



2017 SUFA DAAU QRC SUBMISSION

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Copy to: Aurizon Network (Prue Mackenzie, Jon Windle, Tristan Barns, Donna Bowman)

QRC draft submission on Aurizon Network's 2017 Standard User Funding Agreement

The Queensland Resources Council (**QRC**) provides this submission on behalf of its members in response to Aurizon Network's 2017 UT4 SUFA DAAU of January 2017 and associated draft agreements (**AN Draft SUFA**).

About the QRC

The QRC is the peak representative organisation of the Queensland minerals and energy sector. The QRC's membership encompasses minerals and energy exploration, production, and processing companies and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively and in a socially and environmentally sustainable way.

All operating Queensland coal producers are members of the QRC. A number of coal mining companies in development and operating phase are also members of the QRC.

QRC's position on the AN Draft SUFA documents

In the QRC's view, an effective user funding regime is an important part of a suite of options for expansion funding. Having a suite of options for expansion funding will promote efficient expansion of the network.

A user funding regime was originally contemplated in UT3. UT3 required Aurizon Network to develop a user funding regime. A long regulatory process followed. In addition, Aurizon Network and the QRC engaged in a comprehensive and protracted negotiation over the user funding documents. The QRC, Aurizon Network and the QCA engaged specialist advisers to assist with the consideration of issues relating to the user funding regime. Collaborative stakeholder meetings were arranged which were facilitated by the QCA and its advisors. The QCA made a final decision

by which time all issues had been fully ventilated and considered. In short, the process to get to a final user funding decision had been very detailed and very long.

Aurizon Network have proposed a number of amendments to the QCA's final decision. The QRC is grateful for the fact that Aurizon Network have not sought to re-write the user funding documents. However the bulk of the changes proposed by Aurizon Network have been considered before. For example, Aurizon Network's proposal that it be entitled to set off against rental payments due to the trust, Aurizon Network's proposed post regulatory rental calculation methodology and Aurizon Network's changes to the construction agreements. The issues raised by Aurizon Network in its submission were ventilated ad nauseam in past processes, meetings and decisions. Nothing has changed between the QCA final decision on the user funding regime and now. There is nothing more that can be said or needs to be said on the issues raised in Aurizon Network's submission – it has all been said and considered before. In the QRC's view, the QCA should not accept any change to the user funding documents from its previous final decision.

If the QCA considers (which the QRC does not consider warranted) that changes to the user funding documents should be contemplated the QRC has prepared tables attached to this letter which identify those changes which the QRC suggest would be acceptable and those changes which are not (and in those cases why not).

QCA's powers

Aurizon Network have alleged that the QCA does not have the power to make certain decisions. The QRC does not agree with these submissions. The QRC's UT5 submission included a detailed explanation of the QCA's powers. A modified version of that submission (modified for application for this submission) is attached as Schedule 1.

Composition of the submission

This letter and the following documents comprise the QRC's submission on the AN Draft SUFA.

Capitalised terms used in this submission have the meaning given to them in the SUFA documents.

Thank you for the opportunity to provide this submission.

Yours sincerely



Ian Macfarlane
Chief Executive

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1 Overview

As is noted in the covering letter, the QRC considers that no change should be made to the QCA's final decision.

In the event that the QCA determined that change is required, the tables below set out the QRC's position on Aurizon Network's amendments to the following draft documents, each published by the QCA on 18 January 2017:

- 2014 Undertaking;
- User Funding – Extension Infrastructure Head-Lease;
- User Funding – Extension Infrastructure Sub-Lease;
- User Funding – Trust Deed;
- User Funding – Subscription and Unit Holders Deed;
- User Funding – Rail Corridor Agreement;
- User Funding – Design and Construct Contract;
- AS 4902 – 2000 General Conditions of Contract (**Construction Contract**);
- User Funding – Extension Project Agreement;
- User Funding – Integrated Network Deed;
- User Funding – Access Agreement Specific Terms Deed; and
- User Funding – Specific Security Agreement.

As Aurizon Network has not made any amendments to the User Funding – Financing Side Deed the QRC has not commented on this draft document for the purpose of this submission.

This submission uses the key below to grade the QRC's position on the amendments to the above documents as either 'acceptable' or 'not acceptable'.

-  = Acceptable
-  = Not acceptable

2 2014 Undertaking

Item	Clause	Description	QRC Position	Rating
1	8.8.1(a)(vi) (B)	Process where Users intend to fund an Expansion	The QRC accepts these changes.	
2	8.8.1(b)	Requirement for Aurizon Network to engage with the State	<p>The QRC does not accept these changes.</p> <p>The requirement for Aurizon Network to use reasonable endeavours to procure the State to enter into a User Funding Agreement has been removed and replaced with a requirement for Aurizon to request the State enter into a User Funding Agreement.</p> <p>The previous wording should be reinstated to ensure that the appropriate requirement is placed on Aurizon Network in respect of engagement with the State in these circumstances. It is not enough to just request.</p>	
3	8.8.3(a)	Development of the SUFA	The QRC accepts these changes.	
4	8.8.3(d)	Cooperation between Aurizon Network and QCA regarding statutory severance	The QRC accepts these changes.	
5	8.8.4	Tax assessment of SUFA	The QRC accepts these changes.	

Item	Clause	Description	QRC Position	Rating
6	11.1.5(c)(i) i)(B)(3) and 11.1.5(h)	Disputes relating to the completion of schedules in a User Funding Construction Agreement to be resolved Consistent with Current Market Practice	<p>The QRC objects to the standard proposed for assessment of a dispute as articulated in clause 11.1.5(h). In particular:</p> <p>1 Consistent with market practice should be a general industry and prudent practices test. It isn't appropriate to seek to impose an artificial midpoint in a range. The QRC therefore believe that the concept of between the 25th and 75th percentile (for monetary matters) and the midpoint in a range for non-monetary matters is not appropriate. The expert's role should be to make a determination according to prudent industry practices.</p> <p>2 The QRC also does not regard the definition of "Reference Principal" to be appropriate. It is not appropriate to establish a benchmark against government owned corporation. Development by government owned corporation is materially different to that in the private sector. The QRC consider that the "Reference Principal" should have regard to a prudent and diligent private infrastructure owner.</p>	
7	Part 12 - Definitions	References to approved agreements and deeds	The QRC accepts these changes.	
8	Part 12 - Definitions	Definition of User Funding Construction Agreement	The QRC accept this change.	

3 User Funding – Extension Infrastructure Head-Lease

Item	Clause	Description	QRC Position	Rating
1	7.2	Access to information	The QRC accepts these changes.	
2	20.1(a)	Entire agreement clause	The QRC accepts this change.	

4 User Funding – Extension Infrastructure Sub-Lease

Item	Clause	Description	QRC Position	Rating
1	1.1	Insert and deletion of various definitions	The QRC accepts these changes.	
2	4.12(a) – (c)	Minor amendments regarding insurance policies	The QRC accepts these changes.	
3	4.12(e)	Removal of initial right of Trustee to obtain insurance where it considers AN has failed to do so	The QRC does not accept these changes. The Trustee should have the right to effect insurance where Aurizon Network fails to do so. The 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.	
4	5.3(c)	Payment condition based assessments where the Railway Network ceases to be regulated	The QRC does not accept these changes. The costs of a condition based assessment report would be recovered elsewhere under Aurizon Network's revenue.	

Item	Clause	Description	QRC Position	Rating
5	7.4, 7.5 and 7.6	Right to set-off	<p>The QRC does not accept these changes.</p> <p>Security of entitlement to rent is fundamental to making the structure bankable. Financed structures do not permit set-off against the revenue stream. The rent is the Trust's sole revenue stream. All advisors have clearly explained that Aurizon Network having a set-off right is not workable. This issue has been considered extensively previously. The prohibition on set-off should remain, and Aurizon Network's proposed change should be rejected.</p>	
6	8.3(j)	SAA EISL DTP Provisions	The QRC accepts these changes.	
7	8.4(e)	Excess Payment	The QRC accepts these changes.	
8	9.6	Determination of Rent Calculation Methodology Dispute	The QRC accepts these changes.	
9	9.7	Determination of Rent Calculation Methodology Dispute during regulatory period	The QRC accepts these changes.	
10	9.8	Determination of Rent Calculation Methodology Dispute following regulatory period	While these changes are drafted in a cumbersome way, the QRC accepts these changes.	

Item	Clause	Description	QRC Position	Rating
11	Schedule 1	Objective – access undertaking references updated to 2016	The QRC accepts the changes to refer to the most up to date access undertaking.	
12	Schedule 1	Objective	<p>The QRC does not accept any other changes to schedule 1.</p> <p>Item 1 (during the regulatory period): The QRC do not consider that it is appropriate that Aurizon Network retain any OPRA. The calculation of rent is not exact. Retention of the OPRA simply seeks to provide Aurizon Network with a benefit which it would not have but for the user funded asset.</p> <p>Item 2 (post regulatory period): The QRC are disappointed with the approach taken by Aurizon Network in this section. The drafting proposed by Aurizon Network results in minimising the Trust's revenue post regulation and maximising Aurizon Network's. The drafting proposed by Aurizon Network was previously put to the QRC and the QRC rejected it with explanation. The drafting proposed by Aurizon Network does not in any way comply with the QCA's final decision. The QRC would be willing to work with Aurizon Network to agree drafting which results in a more balanced outcome.</p>	
13	Schedule 2	Calculation Methodology	Other than for a change to the recent access undertaking, the QRC does not accept these changes. Please refer our comments at item 12 in relation to the OPRA.	

5 Rail Corridor Agreement

Item	Clause	Description	QRC Position	Rating
1	10	Contamination - indemnity	<p>The QRC does not accept these changes.</p> <p>Limiting the contamination indemnity given by Aurizon Network to Claims from a third party or from any Losses incurred by the Trustee to a third party is not appropriate in the context of the arrangements. There is no reason to limit the operation of the indemnity to third party claims. If the contamination is caused by Aurizon Network and a claim made against the Trust, Aurizon Network should bear responsibility.</p>	

6 User Funding – Trust Deed

Item	Clause	Description	QRC Position	Rating
1	17.1	Limitation on Trustee's liability	<p>The QRC does not accept these changes.</p> <p>Aurizon Network has amended the limitation on the Trustee's liability such that the Trustee is no longer liable to any Unit Holder for a Claim for breach of the warranty under clause 14(b) of the Extension Project Agreement.</p> <p>This warranty is given by the Trustee in respect of the new Capacity to be created by the Extension being sufficient to meet the Train Service Entitlements and has been deleted by Aurizon Network in the Extension Project Agreement as a consequence of Aurizon Network's deletion of the capacity warranty under the Construction Contract. The QRC considers that the capacity warranty given in the construction agreement and correspondingly in the extension project agreement are needed. That capacity warranty is a key bankability issue. Clause 17.1(c) of the trust deed is necessary to ensure that the party who ultimately bears the loss (being the unit holders) is able to make a claim, which claim can then form the foundation of a loss which ultimately flows back to Aurizon Network via the trust.</p>	

7 User Funding – Subscription and Unit Holders Deed

Item	Clause	Description	QRC Position	Rating
1	2.5	Termination of the Trust other than in accordance with Transaction Documents	<p>The QRC does not accept these changes.</p> <p>The removal of the word 'material' creates a threshold that is not appropriate in these circumstances given the impact on the trust and potentially gives Aurizon Network unreasonable and unintended bargaining power in respect of the good faith negotiations that the Parties must enter into to agree a process in respect of the winding up of the Trust. It is also worth noting that the obligation on Aurizon Network is only to negotiate in good faith.</p> <p>If Aurizon Network is not required to agree a process which results in any disadvantage to it whatsoever then this may have the effect of impeding the negotiations by the Parties in relation to this matter.</p>	
2	17.1(f)(x)	Tax Indemnity	<p>The QRC does not accept these changes.</p> <p>Aurizon Network should not be able to withhold the OPRA.</p> <p>See Item 12 of the Extension Infrastructure Sub-Lease section for the QRC's position in relation to the treatment of OPRA.</p>	
3	18.1(c)	Stamp Duty	<p>The QRC does not accept these changes.</p> <p>The Trustee should only be liable for stamp duty payable on the issue of the ordinary unit. It is not appropriate that the Trustee is liable for all stamp duty in relation to the ordinary unit.</p>	

Item	Clause	Description	QRC Position	Rating
4	21.9	AN's limitation of liability	<p>The QRC does not accept these changes.</p> <p>To the extent the warranty given by the Trustee pursuant to clause 14(b) of the Extension Project Agreement is reinserted then this clause should also be reinserted.</p> <p>See Item 13 of the Extension Project Agreement section and Item 2 of the Construction Contract section for the QRC's position regarding Aurizon Network's obligation to provide a warranty in relation to capacity.</p>	

8 User Funding – Design and Construct Contract (formal instrument of agreement)

Item	Clause	Description	QRC Position	Rating
1	7.2	Security provisions commence upon execution of Formal Instrument of Agreement	<p>The QRC does not accept these changes.</p> <p>See Item 3 of the Construction Contract section for the QRC's position regarding the Principal's security obligations.</p>	

9 AS 4902 – 2000 General Conditions of Contract

Item	Clause	Description	QRC Position	Rating
1	1.1	Definitions	The QRC notes that certain deletions have been made in respect of terms used in other clauses in the Construction Contract that Aurizon Network has deleted (which the QRC has commented on below). To the extent these clauses are reinstated the corresponding definitions should also be reinstated.	
2	2.2	Contractor's warranties	<p>The QRC does not accept these changes.</p> <p>It is not appropriate that Aurizon Network provides no warranty whatsoever in respect of capacity given that a key factor of any Extension Works are that they fulfil the capacity requirements of the Principal and the Principal's project. Aurizon Network's amendments mean that the Principal will have no recourse against Aurizon Network where the completed extension works fail to meet the Principal's capacity requirements.</p> <p>It is standard market practice for a contractor to provide a warranty in relation to fitness for purpose in a construction contract of this nature. In relation to the works to be carried out under the Construction Contract a principal would expect that the works in question would deliver the capacity being sought.</p> <p>Aurizon Network's proposed warranty exclusions are wholly inappropriate and not consistent with market practice nor with the allocation of risk between contractor and principal in respect of a contract of this nature.</p> <p>We also note that a key requirement to make the structure bankable is that Extension delivers the capacity contracted. Without such capacity, access revenue and rental income is affected. That is not a tenable outcome.</p>	

Item	Clause	Description	QRC Position	Rating
3	5	Security	<p>The QRC does not accept these changes.</p> <p>It is not standard market practice for a principal to be required to provide security – even where they are an SPV.</p> <p>In light of the detailed security arrangements in the Subscription and Unit Holders Deed additional security requirements on the Trustee in this contract are unnecessary. Aurizon Network as a party to this document therefore has significant protection in relation to the credit position of the trust.</p>	
4	8.4	Contract documents - availability	The QRC accepts these changes.	
5	8.5	Contract documents – confidential information	The QRC accepts these changes.	
6	8.7	Contract documents – pricing information	<p>The QRC does not accept these changes.</p> <p>These matters do not contain price sensitive information and further the information in question can only be used for a very limited purpose. These amendments unduly prohibit the principal from disclosing such information where there is a reasonable reason for such disclosure. Limiting disclosure as suggested by Aurizon Network would hamper the administration of the contract.</p>	
7	11.2	Changes	The QRC accepts these changes.	

Item	Clause	Description	QRC Position	Rating
8	23.1	Site – access and possession	<p>The QRC does not accept these changes.</p> <p>In response to Aurizon Network’s note the insurances taken out under the Extension Infrastructure Sub Lease would not necessarily cover any damage to the Works as defined under the Construction Contract.</p>	
9	25	Capacity	<p>The QRC does not accept these changes.</p> <p>The concept of capacity and the Principal's reliance upon the Contractor being able to carry out the works in accordance with a design that will allow the Principal to access a predetermined capacity on the network is fundamental to the purpose of the Construction Contract and the SUFA arrangements as a whole.</p> <p>The deletion of this clause impacts the overall bankability of any extension. If Aurizon Network has no liability or obligations in relation to a shortfall of capacity once the works have been completed then this is a material risk to be borne by the Trustee. It is not appropriate that the party carrying out the work in these circumstances is not held accountable where it fails to deliver the capacity requirements in accordance with the contract.</p> <p>These changes are wholly unacceptable and inappropriate and the QCA strongly opposes that these amendments, and all other amendments throughout the AN Draft SUFA documents in relation to capacity and capacity warranties, be accepted by the QCA.</p> <p>See also Item 2 above regarding the QRC's position in respect of capacity warranties to be given by the Contractor.</p>	
10	25A	Contamination	<p>The QRC does not accept these changes.</p> <p>This deletion results in an unacceptable level of responsibility for the Contractor in relation to site contamination and related matters.</p>	

Item	Clause	Description	QRC Position	Rating
11	33.7A	Liquidated damages - capacity	<p>The QRC does not accept these changes.</p> <p>See Items 2 and 9 above regarding the QRC's position in respect of matters in relation to capacity.</p> <p>This clause should be reinserted if the previous clause 25 is reinserted.</p>	●
12	33.8(b)	Acknowledgement	<p>The QRC does not accept these changes.</p> <p>See Items 2 and 9 above regarding the QRC's position in respect of matters in relation to capacity.</p> <p>This clause should be reinserted if the previous clause 25 is reinserted.</p>	●
13	33.9	Delay damages	<p>The QRC does not accept these changes.</p> <p>Where an EOT for a compensable cause has been issued the damages payable to the Contractor should not include a mark-up for profit and overhead. This is not a usual position.</p>	●
14	35.3	Discretionary variation	<p>The QRC does not accept these changes.</p> <p>The previous clause 35.4 has been moved to subclause 35A.4(c) such that the Independent Certifier is no longer required to have regard to these principles when certifying that the adjustment to the contract sum agreed by the parties is reasonable in the circumstances.</p> <p>The principles that the Independent Certifier is to have regard to should be the same whether or not an adjustment event or a discretionary variation is being considered.</p>	●

Item	Clause	Description	QRC Position	Rating
15	35A.2	Notification of adjustment event	<p>The QRC does not accept these changes.</p> <p>The amendments in this clause in respect of the extension of the time periods for which the Contractor is able to provide notice of, and any initial or updated claim in respect of, an adjustment event are not appropriate.</p> <p>Further the inclusion of the awareness of the Contractor in respect of the adjustment event may have the effect of delaying communication between the Principal and the Contractor in relation to adjustment events.</p> <p>These are matters which are of the utmost importance to the Principal and as such timeframes for communication between the Principal and the Contractor should be prompt and clearly defined.</p>	
16	35A.4	Independent Certifier's determination	<p>The QRC does not accept these changes.</p> <p>See comment at Item 14 above.</p>	
17	36.1(b)	Progress Claims	<p>The QRC does not accept these changes.</p> <p>It is not appropriate that a payment claim made by the Contractor can include plant or materials not yet incorporated into the Works. Payment for unfixed work creates a security risk. This can be managed by Aurizon Network agreeing similar terms with its subcontractors.</p>	
18	38.4	Principal's rights	<p>The QRC does not accept these changes.</p> <p>If, following a suspension, the Contractor is provided with an opportunity to show reasonable cause, remedy the breach or make other arrangements, then each of these matters should be to the reasonable satisfaction of the Principal.</p>	

Item	Clause	Description	QRC Position	Rating
19	38.12	Compensation to Principal	<p>The QRC does not accept these changes.</p> <p>It is not appropriate in all instances to include clause 38.12(d) such that the Compensation Payment is the Principal's sole entitlement to compensation arising from the termination of the Construction Contract.</p> <p>See Item 5 of the Extension Project Agreement section for the QRC's position regarding the Regulatory Asset Base.</p> <p>The Trust should have rights at law.</p>	
20	41.4	Selection of expert	<p>The QRC accepts these changes.</p>	
21	43.1	Liability cap	<p>The QRC does not accept these changes.</p> <p>It is market standard for liability carve outs to not apply where there have been instances of Gross Negligence and Wilful Default. Removing these matters and replacing them with merely 'fraud of the Contractor' is not appropriate.</p>	
22	43.2	Exclusion of consequential loss	<p>The QRC does not accept these changes.</p> <p>The references to the defined terms of Wilful Default and Gross Negligence previously contained in this clause should be reinserted. In addition the outcome of the amendments mean that a party is not liable for Consequential Loss where it has committed Gross Negligence which is not appropriate.</p>	

Item	Clause	Description	QRC Position	Rating
23	Annexure Part A	Contract particulars	<p>The QRC does not accept these changes.</p> <p>Certain deletions have been made in respect of matters (such as capacity) in other clauses that Aurizon has deleted (which the QRC has commented on above). To the extent these clauses are reinstated the corresponding deletions and amendments to Part A should be amended accordingly.</p>	

10 User Funding - Extension Project Agreement

Item	Clause	Description	QRC Position	Rating
1	1.1	Definitions generally	The QRC notes that certain deletions have been made in respect of terms used in other clauses in the Agreement that Aurizon Network has deleted (which the QRC has commented on below). To the extent these clauses are reinstated the corresponding definitions should also be reinstated.	
2	1.1	Definition of Consequential Loss	The QRC does not accept these changes. It is not appropriate for the definition of Consequential Loss to include any loss arising out of any Claim by a third party as third party loss should be recoverable in certain circumstances. The existing drafting of the definition is sufficient to exclude standard matters which are captured by the concept of Consequential Loss.	
3	2.1	Conditions Precedent, Items 5 and 6	The QRC does not accept these changes. The previous Item 5 should be reinserted. An understanding of the duty position in relation to the Transaction Documents is an important factor to be taken into account before the arrangements come into effect. The QRC can accept that Aurizon Network's new Item 5 can be reinserted to replace the deleted Item 6.	

Item	Clause	Description	QRC Position	Rating
4	2.1	Conditions Precedent, Item 7	<p>The QRC does not accept these changes.</p> <p>See Item 3 of the Construction Contract section for the QRC's position regarding security requirements under the Construction Contract.</p> <p>The payment of the advance payment under the Construction Contract is payable within 10 business days of the satisfaction of the Conditions Precedent under the Extension Project Agreement. It is not appropriate that the payment of this amount is a condition precedent under the Extension Project Agreement itself nor is it appropriate that the Trustee is required to pay this amount prior to the arrangements becoming effective.</p>	
5	3.1	Inclusion into Regulatory Asset Base	<p>The QRC does not accept these changes.</p> <p>The amendments to this clause mean that Aurizon Network will not be held to an acceptable standard in respect of making the RAB Inclusion Submission and its interactions with the Access Regulation in these circumstances. Clear obligations in this area are a key bankability concern.</p> <p>Aurizon Network is lodging with the Access Regulator an RAB Submission on behalf of the Trustee. The 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 Trustee for review at least 10 Business Days before the submission is proposed to be lodged with the Access Regulator; and all correspondence between Aurizon Network and the Access Regulator in connection with the inclusion of the Capital Costs and the Construction Interest on the Capital Costs into the Regulatory Asset Base to the Trustee. 	

Item	Clause	Description	QRC Position	Rating
6	4.3	Access Seekers	<p>The QRC does not accept these changes.</p> <p>The QRC queries whether references to Gross Negligence and Wilful Misconduct should include where these matters occur under the terms of the Access Agreement Specific Terms Deed after the termination or expiry of such Deed.</p>	
7	5.1(a)(ii)	Notification of Disputes	<p>The QRC accepts these changes.</p>	
8	5.9	Time bar	<p>The QRC does not accept these changes.</p> <p>The time period of 36 months should be reinstated. As audits are carried out on a yearly basis the time bar of 12 months creates a risk that Claims will be extinguished before the audit determines the full extent of the relevant issue.</p>	
9	7.1	No liability in relation to capacity	<p>The QRC does not accept these changes.</p> <p>This deletion relates to the insertion of the capacity carve out to the warranty given by Aurizon Network under the Construction Contract and as such to the extent the QRC's proposed amendments to this clause are accepted this clause should be reinserted.</p>	
10	7.2	Exclusion of Consequential Loss under the Transaction Documents	<p>The QRC does not accept these changes.</p> <p>There are certain standard circumstances for which a party should be entitled to recover Consequential Loss. The amendments to the Consequential Loss exclusions are not appropriate as there are no instances in which a Party is liable for Consequential Loss except as expressly provided under a Transaction Document.</p>	

Item	Clause	Description	QRC Position	Rating
11	7.3(e)	Trustee's limitation of liability	<p>The QRC does not accept these changes.</p> <p>This deletion relates to a corresponding deletion by Aurizon Network under the Construction Contract and the capacity warranty (see Item 11 of the Construction Contract section). To the extent Aurizon Network's proposed amendments in respect of the capacity exclusion to the warranty it gives under the Construction Contract are not accepted this clause should be reinserted.</p>	
12	7.4	Termination of State Infrastructure Lease	<p>The QRC does not accept these changes.</p> <p>This clause will exclude all liability existing under the Transaction Documents at the point in time that the State Infrastructure Lease is terminated where such liability or claims relate in some way to the circumstances giving rise to the termination of the State Infrastructure Lease or arising out of or in any way related to the termination. It is not appropriate for an exclusion of liability clause of this nature to apply in these circumstances.</p>	
13	14	Construction Agreement Warranties	<p>The QRC does not accept these changes.</p> <p>Aurizon Network has removed the obligation on the Trustee to give a warranty to each Unit Holder and each Access Seeker that the new Capacity to be created by the Extension will be sufficient to meet the Train Service Entitlements.</p> <p>This deletion has been made as a consequence of Aurizon Network's deletion of the capacity warranty under the Construction Contract. As the Trustee is unable to make a claim against Aurizon Network for this matter then it is no longer required to give a corresponding warranty under the Extension Project Agreement.</p> <p>See Item 2 of the Construction Contract section for the QRC's position regarding Aurizon Network's obligation to provide a warranty in relation to capacity of the Extension. To the extent Aurizon Network's proposed carve outs to the warranty clause of the Construction Contract are not accepted this clause should be reinstated.</p>	

11 Integrated Network Deed

Item	Clause	Description	QRC Position	Rating
1	19.1	Entire agreement clause	The QRC accepts these changes.	

12 User Funding – Access Agreement Specific Terms Deed

Item	Clause	Description	QRC Position	Rating
1	1.2	Definitions	The QRC accepts these changes.	
2	Schedule 1, Part 2, Items 1-4	Modification to terms of Access Agreement	The QRC accepts these changes.	
3	Schedule 1, Part 2, Item 5	Completion of matters prior to Commencement of train services	The QRC accepts these changes.	
4	Schedule 1, Part 2, Item 5	Direction to pay	The QRC accepts these changes.	
5	Schedule 1, Part 2, Item 8(a)(i)(B)	Right of renewal	The QRC accepts these changes.	
6	Schedule 1, Part 2, Item 8(g)	Right of renewal	The QRC accepts these changes.	

Item	Clause	Description	QRC Position	Rating
7	Schedule 1, Part 2, Item 8(a)(iii)	Obligation to pay "Take or Pay" charges	<p>The QRC does not accept these changes.</p> <p>The Access Seeker's obligation to pay Take or Pay charges may commence if Aurizon Network is not satisfied that the Connecting Infrastructure and other enhancements have been completed by a certain date and the reasons such Connecting Infrastructure has not been completed is not primarily attributable to any default by Aurizon Network in the performance of legally binding obligations of Aurizon Network in respect of such Connecting Infrastructure.</p> <p>This means that to the extent the Connecting Infrastructure has not been completed for any other reason then, if determined by Aurizon Network, the Access Seeker may be liable to pay Take or Pay charges. It is not appropriate that Aurizon Network determines such matters in these circumstances.</p> <p>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.</p>	

13 User Funding – Specific Security Agreement

Item	Clause	Description	Comments	Rating
1	1.3	Deletions in relation to the removal of Events of Default	<p>The QRC does not accept these changes.</p> <p>Aurizon Network has amended a number of definitions such that an Event of Default under this Agreement only occurs where Aurizon Network is the subject of an Insolvency Event.</p> <p>Where the QRC's position in Item 2 below is accepted the changes in this clause should be rejected.</p>	
2	5	Events of Default	<p>The QRC does not accept these changes.</p> <p>Aurizon Network's amendments mean that the obligations in clause 4 in respect of the creation of Encumbrances or the disposal of any other interest in the Secured Property are no longer Events of Default nor is the failure by Aurizon Network to pay the Monthly DA Instalment under the Extension Infrastructure Sub-Lease. Such an arrangement is neither commercial, reasonable or bankable.</p> <p>It is not appropriate that these matters have been removed as Events of Default such that the only Event of Default under this Agreement is an Insolvency Event.</p>	
3	6	Default powers	<p>The QRC does not accept these changes.</p> <p>To the extent the deletion of clause 5 is not accepted by the QCA then the QRC considers that the amendments to this clause are not required.</p>	

Schedule 1

1 Beyond powers

1.1 Overview of Aurizon Network's position on the QCA's powers

Aurizon Network has made multiple assertions throughout its submissions in relation to the scope of the QCA's power under the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**). These assertions can be summarised as follows:

- (a) the QCA does not have the power under the QCA Act to refuse an 'appropriate' draft amending access undertaking on the basis that it prefers a 'more appropriate' draft amending access undertaking; and
- (b) the QCA cannot impose terms in an amending access undertaking which are inconsistent with the QCA Act.

The QRC notes that Aurizon Network has made similar assertions in the past in this regard. The QRC's UT5 submission includes a detailed explanation of the QCA's powers. The QRC incorporates those submissions by reference into this SUFA submission.

The QRC does not support Aurizon Network's position in relation to either of the matters outlined in sections 1.1(a) and 1.1(b) above. As discussed in sections 1.2 and 1.3 below:

- (c) the QCA is granted wide powers and functions under the QCA Act in relation to the approval of draft amending access undertakings and has a wide discretion when deciding whether it is appropriate to approve a draft amending access undertaking and in any event Aurizon Network's UT4 SUFA DUAA is not 'appropriate'; and
- (d) Aurizon Network's interpretation of how section 119(2)(c) of the QCA Act is intended to operate is manifestly incorrect and as such is not applicable to a determination of whether certain matters in the UT3 SUFA FD are permitted.

1.2 Approval of an 'appropriate' draft amending access undertaking

Aurizon Network has stated in its submissions (see section 2) that if a draft amending access undertaking is appropriate having regard to the factors in section 138(2) of the QCA Act (**section 138(2) factors**) the QCA does not have a residual discretion not to approve the draft amending access undertaking.

The QRC notes that the QCA has a wide discretion when deciding whether it is appropriate to approve a draft amending access undertaking. The section 138(2) factors are not mandatory conditions that must be satisfied before a draft amending access undertaking may be approved by the QCA. Rather, the section 138(2) factors are matters that the QCA must take into account when it decides whether it is appropriate to approve a draft amending access undertaking.

The weighting which the QCA give to each item in s 138(2) is up to the QCA.

Aurizon Network characterise the s 138(2) test in a way which could not have been intended by parliament. Aurizon Network characterise s 138(2) as requiring the QCA to

consider whether an undertaking or amendment submitted by Aurizon Network meets a minimum threshold. If it does meet the minimum threshold the QCA must approve the undertaking or amendment, even though the QCA consider that the undertaking or amendment could be materially improved. Such an approach is inconsistent with the purpose of the QCA's review, which must have been to consider what the appropriate form of undertaking or amendment should look like.

Putting aside Aurizon Network's characterisation of the QCA's role, one of the section 138(2) factors is to have regard to the object of Part 5 of the QCA Act being '...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.' (section 69E). In light of this factor, it is worth noting that the changes to the SUFA regime which are proposed by Aurizon Network substantially erode the bankability of the SUFA regime. That is, if Aurizon Network's proposed changes were accepted, it is likely that the SUFA regime would not be bankable or would be cost prohibitive to utilise.

Irrespective of whether Aurizon Network's characterisation of the QCA's powers is correct, Aurizon Network's UT4 SUFA DAAU is not 'appropriate' when having regard to the section 138(2) factors as, among other things, it will not promote the economically efficient operation of, use of and investment in the rail network and would in fact discourage such investment from occurring. In the QRC's view, the QCA should wholly reject the SUFA DAAU and require Aurizon Network to submit SUFA documents which comply with its prior final decision.

1.3 Terms inconsistent with the QCA Act

Aurizon Network has stated in its submissions that the UT4 SUFA DAAU adopts the agreed positions from the UT3 SUFA FD and also includes other positions that differ from those in the UT3 SUFA FD. One such reason that Aurizon Network gives for adopting a different position is that this was in order to 'address certain positions in the UT3 SUFA FD that Aurizon Network is not prepared to volunteer and that would be beyond the power of the QCA to require' (see section 1 of Aurizon Network's submissions).

Aurizon Network's submissions outlines eight key differences from the UT3 SUFA FD (see section 3) and in respect of each of these differences (with the exception of section 3.3.7 in relation to rental payments following deregulation) state that 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. These statements are made in the context of Aurizon Network being liable for costs, payments and liabilities in certain circumstances in accordance with the UT3 SUFA FD documents. Aurizon Network's assertion is essentially that these costs, payment and liabilities will result in Aurizon Network indirectly funding the Extension and are therefore in contravention of section 119(2)(c) of the QCA Act.

The QRC acknowledges that section 119(2)(c) of the QCA Act states that the QCA must not make an access determination that would require an access provider to pay some or all of the costs of extending the facility. However the QRC does not support Aurizon Network's assertion that this section of the QCA Act has any bearing whatsoever on the matters outlined in Section 3 of Aurizon Network's submissions.

Section 119(2)(c) of the QCA Act is intended to preclude the QCA from requiring Aurizon Network from directly contributing to an Expansion to the Central Queensland Coal Network. It is not intended to operate to alter or exclude the normal allocation of risk under contractual arrangements in respect of the funding, construction and operation of any Extension. Section 119(2) does not operate to relieve Aurizon Network from bearing a liability for a breach of a provision of a contract. For example, s 119(2) does not operate to prevent Aurizon Network giving a warranty as to capacity and where that warranty is breached a liability. If that construction were correct the section would have provided that

Aurizon Network is to have no obligations in respect of an extension – plainly s 119(2) does not provide for that. As such Aurizon Network's assertion that the QCA Act restricts the QCA in the manner that Aurizon Network is suggesting is manifestly incorrect and should not be accepted as a reason to accept Aurizon Network's departures from the UT3 SUFA FD.