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**Aurizon Network Pty Ltd (Aurizon Network) – 2017 Standard User Funding Agreement
Draft Amending Access Undertaking – Response to Draft Decision**

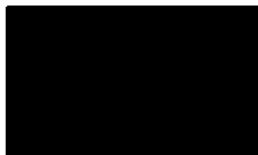
15 September 2017

Dear Professor Green,

Aurizon Network provides this submission in response to the Queensland Competition Authority (QCA) Draft Decision, relating to Aurizon Network's 2017 Standard User Funding Agreement Draft Amending Access Undertaking.

Aurizon Network is committed to working with the QCA and collaborating with stakeholders to support the growth and sustainability of the Central Queensland Coal Network.

Kind regards,



David Collins
Head of Finance and Regulation
Aurizon Network



Aurizon Network 2017 Standard User Funding Agreement Draft Amending Access Undertaking

Response to the Queensland Competition Authority Draft Decision of August 2017

Prepared by Aurizon Network
15 September 2017



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1. Introduction and Executive Summary

The availability of a workable Standard User Funding Agreement (SUFA) framework remains a priority for Aurizon Network and its coal supply chain partners. A workable SUFA will provide additional choice of project funding sources to access seekers as it allows for parties other than Aurizon Network to be able to fund an expansion within the Central Queensland Coal Network (CQCN).

Aurizon Network provides this submission in response to the Queensland Competition Authority's (QCA) 2017 SUFA DAAU Draft Decision on Aurizon Network's voluntary 2017 Standard User Funding Agreement Draft Amending Access Undertaking (2017 SUFA DAAU), published on 11 August 2017.

In the past, the development of SUFA involved engagement with various stakeholders across the CQCN supply chain. However the ability to collaborate on the consideration of the QCA's 2017 SUFA DAAU draft decision has been limited due to the short period between the issue of the draft decision and the submission date. Aurizon Network has only had initial discussions with stakeholders and believes that there is merit in a dedicated collaboration period on the SUFA provisions.

To progress this, Aurizon Network has suggested to the QRC that promptly, after the close of submissions, Aurizon Network and the QRC meet to determine whether the parties can agree on any of the matters being considered by the QCA. While the SUFA standard documents have already been the subject of significant negotiation, collaboration, submission and consideration already, Aurizon Network is seeking to again engage productively with the QRC to understand whether there is any common ground. Aurizon Network would propose to keep the QCA advised of progress of any such engagement. It would be Aurizon Network's desire to engage sufficiently and to ensure that there is no delay to the QCA's decision.

The objective is to engage efficiently to develop a collaborative submission to the QCA by the end of November 2017 (the collaboration period). Aurizon Network hopes, that as per the 2017 Draft Access Undertaking Statement of Regulatory Intent, the QCA will give regard to any consensus positions reached amongst stakeholders. Therefore, Aurizon Network requests that the QCA allows for the collaboration period in its timings if required. Aurizon Network would agree to a QCA request for this collaboration period not being counted in their overall statutory timeframe.

For clarity given the limited time available, the positions within this submission have not been discussed with stakeholders. It is expected that the outcome of collaboration will be that Aurizon Network will change its position on a substantive number of the positions. The positions in this submission are to reflect Aurizon Network's views if the QCA were not inclined to provide an opportunity for a further short period of collaboration or if collaboration was not to achieve the desired outcomes.

Given the limited time combined with the proposed collaborative process, Aurizon Network does not include at this time drafting amendments to the undertaking or the SUFA suite of agreements to reflect this submission's positions. Aurizon Network intends to submit these supplementary documents no later than end of November 2017 – these documents will also reflect any changes in positions resulting from the collaboration period.

Aurizon Network is encouraged by the QCA's acceptance of some of the 2017 SUFA DAAU positions. However Aurizon Network has concerns with the continuation of a number of the material issues that the QCA has not approved, with the most significant including:

- capacity deficiency risk;
- dispute resolution of proposed changes from template agreements; and
- acceleration of rental payments

Aurizon Network considers that the UT4 SUFA DAAU as amended by this submission, as supplemented subsequently with a matching SUFA template and a matching form of UT4, is appropriate, and should be approved by the QCA.

2. Legislative Framework

The UT4 SUFA DD includes a detailed discussion of the QCA's interpretation of the applicable legislative framework. This in turn follows on from submissions made in relation to the UT3 SUFA process. Aurizon Network re-states the positions it articulated in both its UT4 SUFA DAAU and the earlier UT3 submissions. In addition, Aurizon Network makes the following submissions in response to the UT4 SUFA DD.

Appropriate

Aurizon Network submitted its UT4 SUFA DAAU on a voluntary basis under Section 142 of the QCA Act. The QCA must assess the DAAU in accordance with section 143 of the QCA Act. As Aurizon Network has previously submitted, under section 143 of the QCA Act the QCA may approve a Draft Amending Access Undertaking (DAAU) only if the QCA considers it "appropriate to do so having regard to" the factors listed in sections 138(2)(a) to (h) of the QCA Act (**Section 138(2) Factors**).

The Section 138(2) Factors condition the consideration of whether it is "appropriate" to approve a DAAU. That is, in forming a view as to whether it is appropriate to approve a DAAU, regard must be had to each of the Section 138(2) Factors.

While the language of section 138(2) of the QCA Act is ostensibly permissive ("the authority may..."), the correct construction of this section is that if the DAAU is appropriate having regard to the Section 138(2) Factors, the QCA does not have a residual discretion not to approve the DAAU. Similar to the declaration criteria under Part IIIA of the *Competition and Consumer Act 2010* (Cth), the factors specified in section 138(2) of the QCA Act are appropriately understood as conferring a power on the QCA (to approve a DAAU) which must be exercised by approving a DAAU where the QCA considers it appropriate having regard to the Section 138(2) Factors. Where a DAAU is appropriate having regard to the Section 138(2) Factors, there is no other matter or matters that could be devised that would guide the exercise of any residual discretion.¹

In this connection, the QCA does not have a power to refuse to approve a DAAU that it considers appropriate having regard to the Section 138(2) Factors because it may prefer a different DAAU that it considers is also appropriate having regard to the Section 138(2) Factors. This is because the QCA Act does not provide the QCA with a discretion to withhold approval of a DAAU that is appropriate on the basis that the QCA considers that there is a putative DAAU that the QCA considers is more appropriate.² Put another way, 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.³

¹ In *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, the High Court found that although section 44H(4) provided that the relevant Minister "cannot declare a service unless he is satisfied of all of the following matters", the specified matters "should be understood as stating an exhaustive list of the considerations that may bear upon the decision to declare a service" (423, [116], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The Court continued (423–424, [116]):

"Read as a whole, s 44H should be understood as conferring a power on the Minister which must be exercised by declaring the service if the Minister is satisfied of all of the six criteria specified in s 44H(4). If the Minister is satisfied of all six criteria, including in particular, that access (or increased access) to the service would not be contrary to the public interest, no satisfactory criterion or criteria could be devised which would guide the exercise of some residual discretion...That is, if the Minister, having considered the matter, is satisfied of all of the six criteria, the Minister must declare the relevant service."

² This may be contrasted with the position under the National Electricity and Gas Laws, for example, which provide that where the Australian Energy Regulator (AER) is confronted with two or more possible decisions that will or are likely to contribute to the achievement of the national electricity (gas) objective, the AER must make the decision that the AER is satisfied will or is likely to contribute to the achievement of the national electricity (gas) objective to the greatest degree (National Electricity Law, section 16(1)(d); National Gas Law, section 28(1)(b)(iii)(A)).

³ This position is consistent with that articulated by the Australian Competition Tribunal and the Federal Court in a similar statutory context in *Re GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6; [2004] ATPR 41-978 and *ACCC v Australian Competition Tribunal* [2006] 152 FCR 33; 232 ALR 153; [2006] ATPR 42-124

QCA's application of 138(2) Factors

In the UT4 SUFA DD the QCA seeks to reject aspects of the UT4 SUFA DAAU and to substitute the QCA's own preferred approaches. Many of these preferred approaches are justified by the QCA on the basis that they are necessary in order to allow the SUFA model to meet the QCA's requirement that it is "workable, bankable and credible". It appears to Aurizon Network that this requirement, which can only fall under the factor set out in section 138(2)(h) of the QCA Act, has been applied by the QCA in preference over its consideration of the 138(2) Factors other than this factor.

It is not plausible to argue that SUFA would fail in the absence of the QCA's preferred positions and would succeed if they were adopted, particularly in light of the QCA's statement that "...*a standard form of SUFA may not be fit-for-purpose for all expansion projects*"⁴. The QCA's approach in the UT4 SUFA DD is reflective of a search for a "more" or "most" appropriate solution – contrary to the well-established legal principles cited above.

Logically it follows that the UT4 SUFA DAAU, as modified by this submission, is "appropriate" for the purposes of section 143 of the QCA Act, and ought be approved unamended by the QCA.

QCA's assessment of SUFA in the context of voluntary commitments by Aurizon Network

The correct application of the "Appropriate" test is 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. As Aurizon Network has previously submitted, there is no single appropriate approach to transaction documentation for such projects, let alone to standard-form documents intended to operate as a "safe harbour" framework. Aurizon Network has worked with the QCA and other stakeholders over some years to develop template SUFA documents. In so doing Aurizon Network has agreed to adopt voluntary positions (being positions which the QCA could not compel, as the QCA Act does not permit it to do so) in order to develop a SUFA model which is acceptable to Aurizon Network and stakeholders, and is also appropriate, having regard to each of the Section 138(2) Factors.

Aurizon Network has previously submitted – and continues to maintain – that the QCA must approve the UT4 SUFA DAAU, as amended by this submission, in these circumstances, rather than seeking to amend it.

The QCA's contention in response to the UT4 SUFA DAAU is that it is "...*not compelled to approve a DAAU that is the least onerous and restrictive from the perspective solely of the regulated business*"⁵.

Aurizon Network is not seeking the approval of a DAAU that is the least onerous and restrictive on itself. Indeed, if this were the case, Aurizon Network would propose vastly different user funding principles that are more closely aligned to those in the Hunter Valley Coal Network, for example. On the contrary, Aurizon Network has proposed a very detailed user funding model which is significantly more onerous and restrictive on the provider of the declared service than expansion arrangements for similar rail networks in Australia. Indeed, Aurizon Network's proposed SUFA model is more onerous again having regard to the voluntary commitments it includes.

A user funding framework of this scale and complexity is capable of a multiplicity of interpretations when assessed against the Section 138(2) Factors. What is clear is that the UT4 SUFA DAAU, as amended by this submission, addresses all of these factors in a manner which renders it "appropriate" for the purposes of section 143 of the QCA Act.

⁴ Page 16 of the UT4 SUFA DD

⁵ Page 16 of the UT4 SUFA DD

Sections 118 and 119 of the QCA Act

The QCA correctly acknowledges that it “...cannot make an access determination that would have the effect of requiring Aurizon Network to pay some or all of the cost of extending the network”⁶.

The QCA goes on to say that it can make an access determination requiring Aurizon Network to extend the network “...if another party pays the costs of extending the network”⁷. The QCA then seeks to interpret section 119 of the QCA Act so that it operates to prevent the provider of a declared service from passing on risks associated with roles and responsibilities undertaken in the context of a user funding framework⁸.

There is no sound basis for this interpretation, which appears to have been used by the QCA as a justification to impose upon Aurizon Network risks that it would not assume when funding its own expansion of the network, and for which Aurizon Network is not otherwise compensated through regulated returns.

Consideration of this submission and relevance to final decision

Aurizon Network has set out in this submission a number of issues which go to the appropriateness of the SUFA terms identified in the UT4 SUFA DD and to the fairness of those terms to Aurizon Network. Aurizon Network submits that each of the matters identified in this submission should be addressed in a final form of SUFA for consideration as part of a final decision.

Aurizon Network also remains concerned that aspects of what is being proposed by the QCA’s form of SUFA go beyond what the QCA Act permits. Aurizon Network is nevertheless prepared to work with the QCA and stakeholders during the UT4 SUFA DAAU process to seek to agree upon a form of SUFA that Aurizon Network would be prepared to volunteer, even if there are residual concerns with that proposed form.

It is on this positive and constructive basis that Aurizon Network has approached this submission.

Aurizon Network looks forward to receiving a draft of the final decision so that it can consider its implications ahead of any finalisation and implementation.

⁶ Page 20 of the UT4 SUFA DD

⁷ Page 20 of the UT4 SUFA DD

⁸ Page 20 of the UT4 SUFA DD

Response to QCA Policy Issues

3.1 Capacity deficiency consequences

3.1.1 Issue

Whether Aurizon Network has adverse financial consequences under a user-funded transaction if the additional capacity actually provided by that transaction following completion of the project delivery process is less than the capacity contracted as part of that transaction (such an outcome being a 'capacity deficiency' in this submission). In the UT4 SUFA DD these consequences comprise the obligations⁹:

- to pay liquidated damages at pre-agreed rates in respect of that capacity deficiency, and/or
- to rectify at least part of that capacity deficiency by conducting further works.

3.1.2 Overview

Aurizon Network considers that the SUFA template documentation should not impose any adverse financial consequences on Aurizon Network should a capacity deficiency arise.

In Aurizon Network's view, the QCA has not taken into account appropriately the manner in which the scope of a user-funded transaction is developed and then contractually set, and is seeking to impose on commercial parties a highly complex capacity deficiency mechanism that will operate as a significant barrier to the timely agreement of user funding transaction documentation.

3.1.3 Comments on the UT4 SUFA DD

Aurizon Network has numerous concerns with the QCA's treatment of capacity deficiency in the UT4 SUFA DD.

3.1.3.1 Aurizon Network does not control the capacity risk

The QCA asserts that '*...to promote efficient investment, the risks, and the consequences thereof, should be allocated to the party who controls the risk.*'¹⁰ and has allocated the capacity risk to Aurizon Network in Draft Decision 3.1, which states that '*the SUFA trustee should have recourse to Aurizon Network through the SUFA documentation if a capacity shortfall occurs*'.¹¹

The logical corollary of these statements is that the QCA considers that Aurizon Network is the party that controls the capacity risk. However, under the form of UT4 that is part of the UT4 SUFA DD Aurizon Network does not control the capacity risk, as is demonstrated below.

That form of UT4 requires Aurizon Network and the proposed Expansion Funders to '*negotiate in good faith*' a User Funding Agreement.¹² If Aurizon Network fails to negotiate in good faith, a binding dispute mechanism about its conduct is available to the proposed expansion funders.¹³ The online Oxford Dictionary defines 'negotiate' as '*try to reach an agreement or compromise by discussion*'. Accordingly UT4 does not provide for Aurizon Network to 'control', in the sense that this word is used by the QCA in its assertion on the promotion of efficient investment, the project scope and the associated capacity risk during User Funding Agreement negotiations.

Under the arrangements set out in the UT4 SUFA DD, if User Funding Agreement negotiations fail to reach a mutually acceptable outcome, the matter may be referred to the QCA for a binding determination.¹⁴ The QCA's ability to determine the project scope to be different from the scope proposed by Aurizon Network further illustrates that Aurizon Network does not have control of scope (and the associated capacity risk).

⁹ Clause 25 of the form of the CA that is part of the UT4 SUFA DD

¹⁰ Page 17 of the UT4 SUFA DD

¹¹ Page 30 of the UT4 SUFA DD

¹² Section 8.8.1(a)(ii) of the form of UT4 that is part of the UT4 SUFA DD

¹³ Section 8.2.2(a)(v) of the form of UT4 that is part of the UT4 SUFA DD

¹⁴ Section 8.2.2 of the form of UT4 that is part of the UT4 SUFA DD

3.1.3.2 The QCA has not addressed adverse consequences for Aurizon Network of the QCA's ability to determine project scope

Should the QCA, acting in its dispute resolution capacity, determine that the project scope should be different to that proposed by Aurizon Network, the party that controls the risk of the project adopting that alternative scope would be the QCA itself. On the basis of the QCA's stated risk allocation policy, the QCA should therefore assume the risk of a capacity shortfall in this scenario since it would be the party controlling that risk. Under the UT4 SUFA DD however, in these circumstances the QCA would still control the capacity risk but the consequences of that risk would be allocated to another party (Aurizon Network) that does not control it.

The consequences of the QCA's ability to determine project scope, should a dispute arise, are best illustrated by an example. Say Aurizon Network considers a scope of three duplications is necessary for an expansion, but the Access Seekers with which it is negotiating a User Funding Agreement for that expansion consider that only two duplications are needed. Following a failure to reach agreement on scope, the dispute is referred to the QCA, which then determines that two duplications are needed. Following project completion, there is a capital deficiency and a third duplication is needed, and Aurizon Network is then required to construct it at its expense and without any means of recovering its costs or gaining a return on that expenditure.

In this example, Aurizon Network was the only party that made the correct call on project scope, and both the Access Seekers and the QCA made incorrect calls. However the sole party that bears the financial consequences of the incorrect call is the sole party that made the correct call, namely Aurizon Network.

Furthermore, as this example illustrates, the capacity deficiency arrangements proposed by the QCA would encourage 'gaming' by Access Seekers. Even if they believe that three duplications are needed, they could still refer a dispute to the QCA and if the outcome is favourable, the access seekers would win by obtaining a 'three for the price of two' outcome.

In the UT4 SUFA DAAU Aurizon Network submitted that it should not be required to provide a capacity warranty of a scope imposed on it by binding dispute resolution.¹⁵ This argument was based on analysis similar to the analysis set out in this section 3.1.3.2. In its UT4 SUFA DD the QCA referred to this argument and stated that its '*analysis (above) and draft decision (below) apply to this argument*'.¹⁶ This statement is incorrect as neither the relevant analysis nor the relevant draft decision addressed the imposition of a lesser scope on Aurizon Network by binding dispute resolution.

3.1.3.3 UT4 already provides a mechanism of rectifying a capacity deficiency

The QCA states that UT4 '*...does not ensure that the capacity required by access seekers is actually delivered*'.¹⁷ This statement is incorrect.

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.¹⁸

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,

- 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,¹⁹ and

¹⁵ Page 11 of the UT4 SUFA DAAU

¹⁶ Page 28 of the UT4 SUFA DD

¹⁷ Page 26 of the UT4 SUFA DD

¹⁸ Section 8.9.4(a)(ii)(A) of the form of UT4 that is part of the UT4 SUFA DD

¹⁹ 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

- 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,²⁰ so the full implications of that capacity shortfall are rectified.

In either of these scenarios the Access Seekers are able to use a regulatory mechanism to ensure that the capacity they require is actually delivered. If Aurizon Network fails to comply with its obligations under UT4 (or any other approved Access Undertaking), Access Seekers may advise the QCA, which can take appropriate action against Aurizon Network.

3.1.3.4 The QCA-proposed arrangements would prejudice Aurizon Network's ability to meet customers' needs

In the UT4 SUFA DAAU Aurizon Network set out how it wished to be able to provide Access Seekers with a choice between:

- a lean project scope option that provides a lesser degree of capacity certainty, and
- an ample project scope option that provides a higher degree of capacity certainty.²¹

In its UT4 SUFA DD the QCA referred to these options and stated in its view '*there is no difference in either of the options suggested by Aurizon Network for the access seeker, as in neither case is Aurizon Network offering an obligation in respect of capacity.*'²² Aurizon Network does not understand how the QCA could reasonably form the view that there is no difference between the two options, given that it is standard practice within commercial enterprises to decide between significant scope options without performance warranties.

Consider an example in another industrial setting. A mine owner is concerned about flooding risk and engages a technical consultant to consider options to reduce the risk and meet an objective that a mine floods no more often than every 10 years. That consultant develops two flood mitigation options, one costing \$10m and the other costing \$40m. The consultant also predicts that the costly option has a >95% probability of meeting the objective and the low-cost option has a >70% probability of doing so, and that should a flood occur, it will be less severe if the \$40m mitigation option is adopted. The consultant also advises that it will not warrant the accuracy of its flood probability predictions, and that it is extremely unlikely that any civil works contractor would take risk over the flood mitigation performance of its works.

In this example there is a genuine choice between two quite different options, even though no obligation in respect of capacity (or outcomes) is available to the miner. However it is able to manage its business interests by choosing the flood mitigation option that offers the optimal mix of capital cost, effectiveness, business interruption and other relevant factors. In the same way the two project scope options offered by Aurizon Network would provide Access Seekers with two genuinely different options.

In Aurizon Network's view, the QCA has failed to take into account how the capacity deficiency mechanism set out in the UT4 SUFA DD would inevitably affect the User Funding Agreement negotiation process. This mechanism is a 'risk signal' (akin to a 'price signal') that is intended to, and will, encourage a particular behaviour, namely the pursuit of a high level of certainty that contracted capacity will be delivered by the party bearing the contractual risk of a capacity deficiency (i.e. Aurizon Network).

In Aurizon Network's view the Access Seekers, which face conflicting pressures over obtaining capacity certainty and minimisation of future tariffs, are better placed to choose the appropriate project scope, after considering Aurizon Network's advice and the scope option(s) put forward by it. An Access Seeker

²⁰ Section 8.9.4(a)(ii)(B) of the form of UT4 that is part of the UT4 SUFA DD

²¹ Page 11 of the UT4 SUFA DAAU

²² Page 28 of the UT4 SUFA DD

is better placed than Aurizon Network to select the below-rail scope that will result in the optimal coal supply chain outcome for that Access Seeker.

Aurizon Network believes that the adoption of a capacity deficiency mechanism in the SUFA template would materially impair Aurizon Network's ability to enable a set of Access Seekers to choose the optimal scope/expected capacity solution for their particular business circumstances.

3.1.3.5 Optimisation risk is not relevant to the SUFA capacity deficiency mechanism

In its discussion of optimisation risk in the context of the treatment of capacity risk, the QCA states that '*the party funding an expansion...faces the risk that costs of expansion associated with a capacity shortfall may not all be included in the RAB... due to the QCA deeming that some of the costs are inefficient when taking into account the capacity that has been achieved by the relevant expansion*'.²³

In the event of a capacity deficiency, then manifestly the project scope is inadequate, but is most likely that the scope is prudent, since that scope would have been required in any event. This capacity outcome, however, has no bearing on the efficiency and prudence of the project assets that were delivered.

Assume that the scope of a User Funding Agreement requires the delivery of five duplications, and the project proceeds following, among other things, the QCA's pre-approval of the trustee's capital expenditure.²⁴ Those five duplications will have been identified by Aurizon Network during the project's investigation phase as the optimal means of creating additional capacity. Assume further that, following the completion of the project's delivery phase, there is a capacity deficiency that could be rectified by the delivery of a sixth duplication. In hindsight, therefore, six duplications should have been delivered in the first place. In this situation the first five duplications were required, so there should be no question of some of their costs being deemed to be inefficient for the purpose of RAB inclusion.

3.1.3.6 Aurizon Network may be compelled by the QCA to provide an acknowledgment that it knows to be false

The form of the CA in the UT4 SUFA DD states that '*...the Contractor acknowledges that....the liquidated damages for a capacity shortfall at the rate identified {to be specified in the annexure of the CA – Aurizon Network insertion for clarity} represent a genuine pre-estimate of the Principal's loss in the event that there is a capacity shortfall.*'²⁵

Should Aurizon Network's negotiations with proposed Expansion Funders over the form of the CA be successful, then Aurizon Network would be prepared to provide this acknowledgement. However if these negotiations were unsuccessful and a dispute about, among other matters, the liquidated damages rate to be specified in the CA was referred to the QCA for binding dispute resolution, then Aurizon Network may not consider that the QCA-determined rate is a genuine pre-estimate of loss. In this situation Aurizon Network's execution of the resulting User Funding Agreement would breach its corporate governance requirements, which do not permit the company to deliberately make a representation that it knows at the time of making that representation to be false.

Aurizon Network notes that the QCA did not include a capacity warranty in the CA that forms part of the UT4 SUFA DD, whereas the CA that forms part of the UT3 SUFA FD included such a warranty, in response to Aurizon Network's concerns that it could be compelled to knowingly and deliberately make a false representation. Against this background Aurizon Network considers that the QCA should not be able to require Aurizon Network to knowingly and deliberately make a false acknowledgement about the liquidated damages rate of the principal's loss in the event of a capacity shortfall, as that acknowledgement may constitute '*misleading and deceptive conduct in trade or commerce*' under the *Competition and Consumer Act 2010* (Cth).

²³ Page 27 of the UT4 SUFA DD

²⁴ Item 6 in the table in Clause 2.1 of the form of the EPA that is part of the UT4 SUFA DD

²⁵ Clause 33.8(b) of the form of the CA that is part of the UT4 SUFA DD

For these reasons, there should be no acknowledgement by Aurizon Network in the CA about a genuine pre-estimate of the trustee's loss in respect of a capacity shortfall unless Aurizon Network has accepted the associated rate of liquidated damages in the CA's annexure during its negotiations with Access Seekers.

3.1.4 Position

Aurizon Network considers that the SUFA template documentation should not impose any adverse financial consequences on Aurizon Network should a capacity deficiency arise.

3.2 Credit exposure in respect of the construction contract

3.2.1 Issue

Whether Aurizon Network has credit protection in respect of the ‘peak termination’ amount due to it.

3.2.2 Overview

Aurizon Network considers that the SUFA template documentation should address this issue as set out in the UT4 SUFA DD and the form of the CA that is part of it, subject to one amendment. The recourse to security provision of the CA should apply in respect of any unrectified failure to make a payment.

Aurizon Network acknowledges that the QCA has substantially addressed this trade credit issue to Aurizon Network’s satisfaction and thanks the QCA for responding to the arguments set out in the UT4 SUFA DAAU.

3.2.3 Comments on the UT4 SUFA DD

The form of the CA that is part of the UT4 SUFA DD does not permit Aurizon Network to draw on the security in the event of a non-payment by the principal following its termination for convenience of the CA.²⁶ In Aurizon Network’s view, the construction contractor should have recourse to the security in respect of **any** unrectified failure by the principal to pay any amounts due under the CA.

3.2.4 Position

Aurizon Network considers that the SUFA template documentation should address this issue as set out in the UT4 SUFA DD and the form of the CA that is part of it, subject to one amendment. The recourse to security provision of the CA should apply in respect of any unrectified failure to make a payment.

²⁶ Clause 5.3 of the form of the CA that is part of the UT4 SUFA DD

3.3 Determination of construction contract schedules by the QCA

3.3.1 Issue

Whether the QCA should determine a dispute over the completion of the CA schedules for a particular User Funding Agreement transaction on a ‘market equivalence’ basis.

3.3.2 Overview

Aurizon Network considers that any dispute over the completion of the CA schedules for a particular User Funding Agreement transaction should be determined by the QCA on the ‘market equivalence’ basis set out in the UT4 SUFA DAAU.

In order to volunteer to be the constructor under the SUFA template arrangements, Aurizon Network requires a high degree of certainty that each construction contract it executes will provide it, on a prospective basis, with adequate returns. The incorporation of the market equivalence requirement provides that certainty should a dispute about the completion of CA schedules be referred to the QCA.

3.3.3 Comments on the UT4 SUFA DD

Aurizon Network has several comments on the UT4 SUFA DD.

3.3.3.1 The only stakeholder comment was supportive of the market equivalence concept

The only stakeholder to comment on the market equivalence concept, the QRC, objected to two second-order details of this concept, but not to the concept itself. The clear implication of the QRC’s submission was that the resolution of these details to the QRC’s satisfaction would render the concept acceptable.²⁷

In this light, it is not clear to Aurizon Network

- why the QCA has rejected Aurizon Network’s market equivalence proposal, and
- why the QCA has not proposed an alternative market equivalence approach that reflects the QRC’s comments,

particularly as the QCA has not provided any analysis to justify its draft decision for its rejection of Aurizon Network’s market equivalence proposal.

3.3.3.2 The QCA may not price appropriately the risks controlled by Aurizon Network as construction contractor

It is standard for a service provider that competes in a market economy to price adverse outcomes on risks controlled by the service provider. For example, in pricing a construction contract tender, a construction contractor will make allowance for a limited extent of errors in the construction process, such as the use of the wrong materials or asset installation in the wrong location, even though these errors arise in respect of risks controlled by that construction contractor. Market forces operate to ensure that

- the contractor’s risk allowance is not excessive, as that would result in the tender being ‘out of the market’ and therefore being unsuccessful, and
- the contractor’s risk allowance is not inadequate, since that would result, if the tender is successful, in the contractor earning a return unacceptable to its shareholder(s).

The QCA asserts in a different context that *‘rewarding Aurizon Network for risks it controls, which could have an adverse effect on another party, is inefficient and imprudent.’²⁸* Aurizon Network is concerned that the QCA could adopt this attitude during its conduct of a dispute about the completion of CA schedules for a construction contract for a particular User Funding Agreement expansion. If this attitude were adopted, the QCA would not reward Aurizon Network for risks it controls, and the determined construction contract would provide Aurizon Network with unacceptable returns. Such an outcome would also result in the pricing of construction services for that expansion being below the market equivalent level, which would be to the detriment of Aurizon Network as construction services provider.

²⁷ Page 3 of the QRC submission, which was dated 12 April 2017, to the QCA in respect of the UT4 SUFA DAAU

²⁸ Page 67 of the UT4 SUFA DD

3.3.3.3 The QCA did not provided any analysis that justified its draft decision to reject Aurizon Network's proposal

The QCA's section entitled 'QCA Analysis and draft decision'²⁹ did not provide any analysis of Aurizon Network's market equivalence proposal.

As Aurizon Network is not cognisant of the analysis that justified the QCA's draft decision to reject this proposal, Aurizon Network is unable to respond in this submission to that analysis.

3.3.4 Position

Aurizon Network considers that any dispute over the completion of the CA schedules for a particular User Funding Agreement transaction should be determined by the QCA on the 'market equivalence' basis set out in the UT4 SUFA DAAU.

²⁹ Page 34 of the UT4 SUFA DD

3.4 Availability of pricing information

3.4.1 Issue

The extent to which detailed pricing information under the construction contract may be provided by a SUFA trustee to PUHs and Access Seekers, and whether the QCA will enter into a confidentiality undertaking in respect of the pricing information it requests and then receives from Aurizon Network.

3.4.2 Overview

Aurizon Network considers that

- ‘pricing information’ (as defined in the CA) should not be made available to PUHs and Access Seekers, and
- this information should be available to the trustee, its expert adviser, the financiers’ expert adviser, the independent certifier and the QCA under suitable confidentiality obligations.

The QCA’s approach to disclosure of pricing information could have an adverse effect both directly and indirectly on Aurizon Network. Although the indirect effect may be mitigated by suitable pricing of the construction contract, the direct effect, which is on Aurizon Network’s ability to provide project delivery services to principals on non-SUFA assignments outside the regulatory scope of the QCA, is not capable of mitigation.

3.4.3 Comments on the UT4 SUFA DD

Aurizon Network has several comments on the UT4 SUFA DD.

3.4.3.1 No analysis of the proposed QCA confidentiality undertaking

The QCA’s section entitled ‘QCA Analysis and draft decision’ did not provide any analysis that justified its draft decision not to accept Aurizon Network’s proposal in respect of a QCA confidentiality undertaking.³⁰

Without such an undertaking, Aurizon Network faces the risk that the QCA may place any or all of the pricing information in the public domain, with the consequence that it would be publicly available to all construction industry participants. Although Aurizon Network could claim confidentiality over that information in accordance with the QCA’s standard confidentiality claim process, the outcome of that claim will not be known until it has been assessed and approved by the QCA. As whether or not the pricing information will enter the public domain is outside the control of Aurizon Network, its only prudent course of action is to assume that the information may become publicly available.

Aurizon Network notes that the UT4 SUFA DD does not include any statement of intent by the QCA about whether it would make public disclosure of the pricing information that it receives.

3.4.3.2 The QCA’s approach would result in the pricing information becoming widely available, contrary to Aurizon Network’s legitimate business interests

In its response to the UT3 SUFA DD³¹, Aurizon Network explained its position as set out in the extract below. Aurizon Network considers that this position remains valid.

‘The availability of commercially sensitive contract information proposed by the QCA in the CA could, given the potential number of PUHs and Access Seekers, result in this information becoming widely known by competing players in the Australian market for project delivery services and supplies.

For construction contracts between private sector principals and contractors this sort of information is almost never available to other parties. Also commercially sensitive contract information is customarily

³⁰ Pages 36 and 37 of the UT4 SUFA DD

³¹ Page 20 of Aurizon Network’s 16 January 2015 submission in response to the UT3 SUFA DD

withheld from any public disclosure of construction contracts between public sector principals and contractors.

The PUHs and Access Seekers are likely to include many potential customers of design, construction and supply services of Aurizon Network, its sub-contractors and suppliers. Aurizon Network, its sub-contractors and suppliers are active players in the Queensland market for construction services and supplies for projects unrelated to SUFA and outside the regulatory scope of the QCA.

Accordingly the availability of ‘pricing information’ to PUHs and Access Seekers may prejudice the ability of Aurizon Network, its sub-contractors and suppliers to price their services to those PUHs and Access Seekers in respect of other business opportunities (unrelated to SUFA). Such an outcome would be prejudicial to Aurizon Network’s legitimate business interests in being able to provide project delivery services to principals on non-SUFA assignments outside the regulatory scope of the QCA, as those principals would have detailed knowledge of Aurizon Network’s pricing and costing practices.’

Furthermore, Aurizon Network may be adversely affected indirectly by the QCA’s proposed pricing information disclosure regime should Aurizon Network’s potential sub-contractors only be willing to bid in return for better pricing. Unless a suitable allowance for this factor adversely affecting the bidding appetite of these potential sub-contractors is made in the pricing of the SUFA construction contract, the economic burden of this disclosure regime would ultimately be borne by Aurizon Network.

Aurizon Network is not seeking to withhold information from the SUFA parties that need it so as to achieve an unreasonable advantage in a SUFA transaction. Indeed, under Aurizon Network’s proposal the pricing information would be available under confidentiality obligations to the trustee, its expert adviser, the financiers’ expert adviser, the independent certifier and the QCA, so every party with a need to know the pricing information detail may obtain access to it.

3.4.4 Position

Aurizon Network considers that

- ‘pricing information’ (as defined in the CA) should not be made available to PUHs and Access Seekers, and
- this information should be available to the trustee, its expert adviser, the financiers’ expert adviser, the independent certifier and the QCA under suitable confidentiality obligations.

4.1 Security and bankability: Events of default

4.1.1 Issue

The form of the event(s) of default under the SSA.

4.1.2 Overview

Aurizon Network considers that the SSA should contain a single event of default, namely an insolvency of Aurizon Network that is subsisting, with insolvency defined on a basis consistent with the definition of 'Insolvency Event' in the form of the EISL that is part of the UT4 SUFA DD.³²

In the context of the SUFA template already providing a very high level of certainty that rental will be paid to the trustee, Aurizon Network considers that the SSA event of default regime proposed in the UT4 SUFA DD features unnecessary, unreasonably 'hair-trigger' or ineffective event of defaults.

Section 4.2 of this submission addresses the issue of acceleration of lease rental, as is proposed in the UT4 SUFA DD should certain events of default under the associated form of the SSA be triggered.

4.1.3 Comments on the UT4 SUFA DD

4.1.3.1 The insolvency event of default is accepted

The insolvency-related event of default in clause 5(a) of the form of the SSA that is part of the UT4 SUFA DD is accepted by Aurizon Network, provided that is insolvency defined on a basis consistent with the definition of 'Insolvency Event' in the form of the EISL that is part of the UT4 SUFA DD.

In Aurizon Network's view, it is inappropriate for an event of default to apply when Aurizon Network is meeting its EISL obligations in full, and accordingly a tight definition of insolvency is appropriate for this event of default. The insolvency definition in the form of the EISL that is part of the UT4 SUFA DD would have unintended consequences – for example, should Aurizon Network enter into a scheme of arrangement as part of an orderly and planned corporate restructuring exercise in order to become an independent entity, that act would constitute an event of default.

4.1.3.2 The IND-related event of default is unnecessary

The form of the SSA that is part of the UT4 SUFA DD establishes the following item as an event of default: '*clause [7.1] of the Integrated Network Deed applies due to the Grantor's breach of clause [3.2(b)(ii)] of the Extension Infrastructure Sub-Lease*'.³³

For clause 7.1 of the IND to apply, the CQCN infrastructure lease between Aurizon Network and QTH must have come to an end.³⁴ In this situation 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' (as defined in the IND).

There is no logical basis for an event of default to apply when the underlying direction-to-pay arrangement is operating as intended, as there is no increase in the risk of the trustee failing to receive direction-to-pay payments. Accordingly this event of default is unnecessary.

4.1.3.3 The 'nomination of additional access agreements' event of default is unnecessary and ineffective

³² Clause 1.1 of the form of the EISL that is part of the UT4 SUFA DD

³³ Clause 5(b) of the form of the SSA that is part of the UT4 SUFA DD

³⁴ The definition of 'Infrastructure Lease End Date' in clause 1.1, and clause 7.1(a)(i), of the form of the IND that is part of the UT4 SUFA DD

The form of the SSA that is part of the UT4 SUFA DD establishes the following item as an event of default: '*the Grantor defaults in performing or observing any provision of clause [8.3(d)] of the Extension Infrastructure Sub-Lease and fails to remedy that default within 10 Business Days of its occurrence.*'³⁵

This event of default is unnecessary as the form of the EISL already includes a comprehensive mechanism to remedy a 'coverage deficiency' of 'Extension Access Agreements' and 'Specified Access Agreements' (both as defined in the EISL).³⁶ Furthermore this event of default remedy would not provide the trustee with a remedy of the underlying commercial problem, namely the 'coverage deficiency', as is illustrated in the following conceptual scenario.

Say that initially the 'Total DTP Access Charge Amount' (as defined in the EISL) is \$23m, and the 'Threshold Amount' (also as defined in the EISL) is \$20m. Clause 8.3(d) of the EISL does not require the nomination of any additional Specified Access Agreements. Assume then the termination of a large access agreement the access charges for which previously fell within the scope of the Total DTP Access Charge Amount, so that amount has now fallen to \$12m, or \$8m below the threshold. Assume further that for whatever reason Aurizon Network fails to comply with its 'nomination of additional access agreements' obligation under clause 8.3(d) of the EISL promptly.

In this scenario the trustee's commercial problem is that it does not have direction-to-pay arrangements as to 100% of the rent due to it. An event of default only permits the trustee to gain direct access to the direction-to-pay stream as to 60% (being 12/20 in percentage terms) of the rent due to it and will do nothing to fix the absence of direction-to-pay coverage in respect of the other 40%.

For these reasons, Aurizon Network considers this event of default to be unnecessary and ineffective.

4.1.3.4 The 'Aurizon Network has not paid amounts due' event of default is unnecessary and ineffective

The form of the SSA that is part of the UT4 SUFA DD provides that Aurizon Network's failure to pay

- the part of a 'DA Monthly Instalment' in respect of a 'Trustee Detriment' that Aurizon Network does not dispute,
- the part of a 'DA Monthly Instalment' in respect of a 'Trustee Detriment' which has been agreed or determined, or
- the amount required to correct an earlier underpayment to the trustee in respect of an earlier 'DA Monthly Invoice'

in accordance with the applicable payment provision of the EISL constitutes an event of default under the SSA (each term defined in this sentence has the meaning given to it in the EISL).³⁷

Under the EISL the trustee has contractual mechanisms to ensure that it is paid amounts due to it by Aurizon Network. In this circumstance the EISL remains on foot and Aurizon Network continues to be able to meet these obligations. The mechanism to manage this risk is already provided for.

Aurizon Network considers that this event of default also is ineffective as it does not respond to the underlying commercial problem, namely the non-payment of money due to the trustee. The exercise of the trustee's powers on account of this event of default will not provide it with any additional funds.

For these reasons, Aurizon Network considers this event of default to be ineffective and unnecessary.

4.1.3.5 The 'no conflicting interest' event of default is not the most effective remedy and is unduly onerous and unnecessary

³⁵ Clause 5(c) of the form of the SSA that is part of the UT4 SUFA DD

³⁶ Clauses 8.3(e) to (g) of the form of the EISL that is part of the UT4 SUFA DD

³⁷ Clause 5(d) of the form of the SSA that is part of the UT4 SUFA DD

The form of the SSA that is part of the UT4 SUFA DD establishes the following item as an event of default: '*Aurizon Network defaults in performing or observing any provision of clause 4 {of the SSA – Aurizon Network insertion for clarity} and fails to remedy that default within 10 Business Days of its occurrence.*'³⁸

Clause 4 of the SSA provides in turn that, except with the trustee's prior written consent, Aurizon Network must not

- (a) create any Encumbrance over the Secured Property other than a Permitted Encumbrance; or*
- (b) dispose of, or permit to exist, any other interest in the Secured Property.*³⁹

Should an act that is prohibited by clause 4 of the SSA occur, the most effective remedy would be for Aurizon Network to reverse promptly that act. The inclusion in the SSA of a contractual obligation upon Aurizon Network to effect such a reversal promptly after the matter comes to light would be the most direct means of addressing the underlying commercial problem.

In the absence of a contractual obligation of this nature, the 'no conflicting interest' event of default trigger is unduly onerous on Aurizon Network and is unnecessary.

4.1.4 Position

Aurizon Network considers that the SSA should contain a single event of default, namely an insolvency of Aurizon Network that is subsisting, with insolvency defined on a basis consistent with the definition of 'Insolvency Event' in the form of the EISL that is part of the UT4 SUFA DD.

³⁸ Clause 5(e) of the form of the SSA that is part of the UT4 SUFA DD

³⁹ Clause 4 of the form of the SSA that is part of the UT4 SUFA DD

4.2 Acceleration of rental payments

4.2.1 Issue

Whether Aurizon Network may be required, should a defined trigger event occur, to pay to the SUFA trustee on an accelerated basis the future rental payments that would have been subsequently due to it had the trigger event not occurred.

4.2.2 Overview

Aurizon Network considers that there should be no acceleration of rent under any SUFA template document under any circumstance.

4.2.3 Comments on the UT4 SUFA DD

Aurizon Network has several comments on the UT4 SUFA DD as set out below. In addition, Aurizon Network restates the comments set out in section 3.3.5 of its submission for the UT4 SUFA DAAU.

4.2.3.1 An accelerated rent payment would constitute a cost of the expansion

The QCA states that it does ‘...not agree with Aurizon Network that paying accelerated rent is a cost of expansion. Our view is the SUFA trustee’s right to accelerate rent arises as a result of a failure by Aurizon Network of its contractual obligations.’⁴⁰

Aurizon Network acknowledges that under the QCA-proposed model the proximate cause of an accelerated rental payment by Aurizon Network is its insolvency. However the ultimate cause of that accelerated rental payment would be the development of a SUFA expansion on commercial terms that impose this payment obligation on Aurizon Network.

Consider a comparison of two scenarios for Aurizon Network. In the first scenario Aurizon Network undertakes a SUFA Expansion on the QCA-proposed basis and then experiences insolvency. The second scenario is identical to the first scenario in all respects except that there is no SUFA Expansion. Upon insolvency, the financial position of Aurizon Network is the same under the two scenarios except that Aurizon Network has an accelerated rental payment obligation under the second scenario.

That payment obligation is indisputably a consequence of the SUFA expansion. In both common business parlance and in microeconomics that consequence would be characterised as a cost, as the following example demonstrates.

Someone hires a rental car and decides to have the minimum level of insurance. By doing so she is effectively assuming a contingent payment obligation to the car rental company in the event of an accident. Soon afterwards the hirer has a serious accident, the car is a write-off and she owes a \$4,000 excess to the car rental company. The proximate cause of that payment obligation is the accident but its ultimate cause is her decision not to buy additional insurance coverage when renting the car. That payment is both a consequence and a cost of her assumption of that contingent payment obligation.

For these reasons, the QCA’s argument that the accelerated rental payment obligation would not constitute a cost of an expansion is not soundly based.

4.2.3.2 The potential for acceleration of lease rental payments would increase the risk profile to Aurizon Network’s debt financiers

Aurizon Network currently raises debt, and may raise debt in future, on ‘negative pledge’ credit terms. In other words, in its debt agreement with any given financier Aurizon Network

- does not grant security (over assets, contracts or other interests) to that financier but

⁴⁰ Page 43 of the UT4 SUFA DD

- represents that it will not grant such security to any other financier⁴¹.

Should Aurizon Network experience corporate failure, its debt obligations to debt financiers will rank on the same unsecured basis as its trade obligations to suppliers, such as electricity providers, in the process of resolving that corporate distress. ‘Negative pledge’ credit terms are commonly adopted by investment grade credits in Australia.

In normal circumstances, when a company experiences corporate failure, its trade suppliers are only entitled to be paid in respect of services already rendered, or products already supplied, but for which they have yet to be paid as agreed. Debt financiers acknowledge that trade suppliers will be trade creditors when corporate distress occurs, since the borrower has previously gained the benefit of the trade supplies but has failed to pay its suppliers. Typically the amounts due to trade suppliers might correspond to 2 or 3 months of trade supply, so the debt financiers’ interest in the net proceeds of the corporate failure process is not heavily ‘diluted’ by the trade creditors.

Should the QCA’s position on acceleration be adopted in the SUFA template, Aurizon Network enter into several User Funding Agreement transactions on the basis of that template and Aurizon Network experience corporate failure, then Aurizon Network could have a very significant payment obligation to the trustees. For example, if there are two User Funding Agreement expansions of ~\$1 billion apiece and an acceleration trigger applies soon afterwards, the accelerated amount due to the trustees would be up to \$2 billion, an amount that corresponds to several **decades** of future supply. The magnitude of this amount would result in a massive ‘dilution’ of the debt financiers’ interest in the net proceeds of the corporate failure process.

Aurizon Network expects that this scenario would be of serious concern to its debt financiers, as, without mitigation, it would increase their risk profile should corporate failure occur. The acceleration of future expected payments on a trade supply arrangement would fall well outside the norms of Australian financial markets.

Aurizon Network considers that any SUFA model that requires a fundamental change to its credit terms with corporate lenders is unacceptable, as that change would place a manifestly unreasonable burden on Aurizon Network’s ability to conduct its normal business activities.

4.2.3.3 The grant of effective security over future lease rentals could result in Aurizon Network being unable to comply with its negative pledge covenant

Under the UT4 SUFA DD, the QCA purports to establish that

- the trustee has a security interest in respect of the net present value of future rental cashflows, and
- this security interest is an effective mechanism of ensuring the trustee’s receipt of that amount should either of two trigger events occur.⁴²

In order for the security mechanism to be effective, the trustee would need to have security over Aurizon Network-funded assets and/or cashflows ultimately attributable to those assets in addition to cashflows ultimately attributable to SUFA assets. This security arrangement would be prejudicial to the interests of Aurizon Network’s debt financiers, who would understandably expect that Aurizon Network would not provide a party other than themselves with a security interest over Aurizon Network-funded assets and/or cashflows ultimately attributable to those assets.

Should Aurizon Network

- enter into a User Funding Agreement transaction for a ~\$1 billion expansion,
- the transaction’s terms include a security interest as contemplated by the QCA, and
- have not already modified its corporate loan credit terms (as discussed further below)

⁴¹ This explanation is deliberately over-simplified and there is typically a limited degree of flexibility in ‘negative pledge’ obligations

⁴² Draft decision 4.2 on page 44 of the UT4 SUFA DD

it would cease to comply with its negative pledge covenants under its corporate loan documentation. A failure to remedy promptly that non-compliance would enable the corporate lenders to require Aurizon Network to repay all moneys borrowed on an accelerated basis. Such an outcome would threaten Aurizon Network's continued corporate existence.

In order to prevent this outcome, prior to entry into a User Funding Agreement transaction Aurizon Network would need to renegotiate the credit terms of its corporate loan agreements and/or refinance these agreements. Doing so would be a protracted and costly exercise, and there is no certainty that Aurizon Network will be able to achieve it in full due to the wide distribution of its outstanding corporate bonds.

Aurizon Network considers that any SUFA model that requires a fundamental change to its credit terms with corporate lenders is unacceptable, as that change would place a manifestly unreasonable burden on Aurizon Network's ability to conduct its normal business activities.

4.2.4 Position

Aurizon Network considers that there should be no acceleration of rent under any SUFA template document under any circumstance.

4.3 Credit exposure during operational phase (set-off)

4.3.1 Issue

Whether Aurizon Network can manage its credit exposure to the SUFA trustee during the operational phase of a SUFA transaction by setting off all amounts due from the SUFA trustee to Aurizon Network against its rental payments to the SUFA trustee.

4.3.2 Overview

Aurizon Network considers that all amounts due to Aurizon Network from the SUFA trustee under a user funding transaction should be subject to set-off against Aurizon Network's rental payments to the SUFA trustee under that transaction.

4.3.3 Comments on the UT4 SUFA DD

Aurizon Network has several comments on the UT4 SUFA DD as set out below. In addition, Aurizon Network restates the comments set out in section 3.3.8 of its submission for the UT4 SUFA DAAU.

4.3.3.1 The trust is not creditworthy as it is a conduit entity

In response to Aurizon Network's statement that the SUFA trust was not a creditworthy entity at any point in the transaction lifecycle,⁴³ the QCA states that: '*Aurizon Network's claim that the SUFA trust is not creditworthy effectively indicates that these rental cash flows have little value, which in our view is not correct.*'⁴⁴

The QCA's response is based on a misunderstanding of Aurizon Network's position. The trust's lack of creditworthiness arises from its nature as a conduit entity – in other words, the trust pays out substantially all of its income to PUHs in monthly distributions, so minimal cash is retained in the trust structure after each distribution.

The QCA further states that the SUFA trust's ongoing rental income '*...would enable the SUFA trust to obtain finance itself including, if required, to meet a liability.*'⁴⁵ However the trust exists for the benefit of its unitholders and the trustee will be unable to obtain finance as contemplated by the QCA if the PUHs do not want it to do so. In any event Aurizon Network has no control over whether or not the trustee arranges such finance or not.

Should the QCA wish to ensure that the SUFA trust is a creditworthy entity, it could have made changes to the SUFA template so that the trust has a contractual obligation to Aurizon Network to be creditworthy. This outcome could be achieved by the trustee undertaking to Aurizon Network that it will

- retain a minimum level of cash in the trust,
- obtain a funding facility, as contemplated by the QCA, of a minimum size, or
- arrange suitable credit enhancement, such as a bank guarantee of a minimum value, of the trustee's payment obligations to Aurizon Network

Aurizon Network notes that the QCA has made none of these changes to the SUFA template that forms part of the UT4 SUFA DD.

Consequently, the only prudent assumption that Aurizon Network can make in respect of a User Funding Agreement transaction based on the SUFA template is that the trustee will be the equivalent of a '\$2 company' for the purpose of trade credit exposure.

4.3.3.2 The trustee should pay its trade creditors in full as a priority

In a typical project finance arrangement, the debt financiers accept that the borrower must pay its trade suppliers in order for the borrower's business activities to be conducted. Debt financiers take this

⁴³ Page 44 of the UT4 SUFA DAAU

⁴⁴ Page 46 of the UT4 SUFA DD

⁴⁵ Page 46 of the UT4 SUFA DD

position because their loans are valueless unless the borrower's business activities are ongoing, and this will not happen unless the borrower pays its trade suppliers. The borrower's ability to service the debt is dependent on its net cashflow, which is revenue net of operating costs (including payments to trade suppliers), as adjusted for corporate items such as tax payments.

Under the SUFA model, payments due to Aurizon Network are akin to payments to trade suppliers for a typical project finance arrangement. In other words, the payments are operating costs that arise in the course of earning revenue. Without incurring those costs, the trustee would be unable to earn its revenue.

A normal trade supplier has the ability to respond to non-payment by its customer by means of a suspension of service, a termination of service and legal action to recover bad debts. Under the SUFA template Aurizon Network does not have either a suspension right or a termination right in the event of non-payment. In this light Aurizon Network considers that a set-off arrangement is an appropriate mechanism to ensure that it is paid.

Aurizon Network notes that the SUFA model features an elaborate direction-to-pay arrangement backed by a security arrangement to ensure that the trustee is paid on a timely basis the full amounts due to it on trade account. In this context it is surely reasonable that Aurizon Network should have full set-off rights to ensure that it too is paid on a timely basis the full amounts due to it on trade account.

4.3.3.2 Third party financiers should provide finance without free contingent finance from Aurizon Network

The QCA states that:

*'Aurizon Network's proposed full set-off approach could, in the case of low-probability material amount events, potentially result in SUFA rental streams being reduced to the point where there are insufficient distributions to cover the principal and interest due to financiers. Our view is the potential for such an outcome is not compatible with a SUFA framework that provides a predictable and stable rental cash flows, which is necessary to attract third party financing for a workable, bankable and credible SUFA arrangement.'*⁴⁶

Contrary to the QCA's view, the set-off arrangement proposed by Aurizon Network would have no adverse effect on either the magnitude of the SUFA rental streams or the predictability and stability of rental cashflows. Instead that set-off arrangement would ensure that the trustee receive rental cashflows net of outgoings, and the quantum of the net payments will vary from time to time depending on the amount of those outgoings.

In Aurizon Network's view, it is customary for third party (project) financiers to finance the business activities of their borrower on the basis of its net cashflows from operations and corporate outgoings. Third party financiers are accustomed to lending to enterprises with marked variations in monthly/annual net cashflow, whether due to commodity prices, seasonality of production, tax payments or other reasons. Should the third party financiers be unable to finance their client's business activities due to the variability in its cashflows, then it is most likely that the transaction is not bankable.

The QCA's position is that third party financing is only bankable if Aurizon Network accepts that payments to the financiers would take priority over payments to Aurizon Network. Aurizon Network strongly objects to being a contingent lender of last resort so that the trustee can capitalise a gain from third party financing and transfer risk to Aurizon Network for no consideration. Should the third party financiers require subordinated debt in order to reduce the risk to senior debt, then the financiers and their client(s) should obtain finance from providers of subordinated debt.

It is not the set-off that gives rise to the variation in rental cashflows net of outgoings, but rather the trustee's payment obligations to Aurizon Network as a service provider. If there were no set-off and the trustee paid all amounts payable to Aurizon Network when they fall due, the cashflow stream without

⁴⁶ Page 46 of the UT4 SUFA DD

set-off would be the same as the cashflow stream with set-off. The only time there is a difference between these two streams is when the trustee elects to breach its obligation to pay Aurizon Network on a timely basis. Aurizon Network considers that a set-off is both reasonable and appropriate in these circumstances.

Aurizon Network understands the QCA's argument to be that a SUFA transaction will not be bankable unless the trustee is free to elect to breach its obligation to pay Aurizon Network on a timely basis. Aurizon Network considers that no transaction is bankable if it relies on a trade supplier to the borrower being unable to be paid amounts due to that supplier when they fall due.

4.3.4 Position

Aurizon Network considers that all amounts due to Aurizon Network from the SUFA trustee under a user funding transaction should be subject to set-off against Aurizon Network's rental payments to the SUFA trustee under that transaction.

5.1 Binding dispute resolution

5.1.1 Issue

If for a particular transaction there are unsuccessful negotiations over whether the proposed transaction documentation's terms should differ from the approved SUFA template's terms, whether those proposed differences are subject to determination by a binding dispute resolution process.

5.1.2 Overview

Aurizon Network considers that the approved SUFA template should be a 'safe harbour' template agreement, similar to the other template agreements that form part of UT4. If any proposed difference in terms is not agreed by Aurizon Network and Access Seekers on a commercial basis, no binding dispute resolution process should be available to determine a position in respect of that difference, as the template terms should apply. The scope of any binding dispute resolution process should be restricted to disputes over the completion of the schedules and annexures of the transaction documentation on the basis of the adoption of the template's terms.

Aurizon Network's position on this issue is consistent with the explicit provision in UT4, as approved by the QCA on 11 October 2016, that '*a dispute regarding a party refusing to vary the terms of a Standard Agreement {this defined term includes a Standard User Funding Agreement – Aurizon Network insertion} is not*' a dispute for the purpose of Part 11 of UT4, which is its Dispute Resolution and Decision Making section.⁴⁷

5.1.3 Comments on the UT4 SUFA DD

Aurizon Network comments below on the UT4 SUFA DD. In addition, Aurizon Network restates the comments set out in section 3.3.6 of its submission for the UT4 SUFA DAAU.

5.1.3.1 The QCA's position is fundamentally at odds with the purpose of a template agreement

The purpose of a regulated entity's adoption of a template agreement for a given type of business activity, such as access provision or user funding, is that the agreement represents a reasonable balance between the business interests of the potential parties for adoption in a particular potential transaction of that type.

A template agreement by its nature will not be seen by any party to that potential transaction as providing it with ideal terms, but

- the template's ready availability, which eliminates the need for negotiation that may be protracted, costly and yet fruitless, and
- its balanced terms

are of value to the template's potential users.

In developing any template agreement for UT4 (or any other Access Undertaking, future or past) Aurizon Network needs to make numerous compromises from its preferred positions. Aurizon Network is prepared to accept those compromises as part of a package of positions because approval of the template agreement eliminates the risk that an alternative package of positions, which is developed on a transaction specific basis and reflects the outcome of a binding dispute resolution, could be worse for Aurizon Network. This alternative package would be created as a result of a negotiation process under Division 4 of Part 5 of the QCA Act and, if applicable, an access dispute process under Division 5 of Part 5 of the QCA Act.

In other words, Aurizon Network is prepared to be 'locked in' to the terms of a template agreement because the potential counterparties to a template agreement are also 'locked in', in both cases except to the extent that the parties agree to different terms on a commercial basis. A fundamental

⁴⁷ Section 11.1.1(b) of the form of UT4 approved on 11 October 2016

characteristic of a template agreement therefore is that all potential parties are ‘locked in’ to its terms, again other than in respect of agreed differences.

Aurizon Network is only prepared to put in place a template agreement on this basis.

If the QCA’s position that disagreements over the terms of the SUFA template should be subject to a binding dispute resolution were to be adopted in UT4, an Access Seeker would be free to dispute **any** number of commercial positions in **any or all** of the 12 SUFA template documents.⁴⁸ To the extent that the QCA then determines that the suite of User Funding Agreement transaction documentation is to be consistent with the Access Seeker’s preferred positions, the Access Seeker’s dispute could result in a documentation suite that is very different from the SUFA template. If the QCA makes a determination that these changes should be made, Aurizon Network would be required to comply with that determination.

Aurizon Network is strongly opposed to making available a SUFA template if its terms are subject to a binding dispute resolution process, as such an outcome defeats the purpose of putting in place that template in the first place.

5.1.4 Position

Aurizon Network considers that the approved SUFA template should be a ‘safe harbour’ template agreement, similar to the other template agreements that form part of UT4. If any proposed difference in terms is not agreed by Aurizon Network and Access Seekers on a commercial basis, no binding dispute resolution process should be available to determine that difference. The scope of that process should be restricted to a dispute over the completion of the schedules and annexures of the transaction documentation on the basis of the adoption of the template’s terms.

⁴⁸ Sections 8.2.2(a)(vii) and 11.1.1(b) of the form of the CA that is part of the UT4 SUFA DD

6.1 Operating and performance risk allowance (OPRA)

6.1.1 Issue

Whether the SUFA template should make a provision for a mechanism to provide for an allowance (OPRA) in respect of the capital return on SUFA assets to be retained by Aurizon Network, with the magnitude of that allowance to be set subsequently by the QCA.

6.1.2 Overview

Aurizon Network considers that the SUFA template should include the OPRA allowance mechanism in the EISL (and consequently elsewhere in the SUFA template).

Aurizon Network considers that the QCA has not substantively addressed the argument advanced by Aurizon Network in the UT4 SUFA DAAU and that ruling out even the possibility of reward being transferred to Aurizon Network for risk being assumed by it is unreasonable. For the avoidance of doubt, Aurizon Network is not seeking the QCA to determine the amount of OPRA as part of the approved SUFA template; rather Aurizon Network considers that an allowance mechanism should be included in that template and that the amount of it should be determined by the QCA from time to time and from transaction to transaction.

6.1.3 Comments on the UT4 SUFA DD

Aurizon Network restates the comments set out on pages 38, 39 and 40 of its submission for the UT4 SUFA DAAU, and makes further comments as set out below.

6.1.3.1 Aurizon Network's argument for OPRA remains valid

Aurizon Network considers that its argument in the UT4 SUFA DAAU for the incorporation of OPRA remains valid. In essence, that argument was that it is likely that '*....some of the risks that relate to investment are allocated to Aurizon Network without the associated transfer of reward.*'⁴⁹

In the absence of an OPRA allowance mechanism 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, and
- the SUFA investors will correspond exactly to the regulatory capital component.

Given the term of a User Funding Agreement transaction is expected to be several decades, this implicit assumption would apply to that transaction over its entire life.

Aurizon Network believes this implicit assumption may well turn out to be incorrect. The proposed inclusion of an OPRA allowance mechanism does not disadvantage any party if the implicit assumption turns out to be correct as the QCA will set OPRA to zero. However the OPRA mechanism allows for OPRA to be set at a non-zero (positive) amount should that assumption turn out to be incorrect. Aurizon Network's proposal therefore addresses appropriately Aurizon Network's legitimate business interests and does not unfairly disadvantage any other party.

6.1.3.2 The QCA has misunderstood Aurizon Network's proposal

The QCA states that it '*is unclear why Aurizon Network is seeking a fee in excess of the regulated allowances for operating an asset in which it would not invest at the regulated WACC.*'⁵⁰

Aurizon Network has never proposed that it should receive a fee in excess of the regulated allowances. It has rather 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.

⁴⁹ Page 39 of the UT4 SUFA DAAU

⁵⁰ Page 54 of the UT4 SUFA DD

Access customers would pay no more than the regulatory tariff. This is a very different proposal to Aurizon Network seeking a reward from access customers in addition to the reward that they would be providing to CQCN investors by paying regulatory tariffs that are set in the standard manner.

The QCA refers to the SUFA template applying when Aurizon Network would not invest at the regulated WACC. Aurizon Network does not understand why its decision not to fund would have any bearing on the reward it receives under a SUFA transaction. In any event the SUFA template is also available to Access Seekers when

- they elect to fund, even when Aurizon Network is prepared and able to invest for the regulated WACC⁵¹, and
- Aurizon Network is unable to invest, e.g. when there are disruptions in financial markets.

6.1.3.3 Regulatory burdens may arise

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. It is for this reason that Aurizon Network proposed that OPRA should be documented as a placeholder with the quantum to be determined subsequently.

6.1.3.4 SUFA rental streams are unpredictable and uncertain due to the nature of the SUFA template as an investment proposition, rather than due to OPRA

The QCA states that *‘the proposed OPRA mechanism would make the SUFA rental streams unpredictable and uncertain, affecting the credibility and bankability of the SUFA.’*⁵² Aurizon Network does not understand the logic of this statement. If the periodic setting of OPRA by the QCA would result in an adverse effect on the credibility and bankability of SUFA, then the much higher level of unpredictability and uncertainty of SUFA rental streams that result from the periodic setting of regulatory charges (including WACC and depreciation rates) would have a much greater adverse effect on SUFA’s credibility and bankability.

The investment proposition of the SUFA template is that it would provide regular cashflows over a term of several decades, with the magnitude of those cashflows being subject to regulatory risk. A rational potential investor in a user funding transaction would consider the OPRA risk as a small sub-set of its overall regulatory risk.

6.1.4 Position

Aurizon Network considers that the SUFA template should include the OPRA allowance mechanism in the EISL (and consequently elsewhere in the SUFA template).

⁵¹ Section 8.7.1(a) of the form of UT4 that is part of the UT4 SUFA DD

⁵² Page 54 of the UT4 SUFA DD

6.2 Rental arrangements: Rental arrangement in an unregulated environment

6.2.1 Issue

The process and framework that sets out how SUFA rental payments to the trustee are determined if the provision of access on the CQCN ceases to be regulated.

6.2.2 Overview

Aurizon Network considers that the SUFA template documentation should incorporate the post-deregulation mechanism (the ‘PDR Mechanism’) set out in the UT4 SUFA DAAU.

In Aurizon Network’s view, as the QCA is not seeking to impose a rental stream, its preferred rental stream is just that – its preferred position but not a requirement for this DAAU. In addition the QCA has made significant errors in its analysis of the PDR Mechanism and as a consequence has a fundamental misunderstanding of Aurizon Network’s proposal. Consequently the QCA’s draft decision to propose a different mechanism that it considers to be superior is flawed.

Furthermore, the proposal advanced by the QCA would, should deregulation occur, eliminate the SUFA trustee’s market risk over the utilisation of SUFA assets beyond that point in time. As a consequence the trustee would obtain the anticipated magnitude of equity returns and the certainty of debt returns, and it would do so at the expense of Aurizon Network. The QCA’s proposal is unreasonable and contrary to the legitimate business interests of Aurizon Network.

6.2.3 Comments on the UT4 SUFA DD

The following comments should be read in conjunction with section 3.3.7 of the UT4 SUFA DAAU, and the positions set out in it continue to be fully valid in the UT4 SUFA DAAU process.

6.2.3.1 The QCA does not wish to impose a rental stream

Aurizon Network notes the QCA’s statement that it ‘...does not seek to impose a rental stream in a post-deregulation environment’.⁵³ Aurizon Network has considered the concept put forward by the QCA and considers it to be wholly unsatisfactory for the reasons set out in this section 6.2. Aurizon Network does not volunteer to accept the rental arrangement proposed by the QCA.

Accordingly Aurizon Network considers that the QCA, as it does not wish to impose a rental stream, should therefore accept the proposed rental stream proposed by Aurizon Network, namely the PDR Mechanism.

If this argument is accepted, the other comments in this section 6.2.3 are not relevant. Nonetheless Aurizon Network provides those comments to demonstrate that the post-deregulation rental stream in the UT4 SUFA DD is unsuitable.

6.2.3.2 The QCA has required Aurizon Network to underwrite the SUFA trustee’s returns

In the UT4 SUFA DD the QCA has proposed 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’.⁵⁴

The adverse consequences for Aurizon Network of this proposal can be demonstrated by considering a scenario in which Aurizon Network has little market power following deregulation and its access customers are able to secure access agreements that provide it with only a minimal level of positive operational cashflow. It is, of course, plausible, and even likely, that deregulation would occur in the context of transport/energy policy settings and competition from other transport forms so that following deregulation the CQCN operator would have little market power.

⁵³ Page 63 of the UT4 SUFA DD

⁵⁴ Page 62 of the UT4 SUFA DD

Assume the following details apply to this scenario, which is conceptual in nature and not intended to be realistic:

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 & maintenance expenditure:	\$40 million

Under this scenario Aurizon Network would receive net operational cashflow, before allowing for SUFA rental, of \$5m. The QCA's proposal would require Aurizon Network to pay \$0.5 billion over 20 years, equivalent to \$25m p.a. (In this very over-simplified scenario it is assumed for illustrative purposes that the discount rate is 0%pa – of course a positive discount rate would result in each annual payment exceeding \$25m.)

The net outcome of the QCA's proposal under this scenario is that deregulation would affect the two investors very differently:

- Aurizon Network, which accounted for 90% of the RAB, would experience a net **negative** return on its assets of \$20m p.a., and
- the SUFA trustee, which accounted for 10% of the RAB, would receive a **positive** return on its assets of \$25m p.a.

Aurizon Network would not only fail to retain **any** of the modest operational cashflow from access provision, even though it had invested in 90% of the RAB assets, but also it would be required to underwrite the SUFA trustee's returns. By contrast, if there had been no SUFA project, Aurizon Network would receive the positive operational cashflow from the Aurizon Network-funded assets.

This untoward outcome would arise because the QCA has not adopted the post-deregulation objective proposed by Aurizon Network, namely that '*following deregulation Aurizon Network pays rental to the SUFA trustee that is equal to the return earned on the assets funded by the SUFA trustee*'.⁵⁵ Aurizon Network does not volunteer to accept any post-deregulation rental mechanism that provides returns to SUFA trustees in respect of SUFA assets that are in any manner superior to the returns to Aurizon Network (as investor) in respect of Aurizon Network-funded assets.

6.2.3.3 The QCA has failed to understand the risk of regulation to equity investors

The QCA states 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.'*⁵⁶

As a very significant equity investor in a regulated heavy-infrastructure industry, Aurizon Network endorses this view. However in making its equity investments in a regulated industry, Aurizon Network is mindful that, as the 2010 IPO document for QR National stated, '*changes in government policy and regulation may have a material adverse effect on QR National's business, operational performance and financial results'*.⁵⁷

Aurizon Network has not, and does not, seek from any party an underwriting of Aurizon Network's returns on its 'as at deregulation' RAB assets following deregulation. Should deregulation occur, Aurizon Network has no expectation that it will necessarily be able to receive returns equal in net present value to its RAB assets as at deregulation. Rather Aurizon Network expects that, following deregulation, it will be able to earn commercial returns from its assets in the same way as any other non-regulated business

⁵⁵ As cited on page 58 of the UT4 SUFA DD

⁵⁶ Page 59 of the UT4 SUFA DD

⁵⁷ Page 122 of http://media.corporate-ir.net/media_files/irol/23/235329/share_offer_document.pdf, accessed on 14 September 2017

can. In a deregulated environment, the concept of ‘recovering the value of (one’s) investment’ (i.e. the value of an investment at the time of making the investment) is inappropriate, just as it is inappropriate in unregulated industries in general.

In this light Aurizon Network does not understand why the QCA considers that SUFA investors, which are expected to be sophisticated, experienced and well-advised parties, should

- be protected from the downside risk of change in government policy and regulation or the demand risk for usage of the CQCN by means of the post-deregulation rental stream being set to equal the RAB value as at deregulation, and yet
- enjoy equity returns that incorporate the pricing of risk of such changes.

The QCA is effectively proposing that SUFA investors get a ‘double dip’ in these circumstances, which will unfairly encourage Access Seekers to adopt the user funding option over the Aurizon Network-funding option. Furthermore, as discussed above, Aurizon Network is required to fund the ‘double dip’ by underwriting the SUFA investors’ equity returns following deregulation and for no reward.

6.2.3.4 The QCA has misunderstood the PDR Mechanism

There are a number of material misunderstandings of the PDR Mechanism in the UT4 SUFA DD; they are detailed, together with Aurizon Network’s clarifications, in the table in Schedule 2 of this submission.

6.2.4 Conclusion

Aurizon Network considers that the SUFA template documentation should incorporate the PDR Mechanism as set out in the UT4 SUFA DAAU.

7.1 Termination of the infrastructure lease

7.1.1 Issue

Whether and to what extent Aurizon Network is liable for consequential loss to the other commercial parties under a SUFA transaction should Aurizon Network's 'base' CQCN infrastructure lease be terminated.

7.1.2 Overview

Aurizon Network considers that, in the event of the termination of its 'base' CQCN infrastructure lease for any reason, the trustee's sole entitlement is its right to receive a 'disposal distribution' payment from QTH following its disposal of the 'base' CQCN infrastructure.

Aurizon Network also considers that 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 documents (the TD, UHD, EIHL, IND, CA & FSD). As an example of this exception, the CA's liquidated damages regime for late delivery would apply.

7.1.3 Comments on the UT4 SUFA DD

7.1.3.1 Aurizon Network's exposure to the trustee

The QCA has proposed that where the 'base' CQCN infrastructure lease is terminated, '*Aurizon Network may be liable for all losses of the SUFA trusteeincluding consequential loss*'⁵⁸

Aurizon Network does not accept this position for the reasons given in the UT4 SUFA DAAU, which remain valid.⁵⁹ In this situation the trustee's sole entitlement is to its share of the disposal proceeds of the CQCN under the IND.

7.1.4 Position

Aurizon Network considers that, in the event of the termination of its 'base' CQCN infrastructure lease for any reason, the trustee's sole entitlement is its right to receive a 'disposal distribution' payment from QTH following its disposal of the 'base' CQCN infrastructure.

Aurizon Network also considers that 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 documents (the TD, UHD, EIHL, IND, CA & FSD). As an example of this exception, the CA's liquidated damages regime for late delivery would apply.

⁵⁸ Page 68 of the UT4 SUFA DD

⁵⁹ Page 17 of the UT4 SUFA DAAU

Glossary

Item	Meaning
AASTD	Access Agreement Specific Terms Deed
Access Seeker	<p>Either</p> <p>(a) a proposed party to a SUFA transaction that would obtain contingent access rights under an AASTD to which it would be a party, or, as the context requires,</p> <p>(b) a party to a SUFA transaction that has obtained contingent access rights under an AASTD to which it is a party</p>
Access Undertaking	Has the meaning given to that term in the QCA Act
CA	Construction Agreement
CQCN	Central Queensland Coal Network
DAAU	Draft Amending Access Undertaking
EIHL	Extension Infrastructure Head-Lease
EISL	Extension Infrastructure Sub-Lease
EPA	Expansion Project Agreement
Expansion	Has the meaning given to that term in UT4 as at 11 October 2016
Expansion Funder	Has the meaning given to that term in UT4 as at 11 October 2016
FIA	Formal Instrument of Agreement (in respect of the construction contract that includes the CA)
PDR Mechanism	Has the meaning given to that term in section 6.2.2 of this submission
PUH	A preference unit holder in a SUFA trust
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QRC	Queensland Resources Council
QTH	Queensland Treasury Holdings Pty Ltd
RAB	Regulated Asset Base
SSA	Specific Security Agreement
SUFA	Standard User Funding Agreement
UHD	Subscription and Unit Holders Deed
User Funding Agreement	Has the meaning given to that term in UT4 as at 11 October 2016
UT3	The Access Undertaking of Aurizon Network that was approved by the QCA on 1 October 2010, together with any subsequent changes approved by the QCA
UT3 SUFA DAAU	The SUFA DAAU submitted by Aurizon Network to the QCA on 22 July 2013
UT3 SUFA DD	The draft decision of the QCA in respect of the UT3 SUFA DAAU, which was released on 31 October 2014
UT3 SUFA FD	The final decision of the QCA in respect of the UT3 SUFA DAAU, which was released on 14 June 2016
UT4	The Access Undertaking of Aurizon Network that was approved by the QCA on 11 October 2016, together with any subsequent changes approved by the QCA
UT4 SUFA DAAU	The SUFA DAAU submitted by Aurizon Network to the QCA on 11 January 2017
UT4 SUFA DD	The draft decision of the QCA in respect of the UT4 SUFA DAAU, which was released on 10 August 2017

Schedule 1 – Other matters in relation to UT4 SUFA DAAU

The table below is closely based on the table provided in ‘Appendix A: Other Matters in relation to UT4 SUFA DAAU’ as part of the UT4 SUFA DD. The 2nd, 3rd and 4th columns been fully deleted from that ‘source table’ – the other three columns have been retained without any changes. Two columns, one about Aurizon Network’s position about the QCA’s treatment of the applicable item in the source table and the other about the reasoning for that Aurizon Network position, have been added to the right of the three retained columns.

For convenience of the reader, all text in the two added columns is shaded lightly to indicate that it is new – as stated above, the text in the unshaded columns is unchanged from the corresponding table in the UT4 SUFA DD. Also for the reader’s convenience, Aurizon Network has retained in the table below Aurizon Network-proposed changes in the UT4 SUFA DAAU that have been accepted by the QCA in the UT4 SUFA DD.

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
1. Extension Project Agreements				
Clause 1.1 - limb (b) "Consequential Loss"	The QCA accepts Aurizon Network's amendment; however, further drafting for clarification is required.	The amendment suggested by Aurizon Network is consequential to Aurizon Network's amendments to clause 10(a) of the Rail Corridor Agreement. Stakeholders should refer to the QCA's reasoning in respect of the amendments to that clause.	QCA template documentation accepted	Not applicable
Clause 1.1 - limb (k) of "Consequential Loss"	The QCA accepts this amendment.	This amendment improves the workability and credibility of the SUFA documents.	QCA template documentation accepted	N/a
Clause 1.1 - "RAB Inclusion Submission"	The QCA does not accept this amendment.	See the QCA's reasoning in respect of clause 3.1 of the EPA below.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 2.1, former condition precedent 5	The QCA does not accept this amendment.	This condition precedent is for the benefit of both the SUFA trustee and Aurizon Network. Depending on the circumstances at the time, the SUFA trustee (and Aurizon Network) may require the benefit of this condition precedent. If it is no longer needed, the parties may agree to delete it. It should also be noted that the parties may waive it.	QCA template documentation accepted	N/a
Clause 2.1, new condition precedent 5	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 2.1, new condition precedent 7	The QCA does not accept this amendment.	The construction contract provides that the security is to be provided, and the advance payment paid, 10 business days after the satisfaction of the conditions precedent under the construction contract. Not making this amendment retains the credibility and workability of the SUFA documents.	QCA template documentation accepted (Although it accepts this change, Aurizon Network notes that, should the CA terminate due to the trustee failing to meet its provision of security and advance payment obligations, the SUFA transaction remains in place even though there will be minimal if any user funded assets for inclusion in the RAB. In	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
			this admittedly unlikely situation, Aurizon Network continues to hold the view that the entire transaction should be terminated, rather than staying in place within minimal or no assets.)	
Clause 3.1	The QCA accepts Aurizon Network's amendments, other than the deletion of clause 3.1(b). The QCA accepts the QRC's proposal in respect of the provision of the submission and correspondence.	The QCA's reasoning in respect of RAB submissions in its UT3 SUFA final decision still applies, nonetheless, the QCA agrees that it is reasonable for Aurizon Network to not be required to act in the best interests of the SUFA trust, given sufficient other protections are included in the clause. Stakeholders are referred to the UT3 SUFA final decision. ⁶⁰ Retaining clause 3.1(b) (as amended) improves the workability and credibility of the EPA as it provides certainty in respect of the RAB (including submissions in respect of it).	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU.	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 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). 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 ' <i>not understand why it would be in Aurizon Network's commercial interests to seek the removal of projects from the RAB.</i> ' 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

⁶⁰ QCA, UT3 SUFA final decision, pp. 189–199.

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		In respect of the retention of project costs in the RAB, we do not understand why it would be in Aurizon Network's commercial interests to seek the removal of project costs from the RAB. The obligation to retain them in the RAB is in all parties' legitimate interests.		<p>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> <p>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 QCA is anomalous and represents an unreasonable balance of risks.</p> <p>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.</p> <p>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.</p>
Clause 4.3(a)	The QCA accepts this amendment.	<p>This amendment improves the credibility and workability of the SUFA documents.</p> <p>The QCA does not agree with the QRC's comments, as the user should rely on its rights under its access agreement.</p>	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 5.1(a)	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 5.9	The QCA accepts this amendment.	In respect of the QRC's comments, if the audit is the time when a party becomes aware of the event or circumstance, then there will be a 12-month period in which to notify the dispute. If a party is aware of an event or circumstance, but needs an audit to confirm, the party can preserve its position by raising a dispute prior to the audit. The QCA considers 12 months is a reasonable time period. This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 7.2	The QCA does not accept these amendments.	In the QCA's view, clause 7.2, as proposed by the QCA, provides a credible and workable position in relation to consequential loss. Stakeholders should note that the QCA's consideration of	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU.	See section 7.1 of this submission

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		consequential loss in chapter 16 of the UT3 SUFA final decision is still relevant to the QCA's view. Stakeholders are also referred to chapter 7 of this draft decision.		
2. Subscription and Unit Holders Deed				
Clause 2.5(a)(iv)	The QCA accepts these amendments.	This is a risk which the PUHs should take into account when deciding to fund a SUFA and, ultimately, bear the risk of. The amendment improves the credibility of the SUHD.	QCA template documentation accepted	N/a
Clause 18.1(c)	The QCA accepts this amendment. We do not agree with the QRC's comment as the ordinary unit is only issued because there is a need for the SUFA trust.	This is a cost which the PUHs should take into account when deciding to fund a SUFA and, ultimately, bear the stamp duty cost. The amendment improves the credibility of the SUHD.	QCA template documentation accepted	N/a
3. Extension Infrastructure Sub-Lease				

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
Clause 1.1 - "CITS"	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 1.1 - "CITS Provider"	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 1.1 - "Other Transportation Costs "	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 3.5	The QCA accepts these amendments.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clauses 4.12(a)(i), (ii)	The QCA does not accept these amendments.	Whilst the SUFA trustee has no insurable interest, it is interested in ensuring that the non-SUFA infrastructure is insured. This is because the rent is derived from the access charges for the network. The insurance right for the SUFA trustee adds a layer of protection for its income stream. Retaining the UT3 SUFA final decision drafting assists in the maintaining	Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU.	Aurizon Network does not accept this provision. 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. 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' 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

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
		the bankability, credibility and workability of SUFA.		have not met its insurance obligations in respect of a rail system in which the SUFA trustees have no interest.
Clause 4.12(b)	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 4.12(c)	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 4.12(e)	The QCA does not accept Aurizon Network's amendments. The QCA proposes amendments to the UT3 SUFA final decision form of this clause.	<p>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. The SUFA trustee should not face the risk of non-insurance whilst the dispute resolution process is ongoing.</p> <p>The QCA amendments improve the bankability and credibility of the SUFA.</p>	<p>Aurizon Network does not accept the QCA's changes and its position continues to be the position it adopted in the UT4 SUFA DAAU.</p>	<p>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.</p> <p>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 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</p>

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
				<p>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> <p>For completeness, it is noted that Aurizon Network considers that clause 4.12(d), as well as clause 4.12(e), of the form of the EISL that is part of the UT4 SUFA DD should be reverted to the forms of these clauses as set out in the UT4 SUFA DAAU.</p>
Clause 5.3	The QCA accepts Aurizon Network's amendments to clause 5.3(a) and the new clause 5.3(c). The QCA has amended clause 5.3(b).	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 8.3(j)	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 8.4 (f)	The QCA accepts Aurizon Network's amendment; however, further	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
	clarification drafting is required.			
Clause 15.1(b)(ii)	The QCA does not accept this amendment.	<p>As the rent is derived from the access charges for the network, the SUFA trustee has an interest in ensuring that Aurizon Network is accredited for the non-SUFA infrastructure.</p> <p>The original drafting from the UT3 SUFA final decision improves the bankability and credibility of the SUFA.</p>	<p>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 endeavour obligation, which matches the form of the obligation to keep accreditation under clause 15.1(b)(i).</p>	<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 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.</p>
Schedule 2	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
4. Extension Infrastructure Head Lease				
Clause 7.2	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 20.1(a)(ii)	The QCA accepts this amendment.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
5. Rail Corridor Agreement				
Clause 10(a)	The QCA accepts Aurizon Network's amendment however further drafting for clarification is required.	In the QCA's view, as partially supported by the QRC's argument, Aurizon Network should also indemnify the SUFA trustee from any claims Aurizon Network may have against the SUFA trustee under the Rail Corridor Agreement (save as provided in the clause). This is a fair allocation of risk and the amendments improve the credibility and workability of the SUFA documents.	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 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)	See the column to the left.

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
6. Access Agreement Specific Terms Deed				
Generally	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Schedule 1, Part 2, item 9(a)(iii)	Subject to minor clarifications in the drafting, the QCA has retained its position from the UT3 SUFA final decision.	The QCA agrees with the QRC's comment and notes that this reflects the UT3 SUFA final decision. The UT3 SUFA final decision was credible, workable and in the best interests of the parties and this remains the case with the revised drafting.	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	<p>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 delay.</p> <p>Take a scenario in which Aurizon Network agrees that the Access Seeker is to build the Connecting Infrastructure (see section 9.1(k) of UT4). If the Access Seeker chooses a construction contractor to deliver Connecting Infrastructure and that construction contractor experiences insolvency, the delivery of the Connecting Infrastructure is most likely to be late. In this situation the take-or-pay obligation would not be triggered unless Aurizon Network could establish that the reason the Connecting Infrastructure has not been completed <i>'is primarily attributable to the act or omission'</i> of the Access Seeker. This would be a hard position to establish even though the delay has manifestly occurred as an indirect result of the access seeker's actions. If it failed to demonstrate that the delay was primarily attributable to an act or omission of the Access Seeker, Aurizon Network would experience financial loss due to the insolvency of the construction contractor chosen not by Aurizon Network but by the Access Seeker. This is unreasonable and this risk should be borne by the Access Seeker.</p>

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
				Similarly, take a scenario in which a serious safety/environmental incident occurs to a mining contractor on the access seeker's mine in the immediate vicinity of the proposed Connecting Infrastructure. For this reason Aurizon Network is denied access to that land and as a consequence its delivery of the Connecting Infrastructure is delayed. Under Aurizon Network's drafting this delay would not prevent the take-or-pay obligation from being triggered, since the delay is not primarily attributable to a default by Aurizon Network. Under the QCA's drafting the take-or-pay obligation would not be triggered since the delay is not primarily attributable to the Access Seeker. This is unreasonable – the Access Seeker should take risk over its own mining contractor.
7. Construction Agreement and Formal Instrument of Agreement				
Clause 1.1 - "force majeure event"	The QCA does not accept this amendment.	Where force majeure events are expressly listed, it is rare for train and motor vehicle accidents to be listed. Typically the contractor takes the risk for such events and will be covered by insurance. Further, Aurizon Network should be covered by its contractual arrangements with the train operator. The amendment negatively impacts on the credibility of the SUFA documents.	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.

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
Clause 1.1 - "insolvency event"	The QCA does not accept this amendment.	This definition, as amended, is not correct in the instance where it is used in the construction contract. The amendment negatively impacts on the credibility of the SUFA documents.	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU. (This would result in the CA incorporating the definition of insolvency event given in the EISL.)	<p>The insolvency event trigger should be relatively narrow, and only apply when Aurizon 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.</p> <p>In addition, Aurizon Network does not understand why, in the event that the provider of a \$50,000 secured loan to Aurizon Network takes possession of its security over a small warehouse, which is unrelated to this expansion, the QCA considers that the consequences of an insolvency event trigger should be available (i.e. termination of the construction agreement). Even in bank loan documentation, which is typically more onerous than documentation of trade arrangements such as the provision of construction services, investment grade credits have the benefit of a significance test on would-be default events, and that significance test would not be triggered in the example given.</p>
Clause 8.4	The QCA accepts Aurizon Network's amendment.	This amendment, as varied by the QCA, improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 8.5(a)(i)	The QCA accepts Aurizon Network's changes.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 11.2	The QCA accepts Aurizon Network's position; however, has not included the amendment to clause 11.2(a)(iv) as it is not necessary.	This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 23.1	The QCA accepts Aurizon Network's deletion.	In respect of the QRC's comment, the QCA notes that clause 9.1 of the EIHL would also apply which would protect the SUFA trustee in the instances the QRC refers to. This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 24.2	The QCA does not accept this amendment.	Firstly, this is a minor issue as Aurizon Network will need to make a claim under clause 35A.2(a) of the construction contract in any case. Accordingly, this change has no consequence and is unnecessary.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		<p>Further, the QCA does not agree with this proposition. The information required by a clause 24.2 statement cuts across both the notification and claim requirements of clause 35A of the construction contract. Merely issuing a notice will not provide all the information required by clause 24.2 of the contract.</p> <p>Not making this amendment protects the credibility and workability of the SUFA documents.</p>		
Clause 25A(a)(i)	The QCA accepts Aurizon Network's deletion.	The QCA does not fully understand the QRC's comments as Aurizon Network must still comply with legislative requirements. In the QCA's view, the clause (as amended) provides a fair allocation of risk. This amendment improves the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Clause 33.9	Clause 33.9(a): The QCA accepts Aurizon	Clause 33.9(a): This amendment improves the credibility and workability of the SUFA documents.	Clause 33.9(a) QCA template documentation accepted	Clause 33.9(a) N/a

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
	Network's amendment. Clause 33.9(b): The QCA does not accept Aurizon Network's amendment.	Clause 33.9(b): The QCA does not agree with Aurizon Network's interpretation of the intent of the clause. This clause is dealing with the situation where a compensable cause and a different adjustment event overlap. To the extent of any overlap, Aurizon Network can only claim for the adjustment event. Not making this amendment retains the credibility and workability of the SUFA documents.	Clause 33.9(b) QCA template documentation accepted	Clause 33.9(b) N/a
Clauses 35.3, 35.4 and 35A.4(c)	The QCA does not accept these amendments.	Aurizon Network has not provided a compelling reason for the amendments. Further: <ul style="list-style-type: none"> • There are no assessment criteria for discretionary variations under clause 35. • The express statement that the assessment of extension of times was subject to clause 33 was not repeated. Not making these amendments protects the credibility and workability of the SUFA documents.	Clause 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).	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 <ul style="list-style-type: none"> (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 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>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</p>

Clause reference	QCA draft decision	QCA reasoning	Aurizon Network position	Aurizon Network reasoning
				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.
Clause 35A.2	The QCA accepts the inclusion of a reference to Aurizon Network's knowledge (or deemed knowledge). However, in the QCA's view, the time period suggested by Aurizon Network are too long. The QCA has provided for shorter time periods.	This amendment improves the credibility and workability of the SUFA documents.	<p>Nature of trigger event QCA template documentation accepted</p> <p>Time periods Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.</p>	<p>Nature of trigger event N/a</p> <p>Time periods 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) '<i>within 28 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</i>'. 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)	The QCA does not accept these amendments.	Aurizon Network has not provided a compelling reason for the amendments has been given. Further: <ul style="list-style-type: none"> The intent of the amendments made by Aurizon Network was 	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	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

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		<p>already covered by the existing drafting.</p> <ul style="list-style-type: none"> • The need to designate all but the final direction as "interim determinations" does not seem to serve any purpose. • The new drafting does not cater for the fact there might be multiple update claims and multiple updated determinations. <p>Not making these amendments protects the credibility and workability of the SUFA documents.</p>		<p>how any subsequent direction related to the initial direction – for example, could 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>
Clause 36.1(a)	The QCA accepts this amendment.	This amendment improves workability.	QCA template documentation accepted	N/a
Clause 36.1(b)	The QCA accepts Aurizon Network's position.	This amendment improves credibility and workability.	QCA template documentation accepted	N/a
Clause 38.4	The QCA does not accept these amendments.	The combination of clauses 38.2, 38.3 and 38.4 as provided for in the final decision form of construction contract for the 2013 SUFA DAAU provides a balanced	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	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.

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		termination methodology for both parties. Not making these amendments protects the credibility and workability of the SUFA documents and is in the interests of the parties.		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 one another under the CA.
Clause 38.12	The QCA accepts Aurizon Network's position; however, considers that the trigger for the calculation of the compensation payment should be upon some or all of the expended contract sum being submitted for inclusion in the RAB.	These amendments provide clarity to the termination process, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	<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.
Clause 41.4	The QCA accepts these amendments.	These amendments provide clarity, which is in all parties' interests.	QCA template documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		These amendments also improve the credibility and workability of the SUFA documents.		
Clauses 43.1(b)(iv)(A) and 43.2(a)(vii)	Other than for the carve-out for the work under the construction contract, the amendments not accepted.	<p>The carve-out for the work under the construction contract is a reasonable allocation of risk. This amendment improves credibility and workability.</p> <p>The QCA does not agree with the other amendments as they result in an inappropriate allocation of risk. Not making these amendments protects credibility and workability and is in the interests of the parties.</p>	QCA template documentation accepted	N/a
Annexure A, Items 7B and 7C	The QCA accepts Aurizon Network's position.	These amendments provide clarity, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
Annexure A, Item 37	The QCA does not accept this amendment.	In the QCA's view, the liability cap should be 'hard-wired' at the contract sum as Aurizon Network should be liable	Aurizon Network does not accept the QCA's changes and adopts the position it adopted in the UT4 SUFA DAAU.	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

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
		for replacing the whole of the works where that is required. Not making these amendments protects the credibility and workability of the SUFA documents and is in the interests of the parties.		cap is a pricing term of a construction contract that is typically negotiated between the would-be parties to that contract.
FIA signing clause	The QCA accepts these amendments.	These amendments provide clarity, which is in all parties' interests. These amendments also improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
8. Integrated Network Deed				
Clause 19.1	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA template documentation accepted	N/a
9. UT4				
Clause 8.8.1(a)(iv)	The QCA accepts this amendments.	This amendment improves the credibility of SUFA.	QCA UT4 amendment documentation accepted	N/a
Clause 8.8.1(a)(vi)(B)	The QCA accepts this amendment.	This amendment improves the credibility of SUFA.	QCA UT4 amendment documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 8.8.1(b)	The QCA does not accept this amendment.	As the relationship with the State is between Aurizon Network and the State (and not with the SUFA trustee or the Preference Unit Holders), Aurizon Network is best placed to progress matters with the State. This amendment negatively impacts the credibility of SUFA.	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.'	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.
Clause 8.8.3	The QCA does not accept this amendment.	Since our draft decision is to refuse to approve the UT4 SUFA DAAU, the process referred to in these clauses is still underway.	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 form of UT4 are superseded.
Clause 8.8.3(d)	The QCA has accepted this amendment in part and has clarified the QCA's role.	A process for statutory severance improves the credibility of SUFA. However, in the QCA's view, Aurizon Network must seek the statutory severance with reasonable assistance from the QCA.	QCA UT4 amendment documentation accepted	N/a
Clause 8.8.4	The QCA accepts these amendments.	These amendments improve the credibility of SUFA.	QCA UT4 amendment documentation accepted	N/a

<i>Clause reference</i>	<i>QCA draft decision</i>	<i>QCA reasoning</i>	<i>Aurizon Network position</i>	<i>Aurizon Network reasoning</i>
Clause 12.1	The QCA accepts these amendments.	These amendments improve the credibility and workability of the SUFA documents.	QCA UT4 amendment documentation accepted	N/a

Schedule 2 – Clarifications on the PDR Mechanism

These clarifications relate to section 6.2.3.4 of this submission.

#	QCA statement	Aurizon Network clarification
1	<i>'Aurizon Network's proposed post-deregulation rental arrangement is unchanged from what....was considered in the UT3 SUFA final decision.'</i> ⁶¹	<p>In the EISL that formed part of the UT4 SUFA DAAU, Aurizon Network modified two defined terms that are, and deleted one defined term that was, integral to the PDR Mechanism. The QCA has accepted those changes.⁶²</p> <p>These changes are significant in the operation of that mechanism, so the post-deregulation rental arrangement in the UT4 SUFA DAAU has in fact changed from the arrangement in the UT3 SUFA DAAU process.</p>
2	<i>'...Aurizon Network's proposal would allow an integrated Aurizon entity to decide the return on SUFA assets through defining 'capital revenue'"</i> ⁶³	<p>Under Aurizon Network's proposal the only Aurizon entity that plays any role in determining the return on SUFA assets is Aurizon Network itself, which is a party to the EISL. For example, assume that there is another Aurizon entity (say Aurizon Transport Solutions) that is 'integrated', in that it offers to customers integrated transportation services between two defined points and buys access from Aurizon Network to do so. Aurizon Transport Solutions plays no part in deciding the return on SUFA assets as this role is performed solely by Aurizon Network. The CITS element of the PDR Mechanism only applies when Aurizon Network itself provides an integrated transportation service.</p> <p>Furthermore, Aurizon Network's proposal does not allow any entity '<i>to decide the return on SUFA assets through defining 'capital revenue"</i> – rather that proposal requires Aurizon Network to calculate the return on SUFA assets through a determination of 'capital revenue', including the element attributable to CITS, where there are no transparent and separately identifiable access charges.⁶⁴</p>
3	<i>'...capital revenue effectively is a residual figure once the integrated Aurizon entity has accounted for all other costs.'</i> ⁶⁵	Capital revenue is the residual figure once Aurizon Network, not the 'integrated Aurizon entity', has deducted defined costs of Aurizon Network from the sum of Aurizon Network's access revenue and 'Notional Access Revenue'.
4	<i>'...Aurizon Network's proposed rental arrangement would provide a vertically integrated Aurizon entity with complete</i>	The only entity that is relevant to the PDR Mechanism is Aurizon Network, which is the party to the EISL. It is entirely irrelevant to the PDR Mechanism whether Aurizon Transport Solutions attributes part of its revenue to below-rail services, and if it does how much, since any such attribution does not affect the PDR Mechanism. This mechanism relates solely to revenue earned by Aurizon Network for its provision of access, CITS or both to customers.

⁶¹ Page 58 of the UT4 SUFA DD

⁶² Page 76 of the UT4 SUFA DD

⁶³ Page 58 of the UT4 SUFA DD

⁶⁴ Paragraph entitled 'Revenue Sharing' in section 2.3 of Schedule 1 of the form of the EISL that is part of the UT4 SUFA DAAU

⁶⁵ Page 58 of the UT4 SUFA DD

#	QCA statement	Aurizon Network clarification
	<i>discretion over the revenue it attributed to below-rail services...⁶⁶</i>	<p>In the event that the QCA had meant to advance the position that Aurizon Network's proposed rental arrangement would provide Aurizon Network (rather than a vertically integrated Aurizon entity) with complete discretion over the revenue it attributed to below-rail services, this position is incorrect on several grounds.</p> <ul style="list-style-type: none"> • Capital revenue is made up of two elements, one of which is access revenue. Access revenue is the revenue Aurizon Network receives for access provision. Access revenue is a matter of fact and is auditable; Aurizon Network has no discretion in assessing its quantum. • The other element of capital revenue, which Aurizon Network receives when it provides CITS services, is 'Notional Access Revenue'. This amount is determined by reference to two different revenue measures, and one cost measure. One revenue measure is actual revenue – this is a matter of fact and is auditable, and Aurizon Network has no discretion in assessing its quantum. The other revenue measure is the revenue that would have been allowed had regulation continued – Aurizon Network would have minimal if any discretion in determining its quantum. The cost measure is the determined costs, other than below-rail costs, incurred by Aurizon Network in respect of CITS provision. In the first instance Aurizon Network would have a limited degree of discretion over its cost allocation methodology in coming up with these determined costs. • The SUFA trustee has comprehensive audit rights in respect of, among other things, the determination of Rent⁶⁷ under the EISL. • The SUFA trustee is free to utilise a rigorous binding determination process in the event of a dispute about rental after the regulatory period. That process would act as a check on any discretion exercised by Aurizon Network in its determination of 'capital revenue'.⁶⁸
5	<i>Aurizon Network '...would have a strong incentive to reduce the returns on below-rail assets within its portfolio, if that resulted in lower cash outflows in terms of SUFA rental streams'⁶⁹</i>	<p>Aurizon Network does not understand the logic of this assertion, since it assumes that Aurizon Network would act contrary to its own financial interests.</p> <p>Assume that as at deregulation, only one SUFA transaction has occurred. The SUFA trustee's assets account for part of the RAB and Aurizon Network-funded assets account for the balance. Aurizon Network has a financial incentive to earn as much revenue as possible from both access provision and CITS provision, since doing so will maximise the returns in respect of the Aurizon Network-funded assets. This demonstrates that the alignment of business interests between SUFA investors and Aurizon Network (as an investor) occurs after the regulatory period as well as during it.</p> <p>The QCA considers that Aurizon Network would have a strong incentive to reduce the returns on below-rail assets. Assume that Aurizon Network reduced by 25% both the price of access to its access customers, and the price of</p>

⁶⁶ Page 58 of the UT4 SUFA DD

⁶⁷ Clause 10.2 of the form of the EISL that forms part of the UT4 SUFA DAAU

⁶⁸ Clause 9.8 of the form of the EISL that forms part of the UT4 SUFA DAAU

⁶⁹ Page 58 of the UT4 SUFA DD

#	QCA statement	Aurizon Network clarification
		<p>CITS to its CITS customers. This price reduction 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 does not understand why the QCA considers that Aurizon Network would face a strong incentive to make such a price reduction.</p> <p>The QCA has failed to take into account that Aurizon Network itself would bear its share of the loss of revenue arising from the 25% price reduction. This course of action would not make sense since it would result in Aurizon Network foregoing profit available to it. Indeed the logic of the QCA's assertion is that Aurizon Network would continue to make reductions in price of its access and CITS contracts until the SUFA rental streams fell to zero. It is not Aurizon Network' practice to forego profit streams that are available to it and there is no logical reason to expect that it would do so.</p>
6	<p><i>'Aurizon Network...{defined} 'determined other transportation costs'....as the costs incurred by Aurizon (the integrated Aurizon entity) in providing services other than the below-rail service (under a CITS) that Aurizon would have avoided....'⁷⁰</i></p>	<p>Aurizon Network defined 'determined other transportation costs' in respect of various costs incurred by Aurizon Network in providing CITS. That definition does not relate to any other Aurizon entity.</p>
7	<p><i>'In the event the CQCN is no longer declared, an integrated Aurizon entity would have a monopoly position over SUFA rental streams, in the absence of credible constraints.'⁷¹</i></p>	<p>Under Aurizon Network's proposal, and indeed the QCA's proposal, the only Aurizon entity that pays the SUFA rental stream is Aurizon Network itself, as it is a party to the EISL. Should there be another Aurizon entity and it is integrated, such as Aurizon Transport Solutions as in the example above, that entity's business conduct is irrelevant to the SUFA trustee.</p> <p>The reference to any entity having a 'monopoly' position over SUFA rental streams is unclear. SUFA rental streams arise both before and after deregulation from one lessee (Aurizon Network) paying rent to one lessor (the SUFA trustee) in return for the use of the leased assets. Aurizon Network cannot conceive of a SUFA transaction structure in which there are multiple entities that are SUFA lessees, which appears to be the preferred position of the QCA.</p>

⁷⁰ Page 58 of the UT4 SUFA DD

⁷¹ Page 59 of the UT4 SUFA DD