.

Therefore, we consider Aurizon Network's proposal adversely affects the bankability of a SUFA framework.

Our view is that a key element of the bankability of SUFA is for the SUFA trustee to be able to claim for its loss of its sole income—rental cash flow—where that loss is due to Aurizon Network's fault.

We consider the consequences of the termination of the Infrastructure Lease due to an Aurizon Network cause should be borne by Aurizon Network, as it is Aurizon Network which controls whether that cause occurs. Accordingly, our view remains that the SUFA trustee should have the right to claim for its loss (including consequential loss) from Aurizon Network if termination of the Infrastructure Lease is due to Aurizon Network cause.

As we consider SUFA investors' fundamental concern at termination will be to recover the value of their investment, we propose that the amount for which the SUFA trustee may claim is capped at the value of the SUFA assets in the RAB at termination, so that SUFA investors have the potential to claim for the recovery of the value of their investment.

Our final 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 the SUFA trustee being able to claim for its loss (including consequential loss) offsets the fact that the non-Aurizon Network parties to a SUFA

¹⁵⁶ Aurizon Network, sub. 30, p. 18, with Aurizon Network providing the example of its liquidated damages payment obligation in respect of delay in reaching practical completion.

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 this regime is aligned 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 Aurizon Network taking 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). Accordingly, we consider the risk being managed by this liability regime is remote.

Summary of final decision 7.1

The UT4 SUFA DAAU should provide that, if the Infrastructure Lease is terminated due to Aurizon Network cause, the SUFA trustee may claim for its loss (including consequential loss) from Aurizon Network, subject a cap of the value of the SUFA assets in the RAB at termination.

See clause 7.4 in UT4 SUFA DAAU EPA mark-up in Appendix B.

APPENDIX A: OTHER MATTERS IN RELATION TO UT4 SUFA DAAU

Aurizon Network and QRC submissions

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
2. Extension Project Agreement					
Clause 1.1—'Consequential Loss'	Amendments to the paragraph between limb (g) and (h), and to limb (i).	None given.	Not applicable.	The QCA accepts these amendments.	These amendments improve the workability and credibility of the SUFA template.
Clause 1.1—'Rail Safety Act'	Amendment to reflect current Act.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA template.
Clause 1.1—'Segment'	None.	Not applicable.	Not applicable.	Definition deleted as not used.	This amendment improves the credibility and workability of the SUFA template.
Clause 2.1	None.	Not applicable.	Not applicable.	Amendment to provide cross-referencing.	This amendment improves the credibility and workability of the SUFA template.
Clause 3.1	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU. ¹⁵⁷	<ul style="list-style-type: none"> Aurizon Network continues to consider that it should be free to pursue its business interests in the regulatory process as it sees fit and without any contractual fetter, other than in respect of Aurizon 	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	The QCA accepts Aurizon Network's proposal subject to Aurizon Network being obliged to assist the SUFA trustee in the SUFA trustee exercising its rights under clause 3.1.	<p>The QCA has reconsidered its position in light of Aurizon Network's submission.</p> <p>In respect of drafting the RAB Inclusion Submission, the QCA is of the view that the SUFA</p>

¹⁵⁷ Aurizon Network, sub. 30, pp. 38-39.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>Network's process obligation to make the initial SUFA inclusion submission. Aurizon Network notes that all other QCA stakeholders, including the trustee, investors and Access Seekers for any SUFA transaction, are not contractually fettered in their dealings with the QCA, and that Aurizon Network is expressly prohibited from placing a contractual fetter on access seekers in the context of an expansion (see section 6.13.3 of UT4).</p> <ul style="list-style-type: none"> • Furthermore Aurizon Network considers that the QCA is putting in place arrangements that will hinder its ability to make the best possible decision. For example, if the trustee provides a misleading submission to the QCA about RAB inclusion, clause 3.1(c)(iv) would prevent Aurizon Network from 'correcting the record'. • The QCA states that it does 'not understand why it would be in Aurizon Network's commercial 	<p>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> <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.¹⁵⁸ 		<p>trustee will be sufficiently sophisticated to draft the submission however the QCA has also provided for Aurizon Network to provide assistance should it be necessary. In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee.</p> <p>In respect of the removal of projects from the RAB, the QCA anticipates that the SUFA trustee will submit to the QCA that the project should not be removed during consultation on the removal, with the QCA taking such submissions into account. In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee.</p>

¹⁵⁸ QRC, sub. 29, p. 20.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>interests to seek the removal of projects from the RAB.' In a scenario where a user funded expansion was delivered on a given rail system and the associated customers defaulted soon afterwards on their access agreement obligations, then the application of existing regulated pricing may have a disproportionately negative impact on non-defaulting customers in the relevant system and result in a further material deterioration in demand for the regulated service.</p> <ul style="list-style-type: none"> In this scenario Aurizon Network may wish to provide the QCA with a 'last in, first out' submission that recommends that some or all of the SUFA assets, and none of the pre-existing Aurizon Network-funded assets, should be removed from the RAB for that rail system. The trustee and the PUHs are in no way prevented from making a submission to the QCA with the contrary view (i.e. that Aurizon Network funded assets should be removed from the RAB). This imbalance in the ability to make submissions to the 			

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>QCA is anomalous and represents an unreasonable balance of risks.</p> <ul style="list-style-type: none"> • Aurizon Network sees no reason why it should be contractually barred from protecting its business interests in the regulatory process from the outcomes of development decisions by SUFA parties. • Aurizon Network's consistent policy position is that no interested party should be subject to a contractual fetter on its submissions to the QCA, which as a result should be as well informed as possible when it makes decisions about inclusion and removal of costs in the RAB. 			
Clause 7.2	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU. ¹⁵⁹	<ul style="list-style-type: none"> • No commercial party to a SUFA transaction should have any consequential loss liability to any other such party in respect of the transaction, except where such a liability arises under any of six defined SUFA template documents (the TD, UHD, EIHL, IND, CA & FSD). As an example of this exception, the CA's 	None given.	The QCA has retained the drafting from the UT4 SUFA Draft Decision (including the associated definitions), other than moving clause 7.3(c) into clause 7.4 and the addition of drafting for clarification in clause 7.2(a).	The QCA refers to its reasoning in its UT4 SUFA draft decision in respect of the same point. In the QCA's view, the amendments proposed by the QCA improve the credibility and workability of the SUFA template.

¹⁵⁹ Aurizon Network, sub. 30, p. 40.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		liquidated damages regime for late delivery would apply.			
3. Subscription and Unit Holders Deed					
Clause 1.1—'Buffer Amount'	Deletion of "the then Construction Agreement Guarantees" from limb (b)(ii).	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 1.1—'Construction Agreement Guarantee'	Amendment to the definition.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 2.5(a)(iv)	None given.	Not applicable.	The QRC does not accept the deletion of the reference to 'materiality'. ¹⁶⁰	The QCA maintains its position.	This is a risk which the Preference Unit Holders should take into account when deciding to fund a SUFA and, ultimately, bear the risk of. The position improves the credibility of the SUHD.
Clause 4.4	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.
Clause 4.7(b)	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clause 4.11(a)(ii)(E)	Amendment to the clause.	None given.	None given.	Amendment not agreed, original drafting amended for clarity.	The QCA does not accept this amendment as the Construction Agreement Guarantees may have been provided to Aurizon Network by this time and, in such case,

¹⁶⁰ QRC, sub. 32, p. 4.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
					the SUFA trustee can only return them once returned by Aurizon Network. This amendment improves the credibility and workability of the SUFA template.
Clause 7.6(d)(iv)(C)	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 7.6(j)(iii)	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 9.8	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 9.9	Amendment to the clause.	None given.	None given.	The QCA accepts the purpose of this amendment but provides further drafting.	In the QCA's view, the QCA's approach balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.
Clause 9.10	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 18.1(c)	None given.	Not applicable.	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	The QCA maintains its position.	This is a cost which the PUH's should take into account when deciding to fund a SUFA and, ultimately, bear the cost of. The amendment improves the credibility of the SUHD.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
			duty in relation to the ordinary unit. ¹⁶¹		
4. Extension Infrastructure Sub-Lease					
Clause 1.2—'Access Charges'	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clauses 4.12(a)(i), (ii)	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU. ¹⁶²	<p>Aurizon Network does not accept this provision.</p> <p>It is contrary to standard business practice for a party to assume asset insurance obligations to another party that has no insurable interest in the insured assets. Aurizon Network is not prepared to assume such an obligation.</p> <p>Take an example where three separate SUFA trusts had provided assets with a RAB value of \$100m apiece in a rail system with a RAB value of \$2 billion. If Aurizon Network were to accept this obligation in respect of the Landholder Infrastructure, which has a RAB value of \$1.7 billion, it would be exposed to potential disputes with three SUFA trustees about how Aurizon Network had complied with this 'not materially lower'</p>	None given.	The QCA accepts this amendment.	The QCA expects that the SUFA trustee will draw comfort from Aurizon Network's obligations under the Infrastructure Lease in respect of assets in which the SUFA trustee has no interest. In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.

¹⁶¹ QRC, sub. 32, p. 4.

¹⁶² Aurizon Network, sub. 30, p. 42.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		obligation. This exposure would remain on foot even when the RAB value of SUFA assets is de minimis, or where it is claimed that Aurizon Network may have not met its insurance obligations in respect of a rail system in which the SUFA trustees have no interest.			
Clause 4.12(d)	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 4.12(e)	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU. ¹⁶³	Even if Aurizon Network is not in compliance with its insurance obligation under the 'State Infrastructure Lease' (as defined in the EISL), Aurizon Network is not necessarily failing to comply with its insurance obligation under the EISL. Therefore there could be unintended consequences arising from this provision. For example, QTH may consider that self-insurance is inappropriate in respect of rail system A, but have no concerns in respect of rail systems B, C and D. If the SUFA project relates to systems B, C	The SUFA trustee should have the right to effect insurance where Aurizon Network fails to do so. The SUFA trustee should 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. ¹⁶⁴	The QCA accepts Aurizon Network's amendments in part, however has provided the SUFA trustee with a right to insure the SUFA assets in which it has an interest.	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. Notwithstanding, the QCA accepts that the SUFA trustee's right to insure should only relate to the SUFA assets in which it has an interest. In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.

¹⁶³ Aurizon Network, sub. 30, pp. 43–44.

¹⁶⁴ Aurizon Network, sub. 30, p.45.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>and/or D (and not to system A), then the automatic trigger proposed by the QCA in clause 4.12(d) of the form of the EISL given in the UT4 SUFA DD is inappropriate. In these circumstances the SUFA trustee should rather consider whether Aurizon is complying with its EISL insurance obligations and act accordingly, as is set out in Aurizon Network's proposed version of clause 4.12(d) and (e).</p> <p>More fundamentally, Aurizon Network considers that it would be highly confusing and concerning for the insurance market to address a situation in which Aurizon Network has established one insurance policy in respect of the SUFA assets (see clause 4.12(e)(ii) of the form of the EISL that is part of the UT4 SUFA DD) and then the trustee is seeking to establish another policy in respect of the same assets. This confusion and concern could have a material adverse effect on Aurizon Network's (and the Aurizon Group's) ability to place its own insurance programs in respect of assets and business activities in general.</p>			

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
Clause 5.3	Amendment to the clause.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA template.
Clause 15.1(b)(ii)	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU, subject to a minor drafting change. This change establishes that the reinstatement/replacement obligation under clause 15.1(b)(ii) is a reasonable endeavours obligation, which matches the form of the obligation to keep accreditation under clause 15.1(b)(i). ¹⁶⁵	<p>Aurizon Network does not volunteer to assume an obligation to the trustee in respect of the accreditation of non-SUFA infrastructure – the trustee should rely on the commercial alignment of business interests between Aurizon Network as investor and the trustee as investor.</p> <p>Aurizon Network also considers that this provision may have unintended consequences. For example, Aurizon Network may wish to terminate its accreditation in respect of rail system A, as no revenue services have run on that system for years. If the SUFA project relates to systems B, C and/or D (and not to system A), the trustee's contractual right proposed by the QCA would prevent Aurizon Network from unilateral termination of accreditation of system A, even though that termination measure would be commercially irrelevant to the</p>	None given.	The QCA accepts this amendment.	The QCA has reconsidered its draft decision in respect of this point and acknowledges Aurizon Network's arguments. In the QCA's view, this approach suggested by Aurizon Network balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.

¹⁶⁵ Aurizon Network, sub. 30, p. 45.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		SUFA trustee and other SUFA parties. Under this scenario, the QCA-proposed contractual right would allow the trustee to withhold consent in order to gain commercial advantage in circumstances where the trustee was not in any way impacted by the proposed termination.			
5. Extension Infrastructure Head Lease					
Clause 1.1—'Major Authorisation'	Amendment to reflect current Act.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA template.
Clause 1.1—'Rail Safety Act'	Amendment to reflect current Act.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA template.
Clause 7.5(a)(ii)(B)	Amendment to reflect current Act.	None given.	None given.	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA template.
6. Rail Corridor Agreement					
Clause 10(a)	Amendment to the clause. ¹⁶⁶	Aurizon Network accepts the commercial principles of the QCA's changes. However, rather than the insertion of an indemnity as proposed by the QCA, it would be simpler for Aurizon Network to provide the trustee with a release in respect of any claims that	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. ¹⁶⁷	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA template.

¹⁶⁶ Aurizon Network, sub. 30, p. 46.

¹⁶⁷ QRC, sub. 29, p. 8, item 1.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		Aurizon Network might otherwise make. In addition each reference to a 'third party' in the opening paragraph of clause 10.1 should rather be a reference to 'any person who is not a 'Party' (as that term is defined in the Extension Project Agreement)'. This approach effects consistency with the change to limb (b) of the definition of Consequential Loss in the EISL (see the first item in this table)			
7. Access Agreement Specific Terms Deed					
Schedule 1, Part 2, item 9(a)(iii)	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. ¹⁶⁸	The QCA's position imposes an unreasonable risk on Aurizon Network as a result of risks outside of Aurizon Network's control. The Connecting Infrastructure is only being built to connect to the Access Seeker's private infrastructure. Aurizon Network should only fail to earn 'take-or-pay' when the Connecting Infrastructure experiences delay if Aurizon Network's default on its obligations in the Connecting Infrastructure agreement is the primary cause of that	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. ¹⁶⁹	The QCA accepts this amendment.	The QCA has reconsidered its position in light of Aurizon Network's argument. In the QCA's view, the approach suggested by Aurizon Network balances the interests of Aurizon Network and access seekers and improves the credibility and workability of the SUFA template.

¹⁶⁸ Aurizon Network, sub. 30, pp. 47 –48.

¹⁶⁹ QRC, sub. 29, p. 25, item 7.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		delay.			
8. Construction Agreement and Formal Instrument of Agreement					
Clause 1.1— 'Corporations Act'	None.	Not applicable.	Not applicable.	Definition added for the purposes of 'Insolvency Event' and clause 37.3.	This amendment improves the credibility and workability of the SUFA template.
Clause 1.1—'force majeure event'	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	In the context of a 'brownfield' expansion of a heavy-haul railway, a train or motor vehicle accident is an entirely appropriate force majeure event to the extent it is beyond the control of the party. The contractor's insurance policy is unable to provide an EOT under the CA, whereas the inclusion of this type of accident provides that outcome under clause 39A of the CA. As for Aurizon Network's access agreements, as approved by the QCA, their consequential loss provisions operate to protect a train operator for Aurizon Network's indirect loss arising from a delay in its CA works due to the train operator's acts or omissions. In respect of motor vehicles, Aurizon Network has, of course, no contractual rights at all.	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 construction contractor takes the risk for such events and Aurizon Network has not provided a compelling case as to why the position should be otherwise in the construction contract.
Clause 1.1— 'insolvency event'	Aurizon Network does not accept the QCA's changes and adopts the position it adopted	The insolvency event trigger should be relatively narrow, and only apply when Aurizon	None given.	The QCA has revised the definition.	The QCA has revised the definition to deal with Aurizon Network's concern in part.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	QRC's submission	QCA final decision	QCA reasoning
	in the UT4 SUFA DAAU. (This would result in the CA incorporating the definition of insolvency event given in the EISL.) ¹⁷⁰	Network is unable to continue to perform its construction contract obligations, as a broader definition could have unintended and adverse consequences. For example, the trigger event definition proposed by the QCA would not permit Aurizon Network to enter into a scheme of arrangement as part of an orderly and planned corporate restructuring exercise in order to become an independent entity without the need for the trustee's consent, which the trustee would be entitled to withhold.			The QCA notes that the occurrence of an insolvency event provides the SUFA trustee with rights, which it may, or may not exercise. The consequence of the exercise of such rights will be a commercial matter at the time for the SUFA trustee, just as the triggering of the right is a matter for Aurizon Network. In the QCA's view, the QCA's revised drafting balances the interests of Aurizon Network and access seekers and improves the credibility and workability of the SUFA template.
Clause 8.7(b)	Amendments to the clause. ¹⁷¹	None given.	None given.	The QCA does not accept some of the amendments.	The amendments accepted by the QCA improve the credibility and workability of the SUFA template. In respect of the amendments not accepted, it is the QCA's view that the SUFA trustee having a right to see pricing information relating to discretionary variations (which the SUFA trustee would not have a right to see if the amendments were accepted) maintains the workability and credibility of the SUFA template.

¹⁷⁰ Aurizon Network, sub. 30, p. 49.

¹⁷¹ Aurizon Network, sub. 57, p. 21.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
Clause 11.2(a)(i)	Amendment by addition of new limb (D).	None given.	None given.	The QCA does not accept this amendment.	This amendment is not necessary. The QCA also notes that Aurizon Network has stated that it accepts the QCA's drafting in respect of this clause. ¹⁷²
Clause 35.2(d), Item 39	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clause 35.3(b), Item 40	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clauses 35.3, 35.4 and 35A.4(c)	Clause 35.4 should not govern the Independent Certifier's pricing of a discretionary variation (but it should still govern the Independent Certifier's pricing of an adjustment event). ¹⁷³	Clause 35.4 leaves open the possibility that the Independent Certifier could decide to price a discretionary variation after its delivery at a lower level than either (i) the 'adjustment to the contract sum' that it had previously certified under clause 35.3(a)(i) to be reasonable for that discretionary variation; or (ii) the 'adjustment to the contract sum' that the principal and the contractor had agreed under clause 35.3(d), and in either case Aurizon Network could receive less	None given.	The QCA accepts the purpose of these amendments but provides further drafting.	In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.

¹⁷² Aurizon Network, sub. 30, p. 50.

¹⁷³ Aurizon Network, sub. 30, pp. 52 –53.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>than the pre-agreed price for delivering the applicable discretionary variation. Clause 35.4 therefore is in conflict with clause 35.3(a) (in respect of item (i)) or clause 35.3(d) (in respect of item (ii)); for both items Aurizon Network considers that clause 35.3 documents the correct position.</p> <p>Aurizon Network has no objections to the Independent Certifier certifying whatever price it sees fit. However there should be no doubt that when a deal is struck between the principal and the contractor for a discretionary variation in accordance with clause 35.3, the pricing of that deal is fixed by these parties in advance, and the Independent Certifier has no role thereafter in the pricing of that discretionary variation.</p>			
Clause 35A.2	Time periods: Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. ¹⁷⁴	Aurizon Network does not consider it will always be practicable, in respect of a range of potential adjustment events, to be able to provide the comprehensive suite of information required under clause 35A.2(a)(ii) 'within 28	None given.	The QCA accepts Aurizon Network's position.	This amendment improves the credibility and workability of the SUFA template.

¹⁷⁴ Aurizon Network, sub. 30, p. 53.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		<p>days of the earlier of when the Contractor becomes aware, or ought reasonably have become aware, of the commencement, or existence, of the adjustment event'. Aurizon Network would then be time barred from making a claim about such an adjustment event, due to the operation of clause 35A.2(d). Furthermore a requirement that the contractor provide an update of this comprehensive suite of information every 14 days is unduly onerous.</p>			
Clauses 35A.4(a) and (b)	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU ¹⁷⁵ .	<p>Aurizon Network does not agree that the intent of the amendments was already covered by the existing drafting. That drafting, i.e. the drafting in the form of the CA that was part of the UT3 SUFA FD, required the Independent Certifier to make a (definitive) statement about all aspects of the claim in its first direction under clause 35A.4(a) of the CA, even though the full extent of the underlying issue may not be known at that time. That drafting was ambiguous about how any subsequent direction related to the initial direction – for example, could</p>	None given.	The QCA does not accept these amendments however has amended the drafting for clarity.	<p>Aurizon Network has not provided a compelling reason for the amendments has been given. Further:</p> <ul style="list-style-type: none"> the intent of the amendments made by Aurizon Network was already covered by the existing drafting 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

¹⁷⁵ Aurizon Network, sub. 30, pp. 53–54.

Clause reference	Aurizon Network submission	Aurizon Network reasoning	QRC's submission	QCA final decision	QCA reasoning
		<p>the subsequent direction override the initial direction, or would the initial direction prevail even if more information had come to light? Aurizon Network's drafting of this clause in the CA established a clear inter-relationship between multiple directions under this clause.</p> <p>Aurizon Network considers that its drafting does indeed cater for multiple update claims and multiple updated determinations better than the drafting in the CA that forms part of the UT4 SUFA DD.</p>			<p>claims and multiple updated determinations.</p> <p>Not making these amendments together with the QCA's amendment protects the credibility and workability of the SUFA template.</p>
Clause 36.1(b)	None given.	None given.	The QRC does not accept these changes in the draft decision. 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. ¹⁷⁶	No amendment necessary.	In the QCA's view, this approach balances the interests of Aurizon Network and the SUFA trustee and improves the credibility and workability of the SUFA template.
Clause 36.1(f) and (g)	Amendments to the clauses.	None given.	None given.	The QCA accepts these amendments.	These amendments improves the credibility and workability of the SUFA template.
Clause 36.2(f)	See section 3.2.	See section 3.2.	See section 3.2	The QCA has made an amendment for clarity to Aurizon Network's proposed	This amendment improves the credibility and workability of the template SUFA

¹⁷⁶ QRC, sub. 32, p. 4.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
				clause. See section 3.2 in respect of the amendments to this clause generally.	documents.
Clause 37.3	None.	Not applicable.	Not applicable.	Amendment required as 'Corporations Law' was not defined.	This amendment improves the credibility and workability of the SUFA template.
Clause 38.4	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. ¹⁷⁷	<p>The principal's obligations essentially relate to the payment of money when due, and any obligation breach is capable of prompt remedy. By contrast the contractor's obligations are numerous and diverse in nature, and the remedy of obligation breaches may take time to remedy.</p> <p>In this light Aurizon Network does not understand why, under the CA that forms part of the UT4 SUFA DD, the QCA takes the view that the principal is able to terminate as early as 10 business days after issue of a show cause notice (see clause 38.3), whereas the contractor is only able to terminate after 30 days (which is roughly equal to 20 business days) after issue of a show cause notice (see clause 38.9). The QCA-proposed termination triggers are entirely inappropriate given the nature of the parties to</p>	None given.	The QCA does not accept these amendments but has amended the timing to show reasonable cause.	<p>In the QCA's view, Aurizon Network's comments based on a false assumption.</p> <p>The construction contractor need not remedy the breach in 10 business days, it need only show reasonable cause. That reasonable cause can include a remediation regime that extends beyond the 10 business days.</p> <p>It is true to say that the construction contractor has many more obligations than the principal's single payment obligation, but those obligations can be just as important to the principal as payment is to the construction contractor.</p> <p>Notwithstanding the above comments, the QCA has amended the timing to show reasonable cause (in clause 38.3) to mitigate Aurizon Network's argument.</p>

¹⁷⁷ Aurizon Network, sub. 30, pp. 54 –55.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		one another under the CA.			
Clause 38.12	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. ¹⁷⁸	<p>An Expansion may be comprised of two elements, being one small element delivered first and then a large second element. If a small RAB inclusion is made in respect of the first element, then the QCA's proposal would unduly impose a compensation payment on Aurizon Network in these circumstances. This burden would arise from:</p> <ul style="list-style-type: none"> • Aurizon Network's credit risk of the Trust to make the refund of the amount previously paid (noting the current QCA position does not provide set-off protection and not allow the CA security to be drawn upon); and • Aurizon Network earns no return in respect of its holding cost on the amount which is refunded for the period between the initial payment and the subsequent refund. 	None given.	The QCA does not accept this amendment.	The QCA notes Aurizon Network's arguments. However, this clause is triggered in the event of termination due to Aurizon Network's default or repudiation. The risk of these events occurring is in Aurizon Network's control. In such a termination, Aurizon Network must bear the consequences of the termination, as outlined in the construction contract.
Clause 38.12(a)(ii)(A), Item 40	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.

¹⁷⁸ Aurizon Network, sub. 30, p. 55.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
Clause 38.12(a)(ii)(B)	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clause 39B(b)	None.	Not applicable.	Not applicable.	Amendment for clarity.	This amendment improves the credibility and workability of the SUFA template.
Clause 43.1	None.	Not applicable.	Amendments required to reflect the UT3 SUFA Final Decision and the UT4 SUFA Final Decision. ¹⁷⁹	The QCA agrees with the QRC's submission.	This amendment improves the credibility and workability of the SUFA template.
Clause 43.2	None.	Not applicable.	Amendments required to reflect the UT3 SUFA Final Decision and the UT4 SUFA Final Decision. ¹⁸⁰	The QCA agrees with the QRC's submission however has provided further amendment, which is reflected in the drafting.	These amendments improves the credibility and workability of the SUFA template.
Annexure A, Item 37	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. ¹⁸¹	Aurizon Network considers that the amount of the liability cap is a pricing term that should be negotiated between the parties in the context of a proposed user funding transaction, and that failing agreement that amount should be set by the QCA in its dispute resolution capacity. The size of the liability cap is a pricing term of a construction contract that is typically negotiated between the would-be parties to that	None given.	The QCA accepts this amendment.	In the QCA's view, this amendment maintains the credibility and workability of the SUFA documents and is in the interests of the parties.

¹⁷⁹ QRC, sub. 32, p. 4.

¹⁸⁰ QRC, sub. 32, p. 4.

¹⁸¹ Aurizon Network, sub. 30, pp. 56 –57.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		contract.			
9. UT4					
Clause 8.8.1(b)	Aurizon Network does not accept the QCA's changes. Aurizon Network proposes that this obligation should be expressed in these terms: 'Aurizon Network will use reasonable endeavours to engage with the State so as to facilitate its entry into a User Funding Agreement for each user funding transaction.' ¹⁸²	In normal commercial usage, when Party A assumes an obligation to 'procure' Party B to do something, Party A has the direct or indirect ability to cause Party B to do that thing. Aurizon Network is in no position to 'procure' or 'cause' the State to do anything. Aurizon Network considers that the proposed form of the QCA-proposed obligation could, and understandably so, be regarded by the State as at best inappropriate and at worst offensive.	The QRC does not accept these changes. In the QRC's view, it is not enough to just request. ¹⁸³	The QCA accepts this amendment.	The QCA has reconsidered its position in light of Aurizon Network's argument. In the QCA's view, the approach suggested by Aurizon Network balances the interests of Aurizon Network and access seekers and improves the credibility and workability of the SUFA template.
Clause 8.8.3	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	The form of UT4 proposed by Aurizon Network would take effect upon the approval of the SUFA template, and at that point there be no question of Aurizon Network needing to make a SUFA submission under UT4. In any event, as stated on page x of the UT4 SUFA DD, clause 8.8.3(a) of the approved form of UT4 has already been met, so clauses 8.8.3(a) to (d) of the approved	None given.	The QCA does not accept this amendment.	In the QCA's view, no amendments are necessary to this clause. In the QCA's view, not accepting the proposed amendments maintains the credibility and workability of the SUFA template.

¹⁸² Aurizon Network, sub. 30, p. 58.

¹⁸³ QRC, sub. 29, p. 3, item 2.

<i>Clause reference</i>	<i>Aurizon Network submission</i>	<i>Aurizon Network reasoning</i>	<i>QRC's submission</i>	<i>QCA final decision</i>	<i>QCA reasoning</i>
		form of UT4 are superseded.			

Other submissions

The QCA has noted the submission of QTH¹⁸⁴. In the QCA's view, no amendments were necessary to the SUFA template in this final decision as a consequence of that submission.

¹⁸⁴ QTH, sub. 32.

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 SUFA template documents:

- 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 Infrastructure Head-Lease (EIHL)
- Extension Project Agreement (EPA)
- Access Agreement Specific Terms Deed (AASTD)
- Specific Security Agreement (SSA)

(2) QCA mark-up of associated amendments to UT4.

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

- Integrated Network Deed (IND)
- Financing Side Deed (FSD).

APPENDIX C: LIST OF STAKEHOLDER 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 (Formal Instrument of Agreement)—marked up	January 2017
17	Aurizon Network	Design and Construct Contract (Formal Instrument of Agreement)—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
30	Aurizon Network	2017 SUFA DAAU—Response to the QCA draft decision of	September

Number	Stakeholder	Submission item	Date
		August 2017	2017
31	Pacific National	Submission regarding the QCA draft decision on the Aurizon Network 2017 SUFA DAAU	September 2017
32	QRC	Submission regarding the QCA draft decision on Aurizon Network's UT4 SUFA DAAU	September 2017
33	Queensland Treasury Holdings (QTH)	Submission in response to the QCA draft decision on Aurizon Network's UT4 SUFA DAAU	September 2017
34	Aurizon Network	Supplementary submission—cover letter	October 2017
35	Aurizon Network	Supplementary submission—UT4—marked up	October 2017
36	Aurizon Network	Supplementary submission—UT4—clean	October 2017
37	Aurizon Network	Supplementary submission—Subscription and Unit Holders Deed—marked up	October 2017
38	Aurizon Network	Supplementary submission—Subscription and Unit Holders Deed—clean	October 2017
39	Aurizon Network	Supplementary submission—Trust Deed—marked up	October 2017
40	Aurizon Network	Supplementary submission—Trust Deed—clean	October 2017
41	Aurizon Network	Supplementary submission—Specific Security Agreement—marked up	October 2017
42	Aurizon Network	Supplementary submission—Specific Security Agreement—clean	October 2017
43	Aurizon Network	Supplementary submission—Rail Corridor Agreement—marked up	October 2017
44	Aurizon Network	Supplementary submission—Rail Corridor Agreement—clean	October 2017
45	Aurizon Network	Supplementary submission—Integrated Network Deed—marked up	October 2017
46	Aurizon Network	Supplementary submission—Integrated Network Deed—clean	October 2017
47	Aurizon Network	Supplementary submission—Financing Side Deed—marked up	October 2017
48	Aurizon Network	Supplementary submission—Financing Side Deed—clean	October 2017
49	Aurizon Network	Supplementary submission—Design and Construct Contract (Formal Instrument of Agreement)—marked up	October 2017
50	Aurizon Network	Supplementary submission—Design and Construct Contract (Formal Instrument of Agreement)—clean	October 2017
51	Aurizon Network	Supplementary submission—Extension Project Agreement—marked up	October 2017
52	Aurizon Network	Supplementary submission—Extension Project Agreement—clean	October 2017
53	Aurizon Network	Supplementary submission—Extension Infrastructure Sub-Lease—marked up	October 2017
54	Aurizon Network	Supplementary submission—Extension Infrastructure Sub-Lease—clean	October 2017
55	Aurizon Network	Supplementary submission—Extension Infrastructure Head Lease—marked up	October 2017

Number	Stakeholder	Submission item	Date
56	Aurizon Network	Supplementary submission—Extension Infrastructure Head Lease—clean	October 2017
57	Aurizon Network	Supplementary submission—Construction Agreement—marked up	October 2017
58	Aurizon Network	Supplementary submission—Construction Agreement—clean	October 2017
59	Aurizon Network	Supplementary submission—Access Agreement Specific Terms Deed—marked up	October 2017
60	Aurizon Network	Supplementary submission—Access Agreement Specific Terms Deed—clean	October 2017

REFERENCES

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— 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. (QCA UT3 SUFA final decision)

— 2017, *Aurizon Network's 2017 Standard User Funding Agreement Draft Amending Access Undertaking*, draft decision, August. (QCA UT4 SUFA draft decision)

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
CA	Construction Agreement
CITS	Commercially integrated transportation services
cl., cls.	clause, clauses
CQCN	central Queensland coal network
DAU	Draft Access Undertaking
DAAU	Draft Amending Access Undertaking
DPG	Deed Poll Guarantee
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
PDR mechanism	Post-deregulation rental mechanism
PUH	Preference unit holder
QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997
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
TD	Trust Deed
UT3	Aurizon Network's 2010 access undertaking
UT4	Aurizon Network's 2016 access undertaking

WACC Weighted average cost of capital