

30 August 2013

## SUFA Documents – Key outstanding tax issues and drafting changes

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## 1 Summary

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The tax aspects of the SUFA Documents have been the subject of prolonged negotiation between the QRC and Aurizon Network. Whilst both parties have made compromises and some progress has been made, the SUFA Documents still expose Preference Unit Holders to unacceptable tax risk. Given the level of tax risk, Greenwoods & Freehills (advisors to the QRC on tax matters) consider that no third party investor would invest in a SUFA project (or even agree to it as a framework) based on the current drafts of the SUFA Documents.

The key outstanding tax issues in the SUFA Documents are:

- the scope of the tax indemnity provided by Preference Unit Holders;
- obtaining further certainty through the private binding ruling process in respect of the incremental tax risks presented by the revised SUFA ownership structure (including the tax consequences of the transfer and lease back of the Extension Infrastructure and the Trustee's ability to claim depreciation deductions in respect of the Extension Infrastructure); and
- when and how private binding rulings will be obtained from the Australian Taxation Office to confirm the income tax treatment of complex aspects of the SUFA structure (including, but not limited to the transfer and lease back and depreciation issues discussed above).

Each of these is addressed in turn below. Other material tax issues arising out of the SUFA Documents can be addressed by what should be fairly uncontroversial drafting changes, which are set out in section 3 of this paper. Many of these drafting changes have previously been discussed between QRC and Aurizon Network and are agreeable in principle. For the avoidance of doubt, we have not discussed minor drafting changes.

### 1.1 Scope of the tax indemnity

Aurizon Network will not accept any tax risk arising from a SUFA project. As a result, a tax indemnity has been negotiated under which Preference Unit Holders indemnify Aurizon Network and the Trustee for any "Extension Structure Tax Cost". Broadly speaking, this is any tax or duty incurred by Aurizon Network or the Trustee as a result of a SUFA project.

The tax indemnity has been the subject of prolonged negotiation between the QRC and Aurizon Network, and both parties have made compromises. However, the scope of the tax indemnity is still unacceptably broad and there are still some key issues outstanding which expose Preference Unit Holders to unacceptable tax risk. The most material issue is that the revised SUFA ownership structure (under which QTH owns the Extension Infrastructure) has resulted in Preference Unit Holders effectively indemnifying QTH for tax it suffers as a result of a SUFA project. The QRC submits that this is not appropriate for the reasons outlined in TAX1 below and considers that this is a matter requiring resolution as a matter of absolute priority.

Drafting changes required to address other less significant, but still material, issues with the tax indemnity are outlined in TAX3 to TAX7. Again, we have not discussed minor drafting changes.

## **1.2 Obtaining further certainty in respect of the incremental tax risks presented by the revised SUFA ownership structure**

Two material tax issues have arisen as a result of the revised SUFA ownership structure, being:

- that Preference Unit Holders are exposed to potential significant income tax and stamp duty exposure on the transfer and lease back of the assets comprising the Extension Infrastructure. This issue is discussed in TAX2 below; and
- how the Trustee will establish that it is entitled to claim depreciation deductions in respect of the Extension Infrastructure. This has become far less certain under the revised SUFA ownership structure.

Given the materiality of the potential tax exposure on the transfer and lease back of the Extension Infrastructure and the importance of depreciation deductions in achieving the intended tax and economic outcomes of the SUFA structure, the QRC and Aurizon Network agree that additional certainty must be obtained through the private ruling process. However, how and when private rulings will be sought is still unclear (see 1.3 below).

## **1.3 When and how private binding rulings will be obtained from the Australian Taxation Office**

The parties agree that, given the complexity of the tax issues involved and the importance of the intended tax outcomes to the overall economics of the SUFA structure, private binding rulings should be sought from the Australian Taxation Office to confirm the tax treatment of various aspects of the SUFA structure prior to the SUFA Documents being signed. The QRC considers that that no third party investor would invest in a SUFA project (or even agree to it as a framework) in the absence of a private binding ruling confirming the tax treatment of the more complex aspects of the structure.

Despite this, Aurizon Network have been resistant to including obtaining favourable private binding rulings as a formal requirement under the SUFA Documents. Aurizon Network consider that from a practical perspective, the risk of favourable private binding rulings not being obtained can be managed by the parties simply not signing the SUFA Documents.

Ideally, the QRC would prefer that obtaining favourable private binding rulings be included as a condition precedent to the SUFA Documents. This is consistent with the approach which would normally be taken in an infrastructure transaction where complex tax issues are involved.

Obtaining private binding rulings is a key issue for the QRC, including in respect of the transfer and lease back of the Extension Infrastructure, the Trustee's ability to claim depreciation (see section 1.2 above and TAX16 below) and the tax treatment of distributions from the Trust.

Given that the parties agree that private binding rulings must be sought, the key outstanding issue is how and when this will occur. The QRC proposes that the issue of seeking private binding rulings be escalated and be resolved as a matter of absolute priority.

## 2 Issues requiring resolution as a matter of absolute priority

| Issue | Clause           | Description of issue and Aurizon Network's position   | QRC submission   |
|-------|------------------|---|--|
| TAX1  | cl. 5.1(c) of UA | <p><b>Definition of Extension Structure Tax Cost</b></p> <p>An Extension Structure Tax Cost is currently defined as:</p> <ul style="list-style-type: none"> <li>any Liability for Tax that an Indemnified Entity or Head Company incurs, suffers or is liable for, less any Extension Structure Tax Benefit;</li> <li>any Liability incurred by an Indemnified Entity under a Transaction Document to compensate another party to that document in respect of that party's Liability to Tax; or</li> <li>the tax effect (if any) of any Tax Relief (being a tax offset or credit) of an Indemnified Entity or the Head Company which is utilised or denied,</li> </ul> <p>in respect of the Extension Structure where the Liability, utilisation or denial would not have arisen (or is greater than it would have been) if the Extension Structure had not been implemented.</p> | <p><b>Liability incurred to compensate another party for Tax</b></p> <p>The QRC does not object to the first limb of the definition of Extension Structure Tax Cost. However, the second limb of the definition is a new addition which has not been subject to negotiation or discussion with the QRC.</p> <p>This new limb appears to be intended to provide a "back to back" indemnity to Aurizon Network and the Trustee for indemnities they provide under the SUFA Documents. Specifically:</p> <ul style="list-style-type: none"> <li>Aurizon Network indemnifies QTH under the EIHL in respect of any "Losses" in respect of the Extension Infrastructure. "Losses" is broadly defined and includes "all liabilities on account of taxes"; and</li> <li>under the EISL, the Trustee indemnifies Aurizon Network for any amounts Aurizon Network pays under the indemnity in the EIHL to the extent that the Trustee (or its associates) have caused the "Losses".</li> </ul> <p>However it is far from clear how these "back to back" indemnities will work in practice. Although QTH is a State and Territory Body which is exempt from paying income tax to the Commonwealth, QTH pays "tax" to the Queensland State Treasurer under the National Tax Equivalents Regime (<b>NTER</b>). Given the broad definition of Losses in the EIHL, Preference Unit Holders will be liable under the "back to back" indemnity for QTH's NTER payments and any duty payable by QTH.</p> <p><b>Indemnifying QTH for tax is not appropriate</b></p> <p>The QRC considers that it is <b>not appropriate</b> for QTH to be indemnified for NTER payments or duty (or any other taxes or duties which are payable to the State). This is because QTH is a State owned entity and any "taxes" paid would not represent a real loss to the State. In contrast, a claim against Preference Unit Holders by Aurizon Network or the Trustee under the tax indemnity in the UA in respect of QTH's "Losses" on account of taxes would represent a <b>real</b> loss to Preference Unit Holders. The exception is GST or other federal taxes which are payable by QTH to the Commonwealth rather than to the Queensland State Treasurer.</p> |

| Issue | Clause | Description of issue and Aurizon Network's position | QRC submission   |
|-------|--------|---|--|
|       |        |   | <p>As such, the QRC submits that Preference Unit Holders should not be required to indirectly indemnify QTH for taxes paid by QTH to the Queensland State Treasurer as a result of the Extension Infrastructure.</p> <p><b>If indemnity remains, drafting amendments are required</b></p> <p>If, despite the QRC's view, QTH must be indemnified for its tax Losses as a result of the Extension Infrastructure, the indemnity should be amended to reflect an appropriate and commercially acceptable scope.</p> <p>Specifically:</p> <ul style="list-style-type: none"> <li>the differences between the concept of "Losses" in the indemnity provided to QTH under the EIHL and the concept of Extension Structure Tax Cost in the tax indemnity in the UA need to be aligned. The current mismatch between these concepts means the indemnities are not truly "back-to-back" and creates uncertainty as to what losses Preference Unit Holders are indemnifying;</li> <li>it is <b>not appropriate</b> that Preference Unit Holders indemnify Aurizon Network to the extent that QTH's tax Losses are due to the acts or omissions of Aurizon Network;</li> <li>it should be made clear that Preference Unit Holders cannot incur liabilities under multiple indemnities for the same QTH loss. The current drafting exposes Preference Unit Holders to such a risk due to the indemnity provided by the Trustee to Aurizon Network under the EISL. Whilst cl. 5.3(d) of the UA is intended to prevent double <i>payment</i> of claims, this clause does not prevent double liabilities from arising; and</li> <li>the indemnity provided to QTH should be amended to reflect an appropriate and commercially acceptable scope. Currently, the indemnity does not replicate the carve-outs in the tax indemnity provided to Aurizon Network and the Trustee in the UA. For example, it does not exclude tax "Losses" which are properly payable by QTH (e.g. NTER payments in respect of QTH's income, if any). If Preference Unit Holders are required to indemnify QTH for tax, appropriate carve-outs (similar to those included in the tax indemnity in the UA) will need to be negotiated and drafted.</li> </ul> <p><b>Compensation for Tax Relief</b></p> <p>In respect of the third limb of the definition of Extension Structure Tax Cost,</p> |

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|-------|---------------|---|---|
|       |               |   | <p>the QRC considers that an indemnity for an increase in Tax payable adequately compensates an Indemnified Entity for any utilisation or denial of Tax Relief.</p> <p>This is because the Indemnified Entity will be compensated in the period in which the additional Tax is payable. Compensation for Tax Relief potentially allows Indemnified Entity to claim twice for same loss (and potentially before the Tax Relief could actually make a difference in cash terms).</p>  |
| TAX2  | cl. 3 of EIHL | <p><b>Transfer and lease back – transfer of assets comprising Extension Infrastructure</b></p> <p>As a result of the revised ownership structure under which QTH is the legal and beneficial owner of the assets comprising the Extension Infrastructure, once those assets are constructed by the Trustee and commissioned and ready for use, the Trustee is required to transfer ownership (both legal and beneficial) of these assets to QTH.</p> <p>There are similar transfer requirements in respect of any parts, accessories, equipment and replacements or modifications to the Extension Infrastructure which either the Trustee or Aurizon Network initially owns.</p> | <p><b>Income tax and stamp duty consequences of transfer</b></p> <p>Aurizon Network considers that the transfer will not give rise to an income tax liability under the depreciating asset regime or to a duty liability for any party.</p> <p>Whilst there is a basis for Aurizon Network's position, it is reliant on some matters of judgement and interpretation. Given the materiality of the consequences, the QRC requires that greater certainty be obtained by seeking a private ruling from the Australian Taxation Office (<b>ATO</b>) to confirm the income tax treatment of the transfer and lease back. Aurizon Network agrees that a private ruling should be sought. Private rulings are not available in the stamp duty context.</p> <p>Obtaining a private ruling is particularly important as Preference Unit Holders will bear the full cost of any tax or duty payable in respect of the transfer due to the tax indemnities provided to Aurizon Network and the Trustee (and indirectly, to QTH).</p> <p>The risk of tax exposure arising from the transfer and lease back gives added impetus for the issue of how and when private binding rulings will be sought to be resolved as soon as possible. As noted in section 1.3 above, the QRC proposes that the issue of seeking private binding rulings be resolved as a matter of absolute priority.</p> <p><b>GST consequences</b></p> <p>Whilst the transfer is likely to be subject to GST, there should be no net GST cost as the GST payable should be offset by corresponding input tax credits. However, the current drafting does not provide appropriate mechanisms to facilitate this.</p> <p>If the transfer is a supply made for non-monetary consideration (being the</p> |

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|-------|--------|---|--|
|       |        |   | <p>grant of the lease to the Trustee) then both the Trustee and QTH would make a taxable supply and corresponding acquisition (i.e. a non-monetary "barter" transaction).</p> <p>Usual ATO practice is to accept that the supply and acquisition are of equal and offsetting value, so no net GST cost should occur provided market value is agreed and tax invoices are exchanged on a timely basis. As such, appropriate drafting will need to be adopted to mitigate against GST leakage.</p> |

### 3 Drafting changes required to address material tax issues

| Issue | Clause               | Description of issue and Aurizon Network's position   | QRC submission  |
|-------|----------------------|---|---|
| TAX3  | cl. 5.1(b) of the UA | <p><b>Tax Indemnity – indemnified costs</b></p> <p>Aurizon Network and the Trustee are indemnified for any Extension Structure Tax Cost plus <b>all costs and expenses</b> incurred or payable in connection with any Extension Structure Tax Cost.</p> <p>The costs and expenses (eg legal costs and expenses and costs of employees) are not limited by a "reasonableness" concept.</p> | <p><b>Indemnified costs should be reasonable</b></p> <p>The QRC proposes that the recovery of <i>all</i> costs and expenses be subject to a reasonableness requirement.</p> |

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|-------|----------------------|--|--|
| TAX4  | cl. 5.1(f) of the UA | <p><b>Carve-outs from Tax Indemnity</b></p> <p>Broadly, the carve-outs to the tax indemnity are intended to ensure that the tax indemnity is appropriate in scope.</p> <p>For example, the tax indemnity does not cover Tax which is properly payable by the Indemnified Entity, such as Tax on income or other receipts (e.g. Trustee remuneration or Aurizon Network's other income under SUFA).</p> <p>Following numerous QRC requests that additional carve-outs be included, the UA includes additional carve-outs which mean that Preference Unit Holders will not be liable for claims:</p> <ul style="list-style-type: none"> <li>• as a result of the Indemnified Entity's failure to comply with a Tax Law (except where the position taken by the Indemnified Entity is reasonably arguable); and</li> <li>• where the claim is not made within 3 months of the expiry of the statutory period within which the relevant Government Agency is able to recover the Tax.</li> </ul> | <p>Given the broad definition of Extension Structure Tax Cost, the QRC proposes minor amendments to existing carve-outs and additional carve-outs.</p> <p><b>Amendments to existing carve-outs</b></p> <p>The QRC submits that drafting amendments are required to the existing carve-outs so that an Indemnified Entity is not indemnified for:</p> <ul style="list-style-type: none"> <li>• Tax as a result of failure to take action which reasonably should be taken under the Tax Law. This is a standard requirement in tax indemnities and Aurizon Network should not be subject to a lower standard;</li> <li>• failure to take reasonable actions to mitigate the amount of Tax. This is appropriate as an Indemnified Entity is indemnified for costs incurred mitigating or resolving any process which could lead to an Extension Structure Tax Cost. Further, QTH is subject to a duty to mitigate in respect of the indemnity provided by Aurizon Network to QTH under the EIH and Aurizon Network should be subject to the same standard; and</li> <li>• Tax where the claim is not made within 30 days of the expiry of the statutory period within which the relevant Governmental Agency is able to recover the Tax. This is a standard claim period for tax claims and provides necessary certainty to Preference Unit Holders. To provide context, the ATO is subject to a statutory limitation period of four years, which means that practically speaking, an Indemnified Entity would be required to make a claim within 4 years and 30 days of lodging its tax return in respect of the year in which the relevant Extension Structure Tax Cost was incurred.</li> </ul> <p><b>Additional carve-outs</b></p> <p>The QRC proposes additional carve-outs:</p> <ul style="list-style-type: none"> <li>• to prevent Preference Unit Holders from being liable under the tax indemnity for amounts recovered by the Indemnified Entity under another SUFA Document. The UA includes a new cl. 5.3(d), which provides that Preference Unit Holders are not required to <i>make a payment</i> under the tax indemnity to the extent that the Indemnified Entity has recovered compensation under another SUFA Document. However, the QRC submits that it is imperative in such circumstances that Preference Unit Holders do not incur a liability under the tax indemnity in the first instance. This amendment should not be uncontroversial on the basis that Aurizon</li> </ul> |

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|-------|-------------------|---|--|
| TAX5  | cl. 5.2 of the UA | <p data-bbox="488 906 1106 960"><b>Disagreeing with or disputing an Extension Structure Tax Cost</b></p> <p data-bbox="488 992 1106 1241">Given that Preference Unit Holders will be liable under the tax indemnity for any Extension Structure Tax Cost incurred by an Indemnified Entity, cl. 5.2 gives the Preference Unit Holders the opportunity to disagree with the Indemnified Entity's assertion of an Extension Structure Tax Cost or alternatively, to request that the existence of the Extension Structure Tax Cost (i.e. the existence of the tax liability) with the relevant Governmental Agency be disputed.</p> <p data-bbox="488 1273 1106 1295">cl. 5.2 outlines the processes which must be undertaken if:</p> <ol data-bbox="488 1311 1106 1391" style="list-style-type: none"> <li>the Unit Holders and relevant Indemnified Entity cannot agree on the existence, calculation or the allocation of an Extension Structure Tax Cost</li> </ol> | <p data-bbox="1196 331 1935 411">Network agree in principle that Preference Unit Holders should not be required to compensate an Indemnified Entity twice in respect of the same loss;</p> <ul data-bbox="1151 434 1980 833" style="list-style-type: none"> <li>to prevent Aurizon Network from being compensated under the tax indemnity for tax properly payable on any distributions it receives as a result of the early winding up of the Trust. The tax indemnity should only compensate Aurizon Network for tax payable which is disproportionate to the economic benefit Aurizon Network receives on a winding up; and</li> <li>to prevent an Indemnified Entity from being indemnified to the extent that it fails to comply with the facts and circumstances in private rulings applicable to it. Although Aurizon Network have previously resisted any obligation to comply with private rulings (on the basis that the Trustee will be required to comply with the SUFA Documents and this should provide sufficient protection to PUHs), the QRC considers that the Preference Unit Holders should not be liable under the tax indemnity in the first instance for Tax as a result of an Indemnified Entity's failure to comply with private rulings</li> </ul> <p data-bbox="1151 906 1935 992">The QRC requires that the dispute procedures are fair and provide an adequate opportunity for Preference Unit Holders to dispute an Extension Structure Tax Cost alleged by an Indemnified Entity.</p> <p data-bbox="1151 1018 1778 1040">As such, the QRC proposes the following drafting changes:</p> <ul data-bbox="1151 1072 1980 1417" style="list-style-type: none"> <li>in deciding the existence, calculation or allocation of an Extension Structure Tax Cost, the Tax Expert be instructed to review the <b>legal basis</b> of the Extension Structure Tax Cost having regard to the Tax Law <b>and the relevant Governmental Agency's interpretation of it</b> (rather than just the "basis" of the Extension Structure Tax Cost);</li> <li>Unit Holders should only have to provide evidence that 75% of Unit Holders agree to the Disputing Action. Requiring evidence <b>reasonably satisfactory to the Indemnified Entity</b> could allow the Indemnified Entity to "block" the Disputing Action;</li> <li>whilst it is appropriate that the Unit Holders who either disagreed with the existence, calculation or allocation of the Extension Structure Tax Cost</li> </ul> |

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|-------|--------|--|--|
|       |        | <p>between Unit Holders; or</p> <p>2. the Unit Holders and the relevant Indemnified Entity cannot agree as to whether to dispute an Extension Structure Tax Cost with the relevant Governmental Agency (i.e. take Disputing Action). In order to do this, the relevant Unit Holder must provide evidence <b>reasonably satisfactory to the Indemnified Entity</b> that 75% of Unit Holders agree to the Disputing Action.</p> <p>In short, these two separate processes involve referring the relevant issue to a Tax Expert who will decide (i) the existence, calculation or allocation of the Extension Structure Tax Cost or (ii) whether to take Disputing Action (as relevant).</p> <p><b>Existence, calculation or allocation of Extension Structure Tax Cost</b></p> <p>In deciding the existence, calculation or the allocation of an Extension Structure Tax Cost, the Tax Expert must be instructed to review the <b>basis</b> of the Extension Structure Tax Cost by reference to the applicable Tax Law.</p> <p><b>Expenses of Tax Expert</b></p> <p>Expenses of the Tax Expert are to be borne by those Unit Holders who disagreed with the existence, calculation or allocation of the Extension Structure Tax Costs, or those Unit Holders who agreed to dispute the Extension Structure Tax Cost.</p> <p><b>Conduct of Disputing Action</b></p> <p>Whilst the Indemnified Entity will be responsible for conducting the Disputing Action, Unit Holders can appoint a Unit Holder Representative. The Indemnified Entity must consult with that representative during the Disputing Action.</p> <p>However, the Indemnified Entity is not required to consult or seek consent if a Unit Holder Representative is not</p> | <p>bear the costs of the Tax Expert if the Tax Expert finds against those Unit Holders (i.e. in favour of the Indemnified Entity), if the disagreement is resolved in those Unit Holders' favour, the costs of the Tax Expert should be a trust administration cost (as the outcome is for the benefit of all Unit Holders). This is consistent with the treatment of other expert costs in the SUFA Documents;</p> <ul style="list-style-type: none"> <li>the costs of a Tax Expert appointed to review whether Disputing Action should be taken should also be a trust administration cost given that 75% of Unit Holders must approve the Disputing Action. This is consistent with the treatment of other expert costs in the SUFA Documents;</li> <li>Unit Holders should be able to request access to the decision of the Tax Expert to ensure adequate transparency; and</li> <li>Unit Holders must be required to appoint a Unit Holder Representative. This ensures that the Indemnified Entity is required to consult during the Disputing Action and seek the Unit Holder Representative's consent prior to accepting, compromising or paying an Extension Structure Tax Cost to the relevant Governmental Agency.</li> </ul> |

| Issue | Clause                                      | Description of issue and Aurizon Network's position   | QRC submission  |
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|       |   | appointed.  |   |
| TAX6  | cl. 5.4 of UA                               | <p><b>No further adjustment to particular Extension Structure Tax Cost</b></p> <p>This clause attempts to prevent the “re-opening” of a claim in respect of an Extension Structure Tax Cost once it is settled by precluding the Indemnified Entity from bringing a further claim, and stating that the Unit Holders will have no further obligation to pay, in respect of the “particular” Extension Structure Tax Cost.</p>   | <p>The QRC considers that an Indemnified Entity should be precluded from bringing a claim in respect of the “matter or facts and circumstances” to which a settled Extension Structure Tax Cost relates.</p> <p>The current clause may not prevent an Indemnified Entity from bringing a claim for a technically different Extension Structure Tax Cost (for example, additional tax as a result of a different provision of the Tax Law) despite the fact that the new claim relates to the same matter or facts and circumstances which gave rise to the original Extension Structure Tax Cost.</p> |
| TAX7  | cl. 5.6 of UA                               | <p><b>Apportionment of Extension Structure Tax Cost</b></p> <p>This clause deals with the allocation of the Extension Structure Tax Cost and any related costs amongst the Unit Holders.</p> <p>The Extension Structure Tax Cost and related costs are to be allocated based on the number of units held by each Unit Holder at the time the Extension Structure Tax Cost and related costs are incurred.</p> <p>However, any refunds to Unit Holders for overpayments (for example, as a result of overpayment to the Governmental Agency during Disputing Action, or the Indemnified Entity being otherwise compensated for the loss) are to be allocated based on the number of units held by a Unit Holder at the time of the refund.</p> | <p>Whilst allocation amongst Unit Holders on the basis of units held at the time that the Extension Structure Tax Cost or related costs are incurred is reasonable, the QRC submits that any refund to Unit Holders for overpayment should be allocated to the Unit Holders based on the amount each Unit Holder initially paid in respect of the Extension Structure Tax Cost or related costs which are being refunded (i.e. it should be a “refund” to the person who paid the initial claim under the tax indemnity, regardless of any changes in ownership of units).</p>                        |
| TAX8  | cl. 12.5 of the TD and cl. 14.5 of the SUHD | <p><b>Trustee may accumulate income</b></p> <p>For accounting reasons Aurizon Network require that the Trustee be able to “accumulate” income, rather than being obliged in all circumstances to distribute all Distributable</p>   | <p>Both the TD and the SUHD contain clauses relevant to the “accumulation” of income, although the SUHD clauses are intended to override whilst Preference Units are on issue. However, the linkages between the clauses are not sufficiently clear and can be resolved through some minor drafting</p>   |

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|       |                     | <p>Income. This is acceptable to the QRC provided that the Trustee or Ordinary Unit Holder provides adequate compensation to the Trust (and Preference Unit Holders).</p> <p>cl. 12.5(a) of the TD acknowledges that, before the end of a Distribution Period, the Trustee may determine to "accumulate" the Distributable Income for the Distribution Period.</p> <p>cl. 12.5(c) of the TD states that "while the Unit Holders Deed is in force, the Trustee must accumulate Distributable Income and distribute accumulated Distributable Income in accordance with the Unit Holders Deed".</p> <p>cl. 14.5 of the SUHD allows the Ordinary Unit Holder to direct the Trustee not to make distributions and requires the Trustee / Ordinary Unit Holder to pay a "compensation amount" to the Trust.</p> | <p>changes.</p> <p>The QRC submits that:</p> <ul style="list-style-type: none"> <li>cl. 12.5(c) of the TD be amended to clarify that only if the Trustee determines to accumulate income in accordance with the SUHD will the provisions of the SUHD apply. The current drafting suggests that while the SUHD is in force, the Trustee must accumulate Distributable Income (i.e. that no distributions will be made at all), which is not the intended result; and</li> <li>it should be explicitly stated that whilst the SUHD is in force, all of the accumulation clauses in the SUHD override those in the TD. Despite previous negotiation with Aurizon Network on this point, there are some inconsistencies between the accumulation clauses which create uncertainty.</li> </ul> <p>These drafting changes should not be controversial given that they seek only to clarify the intended accumulation process (as agreed between QRC and Aurizon Network) to avoid unnecessary uncertainty.</p> |
| TAX9  | cl. 12.13 of the TD | <p><b>Trustee's liability for Tax</b></p> <p>The Trustee is not liable for any liability or loss (including consequential loss) in respect of discretions exercised or determinations made in respect of distributions, despite any errors or miscalculations in any provision for Tax.</p> <p>However, the Trustee will be personally liable for tax assessed to the Trustee as a result of accumulating income under cl. 12.5 of the Trust Deed.</p>   | <p><b>Liability for errors or miscalculations of Tax</b></p> <p>The QRC submits that the Trustee should be liable for errors or miscalculations to the extent that the Trustee has been guilty of fraud, negligence, wilful default or breach of trust.</p> <p>This is consistent with the Trustee's "standard risk position" adopted for both legal and tax purposes and is also with the Trustee's level of liability under "Trustee's limitation of liability and indemnity" clause in cl. 17 of the TD.</p> <p><b>Liability for Tax due to accumulation of income</b></p> <p>As both the TD and the SUHD contain accumulation clauses, the QRC proposes that it be explicitly stated in cl. 12.13 of the TD that the Trustee is personally liable for Tax assessed to the Trustee as a result of accumulating income under <b>either</b> the TD <b>or</b> the SUHD.</p>  |

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| TAX10 | cl. 20.2 of the TD  | <p><b>Wind up on changes to Tax Law</b></p> <p>This clause addresses the process which occurs if the Trust to be wound up due to changes to Tax Law which results in the Trustee not being a flow-through vehicle for tax purposes.</p> <p>As a result of negotiations, Aurizon Network has included amendments so that winding up of the Trust is not the only option on a change to Tax Law. However, the Trustee still has considerable discretion regarding the action to be taken.</p> <p>Specifically, cl. 20.2 requires that the Trustee call a meeting of the Unit Holders to consider the winding up of the Trust "or taking any other measures proposed by the Trustee". If approved by Unanimous Resolution of Preference Unit Holders, the Trustee may commence winding up of the Trust or take any other measure decided by the meeting.</p> | <p>The QRC proposes that Preference Unit Holders should have an express right to make submissions as to the alternate measures which may be taken (i.e. it should not only be the Trustee that can propose alternatives to the winding up of the Trust).</p>  |
| TAX11 | cl. 2.5 of the SUHD | <p><b>Wind-up of the Trust before the Zero Value Date</b></p> <p>Preference Unit Holders have no rights to participate in the winding up of the Trust. This means that if the Trust is wound up before the Zero Value Date, the Ordinary Unit Holder (i.e. Aurizon Network) would be entitled to all the proceeds of the winding up even though it has contributed no capital.</p> <p>The parties have agreed to negotiate to resolve this inequity. The mechanism on early winding up cannot result in "any disadvantage", including in respect of Tax, to the Ordinary Unit Holder.</p>   | <p>Due to the continuing tax indemnity in the UA, Aurizon Network would be indemnified for any Tax payable by it on a winding up. This is not appropriate except in respect of Tax incurred by Aurizon Network which is disproportionate to the economic benefit Aurizon Network receives on a winding up. An additional carve-out should be included in the tax indemnity to address this.</p> |

| Issue | Clause               | Description of issue and Aurizon Network's position   | QRC submission  |
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| TAX12 | cl. 12.3 of the TD   | <p><b>Ordinary Unit Holder's rights to distributions</b></p> <p>As a commercial matter, the parties have agreed that whilst Preference Units are on issue, the Ordinary Unit Holder will be not be entitled to distributions from the Trust.</p> <p>cl. 12.3 of the TD states that Ordinary Unit Holders will not be presently entitled to any Distributable Income at any time that Preference Units are on issue.</p> <p>However, the Trustee may keep a Reserve Account of any net realised and unrealised capital gains or losses of the Trust and may at any time distribute amounts from the Reserve Account to the Unit Holders (including the Ordinary Unit Holder).</p>  | <p>To avoid the risk of the Ordinary Unit Holder having rights to distributions of capital or capital gains while Preference Units are on issue, the QRC proposes that the Trustee's power to make distributions from the Reserve Account should be subject to an explicit statement that the Ordinary Unit Holder will not be entitled to any distributions while Preference Units are on issue.</p>   |
| TAX13 | cl. 16.2 of the SUHD | <p><b>Requirement to comply with the Tax Policy</b></p> <p>To ensure certainty of tax outcomes for SUFA (to the extent possible), a Tax Policy has been included as Schedule 8 to the SUHD. Both QRC and Aurizon Network have been involved in drafting the Tax Policy.</p> <p>The Tax Policy is intended to regulate the conduct of the Trustee in respect of tax matters, particularly where choices or options are available to the Trustee. This is because the outcomes of tax choices made by the Trustee will primarily affect Preference Unit Holders.</p> <p>Following negotiations with QRC, Aurizon Network have included a requirement in cl. 16.2(a) that the Trustee must, <b>acting reasonably</b>, administer the Trust in accordance with the Tax Policy, except where to do so would breach or contravene the Law.</p> <p><b>Modifying the Tax Policy</b></p> <p>Under the current drafting of cl. 16.2(c), the Trustee may modify the Tax Policy by notice to Unit Holders if it considers it necessary to address a change in Tax Law (or</p> | <p><b>Requirement to comply with the Tax Policy</b></p> <p>The Tax Policy contains a requirement that the Trustee comply with the Tax Law and in doing so, must act reasonably. The Tax Policy also requires that the Trustee take positions that are at least reasonably arguable.</p> <p>Whilst these provisions offer some protection, the current placement of the words "acting reasonably" suggests that the Trustee's obligation to comply with the Tax Policy is qualified, which is not appropriate. Instead, the QRC submits that cl. 16.2(a) should be amended to ensure that the Trustee has an unqualified obligation to administer the Trust in accordance with the Tax Policy and in doing so, the Trustee must <b>act reasonably</b>.</p> <p><b>Modifying the Tax Policy</b></p> <p>Given the role of the Tax Policy in ensuring, to the maximum extent possible, certainty of tax outcomes and regulating the conduct of the Trustee, the Trustee should not be able to make material amendments to the Tax Policy without Preference Unit Holder consent.</p> <p>As such, the QRC proposes that:</p> <ul style="list-style-type: none"> <li>the Trustee may make unilateral amendments to the Tax Policy only in respect of non-material matters, and must be required to act reasonably</li> </ul> |

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|       |                      | <p>the interpretation of it), in respect of non-material matters, or otherwise where approved by a Special Majority of Preference Unit Holders.</p>   | <p>in determining whether a change in Tax Law (or the interpretation of it) is non-material or not;</p> <ul style="list-style-type: none"> <li>the Trustee must notify Preference Unit Holders if the Tax Policy is required to be modified if compliance with the Tax Policy would result in a breach or contravention of the Law, with such amendments being subject to Preference Unit Holders' consultation and approval; and</li> <li>the Trustee must notify and consult with Preference Unit Holders if the Tax Policy needs to be amended to address changes to Tax Law or administrative practice. This is reasonable as the Trustee is required to monitor developments in the Tax Law and its interpretation as part of good tax management and proper tax compliance.</li> </ul>  |
| TAX14 | cl. 16.3 of the SUHD | <p><b>Appointment of Tax Reviewer</b></p> <p>A Preference Unit Holder may request that a Tax Reviewer be appointed to review whether the Trustee has administered the Trust in accordance with the Tax Policy, provided that the Preference Unit Holder provides evidence <b>reasonably satisfactory to the Trustee</b> that Preference Unit Holders holding at least 50% of units agree to appointing a Tax Reviewer.</p> <p>If the Tax Reviewer determines that the Trustee has <b>not</b> administered the Trust in accordance with the Tax Policy, the Trustee is required to administer the Trust in accordance with the Tax Policy taking into account the determination of the Tax Reviewer. There is no requirement that the Trustee act reasonably in doing so or that the Trustee revisit its past conduct.</p> <p>Whilst the Tax Reviewer must sign a confidentiality undertaking, despite the QRC's previous suggestions cl. 16.3 does not include an obligation on the Trustee to provide reasonable access or assistance to the Tax Reviewer.</p> | <p>The QRC proposes that:</p> <ul style="list-style-type: none"> <li>Preference Unit Holders should only have to provide evidence that 50% of Preference Unit Holders agree to the appointment of the Tax Reviewer. Requiring evidence <b>reasonably satisfactory to the Trustee</b> could allow the Trustee to "block" the appointment of a Tax Reviewer (therefore circumventing the whole process);</li> <li>if the Tax Reviewer finds that the Trustee has <b>not</b> administered the Trust in accordance with the Tax Policy, the Trustee should be required to administer the Trust in accordance with the Tax Policy (including, if required, revisiting any positions previously taken), <b>acting reasonably</b> and taking into account the determination of the Tax Reviewer; and</li> <li>the Trustee should be required to provide reasonable access and assistance to the Tax Reviewer.</li> </ul> |

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| TAX15 | Schedule 8 of the SUHD | <p><b>Tax Policy</b></p> <p>Whilst the Tax Policy has been the subject of prolonged negotiation between Aurizon Network and the QRC, involving compromises on both sides, there are still some drafting changes required to ensure the Tax Policy provides adequate certainty and protection in respect of tax matters.</p> <p><b>Material Tax Matter / Material Tax Dispute</b></p> <p>Material Tax Matter is defined as an adjustment that would, <b>or is reasonably likely to</b>, result in the net income of the Trust being increased by at least 5% of the Target Cost (which equates to 1.5% in cash terms).</p> <p>Following negotiations with QRC, Aurizon Network have included a requirement that the Trustee consult with Preference Unit Holders on "Material Tax Matters" and "Changes in Tax Law".</p> <p>However, it is only a change in Tax Law (or the interpretation of it) which <b>may</b> have a "material impact on the Tax status of the Trust" which requires consultation. There are currently separate consultation processes for Material Tax Matters and Changes in Tax Law.</p> <p>Material Tax Dispute is defined as a dispute with a Governmental Agency which, if lost, would result in a Material Tax Matter or Material Tax Adjustment. A Material Tax Dispute requires the Trustee to consult with Preference Unit Holders.</p> <p><b>Access to records</b></p> <p>Preference Unit Holders have an ability to request access to information and tax records. However, such requests must be accompanied by <b>evidence reasonably satisfactory to the Trustee</b> that 50% of Preference Unit Holders (excluding Aurizon Network Preference Unit Holders if any) agree to the request and are limited to two requests per Financial Year, except in certain</p> | <p>To simplify the Tax Policy and ensure that it offers adequate protection, the QRC proposes that:</p> <ul style="list-style-type: none"> <li>the definition of Material Tax Matter be amended to encompass any tax matter or change in Tax Law which <b>could reasonably</b> result in a breach of the requisite income threshold. This removes the need for separate consultation processes for Material Tax Matters and Changes in Tax Law and reduces the trigger for consultation to a more appropriate level;</li> <li>the concept of Material Tax Dispute be changed to "Material Tax Enquiry" to allow for early Preference Unit Holder notification and consultation in respect of material compliance risk reviews, audits or requests for information <b>before</b> these escalate into disputes with the relevant Governmental Agency;</li> <li>it be made clearer that consultation in respect of Material Tax Matters or Material Tax Enquiries is not intended to interfere with the Material Adverse Tax Change concept in cl. 2.4 of the SUHD, but is intended to prevent a Material Adverse Change from occurring;</li> <li>Preference Unit Holders should only have to provide evidence that 50% of Preference Unit Holders agree to the request for access to records. Requiring evidence <b>reasonably satisfactory to the Trustee</b> that 50% of Preference Unit Holders approve, as this could allow the Trustee to "block" Preference Unit Holders' access to records;</li> <li>requests by Preference Unit Holders for access to records should not be limited to two per year, but should instead be limited by a reasonableness concept (having regard to the administrative burden on the Trustee);</li> <li>regarding the requirement that the Trustee notify Preference Unit Holders of a breach of the Tax Policy, the "reasonably likely" to result in a Material Tax Matter is too high a threshold. The Trustee should be required to notify Preference Unit Holders of any breach which "could reasonably" result in a Material Tax Matter; and</li> <li>include a requirement that the Trustee not become the head company or a member of a tax consolidated group while Preference Units are on issue. Aurizon Network had previously agreed in principle to this change but it has not been included in Aurizon Network's revised version of the</li> </ul> |

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|-------|--------|--|--------------------------------|
|       |        | <p>circumstances.</p> <p><b>Breach of Tax Policy</b></p> <p>The Trustee, acting reasonably, must notify and consult with Preference Unit Holders in respect of any non-compliance with the Tax Policy if that non-compliance is <b>reasonably likely</b> to result in a Material Tax Matter.</p> | <p>Tax Policy or the SUHD.</p> |