Queensland Competition Authority

Final decision

Aurizon Network's 2013 Standard User Funding Agreement Draft Amending Access Undertaking

June 2016

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EXECUTIVE SUMMARY

The Queensland Competition Authority Act 1997 (QCA Act) stipulates that, under an access regime, the regulator cannot require an access provider, such as Aurizon Network, to pay some or all of the costs of extending its network.[1] Nonetheless, the QCA Act allows the regulator to require an access provider to extend its network.

Progress in developing a SUFA arrangement

In our final decision on the 2010 Access Undertaking (2010 AU), we required Aurizon Network to provide us with a proposed Standard User Funding Agreement (SUFA) and related amendments to the 2010 AU, to fully implement the investment framework amendments (Schedule J of the 2010 AU).

The need for a SUFA stemmed from what Aurizon Network's stakeholders described during the QCA's review of the 2010 AU as concerns about Aurizon Network's unwillingness to fund network expansions at the regulated rate of return.

The SUFA is designed to be a suite of standard pro forma agreements to facilitate financing options as alternatives to Aurizon Network funding rail infrastructure expansions on the CQCN.

First-generation SUFA

The first-generation SUFA, developed late in 2010, was simple and straightforward, but was unlikely to be utilised by stakeholders due to tax implications. It was eventually withdrawn and replaced with the second-generation SUFA.

Second-generation SUFA

The second-generation SUFA developed by Aurizon Network during 2011–13 was based upon a trust model, where preference unit holders (PUHs) in a SUFA trust commit the funds required to develop an infrastructure project, in return for rights to future rental cash flows. PUHs do not have ownership rights over the infrastructure once it is completed.

Under Aurizon Network's proposals, it was anticipated that primarily larger mining companies would fund a SUFA project off-balance-sheet, and that smaller mining companies might lack sufficient funding or reserves to do so.

Whilst both Aurizon Network and the Queensland Resources Council (QRC) made significant investments in developing the SUFA framework to the point of Aurizon Network's 2013 SUFA DAAU, it was clear from submissions we received that Aurizon Network and its stakeholders had been unable to develop an effective SUFA framework. Notably, in August 2013, the QRC indicated that:

> *The SUFA Document structure is complex and difficult. If the SUFA Documents are amended as proposed by the QRC in this submission and the QRC Mark-up, it will provide, at best a barely workable framework through which mining companies may invest their own capital....*

Given the importance of the SUFA, particularly in the context of the 2014 DAU[2] and Aurizon Network's proposed approach to expansions, we considered it prudent to undertake a further considered review of the existing SUFA framework, with a view to determining what changes would be necessary, or possible, to produce a workable, bankable and credible SUFA.

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[1] Unless the access provider has voluntarily agreed to do so within its access undertaking.

[2] The 2014 DAU process has run parallel to the SUFA assessment process; it relates to the development of an undertaking to replace the 2010 AU.

In this context, workable, bankable and credible mean the following:

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

QCA engagement of financial and legal advisors

We engaged Grant Samuel, as financial advisor, to provide us with commercial advice on the 2013 SUFA DAAU. Grant Samuel said the 2013 SUFA DAAU was neither workable nor bankable, and it was not a financing structure that would be attractive to third party financing, and as a result, was not credible in its current form.

Despite this, Grant Samuel, working with our legal advisors, Clayton Utz, considered the 2013 SUFA DAAU could be amended to achieve a workable, bankable and credible SUFA. However, establishing a SUFA that is workable, bankable and credible would require changes, and a compromise to be achieved between Aurizon Network and stakeholders. It would also require us to change aspects of processes within the access undertaking.

QCA position paper

In May 2014, we released a position paper to inform interested parties of our views on the way in which the 2013 SUFA DAAU could be amended to achieve a workable, bankable and credible SUFA.

Our intention was to gauge stakeholders' views on our proposed package of measures. For the most part, stakeholders' submissions indicated broad support for the potential changes we outlined; they also offered alternative suggestions seeking to improve the proposed arrangements.

In September 2014, we released exposure drafts of alternative pro forma SUFA documents. These documents were based on the outcomes of our position paper and the cooperation of Aurizon Network and its stakeholders. Whilst the form and content of these pro forma SUFA documents substantially differed from those in the 2013 SUFA DAAU, they built upon the considerable work undertaken by Aurizon Network and its stakeholders in the lead-up to the 2013 SUFA DAAU.

Draft decision

Work on developing the pro forma SUFA documents continued and we published a draft decision on Aurizon Network's 2013 SUFA DAAU in October 2014. Stakeholders' comments on this were provided in January 2015. Thereafter, work on the SUFA framework subsided as industry resources were refocused toward reaching a final decision on the assessment of Aurizon Network's 2014 DAU. This reflected the near-term criticality of the issues concerning the 2014 DAU.

Since the start of 2016, our focus has returned to SUFA. We have sought further stakeholders’ comments on our examples regarding the SUFA rental calculation methodology under the existing regulatory regime, and SUFA rental streams in the event the CQCN is no longer declared.

Final decision

Our final decision refuses to approve the 2013 SUFA DAAU in its current form. We have set out the reasons for our position and the way in which we consider it is appropriate to amend the 2013 SUFA DAAU, to achieve what we consider is a workable, credible and bankable set of SUFA agreements.

We have focused on the pro forma SUFA documents, rather than amendments to the 2010 AU—as the 2010 AU is likely to be superseded by a new undertaking in the near term. Our proposals aim to provide a more conventional and attractive financing structure that allows as many financing options for, and potential participants to, a SUFA as possible. They seek to form a basis for a competitive process for the financing of expansions in the CQCN, to the extent practicable given our powers and obligations under the QCA Act.

Our final decision proposes a package of measures that we consider:

- simplify the SUFA agreements, and, to the extent possible, refocus the 2013 SUFA DAAU to become a financing vehicle for potential future expansions
- ensure roles and responsibilities are clearly defined
- ensure regulatory arrangements are fit-for-purpose in an environment where a SUFA applies.

Our final decision proposals also reflect a workable tax position, to the best of our ability. In this context, we note there are decisions regarding the tax treatment of a SUFA over which we have no jurisdiction, but which are necessary for an effective SUFA framework.

Further, our final decision proposals have accounted for the fact that, if the SUFA framework is to be workable, bankable and credible, Aurizon Network has to be provided with a monopoly position as the constructor of SUFA infrastructure. We have also been conscious of the fact that, if the proposed arrangements for post-deregulation SUFA rental streams impacts the effectiveness of the SUFA framework whilst the CQCN is regulated (i.e. the third party access regime in the QCA Act is in force), we are required to have regard to this in coming to our final decision.

The key matters addressed in our final decision are summarised below.

Focus of the final decision

Our final decision proposals focus on the pro forma SUFA documents, due to the likely conclusion of the 2014 DAU process in the near term. However, in order to address any delays in that process, we have proposed to include a sunset clause in the 2010 AU. This will trigger amending the 2010 AU to account for SUFA, in the event the 2014 DAU process becomes more protracted.

Further, given the process for developing the pro forma SUFA documents, our draft decision pro forma SUFA documents were significantly different from those in the 2013 SUFA DAAU. Our final decision proposes to use the draft decision suite of SUFA documents as the starting point from which to develop the final decision proposals. Our view is this reflects the evolution of the pro forma SUFA documents, and provides a clear and transparent base point from which to develop the detail of our final decision proposals.

Key issues and final decision proposals

Our final decision proposals can broadly be split into the following categories: SUFA rental streams, construction, cash flow security, termination, differential treatment, preference unit trading and third party financing, tax, inclusion of SUFA assets in the RAB, and liability.

SUFA rental streams

Three issues have arisen from the calculation of SUFA rental streams: transparency of the calculation methodology under the existing regulatory regime; implications for SUFA rental streams if there are changes to that regime; and the process for calculating SUFA rental streams if the CQCN is not declared.

Our final decision proposes to accept the calculation methodology in Aurizon Network's 2013 SUFA DAAU for SUFA rental streams based on existing regulatory principles[3], but also to require the provision of worked examples of the calculation process alongside the suite of pro forma SUFA documents for illustrative purposes. This seeks to enhance methodological transparency. Further, given our regulatory obligations regarding consultation and the role of natural justice, our final decision proposes to maintain our position that it is at SUFA funder's risk if the regulatory regime changes and impacts the calculation of SUFA rental streams.

Our final decision also refuses to approve Aurizon Network's proposed process for setting SUFA rental streams in the event that the CQCN becomes undeclared, on the grounds its proposal provides undue discretion to Aurizon Network to impose a rental payment profile unduly balanced in its favour. We propose that the SUFA documents adopt a specific dispute resolution process that provides an expert panel with the power to impose an alternative approach to an Aurizon's proposal, if the panel considers it better reflects the post-deregulation SUFA rental objectives as set out in the pro forma SUFA documents. This seeks to assure prospective SUFA funders that any investment made in the period when the CQCN is declared will be treated fairly and reasonably if regulation ceases to apply. Our view is, without such a measure, the effectiveness of SUFA is compromised whilst the CQCN is declared.

Construction

With respect to construction, our key final decision proposals relate to the introduction of a capacity obligation within the construction agreement, the risk balance underpinning the construction agreement, and Aurizon Network's security provisions during the construction process. Further, our final decision provides guidance regarding our expectations around the interaction of the construction aspects of a SUFA transaction with undertaking processes (such as the expansion process and preapproval).

The capacity obligation in the construction agreement replaces the capacity guarantee under the access undertaking as proposed in our draft decision on the 2013 SUFA DAAU. It represents part of the package of measures—such as initial scope, lump sum, adjustment events and provisional sums—that Aurizon Network, as contractor/constructor of SUFA infrastructure, negotiates with prospective funders when completing the schedules to the construction agreement for a SUFA project. Failure to achieve certain capacity levels leaves Aurizon Network open to liquidated damages and/or rectification costs. This approach allows disputes to be considered in terms of the reasonableness of the minimum incremental capacity for an overarching risk/reward package and project scope that has been commercially agreed.

Further, for any given SUFA project, the schedules to the construction agreement require a degree of negotiation. Negotiation takes place against a backdrop where Aurizon Network is the only viable option as the contractor/constructor for the SUFA project. Given this, the standard terms and conditions proposed in our final decision construction agreement have been developed based on an ethos that is similar to that of a standard access agreement. That is, they seek to provide credible backstop positions that can be adopted by prospective SUFA funders, if Aurizon Network seeks to lever its monopoly position. Moreover, to ensure common understanding, the pro forma SUFA construction agreement is based on the template for a standard Australian design and construct construction contract.

In terms of the linkages with the access undertaking, our view is the schedules to the construction agreement should be directly informed by the outputs of the expansion process for a given project. Regarding preapproval, we consider a dynamic approach should be adopted to account for the uncertainties associated with the practicalities of construction. However, any capital expenditure preapproved will be subject to a final assessment of prudency and efficiency, prior to inclusion in the RAB.

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[3] This is subject to the treatment of the operating and performance risk allowance (OPRA). OPRA is discussed in the liability section.

Provided the expansion and preapproval processes are used appropriately and rigorously, inclusion of SUFA capital costs in the RAB ought to be a straightforward exercise, because throughout the project's evolution, prudency, efficiency and capacity delivery would have been at the forefront of Aurizon Network's focus, it being the contractor/constructor. In this context, we consider preapproval should only be available if a suitable capacity obligation exists, and prospective SUFA funders should have the right to trigger that Aurizon Network attains preapproval. This seeks to ensure that capacity, which is the product demanded, receives due attention.

Lastly, our final decision construction agreement does not propose to include security provisions to cover peak construction costs in the construction agreement, because this would result in the parties financing a SUFA transaction providing security to both Aurizon Network and the SUFA trustee. Our view is this creates unnecessary barriers to participation in the construction phase of a SUFA transaction, and does not reflect that, practically, a professional trustee would not enter the arrangement without being confident of sufficient funding to meet the requirements of the construction agreement. Our final decision does, however, propose Aurizon Network receive pre-payments to help mitigate the absence of specific security in favour of Aurizon Network.

Cash flow security

Security over SUFA rental streams, as well as rent-equivalent compensation cash flows and compensation payments, are fundamental to the SUFA framework providing financing choice. Without it, third party financing is not viable. The two issues to be addressed are the SUFA security agreements and Aurizon Network's right to set-off.

Our final decision proposals continue to require that security arrangements cover SUFA rental streams, rent-equivalent compensation cash flows and compensation payments, given the rights to these cash flows are the primary assets of the SUFA trustee. We have also retained other provisions that maximise a SUFA trustee's rights in the event of an Aurizon Network's insolvency. Further, our final decision proposes to extend the security arrangements granted by Aurizon Network in favour of the SUFA trustee to include bundled-service agreements, not just relevant access agreements.

Our final decision also proposes Aurizon Network's right to set-off only extend to the monthly rent adjustment process (to account for actual payment of access charges), rather than full set-off proposed by Aurizon Network. Our view is if this position is not adopted, the SUFA framework would be significantly compromised, because uncertainty and volatility in monthly SUFA rental streams or rent-equivalent compensation cash flows would increase, thereby making it harder for third party financiers to back off their own commitments based on incoming rental cash flows.

The absence of full set-off does not stop Aurizon Network from obtaining any amounts it is owed through other standard means. It, however, prevents Aurizon Network from adjusting, at its discretion, monthly SUFA rental streams to account for those outstanding amounts. It also means there is potential for Aurizon Network to be exposed to, in certain circumstances, some credit risk in the short term—in particular, during the period in which a SUFA trustee and PUHs meet their obligations.

Termination

This relates to how SUFA funders will be compensated if a termination event occurs. A SUFA transaction can be terminated in a variety of ways that are dependent on the actions of Queensland Treasury Holdings (QTH), Aurizon Network and the SUFA trustee. For each termination event, liability is allocated, and compensation arrangements and security over compensation are defined. A further complication is that Aurizon Network's lease with QTH (the Infrastructure Lease) contains various termination triggers, but is a confidential document.

Our final decision proposes to broadly maintain our draft decision position, the main points of which are:

- A redacted Infrastructure Lease should be provided during negotiation of SUFA agreements.
- Security over rent-equivalent cash flows should be provided, net of any detriment due to any party.
- If the Infrastructure Lease is terminated due to Aurizon Network cause, Aurizon Network is potentially liable for the consequential loss of the SUFA trustee flowing from such termination.
- If the Infrastructure Lease is terminated due to SUFA trustee cause, the SUFA trustee's liability is limited to the assets of the trust, in respect of any claims Aurizon Network may have against the SUFA trustee in respect of such termination.

Aurizon Network's liability for consequential loss is considered further in the liability section below.

Differential treatment

Our final decision proposals focus on the condition of SUFA assets and the eligibility to fund a SUFA transaction. With respect to eligibility to fund, our final decision maintains the criteria adopted in our draft decision, as we consider these sufficient.

Regarding asset condition, our final decision strengthens Aurizon Network's obligations within the pro forma SUFA documents, with respect to maintaining SUFA infrastructure in a manner comparable to other infrastructure within the CQCN and providing information on asset condition. This reduces reliance on an access undertaking being in place and supports the effectiveness of the SUFA framework whilst the CQCN is declared, as it provides assurances in the event the CQCN is not declared.

Preference unit trading and third party financing

We propose to maintain our draft decision position of no requirement for 'stapling', and Aurizon Network not having first right of refusal in a bidding process to transfer preference unit ownership.

We also remain of the view that SUFA should allow for parties to determine the type of financing desired on a case-by-case basis, that the negotiation of financing type be subject to dispute resolution, and the Financing Side Deed be included as part of the suite of SUFA documents.

Tax

Not all issues surrounding tax can be dealt with by the QCA. In particular, statutory severance from the Queensland Government and favourable tax rulings from the Australian Tax Office (ATO) are needed if the SUFA arrangements are to be tax efficient. Our view remains that whilst we should seek to design the SUFA documents and the access undertaking to assist the process of obtaining the relevant permissions and rulings, obtaining such permissions/rulings is ultimately the responsibility of Aurizon Network and SUFA funders.

Of the areas that we can deal with, Aurizon Network’s and QTH’s tax indemnities are the key remaining issues. Our final decision proposes to maintain these indemnities. Our view is the QTH’s tax indemnity has little impact once statutory severance is obtained. Regarding Aurizon Network's tax indemnity, the proposed drafting of the pro forma SUFA documents seeks to ensure it can only be triggered for genuine SUFA-specific tax issues. Its proposed use is also subject to binding dispute resolution.

Inclusion of SUFA assets in the RAB

Our final decision proposes to continue to require that Aurizon Network acts in the interests of the SUFA trust in the context of seeking inclusion of SUFA capital costs in the RAB. Aurizon Network must also not do anything that would prejudice such capital costs' continuing inclusion in the RAB. Our view is these are appropriate because Aurizon Network should construct SUFA assets, on behalf of the SUFA trustee, such that they meet the prudency and efficiency requirement for RAB inclusion, as it is the SUFA trustee who bears optimisation risk. Moreover, provided Aurizon Network is obliged to act in the interests of a SUFA trust, the SUFA trustee may have recourse to seek compensation outside of the regulatory process, in the

event capital costs are excluded from the RAB as a consequence of Aurizon Network breaching that obligation.

Liability

Other than including limitation of liability provisions associated with the capacity obligation under the construction agreement, the liability framework proposed in the final decision is similar in intent to that of our draft decision, but is subject to some minor modifications and clarifications.

Our final decision proposals include a proportionality concept with respect to the SUFA trustee's liability in relation to environmental damage. Amendments to the consequential loss provisions aim to ensure QTH and the State of Queensland do not bear consequential loss but that Aurizon Network may be subject to consequential loss, if its actions result in the Infrastructure Lease terminating and the action constitutes wilful default. We have also sought to clarify within the construction agreement that Aurizon Network's limitation of liability regarding construction is the contract sum. Lastly, our final decision proposes we continue to exclude the OPRA from the suite of SUFA agreements and the rental calculation methodology.

Summary

Our final decision, as set out in this final decision document, is to refuse to approve the 2013 SUFA DAAU under section 142(2) of the QCA Act.

As required by section 142(3) of the QCA Act, this document sets out the reasons for our position and the way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU to achieve what we consider a workable, credible and bankable SUFA agreement, and a 2013 SUFA DAAU we could approve.

We consider the development of a workable, credible and bankable SUFA is critical to supporting the object of Part 5 of the QCA Act (section 69E), which is to promote the economically efficient operation of, use of and investment in the CQCN, with the effect of promoting effective competition in upstream and downstream markets.

Our final decision, as set out in this final decision document, has sought to appropriately balance the matters of section 138(2) under the QCA Act, which we are required to have regard to.

THE ROLE OF THE QCA—TASK, TIMING AND CONTACTS

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

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

Task, timing and contacts

On 22 July 2013 Aurizon Network formally withdrew its 2012 SUFA DAAU and submitted its 2013 SUFA DAAU containing the following documents:

- explanatory notes (from its 2012 SUFA DAAU) modified by its submission letter dated 22 July 2013 and related schedule
- regulatory notes (unchanged from its 2012 SUFA DAAU)
- new SUFA template legal agreements
- DAAU (unchanged from its 2012 SUFA DAAU).

We commenced an investigation into Aurizon Network's 2013 SUFA DAAU on 25 July 2013. Consistent with section 138(3)(c) of the QCA Act, we published Aurizon Network's DAAU on our website and invited stakeholders to make submissions. Six submissions were received. On 14 October 2013, we invited all stakeholders to provide reply submissions on all submissions provided to date. Six reply submissions were received.

On 22 May 2014, we released a position paper along with a set of term sheets and a consultant's report commenting on the workability, credibility and bankability of Aurizon Network's 2013 SUFA DAAU. We asked for comments on those documents by 27 June 2014, and received six submissions in response.

We released our draft decision on 31 October 2014 accompanied by drafts of the twelve standardised agreements. We requested parties provide stakeholder comment on the matters raised in our draft decision. We received five submissions in response.

Subsequently, we have also requested stakeholder comment on some examples of the SUFA rental calculation process based upon existing regulatory processes and published a position paper regarding SUFA rental streams if the central Queensland coal network (CQCN) is no longer declared. We received two submissions on this position paper.

This document and the associated pro forma SUFA documents represent our final decision.

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1 WHAT IS A SUFA AND WHY IS IT NEEDED?

While Aurizon Network Pty Ltd (Aurizon Network) is the sole owner and operator of the central Queensland coal network (CQCN), it is under no legislative obligation to fund railway expansions in its own network. The Standard User Funding Agreement (SUFA) framework seeks to provide an alternative arrangement that allows parties—other than Aurizon Network—to finance the costs of railway expansions in the CQCN.

This chapter outlines Aurizon Network's proposed SUFA framework in the CQCN context. The subsequent chapter discusses our role in assessing the SUFA proposals.

1.1 What is a SUFA?

A Standard User Funding Agreement (SUFA) in this instance refers to a suite of pro forma agreements designed to facilitate funding options for rail infrastructure in the CQCN. The SUFA framework has been developed to provide an alternative arrangement that allows parties—other than Aurizon Network—to finance railway expansions in the CQCN needed to accommodate access seekers' capacity requirements and timeframes. Having a SUFA in place does not preclude negotiation of alternative funding arrangements with Aurizon Network.[4]

1.2 What does a SUFA seek to achieve?

The SUFA framework has been initiated in response to concerns from CQCN stakeholders that Aurizon Network was under no legislative obligation to fund railway expansions in its own network.

While we have the power to determine an access dispute in respect of declared services that are referred to us[5], we may not make an access determination that would result in any of the following access outcomes:

- a reduction in the amount of the service an access provider can obtain
- an access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement
- an access provider being required to pay some or all of the costs[6] of extending the facility.

Rather than the QCA separately making a determination in response to each access dispute with respect to user funding of an expansion, a SUFA seeks to provide baseline funding arrangements and the responsibilities of parties (including Aurizon Network) involved.

Finalising the suite of SUFA pro forma agreements has been a complex process, and has involved collaboration between Aurizon Network, the Queensland Resources Council (QRC) and the QCA.

[4] Aurizon Network 2013b: 4.
[5] Under section 119(2) of the QCA Act.
[6] Note that there is no definition of 'cost' in the QCA Act.

1.3 Summary of Aurizon Network's 2013 SUFA DAAU

Use of a trust

The use of a trust model has become the preferred SUFA model—assuming a certain tax treatment of the SUFA infrastructure, the trust model allows for the most tax-efficient method of funding an expansion project. Under Aurizon Network's 2013 SUFA DAAU, a trust is formed by Aurizon Network: (1) appointing a trustee in respect of the SUFA trust, and (2) subscribing for an ordinary unit in the trust. The trust is to be financed by access seekers purchasing preference units in it—the preference unit holders (PUHs) are to provide all trust funding.[7] As the ordinary unit holder, Aurizon Network has residual rights in the SUFA trust assets and will be the sole beneficiary of the SUFA trust once the PUHs' preference units are redeemed.

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

This framework is designed so that PUHs commit the funds required to develop an infrastructure project for an asset that will ultimately be owned by QTH, and maintained and operated by Aurizon Network. In return for this, PUHs receive, via the trust, a rental stream from the SUFA infrastructure. This cash flow, rather than the physical assets themselves, is the principal asset of the trust.

Life cycle of a SUFA asset

Aurizon Network has defined the life cycle of a SUFA asset by the following stages:[8]

- **Stage 1: Pre-closure phase**—Aurizon Network initiates its commercial and technical engagement with access seekers who are potential PUHs, including discussions on scope, procurement method, target cost and target budget.

  Indicative time duration: approximately 12 months to complete.

- **Stage 2: Completion and commencement phase**—execution of all SUFA documents is completed and initial funds are paid into the trust.

  Indicative time duration: approximately two months to complete, provided all documents are executed on a timely basis.

- **Stage 3: Project delivery phase**—this phase starts when all the agreements are executed and ends when the last segment[9] constructed becomes available.

  Indicative time duration: approximately two to three years.

- **Stage 4: Project delivery consolidation phase**—this phase starts when the last segment becomes available and ends when all outstanding construction issues have been addressed.

  Indicative time duration: approximately three to five years.

[7] The 2013 SUFA DAAU allowed for Aurizon Network to be a preference unit holder where it chooses to jointly fund the SUFA asset (referred to as hybrid funding).

[8] The timeframes outlined for each stage in the SUFA asset life cycle are based on discussions with Aurizon Network and should be viewed as a guideline if the process and construction run smoothly.

[9] A segment is a contiguous section of the network for which: capacity is required by an access seeker(s), construction is required either within that segment or outside the area of that segment to provide the capacity.

- **Stage 5: Revenue phase**—generally starts when rent is first due from Aurizon Network and ends when there is no further obligation to pay rent. This will generally overlap with stage 4.

  Indicative time duration: asset dependent, but could be up to 40 years.

- **Stage 6: End of life phase**—begins when the SUFA assets have a zero value in the regulated asset base (RAB) (zero value date). The Extension Infrastructure Sub-Lease (EISL) automatically terminates 12 months after the zero value date—which in turn terminates the SUFA agreements, except for the Trust Deed (TD) and the Subscription and Unit Holders Deed (SUHD).

  After the zero value date, Aurizon Network, acting as the ordinary unit holder, can direct the SUFA trustee to redeem all of the preference units. Once all preference units have been redeemed, the trust can be wound up by Aurizon Network (acting as ordinary unit holder).

  Indicative time duration: at least one year.

SUFA agreements and the parties involved

Aurizon Network's 2013 SUFA DAAU included nine interconnected template agreements covering funding, legal structures, lease tenures, construction and supporting matters (see Figure 1 for the SUFA suite of agreements). It contemplated the involvement of the following six parties:

- **Access seekers**—fund the construction of infrastructure by purchasing preference units in the SUFA trust (and subsequently become PUHs) and secure access rights by executing access agreements, as contemplated in each access seeker's Umbrella Agreement (UA)
- **SUFA trustee**—a trustee appointed by Aurizon Network in respect of the SUFA trust (with Aurizon Network as the ordinary unit holder and the PUHs as beneficiaries). The trustee is the principal under the SUFA construction agreements; leases SUFA infrastructure from QTH and subleases it to Aurizon Network (or owns the SUFA infrastructure and leases it to Aurizon Network in certain circumstances). The trustee also receives the rent and distributes it to the PUHs.
- **State of Queensland**—the ultimate owner of Aurizon Network's railway land. Consent is required from the State of Queensland for Aurizon Network to grant a land licence under the Rail Corridor Agreement (RCA); as such, the State is signatory to the Integrated Network Deed (IND).
- **Queensland Treasury Holdings (QTH)**—the ultimate owner of all infrastructure assets developed under a SUFA arrangement. QTH, as the lessor, agrees to a SUFA on a transaction-by-transaction basis. Where infrastructure assets are on the North Coast Line, the ultimate owner of the infrastructure assets is Queensland Rail (QR).
- **Aurizon Network**—performs the following roles in the context of SUFA: land owner (as lessee of the State of Queensland); funder/PUH[10]; ordinary unit holder of the trust; sublessee of SUFA infrastructure (or lessee, with the SUFA trustee as owner, in certain circumstances); project manager; access provider; and network operator.
- **Aurizon Holdings**—is the guarantor, as Aurizon Network's parent company, to QTH of the performance of Aurizon Network and the trust.

[10] Where Aurizon Network chooses to partially fund a SUFA (this is the hybrid funding option).

Figure 1 Aurizon Network's 2013 SUFA DAAU—parties and agreements

Agreement	Description	Queensland Treasury Holdings	State of Queensland	Aurizon Holdings	Aurizon Network	SUFA Trustee	User Funders
The Trust							
Trust Deed (TD)	Establishes the Trust with Aurizon Network as ordinary unit holder, permits the issue of preference units and appoints the Trustee				Yes	Yes	
Subscription and Unit Holders Deed (SUHD)	- Imposes obligations on access seekers to subscribe for preference units - Establishes the operational rules of the Trust whilst there are unredeemed preference units - Prevails over the Trust Deed if there is a conflict				Yes	Yes	Yes
Project Delivery and Land Access							
Project Management Agreement (PMA)	- Engages Aurizon Network as Project Manager - Identifies the terms and governance requirements under which this role is undertaken				Yes	Yes	
Rail Corridor Agreement (RCA)	- Provides a licence to the Trustee so that it can access Aurizon Network land and modify infrastructure - Identifies the terms and conditions associated with this right				Yes	Yes	
Leasing, Ownership and Rent							
Extension Infrastructure Head-lease (EIHL)	- Establishes the ownership and leasing terms and conditions for the SUFA asset between QTH, the Trust and Aurizon Network	Yes			Yes	Yes	
Extension Infrastructure Sub-lease (EISL)	- Establishes the sub-leasing terms and conditions for the SUFA asset between the Trust and Aurizon Network - Contractually defines the rental terms and conditions for Aurizon Network to pay rent to the Trust				Yes	Yes	
Access Rights and Tax Indemnity							
Umbrella Agreement (UA)	- Establishes that each preference unit holder or nominee will enter into an access agreement - Establishes that each preference unit holder will provide various tax indemnities				Yes	Yes	Yes
Agreement Termination and SUFA Asset Disposal							
Integrated Network Deed (IND)	- Governs the circumstances and process by which the QTH may dispose of SUFA assets following termination of the EIHL - Governs the disposition of any disposal proceeds if a disposal occurs	Yes	Yes		Yes	Yes	
Performance Standards							
Deed Poll Guarantee (DPG)	- Guarantees to QTH, Aurizon Network and the Trustee's performance of their obligations under the EIHL and IND - Indemnifies QTH against any losses it may incur due to a default of delay in the performance of these obligations			Yes			

2 LEGISLATIVE FRAMEWORK

This chapter sets out how we have applied our legislated obligations in making our final decision on the 2013 SUFA DAAU. Subsequent chapters and our final amended SUFA DAAU provide more specific analysis.

2.1 Part 5 of the QCA Act

Part 5 of the QCA Act establishes a third-party access regime to provide a legislated right for third parties to acquire services provided using significant infrastructure that is owned by a monopoly service provider. When the Bill to establish the QCA Act was introduced, the accompanying Explanatory Notes said:

> *The underlying rationale of creating third party access rights to significant infrastructure is to ensure that competitive forces are not unduly stifled in industries which rely upon a natural monopoly at some stage in the production process, especially where ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations.*
>
> *A key aspect of the market system is that an infrastructure owner is entitled to choose with whom it will deal. The threat of competitors providing substitutes constrains a seller's ability to charge excessive prices or otherwise restrict supply. However, in cases where these substitutes do not exist, a seller possesses significant market power. A seller may exercise its market power to increase its profit by restricting output because doing so enables the seller to increase its price.*
>
> *In cases of natural monopoly, one facility meets all of a market's demand more efficiently than a number of smaller and more specialised facilities. Accordingly, it is not socially desirable that the infrastructure comprising a natural monopoly be duplicated. At the same time, the absence of competition enables a natural monopoly infrastructure owner to extract excessive profits through exercising market power.*
>
> *This is especially the case where the business which operates the natural monopoly also has a commercial interest in upstream or downstream markets (for example a rail operator who also owns the track). Such a business may discriminate against its upstream or downstream competitors by offering access on more favourable terms and conditions than is offered to competitors. In this way, an owner of a natural monopoly is able to stifle competition in upstream or downstream markets.*
>
> *The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.*[11]

Declared service

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

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

As a result of this declaration, Aurizon Network (as the access provider for the service) and access seekers are subject to various rights and obligations under the QCA Act, including an obligation to negotiate access to the service in good faith (s. 100 of the QCA Act).

2.2 Assessment approach

On 22 July 2013, Aurizon Network submitted the 2013 SUFA DAAU for our approval. The 2013 SUFA DAAU replaces, in part, the 2012 DAAU that was withdrawn on the same date. The 2013 DAAU included the following documents that were also part of its 2012 SUFA DAAU:

- Explanatory Notes (as modified by submission letter dated 22 July 2013)
- Regulatory Notes
- Draft Amending Access Undertaking.

The pro forma SUFA agreements submitted as part of the 2013 SUFA DAAU replaced all the 2012 SUFA DAAU pro forma SUFA agreements. The Regulatory Notes comprise part of Aurizon Network's 2013 SUFA DAAU, and state in Part 2.1 of section 2 that the proposed SUFA arrangements have been submitted pursuant to section 142(1) of the QCA Act.

Section 142(1) of the QCA Act permits Aurizon Network, as owner and operator of a declared service, to voluntarily submit a draft amending access undertaking (DAAU), as a proposal to amend the approved access undertaking. We must then consider the DAAU and either approve it, or refuse to approve it (s. 142(2) of the QCA Act). In doing so, we must publish Aurizon Network’s submission and consider any comments on it.

Section 143 of the QCA Act outlines the factors affecting the approval of a DAAU. We may approve a DAAU only if we consider it appropriate to do so having regard to the matters in section 138(2) of the QCA Act.[12] If we refuse to approve the DAAU, section 142(3) of the QCA Act requires that we give Aurizon Network a written notice stating the reasons for the refusal and the way in which we consider it appropriate for Aurizon Network to amend the DAAU.

We acknowledge that we are not permitted to refuse to approve the 2013 SUFA DAAU simply because we consider a minor and inconsequential amendment should be made to the DAAU.[13]

This final decision on the 2013 SUFA DAAU is the culmination of an extensive regulatory process that has involved Aurizon Network withdrawing and resubmitting its proposed SUFA arrangements. Chapter 3 provides details of the regulatory process undertaken to date.

We note that, in considering this final decision, we have reviewed the 2013 SUFA DAAU applying the legislative criteria and relevant statutory processes taking into account:

- the 2013 SUFA DAAU submitted by Aurizon Network
- all submissions provided by Aurizon Network and stakeholders
- numerous meetings held with Aurizon Network and stakeholders to better understand the genesis of the 2013 SUFA DAAU and to explore options
- all information provided by Aurizon Network to further explain the 2013 SUFA DAAU and issues addressed by the documentation.

[12] Section 143(3) of the QCA Act allows the QCA to approve a DAU but only if the conditions in section 138(3) of the QCA Act are satisfied.

[13] Sections 138(5) and (6) of the QCA Act.

The remainder of this chapter sets out how we have applied the criteria listed in section 138(2) of the QCA Act, in making our final decision on Aurizon Network's 2013 SUFA DAAU as outlined in the relevant chapters.

2.3 Section 138(2) of the QCA Act

Section 143(2) of the QCA Act states that we may approve the 2013 SUFA DAAU only if we consider it appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act. The statutory factors guiding our decision-making process are set out in Box 1.

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

The QCA may approve the 2013 SUFA DAAU only if the QCA considers it appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act:

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

The 'object of this part' as referred to in section 138(2)(a) is set out in section 69E:

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

The pricing principles set out under section 168A are:

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

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

'Appropriate'

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

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

In considering whether the 2013 SUFA DAAU is appropriate, our approach has been that we are not compelled to make a decision that is the least onerous and restrictive, from the perspective solely of the regulated business. We are required to determine whether the 2013 SUFA DAAU is 'appropriate' by reference to the factors in section 138(2) of the QCA Act, these factors that have a focus which is wider than the perspective of the regulated business.

'Have regard to'

In making our decision on whether the 2013 SUFA DAAU is appropriate to approve, we must have regard to the factors in section 138(2) of the QCA Act.

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

As discussed further below, the QCA regards each factor as a fundamental consideration (in the sense of being a central element in the deliberative process) but other relevant considerations may warrant a particular decision being made (see s. 138(2)(h) of the QCA Act).

'Weight'

The factors listed in section 138(2) of the QCA Act, considered in light of the provisions of the 2013 SUFA DAAU, may, and indeed often will, give rise to competing considerations which need to be weighed in deciding whether it is appropriate to approve the DAAU. Some of the factors to which the QCA must have regard favour different conclusions.

Some examples of possible tensions are:

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

In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.[14] We consider that this approach applies here.

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

2.3.1 Object of Part 5

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act when deciding whether it is appropriate to approve a DAAU. The object of Part 5 of the QCA Act is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.[15]

Although the SUFA framework is specifically concerned with efficient financing (as discussed in Chapter 1), we consider that the ability to source efficient finance is directly related to the extent the expansion is considered to be efficient by prospective funders—which, in turn, depends on the reliability and quality of the information and analysis underpinning the expansion.

Further, in order to focus on expansions, our assessment of the 2013 SUFA DAAU regards the efficient operation of the existing CQCN infrastructure as given.[16] For avoidance of doubt, we consider economically efficient operational practices on the existing network a necessary condition for efficient expansion of the CQCN. Further, our view is that efficient operational practices can only be formulated if there is effective mine–port supply chain coordination that aims to maximise the productivity of coal production in Queensland.

Moreover, with a wider choice of financing alternatives, it is more likely that the most efficient financing option for a particular expansion will be revealed, thereby ensuring that access charges for both train operators and mining companies trend towards, or are at, the efficient level. As a result, competition in upstream and downstream markets is promoted due to the absence of inefficient access charges acting as a barrier to entry.

2.3.2 Legitimate business interests of Aurizon Network

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

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

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

- the commercial interest in recovering revenue for the service that is at least enough to meet the efficient costs in providing the relevant service and in earning a return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service
- a balanced risk position in the allocation of contractual risks and liabilities as between Aurizon Network and access holders
- appropriate incentives to maintain, improve and invest in the efficient provision of the facility to provide the declared service
- incentives to improve commercial returns, where these returns are generated from, for example, innovative investments or cost-efficiency measures.

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[15] Section 69E of the QCA Act.

[16] For avoidance of doubt, this should not be taken to mean that we necessarily consider the CQCN is operating efficiently or inefficiently. It is a simplifying assumption adopted for the purposes of our assessment of the 2013 SUFA DAAU.

The legitimate business interest of Aurizon Network is one of the factors to be weighed up by the QCA pursuant to section 138(2) of the QCA Act.

2.3.3 Public interest

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

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

Against this background, we consider that, amongst other things, consideration of the public interest is strongly related to the object of the third party access regime being met. As noted in section 2.3.1, we are of the view that the efficient expansion of the CQCN is a necessary requirement to meet the object of the QCA Act's third-party access regime. Further, efficient expansion of the CQCN requires, amongst other things, efficient financing.

In this context, we consider the development of an effective SUFA framework that provides competition to any Aurizon Network's financing proposal to be in the public interest. It provides a wider choice of financing alternatives, which is more likely to reveal the most efficient financing option for a particular expansion, thereby ensuring that access charges for both train operators and mining companies trend towards, or are at, the efficient level. As a result, competition in upstream and downstream markets is promoted due to the absence of inefficient access charges acting as a barrier to entry. Efficient access charges, other things being equal, also improve or maintain the competitiveness of Queensland's coal mining sector on the global market. This, in turn, provides positive benefits to Queensland's economy.

2.3.4 Interests of persons who may seek access

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

For the avoidance of doubt, we consider that section 138(2)(e) of the QCA Act encompasses the interests of train operators, as access seekers or potential access seekers. This is because the access arrangements in the CQCN provide for train operators to hold access rights in their own right, or provide train operations for access holders. We also consider that the rights of existing access holders are relevant under section 138(2)(h) of the QCA Act, to the extent they are not also access seekers under section 138(2)(e).

To assess the interests of access seekers (and holders) we have consulted extensively on Aurizon Network's 2013 SUFA DAAU proposals.[17] Chapter 3 outlines the specifics of the consultation process undertaken and the evolution of the SUFA documentation to date.

2.3.5 Effect of excluding existing assets for pricing purposes

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

Only prudent and efficiently incurred capital expenditure associated with a SUFA project should be included in Aurizon Network's regulatory asset base (RAB). The return on and of capital

[17] Public submissions are available on the QCA website.

associated with this aspect of the RAB is part of the rental stream received by SUFA funders in Aurizon Network's 2013 SUFA DAAU.

If an element of the capital expenditure incurred during the construction of the SUFA project is not considered to have been prudently and efficiently incurred, it is excluded from the RAB. If this occurs, the element of capital expenditure excluded from the RAB does not attract a rental stream. Our view is this aspect of Aurizon Network's 2013 SUFA DAAU proposals may have implications for both the SUFA documents and the undertaking itself, particularly the undertaking processes that underpin the development of capital projects.

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

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

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

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

The QCA considers the pricing principles to be fundamental considerations (in the sense of being a central element in the deliberative process), but that does not mean they have primacy over other considerations or that it is necessary for them to be 'complied with' in some absolute way. It is open to the QCA to consider other factors such as the object of Part 5 of the QCA Act, the interests of access seekers and holders, and the public interest (ss. 138(2)(a), (d), (e) and (h)).

The 2013 SUFA DAAU does not include explicit pricing proposals. Our view is the main concerns for the SUFA framework with respect to the pricing principles are:

- access charges include the efficient costs of a SUFA funded expansion
- a suitable process for pricing expansions exists.

Expansion pricing largely relates to the process of identifying whether the expansion should be socialised within a CQCN system and how volume risk is allocated. Given Aurizon Network's 2013 SUFA DAAU proposals, whether a SUFA project is socialised or not could have implications for the timing and volatility of SUFA rental returns. Moreover, the inclusion of the efficient costs of a SUFA-funded expansion within access charges relates, in part, to the issues discussed with respect to the exclusion of assets for pricing purposes.

2.3.7 Any other relevant matters

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

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

- whether the SUFA framework is workable, bankable and credible
- the interests of access holders, third party SUFA financers, QTH and the State of Queensland

- risk allocation reflecting the roles of the relevant parties
- suitability of the infrastructure
- sections 118 and 119 of the QCA Act
- the negotiate–arbitrate principle
- the 2014 DAU process.

A workable, bankable and credible SUFA framework

We consider our assessment of the 2013 SUFA DAAU should include having regard to whether the SUFA framework is workable, bankable and credible, which we describe in this context as follows:

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

Our view is that a SUFA framework that meets these criteria aligns with the object of Part 5 of the QCA Act. This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby removing barriers to entry and increasing the likelihood of the financing cost of the expansion being priced efficiently.

The interests of access holders, third party SUFA financers, QTH and the State of Queensland

Section 138(2)(e) of the QCA Act requires that we have regard to the interests of access seekers when considering whether to approve or refuse to approve Aurizon Network's 2013 SUFA DAAU.

We also consider it appropriate to account for the interests of access holders (to the extent they are not access seekers), SUFA financers, QTH and the State of Queensland when considering whether to approve, or refuse to approve, Aurizon Network's 2013 SUFA DAAU.

Access holders may be impacted by the SUFA framework and, as such, it is appropriate for us to have regard to their interests. Further, as noted in the previous section, we consider that a bankable SUFA framework should be capable of attracting third party funding. In order to achieve this, it is necessary for us to have regard to the interests of prospective third party SUFA financers. Finally, QTH and the State of Queensland are signatories to certain SUFA agreements and their interests should be considered.

Roles and risk allocation

The SUFA encompasses the areas of economics, construction, finance and law. This can result in the relevant parties to the SUFA taking on various roles and having responsibilities associated with these roles.

We consider it appropriate that risks, and the consequences thereof, are allocated across the parties in a manner that reflects the roles and responsibilities they have with respect to the SUFA framework. We are of the view that this reduces uncertainty and provides more transparent SUFA documents, which in turn enhances the workability of the SUFA framework.

Further, we also consider that it would be counter to the intent of the object of Part 5 of the QCA Act, if risk was not allocated in this manner. This is because the party most capable of mitigating a risk is the party that controls the risk, and has incentives to manage it. We consider that allocating risk in such a manner reduces the likelihood of costs being incurred in an imprudent and inefficient manner.

Infrastructure and the declared service

An expansion of the CQCN is undertaken for the purpose of increasing the capacity of the declared service. The infrastructure built to achieve this incremental capacity is not the end in itself and the infrastructure of itself does not define whether the expansion is ‘fit-for-purpose’. We consider that the capacity created by the infrastructure is a better indicator of whether the expansion is ‘fit-for-purpose’ because it is the demand for this service/good that necessitates the expansion.

Further, any access seeker that develops a business case that seeks to increase the capacity of the declared service does so on the expectation that the investment will provide it with a certain level of capacity over the lifespan of the investment. It is the delivery of this capacity that to a large extent defines whether the investment the access seeker is preparing to undertake constitutes an efficient use of resources. This is because the efficiency implications of an expansion that was expected to deliver an additional 100 units of declared service capacity for a given cost could be materially different to the efficiency implications if the expansion only delivers an additional 75 units of declared service capacity for the same cost.

In the context of the SUFA framework we consider that the risk/reward associated with the expansion being/not being ‘fit-for-purpose’ should sit with the party that has the role of contractor/constructor. This is because that party is best able to control and/or mitigate such risk. Our view is that the party undertaking this role in the SUFA framework should be unwilling to undertake the construction if it did not consider it ‘fit-for-purpose’ because the level of capacity expected was unachievable—the caveat being that if an independent dispute resolution process indicated that the level of capacity expected was achievable or could be exceeded, the party acting as contractor/constructor would undertake the construction and accept the decision of the dispute resolution process as binding.

Sections 118 and 119 of the QCA Act

Section 118(1)(d) of the QCA Act allows for an access determination to require an access provider to extend, or permit the extension of, the facility. However, section 119(2) of the QCA Act imposes limitations on the making of an access determination in those circumstances, including not making an access determination that:

(a) reduces the amount of service able to be obtained by the service provider

(b) results in an access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement

(c) requires an access provider to pay some or all of the costs of extending the facility.

Although these sections of the QCA Act are not triggered unless an access dispute arises, we consider them relevant for SUFA and expanding the network; they provide infrastructure owners with certainty in respect of the outcomes that may not be achieved when we make a determination in relation to an access dispute.

We do not consider that sections 118 and 119 of the QCA Act are intended to provide Aurizon Network with the ability to use its position as a monopoly provider of the declared service to pass on risk and costs associated with the roles and responsibilities it undertakes in the context of the SUFA framework. Our view is Aurizon Network is responsible for its actions and the consequences thereof with respect to the roles and responsibilities it has under the SUFA framework.

Negotiate–arbitrate model and primacy of commercial negotiations

The third party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation.

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

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

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

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

The 2014 DAU

The 2013 SUFA DAAU was submitted to us for consideration as an amendment to the 2010 AU and as such our assessment must be based on the 2010 AU. The 2010 AU is due to expire no later than 30 June 2016.

From 1 July 2016, a new undertaking (referred to as UT4) is expected to be in place based upon the 2014 DAU process. Our understanding is that Aurizon Network intends to incorporate any approved SUFA documentation arising from the 2013 SUFA DAAU process into UT4.

While we are required to ensure our final decision for the 2013 SUFA DAAU is assessed against the 2010 AU, we consider it would be pragmatic to also ensure our final decision provides for the SUFA framework to be used in UT4.

In order to meet these requirements, we have developed the SUFA documents associated with our assessment of the 2013 SUFA DAAU such that they are 'stand-alone' from a legal technical perspective. This means that it is possible for the SUFA documents to be used without recourse

to an undertaking; however, using the documents in such a way provides a less-balanced risk profile across the relevant parties to a SUFA transaction than if certain aspects of the 2010 AU are amended.

Of particular relevance in this regard are the processes underpinning expansions, capacity-related provisions, pricing of expansions, the care and maintenance of SUFA assets, and the process for including the capital costs of an expansion into the RAB. This final decision does not address these issues to a level of detail that extends to provision of revised drafting for the 2010 AU to complement the SUFA documents. Rather, where necessary, it provides our view on SUFA's implications for the 2010 AU and how we would envisage the SUFA framework working with the undertaking.

Our reason for adopting this approach is that these undertaking matters are being dealt with under the UT4 process. We do not consider it an appropriate use of the industry's resources to work on amendments to the 2010 AU in the context of the 2013 SUFA DAAU, given the 2010 AU is likely to be superseded in the near future. Only if it becomes apparent that this is not the case, will we focus on the 2010 AU amendments in the context of the SUFA framework.

3 ASSESSMENT PROCESS AND PROGRESS TO DATE

This chapter summarises the SUFA assessment and consultation process to date.

3.1 Timeline

The timeline, including the consultation process, for the SUFA is summarised in Table 1.

Table 1 Timeline of the SUFA assessment process

Date	*Event*
September 2010	The QCA releases final decision on Aurizon Network's 2010 AU.
December 2010	Aurizon Network submits its 2011 SUFA DAAU.
March 2011	Stakeholder submissions received on Aurizon Network's 2011 SUFA DAAU. Stakeholder discussions regarding moving towards a trust model.
April 2012	Aurizon Network withdraws its 2011 SUFA DAAU. Stakeholder discussions regarding moving towards a trust model.
December 2012	Aurizon Network submits its 2012 SUFA DAAU (based on a trust model).
February 2013	The QCA releases an issues paper on the 2012 SUFA DAAU.
July 2013	Stakeholder submissions received on the QCA issues paper. Aurizon Network withdraws its 2012 SUFA DAAU. Aurizon Network submits its 2013 SUFA DAAU.
August 2013	Stakeholder submissions received on Aurizon Network's 2013 SUFA DAAU.
December 2013	Reply submissions received on Aurizon Network's 2013 SUFA DAAU.
February 2014[18]	Correspondence between the QCA and Aurizon Network: • how to take the SUFA forward after QCA's engagement process with industry • continuing concerns regarding the 2013 SUFA DAAU being 'barely workable'.
June 2014	The QCA releases a position paper on the 2013 SUFA DAAU.
July 2014	Stakeholder submissions received on the QCA position paper.
September 2014	The QCA releases the SUFA document exposure drafts.
October 2014	The QCA releases the draft decision on the 2013 SUFA DAAU.
January 2015	Stakeholder submissions received on the QCA draft decision.
February 2016[19]	The QCA seeks comments on SUFA rental calculation examples.
April 2016	The QCA releases a position paper on the post-deregulation rental regime.

[18] Letter by the Chairman of the QCA to the CEO of Aurizon Network, dated 6 February 2014; letter in response from the CEO of Aurizon Network, dated 11 February 2014. Both letters are available on the QCA website.
[19] The gap between January 2015 and February 2016 reflects the refocusing of available industry resources towards the assessment of Aurizon Network's 2014 DAU.

Date	Event
May 2016	Stakeholder submissions received on the QCA position paper on post-deregulation rental regime.[20]
June 2016	QCA publishes the final decision on Aurizon Network's 2013 SUFA DAAU.

Elements of these events are considered in subsequent sections of this chapter. A working knowledge of the SUFA process and terminology adopted is assumed.

3.2 Developing the SUFA

3.2.1 First generation SUFA—the 2011 SUFA DAAU

The first generation of SUFA submitted to us for review in December 2010 consisted of a participation agreement and a construction agreement. The agreements were simple and straightforward, focusing on Aurizon Network as the constructor of infrastructure, and access seekers/holders making monthly payments to Aurizon Network during construction.

Negotiations took place between Aurizon Network and its stakeholders on this framework until April 2012 when Aurizon Network withdrew its 2011 SUFA DAAU. A particular concern identified was that a SUFA framework of this structure resulted in higher taxation costs than would be the case if Aurizon Network funded the project. This meant a SUFA framework of this form did not provide a competitive practical financing alternative to Aurizon Network.

Negotiations continued after the withdrawal on the development of a new user funding model based on a trust structure. In December 2012, Aurizon Network submitted its 2012 SUFA DAAU, a second-generation SUFA.

3.2.2 Second generation SUFA—the 2012 and 2013 SUFA DAAUs

The second generation of SUFA was developed based on a trust structure. The trust structure theoretically assisted in resolving the tax issues identified with the first generation SUFA. It required that PUHs committed funding to a trust required for the development of a particular infrastructure project. In return, PUHs received rights to a future rental cash flow. PUHs would not have ownership rights over the infrastructure constructed under the trust once completed.

It was anticipated that primarily larger mining companies would fund a SUFA project off-balance-sheet. It was acknowledged that smaller mining companies may lack sufficient funding or reserves to do so.

Both Aurizon Network and the QRC made significant investments in developing the framework to this point, with compromises being made on both sides of the negotiation. However, it was clear from submissions received on the 2013 SUFA DAAU that Aurizon Network and its stakeholders were not able to develop an effective SUFA framework. Of note, in August 2013, the QRC indicated that:

> *The SUFA Document structure is complex and difficult. If the SUFA Documents are amended as proposed by the QRC in this submission and the QRC Mark-up, it will provide, at best a barely workable framework through which mining companies may invest their own capital ...*[21]

[20] Stakeholders' submissions were received at the end of April 2016 and the beginning of May 2016. We have consolidated them as May 2016.

[21] QRC 2013b: 5.

Given the importance placed on the SUFA framework by stakeholders, we considered it prudent to undertake a further considered review of the existing SUFA framework, with a view to determining what changes were necessary, or possible, to produce a workable, bankable and credible SUFA. This review was undertaken in the final quarter of 2013 and the first quarter of 2014.

3.2.3 Repositioning of the SUFA

As part of our review we engaged Grant Samuel as financial advisors to provide us with commercial advice on whether the 2013 SUFA DAAU would be an attractive investment. We set out to investigate specifically whether the SUFA was workable, bankable and credible, in the following context:

- **Workable**—the SUFA documents achieve the intended outcome and can be executed by all parties without negotiation if necessary (i.e. they are sufficiently clear and certain and provide an appropriate allocation of risk).
- **Bankable**—third party financing (that has recourse only to the SUFA assets and rights) can be obtained to fund SUFA. This requires a high level of confidence that the expected returns will be delivered and that the asset will be appropriately operated and maintained over its life cycle. If the SUFA is not financeable through third-party debt and equity markets, its utility is limited to those users with the financial capacity to absorb the risk associated with the SUFA.
- **Credible**—the SUFA structure does not create such risks and uncertainties for users and potential financiers, or overlay such unnecessarily high transaction, tax or finance costs on an expansion project, that the SUFA can never be a credible alternative to Aurizon Network undertaking the expansion itself.[22]

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

Grant Samuel worked with the QCA and our legal advisors, Clayton Utz, to propose amendments allowing for the SUFA framework to become workable, bankable and credible. We considered that achieving a workable, bankable and credible SUFA framework would require change, as well as compromise between Aurizon Network and stakeholders, and that we would be required to commit to change aspects of our processes.

In light of this, in February 2014 the QCA's Chairman wrote to Aurizon Network's CEO outlining the high-level issues that, in the view of the QCA, required resolution to obtain an effective SUFA. It was also noted that unless there was confidence in Aurizon Network's willingness to work with the QCA to reach solutions to the issues identified, it was unlikely that the QCA's assessment of the 2013 SUFA DAAU could result in an effective SUFA being approved. This letter was circulated to both the QRC and Queensland Treasury Holdings (QTH). In its response, Aurizon Network considered that there was value in continued constructive engagement between the QCA, Aurizon Network and other relevant parties, including the QRC and QTH.

[22] Grant Samuel 2014: 2.

3.3 QCA position paper

3.3.1 QCA position paper

In May 2014 we released a position paper to inform parties of our views on the way in which we considered the 2013 SUFA DAAU could be amended to become workable, bankable and credible. Our position paper proposed that the trust structure be maintained and assumed that the tax outcome associated with this would be realised. We also proposed a package of measures designed to work together to:

- simplify the SUFA documents
- ensure roles and responsibilities of the parties were clearly defined
- ensure the existing processes were fit-for-purpose for an environment in which a SUFA applies.

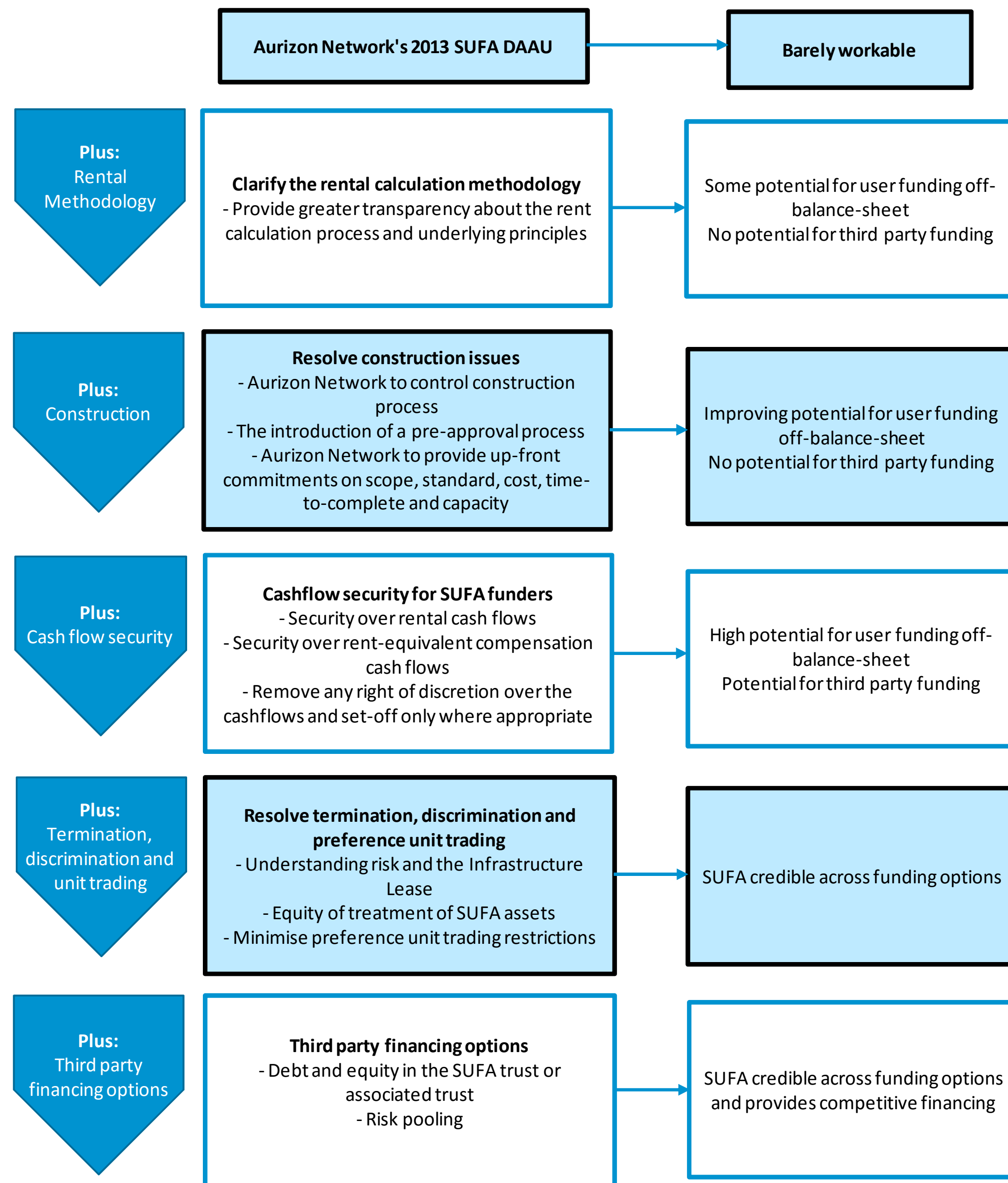
A summary of some of our proposed amendments appears in Table 2 and Figure 2.

Table 2 QCA proposed amendments

Matter	*Proposed change*
Security and certainty over cash flows We considered there was not sufficient security over rental cash flows.	To provide certainty and security over cash flows we proposed: • clarification of rental calculation method • mandatory distribution of cash flows • limitation of set-off for non-material fluctuations in the rental stream • provision of security over the rental cash flows • provision of security over the rent-equivalent compensation cash flows.
Construction, the expansion process and preapproval We considered the construction process in the 2010 AU and the Project Management Agreement (PMA) of the 2013 SUFA DAAU should be refined in order to: • ensure risk is allocated to the party best able to manage it • provide greater certainty regarding what is delivered via a capital project • provide greater certainty regarding the treatment of capital costs.	**Construction** We proposed Aurizon Network should have control of the construction of a SUFA project. We also proposed it should: • provide transparent up-front commitments to construct the infrastructure as efficiently as possible across the dimensions of scope, standard, cost and time to complete • build (as infrastructure planner, asset constructor and operator of the network) a SUFA project to an agreed range of capacity outcomes. **Expansion process** We proposed major capital projects should be subject to an expansion process capable of delivering feasibility studies to a level of accuracy required to provide up-front commitments—which satisfy the needs of Aurizon Network (as infrastructure provider), third party financiers and user funders. **Preapproval process** We proposed a preapproval process in order to reduce/remove optimisation risk for users and financiers.
Maintenance of SUFA assets We considered that any participant in a SUFA has the right to expect that the	We proposed to broaden the existing condition based assessment process in the 2010 AU.

Matter	*Proposed change*
infrastructure invested in is appropriately maintained.	
Third party financing and risk assessment	We considered a structure should be put in place allowing SUFA funders to assess any termination risks associated with Aurizon Network's Infrastructure Lease with QTH. We also considered there should be minimum restrictions on preference unit trading.

Figure 2 Steps required to obtain a workable, bankable and credible SUFA



Our position paper was accompanied by:

- terms sheets for each of our proposed SUFA agreements
- a discussion paper from Grant Samuel.

We received six stakeholder submissions from parties including: Anglo American, Asciano, Aurizon Network, BHP Billiton Mitsubishi Alliance (BMA), Glencore and the QRC. Generally, stakeholders supported the positions we proposed in the position paper and term sheets; a number of stakeholders also made submissions on how our proposals could be amended to reach a better outcome.

3.3.2 Stakeholders' submissions on the QCA position paper

The table below is a high-level summary of stakeholders' submissions on our May 2014 position paper.

Table 3 High-level summary of stakeholders' submissions

Matter	*Aurizon Network*	*Other stakeholders*
Rental methodology	Agreed with the clarification and simplification of the rental calculation method.	Stakeholders agreed with proposals to simplify rental calculations and provide certainty over cash flows.
Construction, expansion process and preapproval	Agreed with inclusion of a construction agreement with Aurizon Network in control of construction and with a preapproval process for capital expenditure and proposed adoption of lump-sum pricing for the construction agreement. Aurizon Network proposed we adopt the method of treatment of capacity shortfalls included within the expansion process developed under the UT4 process.	Agreed on moving to a construction agreement with Aurizon Network to control construction, but noted there may be an incentive for Aurizon Network to game up-front commitments on scope, standard and time to complete a project.
Cash flow security	Agreed to security over cash flows provided Aurizon Network does not suffer adverse consequences. Agreed to remove the ability of the ordinary unit holder to direct the trustee to withhold distributions from preference unit holders.	There should be ranking of security over rental cash flows. Distributions from the trust should be mandatory—it should not be at the discretion of the ordinary unit holder.
Termination, discrimination and unit trading	Agreed with the removal of stapling[23] in both construction and operation phases given a passive trustee and use of a construction agreement. Agreed to provide further understanding of the risks around infrastructure leases, including provision of redacted version of existing infrastructure leases with the Queensland government in a data room. Aurizon Network proposed that it not be obliged upon termination to pay a SUFA trust the amount, if any, by which the net present value (NPV) of its expected rentals exceeds its share of infrastructure disposal proceeds.	Most stakeholders agreed preference units should not be stapled to access rights.

[23] Stapling means that a SUFA funder must hold both preference units and access rights, or that the parties holding preference units and access rights have shared ownership. Stapling effectively creates a constraint on who can own preferences units.

Matter	*Aurizon Network*	*Other stakeholders*
Third party finance options	Any party is eligible to fund given a passive trustee and use of a construction agreement. Agreed with the concept of debt in the trust, provided Aurizon Network (as ordinary unit holder) is not disadvantaged. Aurizon Network proposed any changes to the Subscription and Unit Holders Deed (SUHD) and Trust Deed (TD) as a result of third party finance options be treated in the same way as other template agreements, which are only varied by agreement.	The pool of parties eligible to participate in a SUFA should be broadened. Broad agreement with the concept of debt in the trust , but recommended further thought should be given to ways in which finance could be provided to the trust.
Tax	Agreed to support: • statutory solution for severance • Aurizon Network seeking an administratively binding advice (ABA) from the Australian Tax Office (ATO) in respect of the standard SUFA document • Aurizon Network seeking a Private Binding Ruling (PBR) for each SUFA project • Aurizon Network to have a tax indemnity.	Tax matters require further attention—notably comment from QRC and Anglo American on the trust's ability to claim tax depreciation.

3.4 QCA draft decision

In the lead-up to our draft decision, we published exposure drafts of the SUFA agreements on our website to inform interested parties of our thinking at that time and to elicit the views of interested parties. We welcomed written submissions on the exposure drafts and noted willingness to meet with and discuss matters with interested parties.

Our draft decision was released on 31 October 2014. The SUFA agreements released with the draft decision included amendments made to reflect discussions and submissions in respect of the exposure drafts. Subsequent to that, we received five submissions on our draft decision, which were from Anglo American, Asciano, Aurizon Network, the QRC and Vale.

3.4.1 Aurizon Network's submission on the QCA draft decision

In its submission, Aurizon Network noted:

- Its ability to support a voluntary form of SUFA would be determined by the extent of risk it can commercially accept, noting it is not obliged (by the QCA Act) to accept costs related to the extension of a facility.
- It may choose to accept certain costs and risks in the SUFA template in order to facilitate the economically efficient development of the CQCN.

- It is prepared to negotiate with the relevant access seekers, changes to the approved SUFA template's risk allocation to reflect the particular needs of those access seekers and/or project issues.[24]

Aurizon Network also noted that it understood the QCA was seeking to engage with stakeholders throughout the 2014 DAU process to flesh out the details on the following:

- the expansion process
- capacity guarantees
- discrimination
- preapproval process for prudency of scope, standard and cost.

Given this, and the low likelihood that an expansion project would be pursued in the near future, Aurizon Network said it would not be in any stakeholder's interest to divert time and resources to develop extensive drafting changes to the 2010 AU. Rather, Aurizon Network proposed:

- the inclusion of approved SUFA template documents
- the inclusion of a requirement that Aurizon Network submit further 2010 AU drafting changes by a 'sunset date'.[25]

Table 4 is a high-level summary of Aurizon Network's submission in addition to the matters listed above. Matters will be discussed further in the content-specific chapters to follow.

Table 4 Aurizon Network's comments on the QCA's draft decision[26]

Matter	***Agreement***	***Disagreement***
Rental methodology	Aurizon Network agreed that the rental calculation methodology under current regulatory regime is reasonable, and simplified examples should be included in the SUFA documentation.	Aurizon Network disagreed that access charges should be predetermined in the event that SUFA assets are no longer declared.
Construction	Aurizon Network agreed to: • the adoption of a construction agreement based on a standard form • providing up-front commitments, as the contractor, with respect to scope, standard, cost and time to undertake.	Aurizon Network disagreed with: • providing a capacity guarantee for a SUFA project and taking on the risk of providing a capacity guarantee • aspects of the draft decision construction agreement and proposed various changes.
Cash flow security	Aurizon Network agreed to the inclusion of a specific security agreement and the direction to pay arrangements as set out by the QCA.	Aurizon Network disagreed with the removal of set-off provisions for immaterial non-rental amounts and non-rental material liabilities. Aurizon Network considered this would expose it to the credit risk of the trust and preference unit holders, each of which may be of low credit standing.

[24] Aurizon Network 2015a: 4.
[25] Aurizon Network 2015a: 5.
[26] Aurizon Network 2015a: 5–7.

Matter	*Agreement*	*Disagreement*
Termination, discrimination and unit trading	Aurizon Network agreed: • to the disclosure of redacted copies of the Infrastructure Lease during negotiation of a SUFA transaction (subject to the consent of the lessor and entering into a confidentiality deed) • with the removal of stapling preference units to access rights. • with the removal of Aurizon Network's priority rights to bid for preference units being disposed of (subject to it still being able to bid for such units in equal priority to other bidders).	Aurizon Network disagreed with the assumption of uncapped liability in respect of its actions under the Infrastructure Lease.
Tax	Aurizon Network agreed that: • the ability of the trust to claim tax depreciation must be tested. • statutory severance is required. • efficiently incurred costs of seeking an ABA should be included in the operating costs.	Aurizon Network considered the need for it to require a tax indemnity remains. The proposal to seek an ABA in respect of the approved SUFA template and PBRs in respect of each SUFA transaction does not eliminate all of Aurizon Network's tax risk.
Liability	Aurizon Network agreed with the proposed treatment of limitation of liability (subject to particular exceptions).	Aurizon Network disagreed with: • the proposed treatment of consequential loss. Aurizon noted it did not volunteer to accept this risk, which is potentially of great magnitude • the proposed exclusion of OPRA.
Inclusion of SUFA capital costs into the RAB		Aurizon Network disagreed with the obligation that it should act in the interests of the SUFA trust.

3.4.2 Other stakeholders' submissions on the QCA draft decision

Other stakeholders expressed support to our draft decision to not approve the 2013 SUFA DAAU. Stakeholders considered it important for an effective SUFA to be developed, with Vale considering:

> *the development of a credible and efficient investment framework to be one of the most critical objectives for the future competitiveness of the Queensland coal industry.*[27]

While Anglo American regarded SUFA as 'essential for the future operation of the Queensland coal industry', it also said that SUFA should not operate as a replacement for mandatory expansion requirements.[28]

Broadly, stakeholders considered it important for SUFA to:

- provide certainty for financiers looking to invest in a SUFA project

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[27] Vale 2015: 1.
[28] Anglo American 2015: 2–3.

- ensure there are appropriate protections against potential discrimination by Aurizon Network
- provide appropriate allocations of risk and limitations of liability between the parties of a SUFA transaction.

Stakeholders noted our approach for potential changes to the access undertaking related to SUFA (e.g. an expansion process) be considered as part of the 2014 DAU assessment process, as opposed to the 2010 AU. Vale supported this approach due to the likely efficiencies to be gained, although it considered that 'acceptance of changes to the 2014 DAU should not be negotiated against the SUFA arrangements as it relates to the 2010 AU.'[29]

The table below is a high-level summary of stakeholder submissions. Summaries of more detailed matters will be included in relevant chapters below.

Table 5 Stakeholders' comments on the QCA's draft decision

Matter	*Agreement*	*Disagreement*
Rental methodology	Stakeholders did not object to the proposed rental calculation methodology under the existing regulatory arrangements. Stakeholders supported preserving existing SUFA contracts in the event the relevant infrastructure becomes de-regulated (unless otherwise agreed by parties).	
Construction	Stakeholders agreed with use of a more standard construction agreement, as well as providing Aurizon Network with more control over construction process.	The QRC disagreed with aspects of the draft decision construction agreement and recommended a number of changes.
Cash flow security	Stakeholders agreed with our draft decision that, as drafted, Aurizon Network's SUFA does not provide security or certainty over cash flows and without these, third party financing is not viable and SUFA cannot function effectively.	
Termination, discrimination and unit trading	Anglo American indicated general support for our draft decision in respect of termination of SUFA contracts. Stakeholders supported removal of the requirement for the stapling of preference units and access rights. Stakeholders supported allowing Aurizon Network to bid for preference units, but without any right of first refusal.	The QRC reserved its assessment of the reasonableness of the termination provisions, as it considered Aurizon Network's Infrastructure Lease should be made available for industry to consider now as part of the 2013 SUFA DAAU assessment process (rather than during negotiation of a SUFA transaction).
Tax	The QRC made the following comments regarding tax: • Issues arising from the use of debt financing are best considered on a case-by-case basis. • An appropriate form of statutory severance is required. • If the tax indemnity for Aurizon Network is to remain, there should be further carve outs from the tax indemnity to ensure appropriate coverage.	

[29] Vale 2015: 2.

Matter	*Agreement*	*Disagreement*
	• It sought confirmation that the QCA's drafting suitably strengthens the trust's ability to establish itself as the owner of tax depreciation. • It would like to see further definition of roles and responsibilities amongst parties seeking ABAs and PBRs. • The tax indemnity for QTH is inappropriate and is likely to be unattractive for third party investors.	
Liability	Stakeholders generally agreed with our approach in the draft decision with respect to liability and risk allocation. Stakeholders also supported the exclusion of OPRA.	

3.5 Rental calculation examples

Subsequent to the draft decision, we also published for stakeholders' comment:

- an excel spreadsheet model of the annual calculation of SUFA rents under various scenarios, designed to show how rental streams vary with changes to volumes and revenue cap adjustments—a document describing calculations in the model, as well as a description of the scenarios, was also published
- an excel spreadsheet model illustrating the month-to-month rental cash flows between Aurizon Network and the trust over the period of a year—a document describing calculations in the model, as well as a description of the scenarios, was also published.

We did not receive any comments from stakeholders on these examples.

3.6 QCA position paper on post-deregulation rental regime

In April 2016, we released a position paper regarding post-deregulation SUFA rental streams.

In response, we received two submissions, which were from Aurizon Network and the QRC.

3.7 Our final decision approach

The process of developing SUFA and the assessment of the 2013 SUFA DAAU has been lengthy. This reflects both the complexity of the underlying issues and a greater industry focus on finalising the UT4 process (to replace the 2010 AU) since 2015.

We consider the assessment process up to this final decision has been undertaken with considerable consultation with industry at each point in the SUFA development cycle. This has afforded interested parties with the opportunity to put their views and proposals forward.

Further, we are of the view that despite the cooperative approach taken across the industry, there still remain a number of issues which industry has not been able to resolve in the context of the assessment criteria outlined in section 138(2) of the QCA Act. This final decision focuses on these matters and should be read in conjunction with the SUFA documents. This final decision also assumes a working knowledge of Aurizon Network's 2013 SUFA DAAU, and our position paper and draft decision regarding the 2013 SUFA DAAU.

The main matters discussed in this final decision are set out as follows:

- Chapter 4: SUFA structure, undertaking and access undertaking
- Chapter 5: Rental method

- Chapters 6 and 7: Construction
- Chapter 8: Security and financeability
- Chapter 9: Termination
- Chapter 10: Discrimination
- Chapter 11: Preference unit transfers
- Chapter 12: Third party finance
- Chapter 13: Tax
- Chapter 14: RAB inclusion and other Extension Project Agreement (EPA) issues
- Chapter 15: Operating and performance risk allowance (OPRA)
- Chapter 16: Liability

4 SUFA STRUCTURE, UNDERTAKING AND ACCESS AGREEMENTS

Since Aurizon Network submitted its 2013 SUFA DAAU, the structure and underpinning ethos of the SUFA framework has undergone further changes (see Chapter 3 regarding the assessment process and progress to date). As a consequence, our draft decision pro forma SUFA documents are significantly different from those in the 2013 SUFA DAAU.

Besides that, while the 2013 SUFA DAAU was submitted under the 2010 AU, the assessment process has overlapped with the separate process of approving the replacement undertaking of the 2010 AU (referred to as the UT4 process). The UT4 assessment process has considered provisions required to support the SUFA framework.

Against this background, our final decision proposes:

- *to adopt the draft decision pro forma SUFA documents as the baseline for further proposed amendments, rather than the those submitted as part of the 2013 SUFA DAAU*
- *to focus our assessment on the pro forma SUFA agreements, and seek to amend the 2010 AU only if it becomes apparent the UT4 process will not be complete by a sunset date.*

4.1 Background

Aurizon Network's 2013 SUFA DAAU was submitted under the 2010 AU. It contained nine interconnected template agreements, and was contemplated they would involve six parties.

While the pro forma SUFA documents have been designed to be able to operate in the absence of an undertaking, the processes and provisions within an undertaking can be developed to support/complement the SUFA framework. In this context, the 2010 AU is due to expire no later than 30 June 2016, and the assessment process of the 2013 SUFA DAAU has overlapped with the separate process of approving the replacement undertaking (referred to as the UT4 process).

In response to our position paper, Aurizon Network said as there were no expansion projects in the pipeline, it questioned the need to pursue amendments to the 2010 AU (in light of UT4).[30] Aurizon Network also recognised the need to retain and incorporate the work done to date by all parties into the UT4 process. Aurizon Network suggested that one possible way forward was for it to withdraw the 2013 SUFA DAAU submitted under the 2010 AU and re-submit as part of the UT4 process—keeping the opportunity open for the QCA to prepare its own version of the SUFA if UT4 is not approved by a certain date.

4.2 QCA draft decision

4.2.1 Structure of the pro forma SUFA documents

Our draft decision proposed a suite of pro forma SUFA documents comprising 12 interconnected template agreements, involving nine parties. This structure and the roles played by various parties differed from Aurizon Network's 2013 SUFA DAAU proposals. Figure 3 summarises the purpose of the relevant pro forma SUFA agreements in our draft decision. This can be compared with Figure 1 in Chapter 1, which outlines Aurizon Network's 2013 SUFA DAAU proposals.

[30] Aurizon Network 2014b: 36.

Figure 3 QCA draft decision proposed SUFA arrangements—parties involved and applicable agreements

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

4.2.2 Our consideration of the SUFA under UT3

In our draft decision, we agreed with Aurizon Network's comments on our position paper that all work done to date should be retained and incorporated into the UT4 process. We also noted we could not pre-judge when the transition to the new undertaking developed under the UT4 process would happen. Therefore, it was necessary for us to consider SUFA as part of the 2010 AU. We considered a decision made by us on this matter would need to result in a SUFA framework that is workable, bankable and credible, and that if the undertaking did not allow for a potential user, or funder, to 'make SUFA happen', we would consider the SUFA had not fulfilled those objectives.[31]

Further, our draft decision did not attempt to directly address the required amendments to the 2010 AU needed to complement the proposed SUFA arrangements. Rather, our draft decision focused on the suite of pro forma SUFA documents. We did, however, indicate, primarily in the context of construction, an interim position on how aspects of the undertaking could be amended to accommodate the proposed SUFA framework. This was a high-level discussion.

4.2.3 SUFA and access agreements

As part of our draft decision, we proposed the creation of the Access Agreement Specific Terms Deed (AASTD) as one of the suite of pro forma SUFA documents. The AASTD incorporates elements of Aurizon Network's 2013 SUFA DAAU Umbrella Agreement (UA). It sets out the requirements for parties to enter into an access agreement related to a SUFA project.

Further, we were also of the view all new access agreements, not just those specifically related to SUFA assets, should include a 'direction to pay' feature, to enable Aurizon Network to require an access holder to pay access charges to a nominated third party or nominated account.[32] We noted this would require amendment of the standard access agreement. We considered this amendment to the standard access agreement would be considered further as part of the UT4 process.

4.3 Stakeholders' submissions on the QCA draft decision

4.3.1 Structure of the pro forma SUFA documents

Stakeholders' comments were directed at the overarching policy positions and corresponding detailed provisions within the draft decision pro forma SUFA documents. These are discussed throughout the subsequent chapters and appendices of this final decision.

4.3.2 Our consideration of the SUFA under UT3

Aurizon Network commented the QCA's draft decision had discussed a number of proposals in very high-level terms and without sufficient detail for Aurizon Network to gain a reasonable understanding of the QCA's vision for these matters, including:

- the expansion process
- a complex 'capacity guarantee'
- the availability of various capacity guarantee options

[31] QCA 2014n: 84–85.

[32] Chapter 5 of this final decision discusses the direction to pay in relation to the rental method.

- an arrangement by which Aurizon Network is to accept a liability to pay costs to 'rectify/compensate for any capacity shortfall'
- discrimination
- a preapproval process for prudency of scope, standard and cost of capital expenditure projects and the scope of the associated Construction Agreement.

Aurizon Network noted it was not in a position to respond comprehensively to the QCA's proposals. Aurizon Network said it understood the QCA was looking to engage with stakeholders throughout the 2014 DAU process to flesh out, among other things, these proposals. Aurizon Network also noted there was a very low probability that an expansion project would be developed to the point it would benefit from SUFA prior to the commencement of UT4.

In light of this statement, Aurizon Network proposed its DAAU make the following two changes only to the 2010 AU:

- the inclusion of the approved SUFA template documents, as resolved through the 2013 SUFA DAAU process
- the inclusion of an obligation on Aurizon Network to submit to the QCA further 2010 AU process provisions, to address the access undertaking issues identified in the QCA's final decision on the 2013 SUFA DAAU by a sunset date (being a date sometime after the currently expected approval date for the 2014 DAU).[33]

Aurizon Network proposed that in the event it failed to submit a further DAAU to the 2010 AU by the sunset date, or if the QCA failed to approve a DAAU (which would reflect the outstanding requirements of the QCA's final decision on the SUFA DAAU), then the current provisions in the 2010 AU allowing the QCA to develop its own version of the SUFA and amendments to the access undertaking would be re-enlivened.

Aurizon Network proposed the following clause be included in the 2010 AU:

> *(a) Aurizon Network agrees to submit a DAAU to the Undertaking by [insert sunset date] (Sunset Date) to reflect any outstanding changes to the 2010 AU required to comply with the QCA's final decision on Aurizon Network's SUFA Draft Amending Access Undertaking*
>
> *(b) Clause 7.6 of this Undertaking ceases to apply unless:*[34]
>
> > *(i) Aurizon Network fails to submit a DAAU as contemplated by paragraph (a) by the Sunset Date; or*
> >
> > *(ii) the QCA refuses to approve the DAAU addressing the requirements of the QCA's final decision on Aurizon Network's SUFA Draft Amending Access Undertaking.*

Aurizon Network also noted that appropriately defined terms would be included in the 2010 AU in the context of this clause.

Aurizon Network commented the adoption of this approach would allow the SUFA template documents to be locked down under the 2013 SUFA DAAU process and the associated access undertaking provisions to be developed as part of the UT4 process, without the diversion of time

[33] Aurizon Network 2015a: 11.

[34] Clause 7.6 of the 2010 AU relates to the QCA's ability develop its own SUFA, and amendments to the 2010 AU.

and resources to the development of 2010 AU amendments that would be short-lived or redundant. [35]

4.3.3 SUFA and access agreements

The QRC raised a number of issues and detailed drafting queries with respect to the AASTD included with our draft decision.[36]

Aurizon Network supported considering the inclusion of a 'direction to pay' feature into the standard access agreement as part of the 2014 DAU assessment process.[37]

4.4 QCA analysis and final decision

4.4.1 Structure of the pro forma SUFA documents

We note stakeholders' comments related to the overarching policy positions and the corresponding detailed provisions within the draft decision pro forma SUFA documents, with these documents being used as the benchmark to propose alternative drafting. We also note the draft decision suite of pro forma SUFA documents is significantly different from Aurizon Network's 2013 SUFA DAAU pro forma documents.

In light of this, our final decision proposal is to refuse to approve the suite of pro forma SUFA documents included within Aurizon Network's 2013 SUFA DAAU. These will be replaced with the draft decision pro forma suite of SUFA documents as the starting point from which to develop our final decision.

Our view is this better reflects the evolution of the suite of pro forma SUFA documents. It provides a clear and transparent base point from which to develop the detail of our final decision proposals. We consider this in the interest of all prospective parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 4.1

(1) After considering Aurizon Network's 2013 SUFA DAAU suite of pro forma SUFA documents, our final decision is to refuse to approve the entire suite of pro forma SUFA documents in the 2013 SUFA DAAU.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to adopt the draft decision suite of pro forma SUFA documents as the base point for any subsequent amendments proposed in this final decision.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.4.2 Our consideration of the SUFA under UT3

We agree with Aurizon Network that, given the UT4 process and the fact no expansions of the CQCN are imminent, the amendments considered necessary to the 2010 AU, in the context of the

[35] Aurizon Network 2015a: 11–12.
[36] QRC 2015: 3–13.
[37] Aurizon Network 2015a: 50–51.

SUFA framework, are not an immediate priority and would likely be superseded by the UT4 process.

In light of this, our final decision proposal is that Aurizon Network should amend the 2010 AU to:

- require the inclusion of the final decision pro forma SUFA documents in the 2010 AU, as resolved through the 2013 SUFA DAAU process
- include an obligation on Aurizon Network to submit to the QCA further 2010 AU process provisions, to address the 2010 AU requirements to support the SUFA framework and pro forma SUFA documents, by a sunset date (being a date chosen by Aurizon Network that is sometime after the current expected approval date for the conclusion of the UT4 process)
- include a clarification that if, by the sunset date, Aurizon Network fails to submit a further DAAU in relation to the 2010 AU provisions required to support the SUFA framework and the pro forma SUFA documents, or if, by the sunset date, the QCA refuses to approve the relevant DAAU, then the current provisions in the 2010 AU allowing the QCA to develop its own version of SUFA and relevant amendments to the 2010 AU will be enlivened.

Our final decision proposal differs slightly from Aurizon Network's suggestion. This is because we are not of the view the QCA should provide a list of issues it has identified and that responding to this list should be the form of Aurizon Network's obligation. We consider experience to date in developing the SUFA framework suggests any up-front attempt to identify all relevant issues will, in all likelihood, be found wanting. We consider this is illustrated in our discussion on the assessment process and progress to date (Chapter 3).

As such, we do not consider it in the interests of the potential parties to a SUFA transaction for the scope of this specific task to be defined in advance by the QCA (ss. 138(2)(b), (e) and (h) of the QCA Act). For avoidance of doubt, this does not preclude discussion between Aurizon Network, stakeholders and the QCA about the necessary amendments to the 2010 AU after the final decision on the 2013 SUFA DAAU is published. Our view is in the event it becomes necessary to amend the 2010 AU, to account for the SUFA framework, such discussion is likely required and beneficial.

The amendments we consider appropriate are outlined below.

Final decision 4.2

(1) After considering Aurizon Network's 2013 SUFA DAAU, our final decision is to refuse to approve the amendments proposed for the 2010 AU.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to remove all proposed 2010 AU amendments and replace them with a clause in the 2010 AU which:

- **(a) includes the final decision pro forma SUFA documents in the 2010 AU, as resolved through the 2013 SUFA DAAU process and our final decision**
- **(b) requires Aurizon Network to submit to the QCA by a sunset date (being a date chosen by Aurizon Network that is sometime after the current expected approval date for the conclusion of the UT4 process) further 2010 AU process provisions to support the SUFA framework and the pro forma SUFA documents**
- **(c) clarifies that if, by the sunset date, either Aurizon Network fails to submit a further DAAU in relation to 2010 AU provisions required to support the SUFA framework and the pro forma SUFA documents, or the QCA refuses to approve the relevant DAAU, the current provisions in the 2010 AU allowing the QCA to develop its own version of SUFA and relevant amendments to the 2010 AU will be re-enlivened.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Given the above, the focus of this final decision on Aurizon Network's 2013 SUFA DAAU is the pro forma SUFA documents. In certain areas, such as in respect of the SUFA construction agreement, we have described various processes that may be included within the 2010 AU. This is to provide context for various proposals regarding the pro forma SUFA documents.

4.4.3 SUFA and access agreements

We note that, in contrast to any other stakeholders, the QRC has raised a number of issues and detailed drafting queries with respect to the draft decision AASTD. Given the nature of these queries, they are discussed in Appendix A of this final decision.

5 RENTAL ARRANGEMENTS

The right to receive rent from Aurizon Network is the primary asset of the SUFA trustee and, by extension, preference unit holders (PUHs). For SUFA assets to attract funding from access seekers and third-parties, it is critical that there is clear and transparent information about the rental arrangements. How the rent is calculated and paid is outlined in Schedules 2 and 3 of the 2013 SUFA DAAU Extension Infrastructure Sub-Lease (EISL).[38]

In broad terms, our final decision proposals are:

- *to adopt the rent calculation methodology for the existing regulatory regime, as per our draft decision EISL, subject to our final decision proposals on Aurizon Network's Operating and Performance Risk Allowance (OPRA)*
- *to include the existing rent example documents/spreadsheets published on our website in addition to the suite of pro forma SUFA documents for illustrative purposes, subject to our final decision proposals on OPRA*
- *to require that the implications of changes to the regulatory regime are at the risk of the parties to a SUFA transaction, noting the consultation and natural justice requirements of the QCA Act*
- *to require the process for the calculation of SUFA rental streams, in the event the CQCN is no longer declared, be redrafted by Aurizon Network in a manner that reflects the requirements of our final decision proposals.*

5.1 Background

Under the 2013 SUFA DAAU EISL, the SUFA trustee subleases the SUFA infrastructure to Aurizon Network, and in return, Aurizon Network is required to pay rent to the SUFA trustee. To facilitate this, the EISL sets out a direction-to-pay mechanism for 'linked' access agreements[39], where under these access agreements Aurizon Network can direct the access holders to pay a portion of the access charges directly to the SUFA trustee. In normal circumstances, the aggregate amount of the access charges which Aurizon Network directs to be paid to the SUFA trustee will be sufficient to meet its rent obligations for a particular month.

Briefly, the process set out in the 2013 SUFA DAAU EISL is as follows:

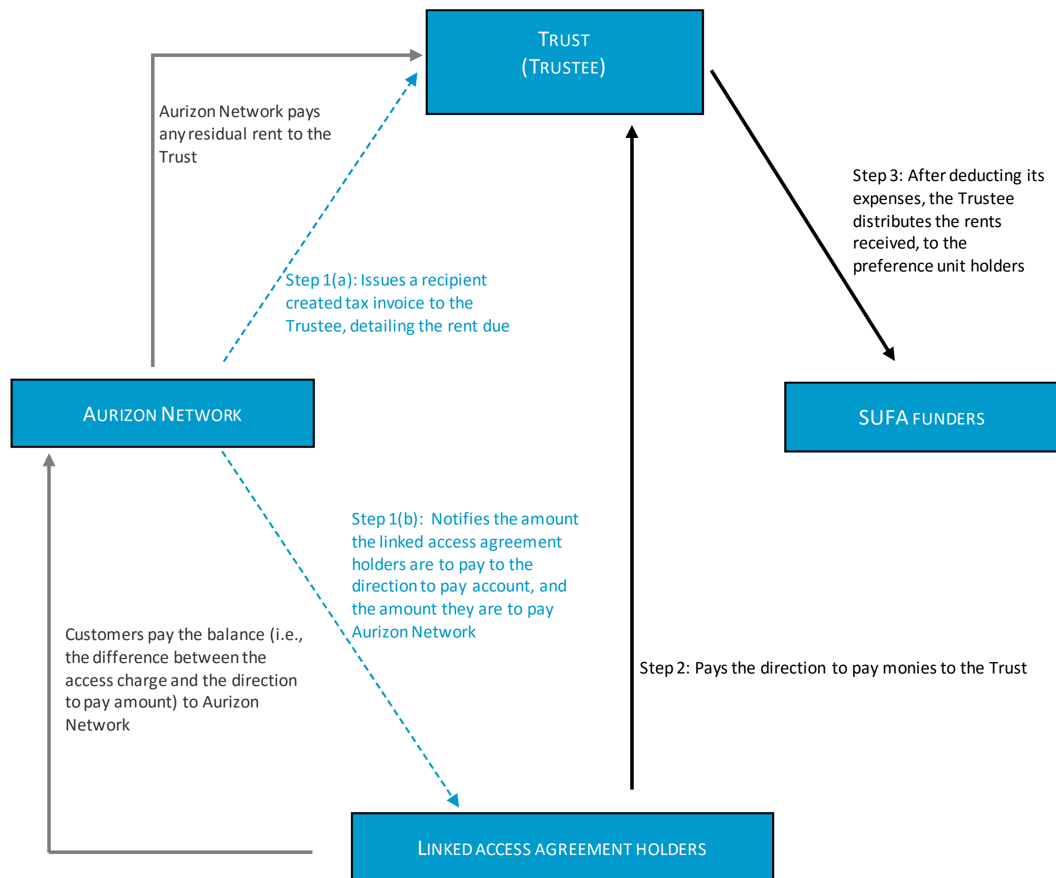
- Aurizon Network sends monthly invoices to all access holders, with direction-to-pay notices sent to linked access agreement holders.
- Once the SUFA trustee receives the rent (from the linked access agreement holders and any residual rent from Aurizon Network), it distributes the rent to the PUHs—minus SUFA trustee costs (including tax).

Figure 4 shows the steps involved in the rent flow process.

[38] These are schedules 1 and 2 in the draft decision EISL.

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

Figure 4 Flow of rent to the PUHs



The 2013 SUFA DAAU EISL specifies how this rent is to be calculated. Schedule 2 of the EISL outlines the objectives underpinning the rent calculation methodology in the respective scenarios where the CQCN is regulated and unregulated (i.e. the CQCN is no longer a declared service). Schedule 3 sets out the rent calculation methodology based on the regulatory principles currently in place.

Clause 10.4 of the 2013 SUFA DAAU EISL provides for a party to request a variation to the rent calculation methodology in Schedule 3, if that party considers the methodology no longer satisfies the objectives specified in Schedule 2.

The subsequent sections set out our assessment of the rental arrangements under the 2013 SUFA DAAU EISL:

- in the regulated environment
- in the unregulated environment.

5.2 Rental arrangements in the regulated environment

5.2.1 Aurizon Network's proposal

Under the 2013 SUFA DAAU EISL, the objective underpinning the rental calculation in the regulated environment in Part 1 of Schedule 2, and the rental calculation methodology in Schedule 3 of the 2013 SUFA DAAU EISL, are based on the concept of the system allowable revenue (SAR). The SAR is applied in the calculation of reference tariffs under the 2010 AU.

5.2.2 QCA draft decision

Rent calculation under the existing regulatory regime

We formed the preliminary view the objective underpinning the rent calculation in the regulated environment in Schedule 2, and the rent calculation methodology in Schedule 3, of the 2013 SUFA DAAU EISL were reasonable. These broadly correspond to the provisions set out in Schedules 1 and 2 of our draft decision EISL.

However, we also agreed with the QRC's view that the rent calculation methodology under the existing regulatory regime was complex. We considered there would be benefit in providing numerical examples of how rent was calculated. This included developing examples:

- of the rent calculation process for month-on-month under- and overpayment
- outlining the role that revenue cap adjustments and volume forecast re-sets would play with respect to calculating rent and maintaining the value of the flow of the rental stream on a NPV basis, such that the value of the SUFA assets in the RAB are recovered.[40]

Rent calculation if the regulatory regime changes

Both our position paper and draft decision noted that changes to the regulatory regime impact the risk profile facing the SUFA trust and Aurizon Network. In the draft decision, we discussed two potential regulation-related changes that may influence the stability and certainty of the rental cash flow—moving from a revenue cap to a price cap; and methodological and parameter assumption changes under a revenue or price cap.

We said any potential changes to the regulatory regime would be considered by parties entering into a SUFA arrangement. We would expect such parties to undertake an evaluation of the level of regulatory risk involved, the extent to which it may be mitigated and the degree to which there is an opportunity to influence an outcome. We noted that any SUFA funders would be expected to be involved in the review and consultation process associated with any changes to the existing regulatory regime.

5.2.3 Stakeholders' submissions on the QCA draft decision

Rent calculation under the existing regulatory regime

The QRC noted our commitment to work with Aurizon Network to develop example spreadsheets and conduct a review of the schedules in the EISL underpinning the rent calculation methodology.[41]

Aurizon Network said it accepted the inclusion of simple examples of rental calculations in the SUFA documentation, with the qualification the examples would only be for illustrative purposes and would not govern the legal interpretation of a SUFA transaction.[42]

Rent calculation if the regulatory regime changes

No comments from stakeholders were received specifically regarding the rent calculation if the regulatory regime changes.

[40] These examples were published on the QCA website and were developed in collaboration with Aurizon Network. Stakeholders' comments were requested.
[41] QRC 2015: 31.
[42] Aurizon Network 2015a: 13.

5.2.4 QCA analysis and final decision

Rent calculation under the existing regulatory regime

As noted above, we released the following for stakeholder review and comment:

- annual rental calculation model and associated write-up
- monthly rental calculation model and associated write-up.

In the context of the existing regulatory regime, these examples sought to capture the underlying workings of the rental calculation process and its interaction with the drafting of the EISL.

Stakeholders have not provided any comments on these examples. In the absence of any view to the contrary, we are of the view these examples appropriately reflect how the rental calculation process would work, in the context of the existing regulatory regime. Given this, we consider these examples should be published on our website in addition to the suite of SUFA pro forma documents, for illustrative purposes only.

Further, we continue to consider the drafting in our draft decision EISL, with respect to the objective underpinning the rent calculation methodology in the regulated environment in Schedule 1, and the rent calculation methodology in Schedule 2, to be broadly reasonable, in the context of the regulatory regime.

An exception to this relates to references concerning the OPRA. Our final decision proposes that the concept of an OPRA be removed from the pro forma SUFA documents and examples. This is discussed further in Chapter 15 of this final decision.

Overall, with respect to rent under the regulatory regime, our final decision is—subject to our position regarding the OPRA—to adopt the EISL drafting within the draft decision and publish on our website the rental examples, and associated write-ups, in addition to the suite of pro forma SUFA documents, noting they are for illustrative purposes. We consider our final decision proposals:

- facilitate an appropriate and reasonable rental stream be provided to the SUFA trustee under the existing regulatory regime
- provide sufficient transparency of the rent calculation methodology under the existing regulatory regime.

Our view is this is in the interests of those parties to a SUFA transaction, which include Aurizon Network and prospective SUFA funders (access seekers and/or third party funders) (ss. 138(2)(b) (e) and (h) of the QCA Act). Further, to the extent possible, we consider that our proposals support the bankability of the SUFA framework.

In light of this, we consider our final decision consistent with the object of Part 5 of the QCA Act (ss. 69E and 138(2)(a) of the QCA Act). This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Rent calculation if the regulatory regime changes

In our view, the risk of potential changes to the regulatory regime should be considered by parties prior to entering into a SUFA transaction. We would expect such parties to undertake an evaluation of the level of regulatory risk involved, the extent to which it may be mitigated and the degree to which there is an opportunity to influence an outcome. We note all relevant parties,

including PUHs, are afforded the opportunity to be involved in the review and consultation process associated with any proposed changes to the existing regulatory regime. In light of this, while we consider the EISL should be as clear as possible regarding what would happen to SUFA rental streams if the regulatory regime changed, it is not possible to specify all outcomes.

In this context, clause 9.4 of the draft decision EISL provides for a party to propose revisions to the rent calculation methodology in Schedule 2 of the draft decision EISL, if this methodology is no longer considered to align with the rent calculation objectives in Part 1 of Schedule 1 of the draft decision EISL. If this arises, the parties to a SUFA agreement must negotiate a new rent calculation methodology (that fits with the objectives of Part 1 of Schedule 1 of the draft decision EISL), with referral to the QCA (by default) or a third-party expert (if the QCA declines the referral or the parties agree to a third party expert instead of the QCA) for determination if negotiation fails.

Against this background, we consider the objective underpinning the rent calculation methodology in the regulated environment, as per Part 1 of Schedule 1 of the draft decision EISL, reasonable.

In light of the above, our final decision proposes to adopt our draft decision in this regard. We consider our final decision proposal appropriate, having regard to the factors in section 138(2) of the QCA Act. Our view is, in the context of a change to the regulatory regime (other than the regulatory regime ceasing to apply or exist), the proposed rental objectives provided in Part 1 of Schedule 1 of the draft decision EISL would facilitate developing a revised methodology to ensure PUHs obtain an appropriate rental stream.

This is because prior to executing a SUFA transaction, all relevant parties are provided with a transparent understanding of the approach to be adopted if the existing regulatory regime changes (but regulation continues to apply). Further, they are able to participate in the consultation process associated with any changes to the existing regulatory regime and have recourse to dispute resolution. We consider this appropriately addresses the interests of those parties to a SUFA transaction, which include Aurizon Network and prospective SUFA funders (access seekers and/or third-party financiers) (ss. 138(2)(b), (e) and (h) of the QCA Act).

Further, to the extent possible, we consider this supports the bankability of the SUFA framework and is consistent with the object of Part 5 of the QCA Act (ss. 69E and 138(2)(a) of the QCA Act). This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 5.1

(1) After considering Aurizon Network's 2013 SUFA DAAU EISL, our final decision is to refuse to approve the drafting with respect to the rent calculation methodology in a regulated environment.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU EISL is to adopt the draft decision EISL drafting, subject to the following amendments:

(a) the requirements regarding OPRA, as described in Chapter 15

(b) the inclusion of the rent calculation examples and associated write-ups for illustrative purposes only (subject to the requirements regarding OPRA described in Chapter 15); the finalised examples are to be developed by Aurizon Network and the QCA and will be based upon the existing examples on the QCA website.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.3 Rental calculation in the unregulated environment

5.3.1 Aurizon Network's proposal

Aurizon Network's proposals for the calculation of SUFA rental streams in the event the CQCN is no longer a declared service (i.e. is unregulated) are provided in Part 2, Schedule 2 of the 2013 SUFA DAAU EISL.

Under Aurizon Network's proposals, following CQCN deregulation, the integrated Aurizon entity (referred to as Aurizon in this specific section, to reflect the 2013 SUFA DAAU EISL) would provide the SUFA trustee a share of Capital Revenue attributable to each Section[43], on the basis that would have applied, had Aurizon earned that Capital Revenue, and the prevailing regulatory regime immediately prior to deregulation (i.e. Final Regulatory Regime) continued to apply.

The 2013 SUFA DAAU EISL indicates that in the unregulated environment Aurizon's customers would either have an access agreement or a CITS agreement. An access agreement relates solely to the provision of below-rail access, while a CITS agreement relates to a bundled set of services that comprise below-rail access and other services (e.g. freight services).[44] The 2013 SUFA DAAU EISL specifies the pricing regime following deregulation must be no more favourable (to the customer) in respect of user-funded or Aurizon-funded assets.

Against this background, the 2013 SUFA EISL specifies the Capital Revenue attributable to each Section (which would be shared between Aurizon and the SUFA trustee) is the sum of:

- access revenue earned from access agreements; and
- a share of the revenue earned from CITS agreements (Notional Access Revenue);

less Aurizon's operating and maintenance costs of providing access to that Section.

Notional Access Revenue attributable to a Section is equivalent to the lesser of:

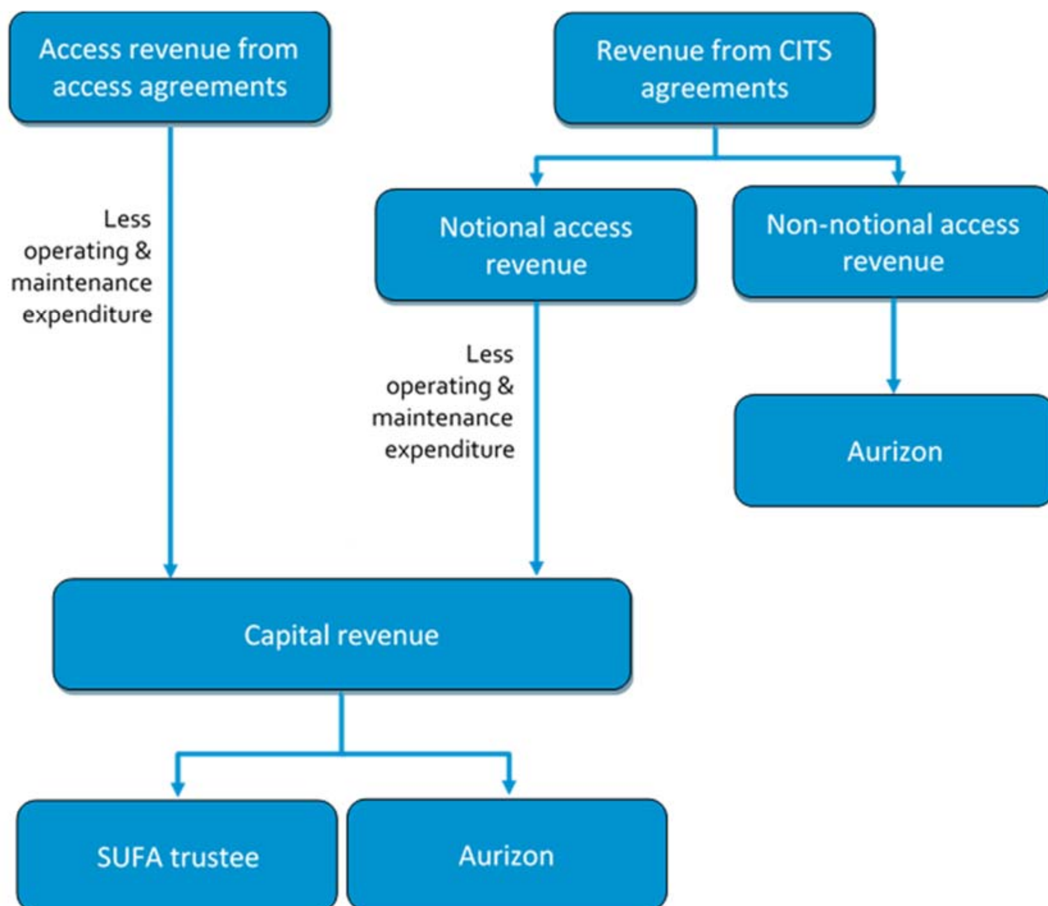
[43] A Section (under the 2013 SUFA DAAU EISL) refers to the rail infrastructure between two points where Aurizon provides a customer with access. SUFA infrastructure could be part of a Section.

[44] CITS agreements are not permitted under the existing regulatory regime in the CQCN.

- the access revenue that would have been allowable to Aurizon in respect to that Section at the time of provision of the CITS, had the prevailing regulatory regime immediately prior to deregulation continued to apply; and
- the revenue received by Aurizon (or any related body corporate providing the CITS) for the provision of the CITS in that Section less the relevant Determined Other Transportation Costs[45] in respect of that Section.

Based on our understanding, this process is summarised in the simplified diagram below.

Figure 5 Allocation of revenue in the unregulated scenario under the 2013 SUFA DAAU



Through applying this process and set of definitions, Aurizon would obtain an estimate of Capital Revenue for below-rail access. The Capital Revenue estimate is that element of the revenue stream for a Section left, once all other costs have been accounted for. A proportion of Capital Revenue would be allocated to any relevant SUFA infrastructure and associated SUFA trustee, based on the proportion it would have received if the Final Regulatory Regime had continued to apply.

[45] The term Determined Other Transportation Costs is defined in the 2013 SUFA DAAU EISL as the costs other than below-rail costs incurred by Aurizon (or any related body corporate providing the CITS) in providing the CITS that would have been avoided had it not provided the CITS, including operating and administrative costs, and an appropriate allowance for the capital costs (depreciation and return on assets).

In terms of the ability of a SUFA trustee to challenge Aurizon's application of this process, Part 2, Schedule 2 of the 2013 SUFA DAAU EISL contains a drafting note regarding the development of a special dispute resolution process.

5.3.2 QCA draft decision

Our draft decision noted advice from Grant Samuel that Aurizon Network's proposed post-regulatory rent objective did not provide certainty over rental cash flows. We considered this circumstance would detract from the bankability of the SUFA framework.

Our draft decision proposed the SUFA framework should allow:

- for parties to remain on their regulated contract (under s. 95 of the QCA Act), given neither party is materially disadvantaged
- the linked access agreements for SUFA assets to include a schedule setting out access charges in the event an asset is no longer declared.

We noted examples of infrastructure services in Queensland, including the Abbot Point Coal Terminal and the Sunwater pipelines, where access is provided in an unregulated environment. In these instances, prices for access are negotiated and typically reflect a 'building block' approach for determining charges.[46]

5.3.3 Stakeholders' submissions on the QCA draft decision

Anglo American agreed the most likely scenario of deregulation would be where the QCA has recommended revocation of the declaration.[47] It also noted Part 5 and section 250 of the QCA Act could be repealed, in the absence of the QCA's recommendation. In addition, Anglo American said there may not necessarily be effective competition even if the private profitability test is satisfied (leading the QCA to recommend revocation).

Anglo American said it supported our draft decision that SUFA contracts should remain in place as a regulated agreement, in the scenario where the CQCN is deregulated.[48] This is because both the funding users and Aurizon Network would be entering into long-term SUFA contracts based on a certain commercial structure, and significant investment decisions would be based on this understanding. Anglo American stressed this should be the default position (that is, the commercial arrangements would continue unless both parties agree to change the arrangements). It said this would ensure that, in situations of deregulation where there is no effective competition, the funding users would not be put in a situation where they are forced to accept a new arrangement.

The QRC noted it had previously commented if the CQCN ceased to be regulated, certainty of continuity of rent would be essential.[49] The QRC also noted it agreed with the following QCA suggestions:

- the SUFA to allow both parties to remain under the regulated contract

[46] The way Aurizon Network's access charges and allowable revenue are set in the existing regulatory regime reflects a building block approach.
[47] Anglo American 2015: 3.
[48] Anglo American 2015: 3.
[49] QRC 2015: 31.

- the SUFA to allow for linked access agreements for SUFA assets to include a schedule setting out access charges in the event an asset is no longer declared.[50]

Aurizon Network disagreed with our position on the rental calculation in the unregulated environment. Its responses are summarised in the table below.

Table 6 Aurizon Network's comments on the post-deregulation rental calculations

QCA draft decision	*Aurizon Network's response*
Aurizon Network's proposals for the post-deregulation rental calculations would not provide certainty over rental cash flows.	Aurizon Network disagreed with our position, as it considered its proposed rent objective would provide as much certainty as possible to address an uncertain future environment.[51] Aurizon Network considered certainty over rental streams following deregulation cannot be documented now since the economic and commercial environmental at the time of deregulation would be different from today's environment.
The SUFA should allow for parties to remain under the regulated contract post-deregulation.	Aurizon Network agreed and noted the existing approved forms of access agreements under the 2010 AU would already allow for their continued existence following deregulation.[52]
The SUFA should allow for linked access agreements to include a schedule setting out access charges in the event that an asset was no longer declared.	Aurizon Network disagreed on the basis of the following: (a) Protection of the trust already exists—the 2013 SUFA DAAU EISL contains provisions allowing either party to initiate negotiations following deregulation if the determination of rent does not achieve the post-deregulation objective. (b) The QCA's role in regulating access ceases once the relevant service ceases to be declared. (c) The QCA's approach is unworkable and has material adverse impacts on Aurizon Network as follows: (i) There is an increased likelihood access charges would not be appropriate for the period following deregulation. (ii) The QCA Act does not allow the QCA to make an access determination now that has the effect of setting long-term access charges that differ from the reference tariff. (iii) The 'regulated contract' does not include the prescription of future access charges with a schedule to an access agreement. (iv) In the event of adverse market conditions, the predetermination of access charges may have significant implications for competition in downstream markets or the viability of above rail operators. (v) In most circumstances, the access charges under linked access agreements will not relate exclusively to SUFA assets.[53]

Upon consideration of stakeholders' comments and undertaking further assessment, our view was the draft decision proposals were unworkable. This was because the proposal to set out access charges in linked access agreements in the event the asset is no longer declared was not

[50] QRC 2015: 31.
[51] Aurizon Network 2015a: 13–14.
[52] Aurizon Network 2015a: 14.
[53] Aurizon Network 2015a: 15–16.

practical, because, in broad terms, the third party access regime in the QCA Act does not apply to the assets if they are not declared. It also related to our view there was a need to further consider the implications of the ability to bundle services in a post-deregulation environment. In light of this, we published a supplementary position paper considering the SUFA rental methodology in the event the CQCN is undeclared.

5.3.4 QCA position paper on the rental methodology if the CQCN is undeclared

In April 2016, we released a brief position paper, in which we considered:

- the relationship between CITS agreements, the QCA Act and SUFA security arrangements
- the potential implications of Aurizon Network's proposals in Part 2, Schedule 2 of the 2013 SUFA DAAU EISL
- possible alternatives to Aurizon Network's proposals in Part 2, Schedule 2 of the 2013 SUFA DAAU EISL.

The relationship between CITS agreements, the QCA Act and SUFA security arrangements

We considered in the event the CQCN is no longer a declared service, the protections afforded to SUFA rental streams via section 95(c) of the QCA Act are likely weaker than initially anticipated in the draft decision. This is because section 95(c) of the QCA Act may not have any force with respect to CITS-type agreements. We considered an integrated Aurizon entity would likely have an incentive to make bundled services more favourable than purely below-rail services, in its product offering to customers. Under such circumstances, customers would likely exit their access agreement (signed with Aurizon Network) and enter into a new CITS-type agreement.

Further, the security requirements included as part of our SUFA draft decision documents referred to the linked access agreements ('security' relates to the rental income arising from these access agreements). Under such drafting, the security arrangements would not appear to extend to CITS-type agreements. We considered that for the security arrangements to be effective, they should apply to both CITS-type agreements and access agreements.[54]

The potential implications of Aurizon Network's proposal

We considered Aurizon Network's 2013 SUFA DAAU proposals would likely provide an integrated Aurizon entity with complete discretion over the revenue (effectively the value) it attributed to below-rail services should the CQCN no longer be declared, for the following reasons:

- The pricing of the individual services offered by an integrated Aurizon entity need not be cost reflective.
- The decision of what constitutes a Section[55] in the unregulated scenario is at the discretion of an integrated Aurizon entity. If, for instance, the CQCN, immediately prior to deregulation, was split into systems (as in the case under the existing regulatory system) the access revenue attributable to each system would be calculated. A Section, however, does not need to correspond to the systems. In such circumstances, our view was it was unclear how an integrated Aurizon entity would calculate the access revenue that would have been attributable to a Section under the Final Regulatory Regime.[56]

[54] This is discussed further in Chapter 8 in relation to security.

[55] As defined in Schedule 2 of Aurizon Network's 2013 SUFA DAAU EISL.

[56] This is significant to the transparency of the derivation of revenue streams under Aurizon Network's proposals, particularly Notional Access Revenue.

- The process of cost allocation to obtain an estimate for the Capital Revenue associated with the below-rail service lacks transparency. The definitions and assumptions adopted appear to be at the discretion of the integrated Aurizon entity.

Our view was, if the amount of rent an integrated Aurizon entity has to pay SUFA funders is directly related to the Capital Revenue attributed to below-rail services, it may have an incentive to downgrade the value it places on below-rail services in its product portfolio, in order to reduce SUFA rental payments. A possible effect is that Capital Revenue attributed to below-rail services may not reflect the true value of these services to an integrated Aurizon entity's business, in a post-deregulation industrial structure that allows for bundling of services. Despite the implications for SUFA funders' rental streams, the only recourse SUFA funders have is an unspecified special dispute resolution process.

Against this background, we considered Aurizon Network's proposals would provide SUFA funders with very little or no certainty over SUFA rental streams, in the event the CQCN declaration expires or is revoked.

Alternative options for calculating SUFA rental streams if the CQCN is not a declared service

In light of this, we noted there was benefit in considering the development of alternative options. Our position was this could be guided by the following:

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

In the position paper, we identified four possible alternative options, noting:

- We considered it possible more than one option could exist if the CQCN declaration expires or is revoked.
- We had intentionally not considered the precise detail of each option, because this would need to be agreed once it became apparent the CQCN declaration was going to expire or be revoked.

The options outlined in the position paper were:

(1) Negotiate an outcome—an integrated Aurizon entity and the SUFA trustee could negotiate an agreed rental stream, subject to an appropriate dispute resolution mechanism being included in the SUFA documents.

(2) Pay out SUFA funders—an integrated Aurizon entity could pay out the SUFA trustee, where the value of the pay-out could be the net present value of the notional rental stream calculated for the specific SUFA.

(3) Pay SUFA funders a defined rental stream—an integrated Aurizon entity could pay a defined monthly rental stream through time to the SUFA trustee, where the notional rental stream calculated for the specific SUFA could be adopted.

(4) Pay SUFA funders a variable rental stream related to the CQCN return on assets—where the SUFA rental streams would vary depending upon the financial performance of the CQCN as a whole.

We considered the fourth approach would avoid attempts to allocate costs in an environment where the prices attached to specific services need not be cost-reflective. Further, by focusing on the CQCN as a whole, the fourth approach would not provide an incentive to appropriate the value attributable to the below-rail service to other services.

We also requested that stakeholders provide any other options they may consider relevant.

5.3.5 Stakeholders' submissions on the QCA April 2016 position paper

Aurizon Network's submission to our April 2016 position paper is summarised in the table below.

Table 7 Aurizon Network's comments on the April 2016 position paper

Issue	*Aurizon Network's comment*
Regulatory process considerations	Aurizon Network identified two specific issues regarding process.[57]
QCA's role in respect to rental arrangements post-deregulation	Aurizon Network considered the QCA has no power to make decisions in relation to periods following CQCN deregulation.[58] Aurizon Network said its proposed post-deregulation arrangements for SUFA were included on a voluntary basis, and it did not volunteer to accept any alternative arrangements.
QCA's assessment of Aurizon Network's proposals	Aurizon Network said the QCA had misunderstood its proposed post-deregulation arrangements for SUFA, and accordingly had not considered the proposal appropriately.[59] In contrast to the QCA's view, Aurizon Network considered its proposed EISL would not provide it with complete discretion over the value attributed to below-rail services, and a key reason was that a binding expert determination would be provided for under its proposals. While the full drafting of the dispute resolution process was not provided, Aurizon Network said the process would be fully consistent with the general approach to dispute resolution taken for SUFA as a whole (for example the process under the Extension Project Agreement (EPA)).
'Core Rent Concept'	Aurizon Network considered its proposed post-deregulation arrangements for SUFA were consistent with the 'Core Rent Concept', where the rent payable to the SUFA trustee always equals the return on assets funded by the trustee.[60] By contrast, Aurizon Network considered the QCA's view—that the best estimate of a notional benchmark SUFA rental stream is the rental stream prior to deregulation—was unreasonable and inconsistent with the 'Core Rent Concept' because the business circumstances must have changed to trigger deregulation.
Options proposed by the QCA	Aurizon Network did not agree the rental stream prior to deregulation should be adopted as the starting point for rental arrangements post-deregulation.[61] For that reason, it did not agree that post-deregulation it should be required to pay out PUHs or provide them with a defined rental stream based on the rental stream prior to deregulation. It also considered that negotiating an outcome (one of the alternatives in the QCA position paper) would, in the absence of any dispute guidance framework to place limits around any binding expert decision, reduce certainty for all parties involved.

[57] Aurizon Network 2016: 13. These are considered in section 5.3.7 of this chapter.
[58] Aurizon Network 2016: 4.
[59] Aurizon Network 2016: 5.
[60] Aurizon Network 2016: 9.
[61] Aurizon Network 2016: 10–12.

Issue	Aurizon Network's comment
	Aurizon Network noted the QCA's fourth option—Aurizon Network would pay the PUHs a variable rental stream related to the CQCN return on assets—would effectively provide the same return for both above-rail and below-rail assets.[62] It considered this would overstate the return allocated to below-rail assets. Aurizon Network considered its proposed arrangements are based on a more realistic business model, it noted: *[I]n circumstances where revenue is inadequate to meet the long-run avoidable costs of both above-rail and below-rail activities, the above-rail activity will only provide train services if it receives revenue equal to its long-run avoidable costs, since otherwise it will deploy its assets elsewhere. The below-rail activity has no ability to deploy its assets elsewhere and will receive the balance of revenue after the above-rail activity has received the portion of revenue equal to its long-run avoidable costs … The validity of this economic model is demonstrated by the difference in returns to above-rail and below-rail operations on the intermodal rail railway between Perth and east coast of Australia.*[63] Aurizon Network said two out of the four QCA options would provide less certainty to SUFA funders than its proposed post-deregulation rental arrangements.

In contrast to Aurizon Network, the QRC emphasised the importance to SUFA investors of clarity regarding post-deregulation revenue streams.[64] It said Aurizon Network's proposal would:

- create uncertainty for SUFA funders
- provide for Aurizon Network to retain any revenue from SUFA assets, which is in excess of that which would have applied under the Final Regulatory Regime
- pass risk to SUFA funders, when the SUFA assets are deemed to earn less than under the Final Regulatory Regime.

The QRC did not consider it appropriate that Aurizon Network capture upside from SUFA assets, while not being exposed to risk.[65] It supported the three guiding principles as set out in our position paper for developing alternative options to Aurizon Network's proposals.

Its comments on our proposed alternatives are as follows:

Table 8 QRC's comments on the April 2016 position paper

QCA's proposed alternative	QRC's view
Negotiate an outcome	The QRC considered this option should allow parties to negotiate at/around the time at which the CQCN ceases to be declared, rather than at the time of entering into a SUFA transaction.[66] It also said the workability of this option is dependent on effective and balanced dispute resolution processes, and the SUFA document should provide guidelines for the expert regarding the basis on which the rental stream should be determined. It considered the guidelines could include the QCA's proposed guidelines as set out in the position paper, and reference to one or more alternative options for determining the revenue stream.

[62] Aurizon Network 2016: 12.
[63] Aurizon Network 2016: 12.
[64] QRC 2016: 1.
[65] QRC 2016: 1.
[66] QRC 2016: 1.

QCA's proposed alternative	QRC's view
Pay out SUFA funders	The QRC considered this would be a reasonable approach only if Aurizon Network accepted (in the SUFA agreements) an obligation to pay out the SUFA funders based on a formula specified within the agreements.[67] Otherwise, providing Aurizon Network with an option to pay out the SUFA funders would provide it with upside benefits but no risk.
Pay SUFA funders a defined rental stream	The QRC considered this option would provide certainty for SUFA funders, and risk of the returns would be transferred to Aurizon Network.[68]
Pay SUFA funders a variable rental stream related to the CQCN return on assets	The QRC considered this option would expose SUFA funders to both the risks and rewards of changes in the returns being earned on CQCN assets, and therefore would not provide SUFA funders with certainty of returns.[69] However, it considered this option may be workable if the SUFA documents set out, in reasonable detail, an equitable approach to determining the returns.

5.3.6 QCA analysis and final decision

Aurizon Network's proposed approach to SUFA rental payments if the CQCN is not declared, as well as alternative approaches, are discussed below.

Thereafter, we consider how best to take this issue forward and issues of process.

Aurizon Network's proposed approach to SUFA rental payments if the CQCN is not declared

Aurizon Network has strongly opposed any alternative approach to its proposal regarding SUFA rental payments, in the event the CQCN is no longer declared. Aurizon Network was of the view its approach should be maintained, but with the drafting note on dispute resolution being replaced with a fully developed dispute resolution mechanism. Based on our understanding of Aurizon Network's submission, the core reasoning for this was:

- Post-deregulation rental streams are outside the QCA's jurisdiction.
- The proposed business model is appropriate.

These issues are considered below:

The QCA's jurisdiction

Aurizon Network did not consider the QCA has the power to make decisions that relate to periods extending beyond the period of the CQCN's declaration.

Our view is we are required to either approve or refuse to approve the 2013 SUFA DAAU as submitted to us. We note that sections 143(2) and (3) of the QCA Act provides the QCA may only approve a DAAU, if it considers it appropriate to do so having regard to the matters set out in section 138(2) of the QCA Act.

In light of this, the fact Aurizon Network has submitted the post-deregulation proposal means we are required to consider it, even though it relates to a period after the CQCN has ceased to be regulated under the third party access regime of the QCA Act.

Given this, our view is we should only consider how the post-deregulation SUFA rental provisions in the 2013 SUFA DAAU may impact the period in which the CQCN is declared. In considering this, we are of the view that if the SUFA framework could not work effectively during the period the

[67] QRC 2016: 2.
[68] QRC 2016: 2.
[69] QRC 2016: 2.

CQCN is declared, because the SUFA framework does not appropriately deal with the issue of post-deregulation rental streams, we can decide on that basis to refuse to approve the 2013 SUFA DAAU. Further, we also consider it open to us to refuse to approve any submitted DAAU with respect to SUFA, on the basis that a lack of an appropriate approach to SUFA rental streams post-deregulation means SUFA is not workable whilst the CQCN is declared.

In light of this, our view is it is not beyond the QCA's remit to propose options associated with, or to comment upon, post-deregulation provisions within the pro forma SUFA transaction documents regarding SUFA rental streams.

Against this background, we consider the post-deregulation rental regime in the 2013 SUFA DAAU negatively impacts the effectiveness of the SUFA framework whilst the CQCN is declared.

There is little value in developing a SUFA framework that is not workable, bankable and credible. Further, what has become clear through the process of developing the SUFA framework is an appropriate level of certainty and predictability for rental cash flows over the life of a SUFA transaction is critical to this.

The life of a SUFA transaction could extend to a number of decades and within that period, in all likelihood, various reviews will be undertaken regarding the CQCN's declaration and whether it should be revoked. If, within the SUFA transaction documents, the approach to SUFA post-deregulation rental streams unduly compromises the certainty and predictability of SUFA rental cash flows, our view is this creates a barrier to participating in a SUFA transaction in the period where the CQCN is a declared service.

Indeed, we note a key requirement of the SUFA framework is that PUHs do not have ownership rights over SUFA infrastructure. Given this, our view is PUHs have limited bargaining power in the event the CQCN is no longer declared. In effect, an integrated Aurizon entity has a monopoly position over SUFA rental streams, in the absence of credible constraints. We consider the provisions within the EISL have to account for this. Otherwise, the SUFA framework within the period the CQCN is declared and regulated, is unlikely to be viable.

Aurizon Network's business model for rental streams post-deregulation

Aurizon Network said we have misunderstood its proposal and as a result, made erroneous criticisms of it, and we have not considered it appropriately. Our understanding is Aurizon Network's proposal has two components comprising: [70]

- a methodology for calculating SUFA rental streams post-regulation
- a special dispute resolution process.

Methodology for calculating SUFA rental streams post-deregulation

Aurizon Network considered its approach more realistic than the options proposed in our position paper. Aurizon Network's description of its approach is:

> *[I]n circumstances where revenue is inadequate to meet the long-run avoidable costs of both above-rail and below-rail activities, the above-rail activity will only provide train services if it*

[70] Pages 5 to 7 of Aurizon Network's response to our position paper provide a number of comments in relation to our view on the level of discretion we considered an integrated Aurizon entity would have, when deriving post-deregulation SUFA rental streams. Upon consideration of these comments, our view is two overarching factors prevail—the reasonableness of the business model proposed by Aurizon Network, given the context in which it is being used, and the effectiveness of Aurizon Network's proposed dispute resolution process. We do, however, acknowledge that a dispute resolution mechanism reduces discretion, provided it is effective.

> *receives revenue equal to its long-run avoidable costs, since otherwise it will deploy its assets elsewhere. The below-rail activity has no ability to deploy its assets elsewhere and will receive the balance of revenue after the above-rail activity has received the portion of revenue equal to its long-run avoidable costs. However the below-rail business must receive at least its incremental costs of those below-rail activities in order to provide them.*

Aurizon Network stated the validity of the economic model proposed was demonstrated by the difference in returns to the above-rail and below-rail operators on the intermodal rail railway between Perth and the east coast of Australia.

We note Aurizon Network's methodological proposal and justification relates to the ACCC's approach to the pricing of below-rail services provided by the Australian Rail Track Corporation (ARTC), which is a government-owned corporation. Our understanding is sources of capital funding attributable to this service include ongoing government grants. Given this, it is not clear to us whether the difference between above-rail and below-rail returns reflects anything more than the fact that, for this system, it is not necessary to cover economic costs through access charges.

Further, we consider the economics, incentives and pricing of services on this particular system are not strictly comparable to the CQCN. Our view is a privatised vertically integrated Aurizon with a strong profit motivation would have an incentive to reduce the below-rail returns on those assets within its portfolio, if that resulted in lower cash outflows in terms of SUFA rental streams. In this context, we also note our view that an integrated Aurizon entity would have considerable discretion in setting these rents, in the absence of appropriate provisions in the EISL, such as an effective special dispute resolution process.

Special dispute resolution process

Aurizon Network disagreed with our view that its proposed approach to post-deregulation rental streams provided it with complete discretion over the value attributable to below-rail services. It considered this was incorrect because binding expert determination would be provided for under its proposals. Aurizon Network considered the fully developed dispute resolution arrangements for the post-deregulation SUFA rental proposals an obvious corollary of the overarching dispute resolution process in the Extension Project Agreement (EPA).

In this context, in its response to our position paper, Aurizon Network proposed to maintain its business model for the calculation of post-deregulation SUFA rental streams, with the inclusion of a fully developed dispute resolution mechanism. Aurizon Network's submission did not explicitly include this mechanism.

Aurizon Network stated its concerns with regard to dispute resolution (in the context of one of the high-level options described in our position paper):

> *Aurizon Network has significant concerns about the risk faced by it and a SUFA trustee of a poor binding expert decision arising from the dispute resolution on such a fundamental term of contract as the amount due between the parties. This concern is heightened by the absence of any dispute guidance framework to place limits around any binding expert.*

Our view is, as Aurizon Network's proposal regarding the special dispute resolution process is not available, it is not possible for us to assess if the process is effective, in the context of the rent methodology Aurizon Network has proposed. As such, it is not possible to suggest whether the dispute process would mitigate an integrated Aurizon entity's discretion.

In light of the above discussion, we continue to consider that Aurizon Network's proposed business model for post-deregulation SUFA rental streams provides undue discretion to an integrated Aurizon entity, which in our view, has an incentive to minimise the payment of SUFA

rental streams to SUFA trustees post-deregulation. We consider the outcome of this is that the workability, bankability and credibility of the SUFA framework, in the period where the CQCN is declared, is compromised. This is because, as Aurizon Network's proposal stands, it severely reduces the certainty and predictability of SUFA rental streams, thereby increasing barriers to participation, whilst the CCQN is declared.

Alternative approaches to SUFA rental payments if the CQCN is not declared

Our assessment considers the following underlying themes with respect to stakeholder responses:

- notional rental stream and the Core Rent Concept
- guiding principles
- options.

Notional rental stream and the Core Rent Concept

Aurizon Network was particularly opposed to the view we had expressed in our April 2016 position paper, that we had considered:

> *the best estimate of a notional benchmark SUFA rental stream is the estimate which would apply on the basis of the regulatory principles and assumptions in place just prior to the CQCN declaration expiring or being revoked.*

Aurizon Network considered the QCA had no sound basis for making this prediction about the future and that it was arbitrary. Aurizon Network also stated the QCA's view was inconsistent with the Core Rent Concept. Aurizon Network described the Core Rental Concept as follows:

> *A core concept of SUFA is that the rent payable to the SUFA trustee is always equal to the return on assets that it funded (the 'Core Rent Concept').*

We do not consider Aurizon Network's concept, when viewed without a context, particularly meaningful. This is because it bears no reference to what can be considered reasonable, in terms of the rent payable and the approach to obtaining this. In the context of reasonableness, we note Aurizon Network alluded to the fact we appear to have accepted Aurizon Network's Core Rental Concept for the regulatory environment, but not for post-deregulation.

In the current regulatory environment, SUFA rental streams comprise a share of the capital components. Capital components relate to the return on assets, depreciation and tax. Any changes to this or the regulatory framework in general, would require an extensive, transparent consultation process and would be subject to natural justice; additionally, any decision would be subject to appeal. Our view is this is a reasonable process to obtain the rent payable to a SUFA trustee.

In comparison, we consider Aurizon Network's post-deregulation proposal, in its existing form, can be characterised as follows:

- allowing Aurizon Network to decide what the return on SUFA assets will be through defining Capital Revenue and therefore SUFA rental streams
- subject to a yet-to-be developed special dispute resolution process being effective and ensuring the proposals are reasonable.

Further, Capital Revenue under the 2013 SUFA DAAU is a residual figure once the integrated Aurizon entity has accounted for all other relevant costs. These costs include an estimate of the return on and the depreciation allowance associated with non-below-rail assets. Below-rail assets do not appear to be accounted for in a comparable manner.

Overall, whilst this process can identify a SUFA rental stream that is broadly equal to the return on SUFA assets in a post-deregulation environment, this is true for any process that defines SUFA rental streams post-deregulation.[71] We, however, do not consider Aurizon Network's specific proposal reasonable.

We acknowledge the return on assets attributable to a notional benchmark SUFA rental stream based on regulatory assumptions is a forecast and does not predict the future with perfect accuracy. However, we also consider the primary asset the SUFA trustee and PUHs hold is the right to receive rent. Further, the SUFA trustee and PUHs do not have ownership rights over SUFA infrastructure. Given this, we consider the SUFA trustee and PUHs have limited bargaining power in the event the CQCN is no longer declared.

In light of this, our view is the provision of a notional benchmark SUFA rental stream, for a given SUFA, provides PUHs with a guide to the rental streams if regulation had remained. Our view is, other than this, the only other information likely to be provided regarding the SUFA rental streams will be from an integrated Aurizon entity.

Against this background, we do not agree with Aurizon Network's view regarding the appropriateness of notional benchmark SUFA rental streams, nor Aurizon Network's characterisation and use of the 'Core Rental Concept'. Further, contrary to Aurizon Network, we do not consider the use of a notional benchmark SUFA rental streams arbitrary or lacking in basis, for the reasons above.

Guiding principles

In relation to the options provided, our position paper provided three guiding principles. The QRC has agreed with these. Aurizon Network's comments are provided in the table below.

Table 9 Aurizon Network's comments on guiding principles for post-deregulation rental streams

Guiding principles	*Aurizon Network's comments*
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.	Aurizon Network did not see any justification for an arrangement that protects one set of CQCN investors from this risk but does not protect a second set of CQCN investors.[72] In this context, Aurizon Network stated that it would be open to any 'level playing field' arrangement that protects all CQCN investors, namely SUFA trustees and Aurizon Network on a non-discriminatory basis. Aurizon Network considered two of the options set out in our position paper did not align with this, as Aurizon Network could be compelled to buy out the SUFA trustee.
SUFA funders have a legitimate expectation that if the CQCN declaration expires or is revoked they will receive a suitable return attributable to their investment, subject to prevailing market conditions.	Aurizon Network agreed with this statement but considered the adoption of a notional benchmark SUFA rental stream inconsistent with this, because prevailing market conditions are likely to be completely different

[71] In a post-deregulation environment, the rent a SUFA trustee obtains net of its expenses, divided by the relevant asset value of SUFA infrastructure, provides a proxy for the rate of return attributable to the SUFA infrastructure. Given this, the return is effectively the SUFA rent stream less expenses. This gives no guidance as to reasonableness.

[72] Aurizon Network 2016: 10.

Guiding principles	*Aurizon Network's comments*
	from those when the notional benchmark SUFA rental stream was put in place.[73]
The regulatory process prior to the CQCN declaration expiring or being revoked would, based on the regulatory principles and assumptions in place at that time, be capable of identifying a notional benchmark SUFA rental stream that would ensure SUFA funders recoup the value of their investment.	Aurizon Network considered that the QCA statement that SUFA funders may 'recoup' the value of their investment demonstrated a striking misunderstanding of the principles of equity investment.[74] Aurizon Network noted equity investors have no certainty that they will receive any return from their investment, let alone a return consistent with expectations at the time of their investment, and therefore 'recoup' its value. Aurizon Network considered a SUFA investor should expect to bear regulatory risk, such as adverse consequences arising following deregulation, in return for receiving regulatory returns.

Firstly, prior to discussing Aurizon Network's specific comments, we note our position paper did not characterise these principles as absolute but as guiding. This reflects the fact they may not be met, given other relevant factors.

Our first guiding principle was investors generally only consider investing if they are sufficiently confident of the return of the value of their investment within an appropriate timeframe. Unlike Aurizon Network, we consider this principle should account for PUHs. The SUFA trustee is a passive entity; it is PUHs that provide funding and receive, through the SUFA trustee, rental payments.

We also note Aurizon Network's comments regarding a 'level playing field'. Our view is Aurizon Network's 2013 SUFA proposal regarding post-deregulation SUFA rental streams places investors, other than an integrated Aurizon entity, at a disadvantage. As discussed previously, if the CQCN declaration expires or is revoked, a SUFA trustee and PUHs have no ownership rights over the SUFA infrastructure. Therefore, a SUFA trustee and PUHs start the post-deregulation period in a position of limited bargaining power.

Against this background, our view is Aurizon Network's proposal would not, whilst the CQCN is declared, provide prospective SUFA funders with sufficient confidence of the return of the value of their investment within an appropriate timeframe. We consider the workability, bankability and credibility of the SUFA framework is compromised as a result of this.

In light of this, we do not share Aurizon Network's view that various options proposed in our position paper, which provide for the option to pay the SUFA trustee the notional benchmark SUFA rental stream, are necessarily misaligned with the concept of a 'level playing field'. Our view is these options assist in mitigating an imbalance of bargaining power in a post-deregulation environment from the outset.

Further, we note Aurizon Network's comment that the use of a notional benchmark SUFA rental stream is inconsistent with PUHs having a legitimate expectation that if the CQCN declaration expires or is revoked, they will receive a suitable return attributable to their investment, subject to prevailing market conditions.

[73] Aurizon Network 2016: 10.
[74] Aurizon Network 2016: 10.

We do not agree with this. Any notional benchmark SUFA rental stream can be adjusted, through time, to account for market conditions. Two of the options in our position paper effectively adopt such an approach. The option to negotiate an outcome suggests the notional benchmark SUFA rental stream could be adopted as the starting point for discussions, whilst the option to adjust a notional benchmark SUFA rental stream to account for the actual CQCN return contemplates an explicit adjustment to account for market conditions.

Further, our view is that whilst it is ideal to account for market conditions, this requires the approach adopted to be reasonable. In this context, we share the QRC's view that Aurizon Network's proposal for post-deregulation SUFA rental streams is unreasonable, because a SUFA trustee and PUHs appear to only face downside risk with respect to market conditions.

The final guiding principle in our position paper stated:

> *The regulatory process prior to the CQCN declaration expiring or being revoked would, based on the regulatory principles and assumptions in place at that time, be capable of identifying a notional benchmark SUFA rental stream that would ensure SUFA funders recoup the value of their investment.*

Aurizon Network suggested that the notion of recouping the investment value showed a 'striking misunderstanding' of equity investment. We do not agree with Aurizon Network. The development, or otherwise, of a notional benchmark SUFA rental stream on this basis is not directly related to an understanding, or otherwise, of equity investment.

Further, with respect to Aurizon Network's comments that a SUFA investor should expect to bear regulatory risk in return for receiving regulatory returns, we note our previous view—that is, that SUFA trustees' and PUHs' limited bargaining power in the post-deregulation environment places them at a disadvantage from the outset, when it comes to considering SUFA rental streams post-deregulation, and Aurizon Network's proposal results in a SUFA trustee and PUHs appearing only to face downside risk, in the context of changing market conditions.

Overall, we remain of the view the guiding principles adopted in the position paper are valid and reasonable, given the position of SUFA trustees and PUHs in a post-deregulation environment and the need to ensure sufficient certainty and predictability in SUFA rental streams. We consider they assist in ensuring the workability, bankability and credibility of the SUFA framework is not compromised whilst the CQCN is declared.

Options

Our position paper provided four high-level options for post-deregulation SUFA rental streams: negotiate an outcome; pay out SUFA funders; pay SUFA funders a defined rental stream; or pay SUFA funders a variable rental stream related to the CQCN return.

Aurizon Network was of the view all options, to a greater or lesser extent, were inconsistent with its Core Rental Concept. Further, Aurizon Network stated it did not volunteer to accept any of the options. We have provided our view regarding Aurizon Network's Core Rental Concept above. We also note Aurizon Network's position regarding its willingness to volunteer to accept any of the options.

With regard to negotiating an outcome, for similar reasons to those stated previously, we do not agree with Aurizon Network's view the notional benchmark SUFA rental stream is an inappropriate starting point for negotiations. Nor do we agree this option provides less certainty to the SUFA trustee and PUHs, particularly if the negotiation process took place at the appropriate time and the dispute resolution process was robust.

In this context, we agree with the QRC's point that any negotiation should take place at the time the CQCN ceases to be declared. We also agree with both Aurizon Network and the QRC regarding the importance of dispute resolution. Our view is the dispute resolution framework associated with the development of post-deregulation SUFA rental streams is pivotal to the credibility, bankability and workability of the SUFA framework, in both the period when the CQCN is declared and the post-deregulation period. In this context, we are also of the view the QRC's proposal—to include the guiding principles adopted in the position paper, and one or more of the alternative options for determining post-deregulation SUFA rental streams, as part of the dispute resolution guidelines—has merit.

Regarding the option to pay out SUFA funders with a lump sum, we are of the view such an approach is unlikely to be practical and do not propose to consider this further. We do not, however, share Aurizon Network's view that it constitutes a commitment to fund. In this context, we note our position paper couched all options as choices and that more than one option could be adopted.

With respect to the option that SUFA funders are paid a defined rental stream post-deregulation and that this be based upon the notional benchmark SUFA rental stream, we agree with the QRC and Aurizon Network that it provides certainty. We also agree with the QRC's observation that it transfers risk of the returns to an integrated Aurizon entity.

Finally, in relation to the option to pay SUFA funders a variable rental stream related to the CQCN return, Aurizon Network considered this approach did not account for the fact that below and above-rail assets could have different returns. Aurizon Network considered that its proposed approach better reflected this, was a more realistic business model and its validity was evidenced by the difference in returns to the above and below-rail operators on the intermodal rail railway between Perth and the east coast of Australia. We do not agree with Aurizon Network's justification for its position, for the reasons set out previously.

We do, however, agree with the QRC that although such an approach exposes post-deregulation SUFA rental streams to both the risks and rewards in the returns being earned on CQCN, it is workable, provided there is an equitable approach to determining the returns and this is well-documented. We also agree with the QRC's observation that this approach does not provide certainty.

Overall, in coming to our final decision proposal, we have had regard to the views expressed by stakeholders and the fact the QCA cannot impose a post-deregulation SUFA rental stream upon an integrated Aurizon entity. Our final decision proposal is outlined in the subsequent section.

Summary and conclusion

Potential SUFA funders are likely to have financial commitments relying on the expected SUFA rental streams for the life of a SUFA transaction and, ideally, they would want certainty over SUFA rental streams post-deregulation. It is, however, not possible for the QCA to provide this and an alternative solution is required.

In this context, our view is any alternative solution should seek to provide an appropriate framework that assures prospective SUFA funders that any investment made in the period the CQCN is regulated will be treated reasonably in the context of a post-deregulation environment. We do not consider Aurizon Network's proposals provide such assurance. Given this, our view is we have little choice but to refuse to approve Aurizon Network's proposal with respect to post-deregulation SUFA rental streams.

Against this background, it is necessary for us to consider what we would be minded to accept, in order to ensure the operation of the SUFA framework, whilst the CQCN is declared, is workable,

bankable and credible. In this context, we consider there are two main issues regarding the development of SUFA rental streams in a post-deregulation environment, comprising:

- dispute resolution
- objective and process.

Dispute resolution

We agree with the QRC and Aurizon Network that the right to use a dispute resolution process is fundamental to determining the SUFA rental streams in the post-deregulation environment. We also note PUHs do not have ownership rights over SUFA infrastructure. We consider the absence of ownership rights tilts the balance of bargaining strength towards an integrated Aurizon entity. This is because PUHs cannot negotiate access terms to the SUFA infrastructure they have financed. In short, our view is an integrated Aurizon entity has a monopoly position in respect of SUFA rental streams in a post-deregulation environment.

Against this background, our view is if the dispute resolution process is to be effective and be perceived to be effective, the process has to provide independent experts with considerable power. We consider independent experts will need to have access to an integrated Aurizon entity's information, to the extent the expert considers it relevant for its decision-making remit. We also consider any independent expert(s) given the task of adjudicating what SUFA rental streams should be in a post-deregulation environment will need to have considerable experience in economics, investment finance and accounting.

Further, the extent to which SUFA rental streams in a post-deregulation environment are predictable and certain, should be balanced against the fact that circumstances change and protections that existed in the regulatory environment may no longer apply. We do, however, consider account also has to be taken of an integrated Aurizon entity's bargaining power.

In light of this, in the event of a dispute, if any independent expert(s) considers an integrated Aurizon entity's proposals regarding SUFA rental streams in a post-deregulation environment is unreasonable and clearly imbalanced, our view is the expert(s) should have the discretion to impose an alternative SUFA rental stream that reflects a greater level of certainty, if they deem this appropriate. We consider such a backstop position provides a credible response, if an integrated Aurizon entity seeks to unduly lever its bargaining power.

Objective and process

Our view is, once it becomes clear the CQCN declaration will expire or be revoked, Aurizon Network should provide SUFA trustees with an indication of the post-deregulation rental approach an integrated Aurizon entity wishes to adopt. The approach proposed should meet the following objectives and provide sufficient time for discussion/negotiation regarding the proposal:

- the SUFA rental stream should clearly link to both the asset value of the SUFA assets and below-rail assets in the CQCN generally
- a time dimension should be specified for the period over which SUFA rental streams should be paid
- an appropriate balance should be sought between the predictability and certainty of SUFA rental streams and the uncertainty of market conditions.

The parties will have a defined period of time in which to consider whether they accept the initial proposal or can come an alternative agreement. If this proves unsuccessful, binding dispute resolution will apply.

Given the significance of any such dispute, our view is dispute resolution should be undertaken with a panel of three independent experts, with globally recognised expertise in economics, investment finance, and accountancy. The panel will initially have a period of six months to reach a decision. This can be extended by agreement of the relevant parties, or if the panel considers it requires further information or time to reach a decision. Until a decision is reached, the SUFA rental streams that would have applied under the Final Regulatory Regime will continue to apply, but be subject to any necessary retrospective adjustment.

The SUFA trustee, on behalf of PUHs, and Aurizon Network, on behalf of an integrated Aurizon entity, can each submit a single proposal to the expert panel for consideration. On the basis that neither party proposes a proposal, the dispute resolution panel can also consider setting post-deregulation SUFA rental streams at the notional benchmark SUFA rental stream that would have applied if the Final Regulatory Regime had remained in place, or it can choose to adopt a similar SUFA rental stream adjusted to account for the actual return achieved for the CQCN as a whole (above- and below-rail operations).[75]

This process provides for up to four options for the SUFA rental stream for a given SUFA transaction. The dispute resolution panel's assessment will take into account the objectives noted above. Further, if any proposed alternative for SUFA rental streams does not have a clear link to both the asset value of relevant SUFA assets and other below-rail assets in the CCQN, or does not include a specified time dimension for the period over which SUFA rental streams should be paid, the expert panel can, at its discretion, discount the proposal.

Subject to appropriate confidentiality arrangements, the dispute resolution panel can require any information from the SUFA trustee or the integrated Aurizon entity that it deems relevant to making its decision. Failure to provide the requested information is at the risk of the relevant party.

Our view is a process similar to that outlined above, whilst not defining what SUFA rental streams will be in a post-deregulation environment, provides assurance to prospective SUFA funders, that, in the event they invest in a SUFA transaction whilst the CQCN is declared, a robust process will be adhered to when considering the appropriate value to place on SUFA rental streams if the CQCN becomes unregulated.

It seeks to ensure proposals put forward are reasonable. It also seeks to provide transparency, through requiring a proposal for SUFA rental streams to have a tangible link to the value of the SUFA assets and below-rail assets in the CQCN more generally. For avoidance of doubt, this does not mean a proposal will necessarily result in the recovery of the residual value of the SUFA assets in a post-deregulation environment. It means, however, that justification as to why this is not the case will need to be more transparent. Further, the notional benchmark SUFA rental streams provide independent information that may assist the dispute resolution panel in understanding the magnitude of difference, relative to the outcome if regulation was still in place.

Overall, our view is this process provides an integrated Aurizon entity, which in effect, has a monopoly position over SUFA rental streams post-deregulation, with incentives to propose an outcome that is reasonable. To the extent an independent expert panel considers this not to be the case, an integrated Aurizon entity risks an alternative option being adopted, including the

[75] Prior to the CQCN declaration expiring or being revoked, the notional benchmark SUFA rental streams and methodology for calculating this CQCN return will be developed by the access regulator, in consultation with the relevant SUFA trustees, PUHs, and Aurizon Network (working on behalf of an integrated Aurizon entity).

notional benchmark SUFA rental stream based on the principles and assumptions underpinning the Final Regulatory Regime.

In the context of the period when the CQCN is declared, we consider a SUFA framework that provides for a process similar to that described above more likely to result in a workable, bankable and credible SUFA than Aurizon Network's existing proposals. Our view is it provides greater clarity of process and assurance, thereby seeking to reduce barriers to participation in a SUFA transaction. This, in turn, can provide greater competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

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

In light of this, our final decision proposes Aurizon Network to replace Part 2 of Schedule 1 of the draft decision EISL, which contains its 2013 SUFA DAAU proposal, with drafting that reflects the discussion in this 'Summary and conclusion' section of our final decision. Further, our final decision proposes that within two months after this final decision is published on the QCA website, Aurizon Network provides the QCA with sight of the proposed drafting.

The amendments we consider appropriate are outlined below.

Final decision 5.2

(1) After considering Aurizon Network's 2013 SUFA DAAU EISL, our final decision is to refuse to approve the drafting with respect to the rent objective in an unregulated environment.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU EISL proposals regarding the rent objective in an unregulated environment, is to remove them from Part 2 of Schedule 1 of the draft decision EISL and replace them with drafting that reflects the discussion in this 'Summary and conclusion' section of our final decision. Further, within two months of the QCA publishing this final decision on the QCA website, Aurizon Network is to provide the QCA with sight of the proposed drafting.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.3.7 Issues of process

In responding to our April 2016 position paper, Aurizon Network noted what it classified as two regulatory process issues, comprising:

- failure to have due regard to Aurizon Network's submission
- inconsistent approach to proposals of Aurizon Network and the QCA.

Failure to have due regard to Aurizon Network's submission

Aurizon Network noted that our draft decision had stated that SUFA should allow 'the linked access agreements for SUFA assets to include a schedule setting out access charges in the event that an asset is no longer declared'.[76] Aurizon Network noted that in its response to our draft decision, it had not supported our position on this matter, and had explained its reasoning at some length.

Aurizon Network said that whilst our April 2016 position paper had cited our draft decision position on this topic, the position paper had not mentioned or appeared to take into account Aurizon Network's position on this matter as expressed in its draft decision submission, therefore our position paper had not given due regard to its submission.[77]

Our April 2016 position paper sought to provide our thinking, as at that time, with respect to Aurizon Network's 2013 SUFA DAAU proposal regarding SUFA rental streams post-deregulation and its relationship to the security agreements. The position paper also provided some intentionally high-level alternative options for discussion and requested stakeholders provide any other options they considered relevant. The objective of the position paper was not to explicitly seek views regarding linked access agreements and whether access charge schedules should be included within them after declaration ceases. We agree with Aurizon Network that its response on this matter was clearly articulated in its February 2015 submission.

The fact we did not mention Aurizon Network's response to the draft decision specifically in the position paper with respect to this issue, does not suggest we have not had regard to Aurizon Network's February 2015 submission. In this context, we note our final decision proposal agrees with Aurizon Network's view that linked access agreements should not set out access charges in the event that an asset is no longer declared.

Inconsistent approach to proposals of Aurizon Network and the QCA

Aurizon Network noted our April 2016 position paper had been critical of Aurizon Network's approach to SUFA rental streams post-deregulation on the grounds that it would provide 'very little or no certainty' to SUFA funders.[78] Aurizon Network stated that two of the four QCA options proposed in the position paper would provide less certainty to SUFA funders than Aurizon Network's approach.

Aurizon Network also noted the QCA position paper had criticised the unspecified nature of the dispute resolution mechanism in the 2013 SUFA DAAU, but had proposed, in respect of one of the four options proposed in the position paper, 'an appropriate dispute resolution mechanism', which was specified to a lesser extent than the dispute resolution mechanism proposed by Aurizon Network.[79] Aurizon Network considered the QCA should not seek to analyse particular features of Aurizon Network's proposal with a view to refusing them in-place of their own proposals that would result in even less certainty or an inferior outcome.

We note Aurizon Network's opinion of the content of our position paper and its view regarding the options put forward. We also note other stakeholders expressed opinions that differed from those of Aurizon Network. Further, from a process perspective and for the avoidance of doubt,

[76] Aurizon Network 2016: 13.
[77] Aurizon Network 2016: 13.
[78] Aurizon Network 2016: 13.
[79] Aurizon Network 2016: 13.

we do not consider consulting on a position paper with alternative options infers a predetermined outcome; it is entirely reasonable for us to elicit stakeholder views on various options.

6 CONSTRUCTION—PRINCIPLES AND APPROACH

We consider Aurizon Network's proposed construction approach in the 2013 SUFA DAAU impractical and unable to support a SUFA framework which facilitates credible alternative funding options for expansions in the CQCN. We propose that the SUFA construction approach should be guided by the principles that SUFA is a financing tool, and that Aurizon Network as the contractor/constructor should have control of the construction process. Moreover, in order to limit Aurizon Network's ability to leverage market power as the sole supplier of the declared service and the contractor/construction of SUFA infrastructure, and to provide greater certainty for SUFA funders, we consider this position needs to be complemented with the following:

- *up-front commitments from Aurizon Network*
- *an expansion process*
- *a preapproval process*
- *an expansion pricing process.*

These issues relate to the interrelationship of the 2010 AU and SUFA documentation. We consider that their implementation provides a more appropriate balance of risk across the parties to a SUFA transaction and enhances the potential for SUFA to be an effective financing option. If these elements were not implemented, the SUFA documentation would still be usable but, in our view, the SUFA funders would bear an inappropriate level of risk, having less protection against Aurizon Network using its market power.

Our final decision on the 2013 SUFA DAAU does not provide the detail of the amendments required in the 2010 AU. We will only consider detailed amendments to the 2010 AU if the sunset clause outlined in section 4.4.2 of this final decision is triggered. We consider this the most pragmatic way forward in light of the 2010 AU expiry date. Consequently, this chapter provides an overarching assessment of the changes we consider would be needed to the 2010 AU in the context of construction. This, in part, provides context for our assessment of the pro forma construction agreement.

6.1 Background

The 2013 SUFA DAAU establishes the contractual arrangements for the SUFA construction approach under the Project Management Agreement (PMA) and aspects of the Rail Corridor Agreement (RCA). The PMA and RCA are not an industry-recognised form of document.

From a legal perspective, because of the trust structure adopted in the 2013 SUFA DAAU, in a SUFA transaction the control over construction of infrastructure technically lies with the SUFA trustee. However, the 2013 SUFA DAAU also includes an agency structure within the PMA, appointing Aurizon Network as the SUFA trustee's agent. This agency structure seeks to allow Aurizon Network to 'claw back' control over construction. Aurizon Network's position is that it should have control over the construction of SUFA projects.

In addition, various aspects of the PMA[80] mean the more input/control SUFA funders would require over Aurizon Network's actions in the construction phase of a SUFA project, the greater the level of risk SUFA funders would be expected to bear.

6.2 Overarching principles

6.2.1 QCA draft decision

Our view was the approach to construction under Aurizon Network's 2013 SUFA DAAU would not support the SUFA facilitating effective funding options for expansions in the CQCN. We considered the proposed agency structure difficult for potential SUFA funders to use practically. Further, it would be challenging to find independent corporate trustees to undertake the role of SUFA trustees at a reasonable cost, given that the role could effectively involve becoming a construction manager.

We considered the SUFA construction approach should be broadly based on the following principles:

- The SUFA is a financing tool.
- Control over construction of SUFA projects should reside with Aurizon Network.

Our draft decision maintained the view set out in our position paper, that the original intent of SUFA was for it to be a financing tool. We also considered it appropriate for Aurizon Network to have control of construction, given Aurizon Network operates and maintains the CQCN. We considered this would significantly reduce the complexity of the construction process and the suite of SUFA agreements, and would refocus SUFA as a financing tool.

In order to limit Aurizon Network's ability to leverage market power as the sole supplier of the declared service, and to provide greater certainty for SUFA funders, we established that Aurizon Network should provide up-front commitments with respect to construction scope, standard, cost, time-to-complete and capacity delivered. We also considered the access undertaking should include an expansion process and a preapproval process. In our view, the implementation of these measures would provide a more balanced risk profile across the parties to a SUFA transaction and enhance the potential for SUFA to be an effective financing option.

As detailed in our position paper and draft decision, our proposed approach would require changes to both the suite of SUFA agreements and the undertaking. We considered that, if the SUFA framework were to be workable, bankable and credible, the undertaking and SUFA agreements have to work together.

6.2.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network generally supported our position on the principles on which the SUFA construction process should be based.[81] However, it did not agree that the up-front commitments should include capacity outcomes (see section 6.3).[82]

Anglo American also supported our position that Aurizon Network should control the construction process for a SUFA project.[83] It considered Aurizon Network is the best placed entity

[80] These include the provisions relating to the procurement method, the control over construction, and the capital cost optimisation process included in the 2013 SUFA DAAU PMA.
[81] Aurizon Network 2015a: 18.
[82] Aurizon Network 2015a: 18.
[83] Anglo American 2015: 4.

to design, construct and operate SUFA assets, and noted the practical implications arising from the fact the SUFA infrastructure would become part of the CQCN. Nevertheless, Anglo American considered that SUFA funders should be entitled to a level of information from Aurizon Network in relation to SUFA projects to allow for accountability.[84]

6.2.3 QCA analysis and final decision

Our view remains that Aurizon Network's proposed construction approach in the 2013 SUFA DAAU would not support the SUFA's objective of facilitating credible funding options for expansions in the CQCN. The proposed agency structure is difficult for potential SUFA funders to use practically. Further, the role of SUFA trustee would extend significantly beyond the standard administrative tasks, making it challenging to find independent corporate trustees to undertake such a role at a reasonable cost.

We have not received any submissions that have led us to revise our view that:

- The SUFA is a financing tool.
- Control over construction of SUFA projects should reside with Aurizon Network.

No stakeholders disagreed that our approach would significantly reduce the complexity of the construction process and the suite of SUFA agreements, and would refocus SUFA as a financing tool. Further, no stakeholders disagreed that Aurizon Network is in the best position to have control of construction, given it operates and maintains the CQCN.

We also remain of the view that in order to limit Aurizon Network's ability to leverage market power as the sole supplier of the declared service, and to provide greater certainty for SUFA funders, our position should be complemented with the following:

- up-front commitments (costs, standard, scope, time-to-complete and capacity) from Aurizon Network
- expansion process
- preapproval process
- expansion pricing process.

Each of these elements is discussed in more detail in subsequent sections in this chapter.

We consider that from an overarching perspective our proposed construction approach supports a workable, bankable and credible SUFA framework. Our view is that the approach, amongst other things, ensures:

- risk can be allocated to the parties best able to manage it
- greater certainty of what is delivered via a SUFA project
- greater certainty over the treatment of capital costs is achievable if needed
- simplification of the SUFA arrangements and documentation.

We consider this supports a workable, bankable and credible SUFA framework. This is because it provides for:

- simplification and clarity regarding the SUFA documentation

[84] Anglo American 2015: 4.

- greater clarity and reasonableness regarding risk allocation
- greater certainty regarding the delivery of project outcomes
- greater certainty regarding inclusion of capital costs in the RAB and SUFA rental streams.

This is in the interests of third party financiers (s. 138(2)(h) of the QCA Act). Further, a workable, bankable and credible SUFA framework aligns with the object of Part 5 of the QCA Act (s. 138(2)(a)). This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently.

Efficient investments in the CQCN are in the public interest as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act). Further, we consider our approach is not counter to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Also in the context of managing risk and the allocation of roles/responsibilities we have noted in our discussion of the legislative framework that if a party to a SUFA takes on particular role/responsibilities, it should also bear the risks and receive the rewards attributable to those roles/responsibilities. In our view this provides incentives for the parties that are most capable of controlling a particular risk to manage it appropriately. We consider it counter to the intent of the object of Part 5 of the QCA Act if risk/reward was not allocated in this manner. This is because to do otherwise is less likely to drive efficient behaviours.

6.3 Up-front commitments from Aurizon Network

6.3.1 QCA draft decision

In the draft decision, we established that Aurizon Network should provide up-front commitments with respect to construction scope, standard, cost, time-to-complete, and capacity outcome. We considered this necessary if the control over construction of SUFA projects was to reside with Aurizon Network. We explained that these up-front commitments could arise from the feasibility study provided for under an expansion process in the undertaking (see section 6.4).

6.3.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network supported our position that it should provide up-front commitments with respect to scope, standard, cost and time-to-complete, subject to the construction agreement providing for specified variations and adjustment events (see Chapter 7).[85]

Aurizon Network did not support providing a capacity guarantee, which it perceived to be unnecessary given the objective that SUFA is to be a financing tool.[86] Aurizon Network said that investors in a SUFA project would receive the same return from their investments regardless of the delivery of capacity. Notwithstanding that, Aurizon Network said while it did not volunteer to undertake a capacity guarantee (which would increase its own risk profile) it would be willing to consider doing so on a project-by-project basis, depending on negotiation with access seekers.

[85] Aurizon Network 2015a: 18.
[86] Aurizon Network 2015a: 22.

Anglo American supported our position with respect to up-front commitments, but emphasised that such arrangements would require an adequately informed preapproval process to minimise the risks of overscoping and overcosting.[87]

6.3.3 QCA analysis and final decision

Our view remains that Aurizon Network should provide up-front commitments with respect to construction scope, standard, cost, time-to-complete and capacity outcome. We consider these should be given effect through the SUFA construction agreement. We consider this necessary if the control over construction of SUFA projects is to reside with Aurizon Network.

In our view, the lack of such commitments constrains the workability, bankability and credibility of SUFA because it may skew the risk allocation associated with SUFA in a manner that unduly favours Aurizon Network. In their absence, SUFA funders would face greater uncertainty with respect to the delivery of the project and the treatment of capital costs. We consider that this would act as a barrier to effective competition in the financing of investments in the CQCN, which is counter to the object of Part 5 of the QCA Act (s. 138(2)(a)).

We note Aurizon Network's objection to an up-front commitment to deliver a particular capacity, based on the following reasons:

- Investors in a SUFA project would receive the same return regardless of the capacity delivered.
- It is not necessary given the position that SUFA is a financing tool.
- Aurizon Network is unwilling to increase its risk profile through the provision of a capacity guarantee.

We are unconvinced by Aurizon Network's position, for the reasons outlined below.

Investor returns and the SUFA

Both access seekers and third party financiers could invest in a SUFA project. We consider the primary driver for access seekers looking to invest is to obtain access to the CQCN. This relates to an expectation that the investment will provide them with a certain incremental capacity. We are of the view that from their perspective the value of the investment is not just related to the return they obtain through rental streams but also to the level of capacity delivered by the project.

Further, Aurizon Network's view that the returns to a SUFA project do not vary according to capacity delivered, relies upon the total capital costs for a SUFA project being included in the RAB and converted, through time, to rental payments. In our view this presumes the level of capital costs included in the RAB will not, for any SUFA project, vary as the capacity delivered by that project varies, which we consider would not necessarily be the case.

It is possible that, depending on the precise circumstances associated with the delivery of a SUFA project, the level of the capital costs included in the RAB may not meet SUFA funders' expectations if the project fails to achieve the capacity expected. Such a situation may occur if it is clear that inclusion of all the capital costs into the RAB would be counter to the object of Part 5 of the QCA Act. This is possible if the SUFA project has delivered capacity to a level less than

[87] Anglo American 2015: 5–6.

expected, to the extent that the total capital costs cannot be deemed a prudent and efficient investment. In our view whilst this is unlikely, it is possible.[88]

Given the above, we consider that Aurizon Network's view—that the returns payable to a SUFA project does not relate to capacity delivery—is overly narrow.

The SUFA as a financing tool

The objective of a SUFA is to provide competition to Aurizon Network's financing proposals. This is based on the premise that for an expansion to be efficient it should be financed efficiently. We are of the view that the fewer barriers to attracting financing options, the more effective SUFA is as a financing tool.

Therefore, in our view, the core question is: Does the inclusion of a capacity commitment mean SUFA is a more effective financing tool?

When answering this question, it is useful to consider what the purpose of expanding the CQCN is. As noted earlier, we consider that access seekers are likely to be the parties that drive the need for expansions because they require access to the CQCN. Any business case that they make to initiate an expansion in the CQCN will, in our view, largely depend on the incremental capacity they expect to get in return, not the infrastructure produced by the expansion.

Access seekers have scarce capital to invest, with numerous projects competing for this capital. Clearly, the absence of certainty over the capacity outcome may act as a barrier to the access seeker, or their corporate body, pursuing the expansion. Given that an access seeker can also be a SUFA funder, a lack of certainty regarding capacity also impacts on the ability to use the SUFA as a financing tool—it can preclude the consideration of the SUFA as a financing option because it impacts on the credibility of the business case from its inception.

Further, we consider that in many cases access seekers considering using the SUFA will want to test whether they can obtain backing from third-party financiers (who are assessing multiple projects and the credibility of the business cases underpinning each of them). We consider that it may be harder for access seekers to provide potential third-party funders with a credible business case without a clear understanding of the capacity delivered, especially if the capacity delivered can affect the level of the capital costs included in the RAB. From this perspective, a lack of understanding of capacity may also act as a barrier to obtaining third party financing interest in the project, thereby reducing the SUFA's effectiveness as a financing tool.

Overall, we are of the view that a capacity commitment is likely to improve the effectiveness of the SUFA as a financing tool because it provides more scope for its use. We consider this aligns with the object of Part 5 of the QCA Act, and is in the public interest and in the interest of access seekers (ss. 138(2)(a), (d) and (e) of the QCA Act). This is because greater choice of financing options means there is a greater likelihood of efficient financing of an expansion being achieved.

Aurizon Network's risk profile

Aurizon Network noted it did not volunteer to take on the risks associated with the provision of a capacity guarantee in the baseline SUFA framework. It is ultimately for the QCA, as the decision-maker, to consider what allocation of roles/responsibilities, risk and reward should be adopted in the baseline SUFA framework. In doing so, we consider we should seek to achieve a credible position from which it is possible for prospective SUFA funders to negotiate alternative terms or to adopt the standard pro forma SUFA documentation. We consider capacity commitments

[88] This assumes that capacity will be utilised as commissioned and that, as a result, it is possible to gain an indication around the commissioning date of capacity to be delivered.

integral to this because, as stated previously, capacity, is the good/service demanded, not the infrastructure.

Summary

Overall, we consider the up-front commitments we have specified above are necessary to support a workable, bankable and credible SUFA framework. We are of the view this is consistent with the object of Part 5 of the QCA Act, as it increases the likelihood of efficient investments in the CQCN by supporting a credible alternative funding arrangement that allows parties other than Aurizon Network to finance rail expansions. Efficient investments in the CQCN are also in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Further, we consider our proposed up-front commitments appropriately balance the legitimate business interests of Aurizon Network with the interests of access seekers and prospective third-party financiers (ss. 138(2)(b), (e), and (h) of the QCA Act). Our view is Aurizon Network's position as monopoly provider of construction services is appropriately accounted for given this approach.

6.4 Expansion process

6.4.1 QCA draft decision

We considered that, for SUFA to be effective, the undertaking would need to include an explicit expansion process. In our view, this process would need to deliver feasibility studies to a level of accuracy required to provide credible up-front commitments that satisfy the needs of Aurizon Network (as infrastructure provider), third party financiers and user funders.

We noted that an expansion process was being developed as part of the 2014 DAU arrangements, and that we understood Aurizon Network and the QRC had made considerable progress on resolving previous differences of position. As such, we considered it more practical to consider issues around the development of an effective expansion process as part of the 2014 DAU process, rather than under the 2010 AU, which was likely to be replaced in the near future.

6.4.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network supported our position to focus effort on ensuring the expansion process provisions being developed as part of the 2014 DAU support a workable, bankable and credible SUFA framework.[89]

Similarly, Vale supported our approach, but emphasised that changes to the 2014 DAU should not be negotiated against the SUFA arrangements, as the SUFA relates to the 2010 AU.[90] Vale said timely and efficient decision-making would be critical for the expansion process, so that SUFA projects are not delayed through the planning, capacity assessment, and preapproval phases, which would provide an advantage to Aurizon Network-funded expansions.

Anglo American proposed that the SUFA framework should include a mechanism to allow SUFA funders, the QCA or an expert to determine an appropriate preapproval scope in instances where

[89] Aurizon Network 2015a: 22.
[90] Vale 2015: 2.

Aurizon Network refuses to provide an efficient scope. It also said that stakeholders should be provided with clear information regarding the baseline capacity in the CQCN.[91, 92]

6.4.3 QCA analysis and final decision position

Our view remains that an expansion process in the access undertaking enhances the workability, bankability and credibility of the SUFA framework. In fact, we consider that such a process should be available to all expansion projects in the CQCN, given the SUFA could technically be used for any expansion project. No stakeholder has objected to an expansion process being included in the undertaking.

The expansion process to be developed will need to be capable of delivering feasibility studies to a level of accuracy required to provide credible and transparent up-front commitments that satisfy the needs of Aurizon Network (as the infrastructure provider and party acting in the role of constructor), third party financiers and user funding off balance sheet. The process also needs to meet the requirements of preapproval and should provide for dispute resolution provisions—as a fallback if negotiations fail—to avoid unreasonable delay to the process.

In our view, an effective expansion process provides more certainty to all parties that a proposed project represents an efficient expansion in the CQCN. This is achieved by requiring greater rigour in the feasibility studies, as well as providing transparency in the scoping, costing and capacity assessment process. We consider that, as an effective expansion process seeks to assist the efficient expansion of the CQCN, it aligns with the object of the Part 5 of the QCA Act, the public interest, and the interests of access seekers and access holders (ss. 138(2)(a), (d), (e) and (h) of the QCA Act). We also consider the concept of an expansion process does not negatively impact Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

The type of expansion process we consider should be included in the 2010 AU in the event that the sunset clause is triggered (see section 4.4.2) is discussed below in terms of:

- expansion studies and timeline
- scope of the feasibility study
- dispute resolution.

Expansion studies and timeline

We consider the expansion process in the undertaking should allow for access seekers and access holders to trigger the following studies (in the order listed):

(1) **concept study**—to enable a preliminary assessment of the costs, benefits and risk involved in potential expansion projects to provide the capacity required

(2) **pre-feasibility study**—to enable a focused study of all possible technical solutions which would deliver the capacity required

(3) **feasibility study**—to enable a detailed assessment of the proposed expansion project.

Aurizon Network should be, in the first instance, the party undertaking these expansion studies, as it is in the best position to do so. However, we consider the expansion process should provide for step-in rights, such that a third-party expert may undertake the studies under limited

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[91] Anglo American 2015: 6.

[92] Whilst we recognise that information regarding the baseline capacity of the CQCN is a significant issue for stakeholders, we do not propose to address it in this final decision. The issue of baseline capacity is being addressed in the 2014 DAU process.

circumstances. These circumstances could include Aurizon Network failing to enter into a study funding agreement in a reasonable time, or the study scope criteria, timelines and output requirements not being met. The step-in rights ensure the expansion process is not delayed unreasonably. We consider this assists in alleviating the concerns expressed by Vale regarding delays.

In our view, at the pre-feasibility stage, Aurizon Network should be required to give an indication of its willingness to fund the expansion, and whether it would seek any access conditions.[93] We consider Aurizon Network's expression of likelihood to invest at the pre-feasibility stage should be non-binding; the purpose is to provide an indication to access seekers whether a user-funding agreement is likely to be required for a project. We consider this provides some transparency and direction, and assists to expedite the process of developing a user-funding agreement.

We would anticipate that at the pre-feasibility stage the discussion of a user-funding agreement, if necessary, may begin as soon as the access seekers have been informed of Aurizon Network's indication of its funding preference. Notwithstanding this, the negotiation of a user funding agreement will most likely be finalised only after the feasibility study has been completed. This is because the outputs of the feasibility study are likely to be required for completing the schedules in the construction agreement.

We also consider that prospective SUFA funders should be able to require Aurizon Network to go through the preapproval process (discussed in section 6.5) where the outputs of the feasibility study will also play a pivotal role.

Scope of the feasibility study

As mentioned previously, the feasibility study would need to be able to satisfy the needs of all parties involved in a SUFA transaction. Effectively, we consider that the feasibility study should provide a package of deliverables that could be reasonably executed by a constructor.

We consider that the scope of the feasibility study should include:

- detailed assessment of technical and operating requirements of the proposed expansion
- all necessary survey and geotechnical investigations
- detailed design of the proposed expansion
- independent design verification, if required by study funders.

The purpose of the above scope is to provide a written report that includes:

- a 'for construction level' specification of the proposed expansion
- definition of an optimised project configuration that will provide the capacity being sought by the access seeker(s)
- confirmation of the technical and economic feasibility of the proposed expansion
- financial evaluation of the proposed expansion on tariffs
- a detailed cost estimation with a ± 10 per cent level of accuracy
- a detailed design and construct project schedule, including:

[93] Thereafter, Aurizon Network is to provide a confirmation of its willingness to fund, or otherwise, at the feasibility study stage. This will include any access conditions associated with a funding proposal.

  - a fully statused program showing critical path
  - time tolerances and project budget with a ± 10 per cent margin
  - an estimate of time and cost contingency supported by risk assessment and cost analysis
  - probabilistic risk assessment analysis to establish the basis of project contingency
  - a fully developed procurement methodology
- a fully developed project management plan (e.g. resource management plan, design management plan, etc.).

We recognise this may be perceived, by some parties, as a high bar for the feasibility study. However, we consider that a feasibility study that meets these requirements would be able to meet the requirements of all interested parties. We include the QCA as an interested party in this context, given its role in the preapproval process. We are of the view that given our duties under the QCA Act, for preapproval to be granted the QCA would have to have considerable confidence in the planning underpinning the SUFA project. This, coupled with our view that SUFA funders should be able to require preapproval, means a feasibility study has to produce high quality and reliable outputs.

We consider the requirements of the feasibility study should alleviate some of Anglo American's concerns regarding the provision of information and ensuring an efficient scope. These requirements are complemented by the right to dispute resolution, discussed below.

Dispute resolution

We consider the expansion process should provide for a dispute resolution mechanism, through which disputes could be referred under the undertaking to a third-party expert or the QCA for a binding determination. This mechanism should be sufficiently comprehensive to cover all possible disputes that could arise during the expansion process, including in relation to the completion of schedules in the SUFA documentation.

In our view, this partially mitigates the risks of a party (including Aurizon Network) unreasonably delaying the process, by providing for external determination as a fallback if negotiations fail. We consider this mechanism assists in addressing Anglo American's concern about Aurizon Network possibly refusing to provide an efficient scope and Vale's concerns regarding unreasonable delays.

Overall, we consider our proposed approach to dispute resolution appropriately balances the interests of all stakeholders (ss. 138(2)(b), (e) and (h) of the QCA Act), to the extent that they are involved in the expansion process. We also consider an effective expansion process aligns the aim of achieving efficient investment in the CQCN, which is consistent with the object of Part 5 of the QCA Act and the public interest (ss. 138(2)(a) and (d) of the QCA Act). This is because it provides support to the negotiate–arbitrate framework and a counterbalance to Aurizon Network’s bargaining power as the sole provider of the declared service.

6.5 Preapproval process

6.5.1 QCA draft decision

In our draft decision, we proposed including a preapproval process in the undertaking, to provide greater certainty to all relevant parties—including SUFA funders—that only efficient and prudent expansion-related capital expenditure would be included in the RAB.

We considered that preapproval should only apply once the expansion process has been completed and a set of up-front commitments have been agreed. We considered this should

strengthen the incentives for parties involved to engage in the expansion process appropriately, and decisions regarding the trade-offs when making a decision to expand would not be transferred to the QCA.

We viewed that up-front commitments regarding standard, scope, cost, time-to-complete and capacity outcome are essential, before the QCA can commit to the inclusion of capital expenditure into the RAB prior to construction of the infrastructure.

Inclusion of capital costs into the RAB

Our draft decision position regarding the preapproval process remained broadly unchanged from the position paper insofar as preapproval should comprise the following steps:

(1) Aurizon Network lodges a preapproval submission providing the required information. A report from an independent engineer/expert advisor (to be appointed by Aurizon Network, but responsible solely to the QCA) should also be provided.

(2) The QCA either approves or rejects the project based on the recommendation of the independent engineer/expert advisor (assuming that the QCA accepts the expert's recommendation is credible).

We said that if the preapproval assessment concluded the construction agreement and deliverables are reasonable, the lump sum would likely be preapproved for inclusion into the RAB. If, however, the QCA deemed the lump sum excessive for the deliverables, it would not be preapproved into the RAB. The critical point is that for each project we would review the construction agreement and its deliverables as a package and assess whether, based on this package, the lump sum could be preapproved.

We also clarified that, given our duties under the QCA Act, only the QCA can decide whether to include capital expenditure in the RAB. This is not a function of independent engineers, certifiers and advisors to undertake. They provide recommendations which may or may not be considered credible.

Treatment of contingency funding

We proposed that a contingency fund, over and above the lump sum, should be adopted for discretionary variations and adjustment events. This fund should be considered as part of the expansion process and agreed upon by parties prior to seeking preapproval and included as part of the preapproval submission.

Our view was this approach reflected that each capital project would have a unique set of risks, and terms and conditions within the construction agreement. It would also provide all prospective funders with a level of assurance as to the maximum expenditure the project was perceived to face.

Baseline capacity

We were of the view that, for the purposes of transparency and to ensure stakeholder confidence in the preapproval process, Aurizon Network should confirm and provide evidence that the proposed expansion would not affect the capacity entitlements of existing access holders. We noted that Aurizon Network's position suggested this would largely appear to be a formality.

6.5.2 Stakeholders' submissions on the QCA draft decision

Key issues that Aurizon Network commented on are summarised in Table 10.

Table 10 Aurizon Network's comments on the preapproval process

Issue	*Comment*
The need for a capacity commitment	Aurizon Network did not consider that a capacity guarantee should be required as part of preapproval.[94] It said the inclusion of a capacity guarantee would make preapproval harder, not easier, to achieve, as the preapproval would need to ensure the scope included as a result of the guarantee is prudent in the light of that guarantee. The inclusion of a capacity guarantee in a SUFA transaction, and substantial financial consequences for the capacity guarantor in the event that the capacity was not met, should be considered in determining whether the project scope is prudent. Aurizon Network expected that a capacity guarantee would support the inclusion of more scope than would otherwise apply.
Independent engineer endorsement	Aurizon Network said it was unclear what would happen if the QCA chose not to preapprove a SUFA project in the case where all SUFA parties, including the independent engineer, had endorsed the costs and scope.[95]
Confirmation of capacity impact	Aurizon Network did not consider further commitment regarding capacity impact on existing users would be required. It said that the extensive project development required under the proposed expansion process, as well as the compression mechanism, should sufficiently address this issue.[96]
Contingency fund	Aurizon Network noted that the amount payable under the draft decision pro forma SUFA construction agreement made no reference to the size of the contingency fund.[97] It considered that the amount payable under the construction agreement should, as is common practice, be the sum of the lump sum price and amounts determined under the construction agreement in respect of adjustment events and variations.

Asciano was unsure whether under our proposed approach the SUFA assets would be subject to the general QCA and access undertaking prudency tests prior to being incorporated into the RAB.[98]

6.5.3 QCA analysis and final decision

The third aspect of our construction approach is to set out a preapproval process in the context of the SUFA framework for the capital costs to be included in the RAB.[99] Our proposed preapproval process provides the opportunity for the capital costs to be preapproved under the expectation that preapproved capital costs will be included in the RAB post-commissioning.[100] We consider that this improves the bankability of the SUFA framework, as it provides some certainty regarding the treatment of SUFA capital costs and consequently the rental returns associated with the SUFA funders' investment.[101]

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[94] Aurizon Network 2015a: 25.
[95] Aurizon Network 2015a: 25.
[96] Aurizon Network 2015a: 26–27.
[97] Aurizon Network 2015a: 27.
[98] Asciano 2015: 7.
[99] While the 2010 AU already provides for Aurizon Network to seek preapproval, Aurizon Network has traditionally sought approval after the construction of the infrastructure.
[100] We note that the cost of the SUFA trustee for the construction phase of the SUFA project may also be included in the RAB. In our view, the construction phase of the SUFA project ends when the defects rectification period for the SUFA transaction is over.
[101] As noted in our discussion on capacity, it is possible that the capital costs included in the RAB may not meet funders' expectations if the project fails to deliver the expected capacity. Such a situation may occur if it is clear that inclusion of all the capital costs into the RAB would be counter to the object of Part 5 of the QCA

It is, however, not the case that a project or part of a project has to gain preapproval for it to be constructed. The existence of a preapproval process does not preclude the project being undertaken without using the process. Its use is triggered by Aurizon Network or SUFA funders.

For the avoidance of doubt, we have not stated that there is absolute certainty that preapproved capital costs will be included in the RAB. The reason for this is that we cannot provide such certainty given the object of Part 5 of the QCA Act. Prior to including expansion capital costs in the RAB, we have to be confident they represent efficient expansion costs. We consider this is dependent on what is actually delivered, which, in our view, largely relates to the extent actual capacity matches expected capacity, and if there is any difference, why this is the case.

We consider this should clarify Asciano's concerns regarding the prudency and efficiency benchmarks we are required to adopt, as well as Aurizon Network's query regarding our role with respect to inclusion of capital costs into the RAB. Ultimately, it is for us to decide whether capital costs are included in the RAB; it is not the role of independent engineers to do so, and the decision need not depend on whether all SUFA parties, including an independent engineer, endorse the cost and scope.

We are nevertheless of the view that preapproval minimises the risk of capital costs being excluded from the RAB. For the QCA to consider preapproving a project, it needs to have a high degree of confidence the project represents efficient investment in the CQCN, and will deliver the expected capacity at the expected costs. In this context, the feasibility study under our proposed expansion process seeks to provide sufficient rigour in the planning stage.

Up-front commitments from Aurizon Network, in the form of deliverables under the construction agreement, should be determined through the feasibility study and clearly articulated in the construction agreement. As such, the deliverables (including scope, cost and capacity) under the construction agreement represent a pivotal part of any preapproval submission and provide some assurance to all parties (including the QCA) that the project will deliver the outcomes expected. We consider this objective is supported by the fact SUFA funders may require Aurizon Network to make a preapproval submission.

We expect the preapproval process will require the QCA to consider various elements of the construction agreement. In addition to considering the deliverables under the construction agreement, we would need to consider, amongst others, the impact of any liquidated damages on the contract price and whether or not any profit element within the contract price reflects a prudent and efficient price, in the context of the other risks Aurizon Network is being asked to assume under the construction agreement.

We do, however, recognise that up-front commitments represent an initial baseline and that, as construction progresses, there can be legitimate events that impact on scope, cost, time-to-complete and expected capacity. Consequently, we are of the view that the preapproval process should adopt a dynamic approach to account for this.

Outlined below is our position with respect to how preapproval would operate and interact with elements of the pro forma construction agreement. Thereafter, the role of a post-commissioning assessment and baseline capacity are considered in the context of preapproval.

Act. This is possible if the SUFA project has delivered capacity to a level less than expected, to the extent that the total capital costs cannot be deemed a prudent and efficient investment. In our view, whilst this is unlikely, it is possible. This also assumes that capacity will be utilised as commissioned and that, as a result, it is possible to gain an indication around the commissioning date of capacity to be delivered.

Preapproval process and the pro forma construction agreement

We consider the preapproval process is likely to be staggered across the lifespan of the construction project—particularly if the completion date of the project is a number of years away. Essentially preapproval of a particular tranche of capital expenditure is unlikely to occur until the relevant parties can demonstrate the need for the expenditure and provide a robust evidence-based justification in support.

Overall, we would expect an initial preapproval submission based on the pro forma construction agreement to include the following:

- initial scope
- contract sum
- risk profile and associated damages regime
- capacity delivery
- adjustment events.

Each of these elements is considered in further detail below.

Initial scope

The initial scope of the project comprises the elements of the capital project that have been verified (possibly through the feasibility study) and agreed between parties as required, and for which there is a high degree of certainty associated with the construction costs.

If the project has a long lead time, we consider it is less likely that there will be clarity regarding the need and form of some aspects of the project at the outset. In such circumstances, there may be valid justifications for these elements of the project not to be included in the initial scope as part of the initial preapproval submission. Instead, where agreed by the relevant parties such elements can be included as provisional sums in the contract sum.

Contract sum

As a result, we see the contract sum as two distinct parts:

Contract sum = lump sum + provisional sums

The lump sum comprises two consolidated parts:

Lump sum = anticipated construction cost + contingency

With respect to the lump sum, the anticipated construction cost represents the anticipated cost of the initial scope, with an additional allowance for contingencies. The contingency allowance seeks to cover risks that are not covered through other aspects of the specific contractual arrangements (such as the adjustment event regime as discussed below). The full lump sum is payable to the constructor even if the contingency events did not occur. We consider this should clarify Aurizon Network's queries regarding the functioning of the contingency funding process.

Provisional sums relate to possible variations to the initial scope that have been agreed, apart from where there is a reasonable degree of uncertainty regarding their form or the need for them or their form. For example, if, at the start of the project it is not clear whether a particular bridge will be required as part of the scope of the project, the bridge should not be included as part of the initial fixed scope. If, however, it is agreed between the relevant parties that the bridge may be required, that element of the scope can be included as a provisional sum.

Provided we are satisfied with the initial preapproval submission regarding the initial scope and the lump sum, preapproval may be obtained for the lump sum and the initial scope, subject to other aspects of the negotiated construction agreement being considered appropriate. Beyond the initial scope, preapproval of provisional sums in the context of the initial preapproval submission will depend on the specific circumstances of each individual project and the information provided to support each provisional sum.

Our view will be informed, but not determined, by the independent engineer's recommendations. Of relevance when making our decision will be the extent to which we consider the independent engineer's recommendation to be genuinely independent and based on objective evidence. If we are of the view the independent engineer's recommendation is not genuinely independent or not based on objective evidence, we may decide to refuse the initial preapproval submission.

If the preapproval submission does not provide us with sufficient detail of the composition of the initial scope and the expected construction dates, it is likely that the preapproval submission will be refused. Further, if we are of the view that the initial scope includes elements more akin to provisional sums, we may reject the preapproval submission or require amendments to it. Preapproval of the lump sum may also be hampered if the contract sum is skewed towards provisional sums. This is because, in our view, the greater the proportion of provisional sums within the contract sum, the greater the uncertainty surrounding the overall capital cost of the project.

In the event that preapproval of the lump sum and initial fixed scope is not provided, the cause of this (and the party/parties we consider responsible for the cause) will be communicated to the relevant parties. It is for the relevant parties to decide the action they wish to take based on this information. This could include resubmitting the initial preapproval submission for preapproval in a manner that takes into account our concerns.

Risk profile and associated damages regime

The level of risk assumed by Aurizon Network under the construction agreement, as defined by provisions such as the liquidated damages regime that may be included in the agreement, is likely to impact on the lump sum (or the profit element included in the contract sum).

We note the parties will need to negotiate the allocation of this risk on a project by project basis. As a result, we will need to understand how this allocation has been developed and what the effect is on the contract sum, in order for us to confirm the proposed contract sum is prudent and efficient. For example, if in the circumstances it is reasonable for an accelerated construction timetable and for an associated aggressive liquidated damages regime to ensure delivery on time, we would expect Aurizon Network to be compensated (through the contract sum) for agreeing to that additional risk. However, we also expect that we would need to test the assumptions against the market to confirm the reward is reasonable in the circumstances and, consequently, the contract sum is prudent and reasonable.

As a result, we anticipate Aurizon Network would provide its detailed costings that resulted in the contract sum to the QCA, to enable preapproval to be effective.

Capacity delivery

In our view, if the initial preapproval submission and construction agreement do not provide some form of certainty over capacity outcomes, preapproval will not be possible. This does not preclude the project being undertaken; it means that preapproval of the initial fixed scope and lump sum cannot occur.

The project exists to provide rail capacity. It is the delivery of this capacity that will, to a large extent, define whether the expansion project costs constitute efficient investment in the CQCN. We consider that it would be difficult for us to assess the efficiency and prudency of a project in the absence of an understanding of the expected capacity for preapproval purposes.

Further, given the nature of the feasibility study that will underpin any preapproval submission, we do not share Aurizon Network's view that having some form of certainty with respect to expected capacity would make preapproval harder. Moreover, it is not clear to us that the provision of such certainty automatically leads to an increase in construction costs.

We are of the view that access seekers and SUFA funders can derive a value from some form of certainty in relation to expected capacity. The extent to which SUFA funders derive such value can be tested on a project-by-project basis via preapproval. Whilst SUFA funders have the right to require the project goes through the preapproval process, this is not a requirement for the project to be undertaken.

Adjustment events

Adjustment events relate to events that, if they occur, may result in the lump sum cost of the project being varied. The pro forma construction agreement includes a list of adjustment events (see section 7.5).

The preapproval process does not necessarily preclude further adjustment events for specific project risks being included in the construction agreement. In fact, we expect the initial preapproval submission to include the adjustment events agreed between the relevant parties. This has implications for the overall risk profile borne by Aurizon Network as the constructor of SUFA infrastructure.

The adjustment events in the initial preapproval submission should mirror those included in the schedules to the negotiated construction agreement. If, in our view, there are adjustment events in the negotiated agreement that appear unreasonable, the preapproval submission is likely to be refused. At our discretion, the refusal may apply to only the adjustment events, or to the whole of the preapproval submission.

It should be noted that preapproval of an adjustment event is not the same as preapproving the inclusion of any cost implications associated with that event. The cost implications associated with adjustment events are considered in the next section.

Applying adjustment events

The cost impact of an adjustment event that has been preapproved as part the initial preapproval submission may be included in the RAB (as part of the construction costs), provided it has firstly been assessed by the independent certifier. We expect the independent certifier to make a decision under the terms of the construction agreement based on the certifier's view as to whether the adjustment event has occurred, and whether the implications the event has for the lump sum cost of the initial fixed scope are reasonable. We note the independent certifier's decision is subject to dispute through an expert determination process under the construction agreement.

We will, at our discretion, decide whether to accept the independent certifier's or expert's decision. Of relevance when making this decision will be the extent to which we consider the independent certifier's or expert's decision is independent and based on objective evidence. If we are of the view that the independent certifier's or expert's decision is not independent, or is not based on objective evidence, we may decide to refuse to include all or part of the cost impact in the RAB.

Applying discretionary variations and provisional sums

Discretionary variation (see section 7.5) and provisional sum items change the initial scope of the project. If a variation or a provisional sum item has yet to be undertaken but there is agreement between the relevant parties (i.e. the SUFA trustee and Aurizon Network) that it may be required, and there is a high degree of certainty over the scope and cost of the variation or provisional sum item, then preapproval can be applied for (either as part of the initial preapproval submission or during the construction phase). This requires the following to be submitted to us:

- revisions to the initial scope
- revisions to the contract and lump sums
- implications for expected capacity.

For provisional sum items, the proposals submitted for preapproval (prior to the work being undertaken) will be expected to be reconciled with those originally identified for the provisional sum, with any differences explained.

Similar to the initial preapproval submission, our view will be informed, but not determined, by the independent certifier's recommendations. Again, of relevance when making this decision will be the extent to which we consider the independent certifier's recommendation independent and based on objective evidence. If we are of the view that the independent certifier's recommendation is not independent, or not based on objective evidence, we may decide to refuse the preapproval submission.

Provided we are satisfied with the cost proposals, preapproval can be obtained for the variation or provisional sum item prior to the relevant work being undertaken. This will result in the preapproved lump sum and the initial scope being amended to account for the variation or provisional sum item. In the event that the variation event is not granted preapproval, the cause (and the party/parties the QCA considers responsible for the cause) will be communicated to the relevant parties. It is for the relevant parties to decide the action they wish to take based on this information. This could include resubmitting the variation or provisional sum item for preapproval in a manner that takes into account our concerns.

For avoidance of doubt, this process does not preclude relevant parties choosing to undertake variations or provisional sum items prior to them being preapproved. Further, the relevant parties can still apply for the variation or provisional sum item to be included in the RAB once the work has been undertaken, particularly if there is still a considerable time period to elapse prior to the completion date of the project. The assessment approach adopted will be similar to that for the preapproval of variations or provisional sum items. The primary risk is that we may not consider all or some of the cost of the variation prudent and efficient. This is less likely for variation and provisional sum items that have been preapproved.

Post-commissioning assessment

Once the construction phase is complete, we will undertake a post-commissioning assessment prior to the costs being included into the RAB. We will assess the actual contract sum, which would include actual adjustment event costs and costs arising from changes to the initial scope, as well as the extent to which the actual capacity delivered aligns with the capacity initially

anticipated to be delivered by the infrastructure.[102] Our view will be informed, but not determined, by the independent certifier's recommendations.

In our view, the post-commissioning assessment should be a relatively simple process, provided the preapproval process outlined above is rigorously applied by all parties and there is no material difference between the actual capacity delivered and anticipated capacity that would require consideration in light of the object of Part 5 of the QCA Act.

Baseline capacity

We remain of the view that for the purposes of transparency and to ensure stakeholder confidence in the preapproval process, Aurizon Network should confirm and provide evidence that the proposed expansion would not affect the capacity entitlements of existing access holders. We consider that such information should arise from the feasibility studies provided for under our proposed expansion process.

Conclusion

Overall, we consider our proposal with respect to preapproval supports the workability, bankability and credibility of the SUFA framework. It provides a mechanism through which SUFA funders can gain confidence that the risk of the capital costs of the project not being included in the RAB is minimised. This results in greater confidence in the SUFA providing the expected returns.

We are also of the view that our proposal is consistent with the object of Part 5 of the QCA Act, as it increases the likelihood of efficient investments in the CQCN. Our proposal not only supports the SUFA but also provides a rigorous mechanism through which the likely treatment of capital costs for any capital project can be tested as the project progresses. Further, efficient investments in the CQCN are in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

We do not consider our proposal is counter to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act). We consider our proposal balances these interests with the interests of access seekers and third party financiers investing in the project, and the interests of access holders who may be impacted by the project (ss. 138(2)(e) and (h) of the QCA Act).

6.6 Expansion pricing process

6.6.1 QCA draft decision

In our draft decision, we noted that part of the preapproval approach is the system test, which would assess whether the SUFA infrastructure should be socialised with existing infrastructure or not.

6.6.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network noted the work currently being undertaken in the 2014 DAU process would likely provide greater certainty around socialisation.[103]

[102] This assumes that capacity will be utilised as commissioned and that, as a result, it is possible to gain an indication around the commissioning date of capacity delivered.

[103] Aurizon Network 2015a: 26–27.

Asciano was strongly opposed to any approach which would result in the socialisation of SUFA costs among existing users. It said that users should only pay for assets they use, and they should not have to bear the costs of assets they do not use.[104]

6.6.3 QCA analysis and final decision

Our position is that, as part of preapproval, Aurizon Network will be required to propose a set of tariff arrangements for the users of the proposed expansion. The objective of this is to provide some clarity over the pricing treatment of the expansion.

We consider such clarity is needed. The pricing regime has implications for SUFA funders' risk profiles. For example, if the SUFA is socialised within a particular CQCN system, volume risk is pooled, which could reduce the month-on-month volatility in SUFA funders' rental streams. This may not be the case if the SUFA project is not socialised.

In our view developing a greater understanding of socialisation at the outset of the project is beneficial as it improves the workability, bankability and credibility of the SUFA framework by creating a better understanding of any risks associated with the pricing of the expansion and the impact these may have on rental streams. We do, however, note that it may be the case that a final assessment of the proposed tariff arrangements for the project needs to be reviewed as part of the post-commissioning assessment.

We are of view this approach appropriately has regard to the interests of SUFA funders (i.e. access seekers and/or third party financiers) and access holders that may be impacted by the expansion (ss. 138(2)(e) and (h) of the QCA Act). Further, we do not consider it counter to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

[104] Asciano 2015: 7.

7 CONSTRUCTION AGREEMENT

A key consideration for our assessment of the pro forma SUFA construction agreement is whether it is an appropriately balanced agreement that accounts for Aurizon Network's monopoly position in the CQCN, and the bargaining power Aurizon Network has as a consequence of this. In this light, the pro forma SUFA construction agreement should seek to achieve a credible position from which it is possible for prospective SUFA funders to negotiate alternative terms or adopt the standard pro forma SUFA documentation. If the standard pro forma SUFA documentation is adopted, then it is expected that negotiation will be largely limited to the construction agreement schedules that are project-specific and dependent on the outcomes of the feasibility study.

Our final decision has the following key proposals:

- *Control over construction should be allocated to Aurizon Network.*
- *The construction aspects of the Rail Corridor Agreement (RCA) should be amended to clarify that the SUFA trustee's access to the rail corridor would only be for limited purposes and to account for Aurizon Network being both the landholder and contractor*.
- *The Project Management Agreement (PMA) should be replaced with a modified version of the Australian Standard Construction contract (i.e. AS 4902–2000)*.
- *The pro forma construction agreement should adopt a flexible price model, allowing for lump sum, provisional sum, discretionary variations and adjustment events, for the delivery of a set of up-front commitments*.
- *An obligation in relation to capacity delivery should be included in the construction agreement.*
- *The contractor is to receive pre-payment in the absence of security provisions covering peak construction costs.*

7.1 Background

Since its inception in 2011, the suite of SUFA documentation has always contemplated that some form of a construction agreement would be a necessary requirement for an effective SUFA arrangement.

The pro forma SUFA construction agreement sets out the baseline terms and conditions for the construction of SUFA projects. These conditions define the risk/reward/liability framework underpinning the construction of a project when the pro forma SUFA construction agreement is adopted. Given this, the terms of the pro forma construction agreement have been the subject of considerable debate between Aurizon Network and stakeholders, and general agreement over the baseline terms and conditions has not been achieved to date.

Against this background and in light of Aurizon Network's monopoly position in the CQCN, we have sought to ensure that the pro forma construction agreement provides a credible position, from where it is possible for prospective SUFA funders to negotiate alternative terms or to adopt the standard pro forma SUFA documentation. The has required us to consider how best to balance the section 138(2) matters in a number of instances.

In undertaking this exercise, we note that whilst the SUFA documentation should aim to be ‘stand-alone’ from a technical legal perspective, the schedules to the pro forma construction agreement are project-specific. We consider our recommendations that the undertaking include

an expansion and preapproval process, as well as an expansion pricing process, provide greater certainty and transparency regarding the outcomes of the project and a guide to the content of the schedules to the pro forma construction agreement.

In this chapter we discuss the following:

- overarching form of the construction agreement
- contract pricing
- contractor's warranties
- discretionary variations and adjustment events
- liquidated damages
- liability
- other issues.

7.2 Overarching form of construction agreement

7.2.1 QCA draft decision

In the draft decision, we considered the construction approach as defined by the PMA and aspects of the RCA within the 2013 SUFA DAAU would not support SUFA's objective of facilitating credible funding options for expansions in the CQCN.

We proposed the PMA be replaced with a more conventional contractual structure where Aurizon Network and the SUFA trustee (representing the funders) would be the designated contractor and principal respectively. Our draft decision construction agreement was a modified version of the Australian Standard template AS 4902–2000—General Conditions of Contract for Design and Construction. We also proposed to amend the RCA to reflect the replacement of the PMA with a construction agreement.[105]

We considered these changes reflect the principle that Aurizon Network should have the control of the SUFA construction process. We also considered using a modified version of an Australian Standard contract would likely make the process of finalising and executing the contract more efficient, as parties are more likely to have previous experience with that form of contract. We viewed our proposal would strengthen the workability, bankability and credibility of the SUFA framework.

7.2.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network generally supported our proposal to replace the PMA with a more standardised construction agreement as well as the consequential amendments to the RCA.[106]

The QRC did not indicate any objection to our proposal, although it made a number of detailed drafting comments on our draft decision pro forma construction agreement.[107] These drafting comments included amendments providing greater certainty about the lump-sum contract price

[105] This was to remove the agency concept and clarify that the SUFA trustee's access to the rail corridor would only be for very limited purposes.
[106] Aurizon Network 2015a: 18.
[107] QRC 2015: 14–25.

and variations to the liability regime set in the construction agreement (as addressed further in this chapter).

7.2.3 QCA analysis and final decision

We maintain the position in our draft decision that we do not consider the PMA and RCA appropriate contractual arrangements for the SUFA construction process. We consider it appropriate to:

- replace the PMA with a modified version of the Australian Standard construction contract (i.e. AS 4902–2000)
- allocate the control over construction to Aurizon Network
- amend the construction aspects of the RCA to clarify that the SUFA trustee's access to the rail corridor would only be for very limited purposes and to account for Aurizon Network being both the landholder and contractor.

These changes reflect our view that Aurizon Network should have control over construction of SUFA projects. We also consider that using a modified version of an Australian Standard contract will make the process of finalising and executing the pro forma SUFA construction agreement more efficient, given parties are more likely to have previous experience with that form of the contract.

Overall, we consider our proposals outlined above appropriate, having regard to the matters set out under section 138(2) of the QCA Act. Our proposals have the potential to reduce barriers to participation in a SUFA through simplifying the contractual arrangements for the construction of SUFA projects. This is in the interests of access seekers and third party financiers (ss. 138(2)(e) and (h) of the QCA Act) as it supports a workable, bankable and credible SUFA framework. Further, our view is a workable, bankable and credible SUFA framework aligns with the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act), as it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently.

Efficient financing assists in ensuring efficient investment in the CQCN, which is in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act). Further, we consider our approach is not inconsistent with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

We do, however, note that while Aurizon Network and stakeholders have not indicated opposition to the overarching form of the construction agreement, they have proposed amendments to detail of the draft decision construction agreement. These amendments are considered further in this chapter.

The amendments we consider appropriate are outlined below.

Final decision 7.1

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to:

(a) replace the PMA with a modified version of the Australian Standard construction agreement (i.e. AS 4902-2000)

(b) allocate the control over construction to Aurizon Network

(c) amend the construction aspects of the RCA to clarify the SUFA trustee's access to the rail corridor would only be for very limited purposes.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.3 Contract pricing

7.3.1 QCA draft decision

Our draft decision pro forma SUFA construction agreement was based on a lump-sum price model. We considered this the most suitable way to price the pro forma SUFA construction agreement, with the main advantage being that it provides a degree of predictability with respect to the overall capital cost of the project, as well as providing some certainty about the time-for-completion of the project.

We, however, noted that our proposal did not preclude other pricing structures being negotiated if it is in the interests of the relevant parties to do so.

7.3.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network supported our position that the construction agreement should adopt a lump-sum price for the delivery of a set of up-front commitments in relation to construction scope, standard and time-to-complete (but not for capacity).[108] It also said that the construction agreement for each SUFA transaction should be priced in line with construction industry norms, and that a ‘consistent with market practice’ principle should be incorporated into the access undertaking’s expansion process to govern the formulation of the construction agreement.[109]

The QRC was unsure under our draft decision construction agreement if the lump-sum contract price would be subject to adjustments for 'rise and fall or escalation'.[110] It considered 'rise and fall' should be excluded from recovery by the contractor. Further, the QRC suggested that provisional sums should only be payable to the contractor arising from a direction from the SUFA trustee.

[108] Aurizon Network 2015a: 20.
[109] Aurizon Network 2015a: 21.
[110] QRC 2015: 14.

7.3.3 QCA analysis and final decision

Our final position is the pro forma SUFA construction agreement should adopt a contract pricing model allowing for a lump sum, provisional sums, discretionary variations and adjustment events.

As noted in our discussion regarding preapproval (section 6.5), the contract sum as defined in the pro forma SUFA construction agreement is:

Contract sum = lump sum + provisional sums

The lump sum comprises two consolidated parts:

Lump sum = anticipated construction cost + contingency

The contract sum is subject to negotiation and informed by the feasibility study provided for under our proposals for an expansion process. During the construction phase, the contract sum may be adjusted depending on the use of (or occurrence of events associated with) provisional sum; discretionary variation; and adjustment event provisions (effectively payable on an 'as incurred' basis).[111]

By contrast, the full lump sum is payable to the contractor (i.e. Aurizon Network). The lump sum is made up of the anticipated construction cost of the initial scope, with an additional allowance for contingencies. The contingency allowance seeks to cover risks that are not covered through other aspects of the specific contractual arrangements (e.g. the adjustment event provision).

Based on expert legal advice regarding the practicalities of construction contracting, our view is that if the pro forma SUFA construction agreement does not allow for provisional sums, discretionary events and adjustment events, the risks associated with these events may be factored into the contingency element of the lump sum. We consider this would create a tension with the object of the third party access regime in the QCA Act with regard to efficient investment in the CQCN (ss. 69E and 138(2)(a) of the QCA Act). This is because risks priced into the lump sum would be paid-out even if these risks did not materialise. Given this, we consider it may be efficient for the SUFA trustee (and effectively SUFA funders) to have the option to bear some risk through the use of provisional sum, discretionary variation and adjustment event provisions.

Against this background, our view is the inclusion of provisional sum, discretionary event and adjustments event provisions provides appropriate balance and flexibility, given the need for the pro forma SUFA construction agreement to be able to deal with projects that may have long lead times. This is particularly relevant, given the longer the lead time, the less certainty there may be surrounding aspects of the projects future requirements.

Our approach allows the parties to a SUFA transaction to decide on a project-specific basis the overall composition of lump sum, provisional sums, discretionary events and adjustment events, noting that a requirement for preapproval suggests there are limitations to the use of provisional

[111] If a provisional sum is included and if the relevant work is carried out, then, under the pro forma SUFA construction agreement, the independent certifier will price this work once completed, and the difference with the provisional sum added or subtracted to the contract sum payable to the contractor, along with an amount for profit calculated using a percentage negotiated between the parties to the agreement. For the avoidance of doubt, being certified itself does not mean the provisional sum has been approved as prudent and efficient by us. It simply means that, from a contractual perspective, the original provisional sum adopted in the overall contract sum has been adjusted to account for independent certifier's view regarding the price of the work being carried out. If the relevant work is not carried out then the provisional sum is not payable.

sums, discretionary events and adjustment events. This is because preapproval requires the QCA to be sufficiently confident that any proposals presented to it are not unduly open-ended.

In this regard, whilst our pro forma SUFA construction agreement means that the contract sum may vary through time, we are of the view the dynamic approach adopted for preapproval provides parties with a mechanism that, if they wish to use it, assists in mitigating the possibility that changes they agree between themselves are considered imprudent and inefficient capital costs by the QCA and excluded from the RAB. This applies equally for provisional sums, discretionary events and adjustments events.

Against this background, our response to the QRC comments is as follows:

- The provisional sum works are only carried out if directed by the principal (i.e. the SUFA trustee representing the funders) during the construction phase.
- The pro forma SUFA construction agreement does not provide adjustments to the contract sum for rise or fall or escalation. Rise or fall or escalation may be legitimate factors to include if, for example, the SUFA project has a long lead time. Our view is this should be considered by, and agreed between, the parties to a SUFA transaction on a project-by-project basis and is dependent on how they wish to construct the contract price and their requirements regarding preapproval.

In relation to Aurizon Network's proposals regarding contract pricing, we do not agree that a 'consistent with market practice' principle be included in an access undertaking's expansion process. The expansion process seeks to provide transparency regarding the development of an expansion project and the outputs expected from that project. This, in itself, is not directly related to a SUFA transaction or the pro forma SUFA construction agreement. Further, our view is the criteria for the inclusion of capital expenditure into the RAB relates to its prudency and efficiency, not it being 'consistent with market practice', although the two may coincide. Given this, we do not consider it appropriate to adopt Aurizon Network's proposal.

Moreover, and for the avoidance of doubt, we reiterate that contrary to Aurizon Network's proposal outlined in its comments regarding contract pricing, we remain of the view preapproval will require some form of up-front commitment in relation to capacity delivery. The final decision regarding the contractor's contractual obligations in relation to capacity delivery is discussed in section 7.4.

We consider that our position regarding contract pricing in the pro forma SUFA construction agreement achieves an appropriate and pragmatic balance between: (1) ensuring the contract pricing structure has regard to efficient investment in the CQCN; and (2) providing sufficient flexibility to allow parties to a SUFA transaction to decide on a project-specific basis how they wish to structure contract pricing when using the pro forma agreement. We consider this aligns with the object of the QCA Act and the public interest, whilst also accounting for the interests of those parties that have a direct interest in the construction agreement of a SUFA transaction, which, in our view, comprise Aurizon Network and some combination of access seekers and third party financiers (ss. 138(2)(a), (b), (d), (e) and (h) of the QCA Act).

Further, we consider the preapproval process supports this through providing a mechanism to gain greater certainty that the capital costs associated with the SUFA transaction will be included in the RAB. We are also of the view that use of the preapproval process requires parties to a SUFA transaction to constrain the use of provisional sums, discretionary events and adjustment events.

The amendments we consider appropriate are outlined below.

Final decision 7.2

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to include, in the pro forma SUFA construction agreement, a contract pricing model allowing for a lump sum, provisional sums, discretionary variations and adjustment events.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.4 Contractor's warranties

7.4.1 QCA draft decision

In our draft decision, we considered that for the SUFA framework to be workable, bankable and credible, Aurizon Network, as the contractor for a SUFA project, must provide up-front commitments to the SUFA trust for scope, standard, time-to-complete and capacity outcome of the project. We considered this necessary to provide parties with certainty about the delivery of the project.

To this effect, the draft decision pro forma construction agreement contained a list of the contractor’s warranties to the principal. These were set out under clause 2.2 of the agreement, which specified the contractor warranting that it:

- shall at all times be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of scope[112]
- has examined any preliminary design included in the principal's project requirements and that such preliminary design is suitable, appropriate and adequate for the purpose stated in the principal's project requirements
- shall carry out and complete the contractor's design obligations to accord with the principal's project requirements
- shall carry out and complete scope in accordance with the design documents so that the works, when completed, shall:
  - be fit for their stated purposes
  - comply with all the requirements of the contract.

The warranty regime in the construction agreement, however, explicitly did not cover a capacity guarantee. This is because the draft decision proposed such a guarantee be incorporated in the access undertaking. In light of this, the warranty regime within the draft decision pro forma construction agreement would effectively only be used to ensure the construction scope is delivered at the required standard and within the specified period.

[112] The construction scope is defined as the 'work under the contract' (WUC) in the construction agreement.

7.4.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network did not support the requirement in the construction agreement for it (as the contractor) to provide a fit-for-purpose warranty in respect of all scope it delivers.[113]

Aurizon Network said it would be prepared to accept such a warranty for scope it proposed or otherwise agreed as part of the expansion process, of a SUFA project. However, it considered the fit-for-purpose warranty should not apply to 'imposed scope'[114] which, in Aurizon Network's opinion, is not fit for purpose. Otherwise, Aurizon Network considered it would be 'subject to reputational risk should it knowingly make a false, misleading and/or deceptive warranty'[115].

To give effect to this position, Aurizon Network proposed drafting changes to the pro forma SUFA construction agreement to specify that the fit-for-purpose warranty would not apply to any part of the works which is a 'scope difference', being any part of the scope that, as a result of a QCA determination, is different to the contractor's documents or submissions to the QCA as part of the expansion process.[116]

By contrast, the QRC considered the contractor's warranties under the draft decision pro forma SUFA construction agreement were 'extremely limited' and would not adequately address the risk of non-performance of the contractor's obligations under the agreement. It proposed the inclusion of a number of additional warranties, including in respect of:

- the performance of due diligence in relation to the availability of skilled labour, equipment and material required for the scope
- the sufficiency of the contract sum
- responsibility for obtaining and maintaining all required regulatory approvals for the scope.[117]

7.4.3 QCA analysis and final decision

We discuss the contractor's warranties in the following sections:

- stakeholders' comments
- capacity commitments and the pro forma SUFA construction agreement.

Stakeholders' comments

We note Aurizon Network's objection to the contractor's warranties included in our draft decision pro forma SUFA construction agreement relating to the fit-for-purpose warranty covering all aspects of the scope, including what Aurizon Network has described as 'imposed scope'. 'Imposed scope' is scope Aurizon Network considers it is compelled to adopt as a result of a dispute resolution determination under the expansion process. Aurizon Network considers that it would be 'subject to reputational risk should it knowingly make a false, misleading and/or deceptive warranty', if it had to warrant such scope as fit for purpose.

[113] Aurizon Network 2015a: 19.
[114] Scope that Aurizon Network is compelled to adopt as a result of a determination through the dispute resolution process under the expansion process.
[115] Aurizon Network 2015a: 19.
[116] Aurizon Network 2015w: 11, 13.
[117] QRC 2015: 14.

We do not agree with Aurizon Network. Our final decision proposes to maintain our draft decision position that the fit-for-purpose warranty should cover the complete scope.

We consider that in circumstances where a scope is determined via binding dispute resolution, it is that scope which should be covered by the contractor's warranties. This is because it has been deemed the appropriate scope through an independent process into which Aurizon Network has had the opportunity to provide input. In effect, the dispute resolution process has defined this scope as fit-for-purpose and any warranty associated with such a scope is not false, misleading and/or deceptive. In our view, only in circumstances where Aurizon Network's analysis was flawed is it likely to receive an unfavourable outcome in an expert determination. In such circumstances, we consider the only risk to Aurizon Network's reputation is if it does not accept the outcome of the dispute process.

With regard to the QRC's proposed amendments to the contractor's warranties regime, we are not convinced that, on the whole, they are necessary. This is because they either relate to matters the principal (effectively the SUFA funders) ought to assess as part of the negotiation of a SUFA project, such as sufficiency of the contract sum for the works under construction (WUC), or are already addressed through existing provisions and processes established elsewhere under the construction agreement (e.g. in relation to defects in the works or the consequences for delays in the procurement of equipment and materials required for the works). For these reasons, we consider it unnecessary to include them in the pro forma SUFA construction agreement.

Overall, we are satisfied the contractor's warranties set out in our draft decision pro forma SUFA construction agreement remain appropriate for our final decision. We consider these warranties appropriately account for the interests of SUFA funders (whether access seekers and/or third party financiers) (ss. 138(2)(e) and (h) of the QCA Act). This is because they provide more certainty about the expected outcome of SUFA projects. Our view is this enhances the workability, bankability and credibility of the SUFA framework, thereby reducing barriers to participation. This aligns with the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act) to the extent that it improves the likelihood of expansion in the CQCN being funded efficiently. Efficient investments in the CQCN are in the public interest, as well as the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Further, we consider that our position supports the 'negotiate–arbitrate' principle and appropriately balances this with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act). This is because it provides Aurizon Network with the opportunity to put forward its case for independent review via a dispute resolution process, whilst ensuring that dispute resolution is seen as a credible process because the outcome of a determination is implemented in an appropriate manner.

Capacity commitments and the pro forma SUFA construction agreement

Our draft decision did not include a specific capacity obligation within the pro forma SUFA construction agreement. Rather, we proposed that capacity commitments be included within the undertaking itself. After further consideration our view is that capacity delivery with respect to SUFA projects should not be dealt with via the undertaking, we are minded to include obligations in respect of capacity within the pro forma SUFA construction agreement itself. Our view is that this aligns more closely with Aurizon Network's roles and responsibilities in the context of the SUFA framework—in particular, the fact that Aurizon Network is the contractor of SUFA projects.

In developing our approach, we have been guided by expert legal advice regarding the structure of obligations in respect of capacity. We have also been conscious that for the SUFA framework to be effective, the principal has only Aurizon Network as an option for a contractor. As a result,

Aurizon Network has the benefit of a monopoly position and potentially undue bargaining strength, unless this is mitigated through the conditions included in the pro forma SUFA construction agreement.

Against this background, our final decision pro forma SUFA construction agreement:

- specifies the contractor is to deliver 'required expansion capacity'
- provides for parties to negotiate a percentage of the 'required expansion capacity' known as the 'minimum capacity change'.

In any case that the contractor (i.e. Aurizon Network):

- fails to deliver the minimum capacity change, it must undertake rectification works to deliver the minimum capacity change (at its own cost). If the contractor fails to deliver the minimum capacity change after a further two attempts, then to avoid further delay if the principal (i.e the SUFA trustee) so requires, the agreed liquidated damages for failure to deliver the minimum capacity change are payable to the principal, subject to a cap (as discussed below)
- delivers the minimum capacity change but fails to deliver the required expansion capacity, the contractor may attempt to rectify the capacity shortfall (at its own cost) or pay the agreed liquidated damages to the principal, subject to a cap (as discussed below).

As part of this proposal, the relevant parties are to negotiate two liquidated damages caps and a liquidated damage rate (dollar per train path undelivered) for capacity delivery, in addition to the existing liquidated damages rate and cap for late completion. If the actual capacity delivered is lower than the minimum capacity change, we expect that a higher liquidated damage cap for capacity delivery will apply; if the actual capacity delivered is higher than the minimum capacity change (but below the required expansion capacity), we expect that a lower level of liquidated damages cap will apply. The difference between these liquidated damages caps reflects the different implications for parties (i.e. access seekers and/or third-party financiers) depending on whether the minimum capacity change is delivered.

For example, suppose the negotiated levels of required expansion capacity and minimum capacity change are 20 train paths and 18 train paths respectively, and after commissioning it is found that only 15 train paths can be sustainably delivered. In that case, the contractor will be contractually required to at least rectify part of this capacity shortfall, at its own costs, such that at least 18 train paths (that is, the minimum capacity change) are delivered. If the contractor fails to rectify such that the minimum capacity change is achieved then, after the second attempt to rectify, the principal can require the contractor pay liquidated damages, as agreed under the construction agreement, due to failure to deliver required expansion capacity. Beyond this minimum capacity change, the contractor can choose to attempt to fully rectify the shortfall (against the required expansion capacity) or to pay liquidated damages as agreed under the construction agreement, due to failure to deliver the required expansion capacity.

If the parties to a SUFA transaction cannot agree on the required expansion capacity and minimum capacity change, this will be subject to binding dispute resolution provided for under the undertaking. Our view is this is necessary given Aurizon Network is the sole option available to SUFA funders to act in role of contractor for SUFA projects. We consider Aurizon Network has, in the absence of binding dispute resolution, the ability to lever this position in a manner that may allow it to adopt an unduly conservative approach to negotiations with regard to the minimum capacity the SUFA project can achieve, as this reduces its risk exposure as contractor.

Our view is that our proposal provides for a credible negotiation between the relevant parties to the SUFA transaction. We consider that it appropriately balances the interests of SUFA funders

(access seekers and/or third party financiers) with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). This is because it provides SUFA funders with a degree of certainty regarding capacity delivery, whilst the process of binding dispute resolution ensures a credible backstop if agreement cannot be reached. Meanwhile, Aurizon Network has recourse to an independent expert assessment of its view if it has genuine credible concerns regarding the capability of the SUFA project to meet SUFA funders' expectations regarding the minimum level of capacity attainable.

We also consider that our approach supports efficient investment in the CQCN and, in turn, the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act). This is because it does not necessarily require the contractor to rectify, at its cost, capacity shortfalls between the minimum capacity change and required expansion capacity—it provides the alternative option to pay the principal liquidated damages. This means shortfalls that are disproportionately expensive to rectify can be offset by opting to pay liquidated damages where that is the more economic option.

Further, we are of the view that requiring Aurizon Network to rectify, at its cost, capacity shortfalls below the minimum capacity change and to either opt to pay liquidated damages or incur rectification costs to achieve the required expansion capacity is not inconsistent with sections 118 and 119 of the QCA Act. Our reason for this is the required expansion capacity and minimum capacity change are negotiated between the contractor (Aurizon Network) and the principal (representing the SUFA funders) as part of the construction agreement underpinning the SUFA project and, as such, is associated with defining the project-specific terms and conditions applying to the SUFA project and the subsequent risk/liability/reward framework agreed. We have simply ensured that, as Aurizon Network is the sole option as contractor, if the SUFA framework is to be effective, Aurizon Network cannot unduly leverage its position in these negotiations, in terms of adopting an unduly conservation approach with regard to the capacity the SUFA project can achieve.

The amendments we consider appropriate are outlined below.

Final decision 7.3

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to:

(a) adopt the contractor's warranties regime as drafted in clause 2.2(a) of the final decision pro forma SUFA construction agreement, so that the contractor's warranties apply to the complete scope

(b) adopt the contractor's obligations for capacity as drafted in clauses 25.3 and 25.4 of the final decision pro forma SUFA construction agreement.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.5 Discretionary variations and adjustments events

7.5.1 QCA draft decision

Our draft decision pro forma SUFA construction agreement included regimes for discretionary variations and adjustment events. The discretionary variation regime (cl. 35) provided for the principal or contractor to initiate a change to the scope originally agreed; the adjustment event regime (cl. 36A) defined the contractor's recourse if a pre-defined adjustment event occurred.

We noted in our draft decision the inclusion of these regimes within the pro forma SUFA construction agreement should not be interpreted as ensuring any incurred costs with respect to these events would be automatically included in the RAB, notwithstanding the recommendations by the independent certifier. We considered the automatic inclusion of construction costs in the RAB would not provide appropriate incentives for parties to manage costs and minimise cost overruns.

Discretionary variations

The discretionary variation regime provided for the principal or contractor to initiate a change to the scope during construction. Once triggered, the contractor would be required to provide information/proposal (e.g. implications for costs and time-to-complete) regarding the change of scope to the principal and independent certifier. A discretionary variation would only proceed if both the principal and contractor agreed, and that the agreement was certified (i.e. the independent certifier accepted the agreed cost adjustments were 'reasonable').[118] The use of the discretionary variation provision would lead to an adjustment to the contract sum.

Adjustment events

Adjustments events as defined were set out in clause 36A.1 in the draft decision pro forma SUFA construction agreement (other events could be included as adjustment events).

[118] Clause 35.4 of the draft decision pro forma SUFA construction contract specified the factors that the independent certifier would be required to take into account as part of its cost assessment (for discretionary variations and adjustment events), which included prior agreement of the parties, and the reasonable amount for profit and overheads.

If an adjustment event occurred, the contractor could make a claim to adjust the contract sum, scope, and time-to-complete.[119] These claims would then be assessed (and certified if deemed reasonable) by the independent certifier. Either party (the contractor or principal) would have access to the dispute resolution provision under the construction agreement if it was not satisfied with the independent certifier's recommendations.

7.5.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network supported the provision for discretionary variations and adjustment events as set out under the draft decision pro forma SUFA construction agreement.[120]

The QRC recommended changes to the variation and adjustments regime under the draft decision pro forma SUFA construction agreement. It considered:

- The definition of 'adjustment event' in the agreement is too broad and detracts from the certainty of the lump-sum contract price. It recommended the exclusion of force majeure events, industrial action and inclement weather from the list of adjustment events, as well as the introduction of time bars for claiming adjustment events.
- In respect of discretionary variations, the pro forma agreement should specify the grounds on which the contractor may refuse to undertake a variation required by the principal, with binding dispute resolution if agreement cannot be reached.[121]

7.5.3 QCA analysis and final decision

We note the key stakeholder issues relate to the QRC's concerns regarding the definition of an adjustment event, the extent to which the contractor can refuse to undertake a discretionary variation required by the principal and whether this should be subject to dispute resolution.

Refusal to undertake a discretionary variation required by the principal

Our final decision is to propose to maintain the discretionary variation regime included in our draft decision pro forma SUFA construction agreement. We do not agree with the QRC's suggestion that the pro forma SUFA construction agreement specify the grounds under which the contractor can refuse to undertake a discretionary variation required by the principal, or that it should allow for dispute resolution.

We consider the QRC's proposal could unduly favour the principal in discussions regarding discretionary variations and may also be inconsistent with our view that the SUFA trustee takes a passive position regarding construction. Further, it is unclear how a dispute resolution mechanism could be adopted to resolve any disagreement, in the absence of any specific proposals from the QRC regarding the grounds upon which the contractor (i.e. Aurizon Network) could refuse to undertake a discretionary variation.

Overall, we consider our proposed discretionary variation regime appropriately balances the interests of those parties to a SUFA project that have an interest in the construction process, which include Aurizon Network and SUFA funders (access seekers and/or third-party financiers) (ss. 138(2)(b) (e) and (h) of the QCA Act). We are also of the view our position supports efficient investment in the CQCN, which is in the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act). The fact that agreement between parties is required to undertake a discretionary variation

[119] An adjustment event is also a 'qualifying cause of delay' which the contractor may claim for and seek an extension of time in accordance with clause 33 of the draft decision pro forma SUFA construction contract.
[120] Aurizon Network 2015a: 20.
[121] QRC 2015: 22.

provides incentives, at the outset of the project, to ensure the initial construction schedules agreed are sufficiently robust and seek to represent an efficient and prudent outcome. In turn, this drive should be reflected in the feasibility study outcome.

The amendments we consider appropriate are outlined below.

Final decision 7.4

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the discretionary variation regime as drafted in clause 35 of the final decision pro forma SUFA construction agreement, including that:

(a) a discretionary variation will only be undertaken by agreement from all parties to the agreement.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Concerns regarding the adjustment event provision

We do not agree with the QRC's proposed exclusions and remain satisfied the adjustment events listed in the draft decision pro forma SUFA construction agreement are sufficiently well-defined, limited and suitable for our final decision. We note the list of adjustment events is not definitive. It is possible to include further matters if they are deemed relevant. We are also of the view that nothing precludes parties agreeing through negotiation to exclude any of the adjustment events listed. Given this, we consider that our proposed list of adjustment events provides a credible baseline from which the parties to a given SUFA project can either maintain or negotiate from, depending on their preferences.

Notwithstanding this, we are proposing in our final decision to:

- adopt the QRC's suggestion that a time bar apply for the notification of and claims for adjustment events by the contractor.

Regarding time bars, we note that clause 36A.2 of the draft decision pro forma SUFA construction agreement already requires notification of an adjustment event to be given 'promptly', with the contractor then given 28 days to claim for an adjustment event.

We consider introducing a specific length of time within which the initial notification must take place, provides the principal (and SUFA funders) with greater certainty and transparency about the occurrence of an adjustment event. It also avoids any mismatch in expectations regarding the meaning of the term 'promptly'. Against this background, our final decision proposes the contractor notify the principal of an adjustment event within 14 days after the event commences and deliver a detailed claim within 30 days after it commences (with updated claims every 14 days if it is an ongoing event). Whilst this places an obligation on the contractor, we do not consider this requirement unreasonable or unduly onerous, given the contractor will effectively be requesting the independent certifier determine if the contractor has access to additional funding.

Overall, we consider our proposal with respect to adjustment events provides a credible position from which it is possible for prospective SUFA funders to either accept the adjustment events included in the pro forma SUFA construction agreement or to negotiate an alternative. Our view

is the inclusion of time bars aids clarity and transparency. We consider our approach seeks to appropriately balance Aurizon Network's legitimate business interest and its interests as a contractor in the context of the SUFA framework, with the interests of SUFA funders (access seekers and/or third party financiers) (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 7.5

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the adjustment event regime as drafted in clause 35A of the final decision pro forma SUFA construction agreement, including:

(a) the proposed definition of adjustment events

(b) that the contractor is to notify the principal of an adjustment event within 14 days after the commencement of the event and deliver a detailed claim within 30 days after it commences (with updated claims every 14 days if it is an ongoing event).

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.6 Liquidated damages

7.6.1 QCA draft decision

Clause 33.7 of the draft decision pro forma SUFA construction agreement set out the liquidated damages regime for late completion. Liquidated damages would be payable if the contractor did not complete the scope within the agreed time period. The draft decision pro forma SUFA construction agreement did not specify an amount for either the daily rate at which liquidated damages would be payable or the contractor's maximum liability (or 'cap') for liquidated damages payable to the principal. These are left for the parties to determine prior to entry into the construction agreement.[122]

We considered that the rate of liquidated damages for late completion should be based on the parties' genuine pre-estimate of the damages that would be incurred by preference unit holders (PUHs) (or the access seekers and funders, if different).

7.6.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network supported the liquidated damages regime for late completion set out in the draft decision pro forma SUFA construction agreement, subject to the liquidated damages rates and caps being set in accordance with construction industry market norms.[123] It noted liquidated damages are commonly set at rates lower than the pre-estimated damages, and provided three reasons for such practice:

[122] See Items 29(a) and (b) of Annexure—Part A of the draft decision pro forma construction agreement.
[123] Aurizon Network 2015a: 20–21.

- a lower liquidated damages rate results in less risk being priced into the construction agreement, which translates to a lower contract price
- a contractor may already do everything practical to mitigate delay at a given liquidated damages rate, hence a higher liquidated damages rate yields minimal incremental value
- a high liquidated damages rate may result in the maximum cap being reached before completion has been achieved, and thereafter the contractor would have a reduced financial incentive under the construction agreement to mitigate delay.

7.6.3 QCA analysis and final decision

Our draft decision pro forma SUFA construction agreement did not specify an amount for either the daily rate at which liquidated damages would be payable or the contractor's maximum liability (or 'cap') for liquidated damages payable to the principal in the case of late completion. We did, however, note in our draft decision that we were of the view the rate of liquidated damages should be based on the parties' genuine pre-estimate of the damages that would be incurred by PUHs (or the access seekers and funders, if different).

Further, as explained in section 7.4.3 of this chapter, we have proposed that parties are to negotiate two separate levels of liquidated damages cap for capacity delivery, in addition to liquidated damages specifically for late completion.

We note Aurizon Network's comments with respect to our draft decision appear to indicate a preference for a liquidated damages regime that reflects a lower level of damages than the genuine pre-estimated level, based on the fact this is commonly the case and has various advantages. We neither agree nor disagree with Aurizon Network's arguments.

However, based on expert legal advice, we understand that it may be difficult to genuinely pre-estimate losses and such losses, if they could be estimated properly, may be too large to be a credible backstop.

Given this, our final decision proposes the liquidated damages regime within the pro forma SUFA construction agreement should be negotiated between the relevant parties, and be subject to the preapproval process (see section 6.5). This reflects our view that Aurizon Network has an incentive to minimise the level of liquidated damages it might be liable for in its role as contractor. This, coupled with its position as the sole possible contractor, may result in any negotiations regarding the level of liquidated damages being balanced in Aurizon Network's favour.

We do not consider our proposal is counter to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), whilst also balancing its business interests as the constructor of SUFA projects, with the interests of access seekers and third-party financiers investing in the project (ss. 138(2)(e) and (h) of the QCA Act).

The amendments we consider appropriate are:

Final decision 7.6

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the liquidated damage regime as drafted in the final decision pro forma SUFA construction agreement, including:

(a) a liquidated damage regime for late completion as drafted in clause 33.7;

(b) a liquidated damage regime in respect of capacity as drafted in clause 33.7A.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.7 Liability

7.7.1 QCA draft decision

Many issues with respect to the allocation of risk and liability between parties are relevant across multiple SUFA documents. Chapter 13 of our draft decision specifically addressed this issue. There were, however, provisions in the draft decision pro forma SUFA construction agreement that were directly related to the issue of liability in the context of construction.

Contractor's liability cap

Clause 43.1 of the draft decision pro forma SUFA construction agreement specified that the contractor's maximum aggregate liability to the principal:

- under the construction agreement
- in tort (including negligence)
- under any statute
- otherwise at law

is limited to a liability cap agreed between the parties. This liability cap, however, would be subject to a number of exceptions (i.e. carve-outs), including any loss arising from fraud or criminal conduct of the contractor. The contractor's liability in relation to these carve-outs would be effectively unlimited, or subject to the consequential loss exclusion of liability discussed in the next subsection. There is also a carve-out for insured losses which is subject to a potentially higher cap, namely the level of insurance required by the construction agreement.

In our draft decision, we did not propose an amount for the liability cap in the pro forma SUFA construction agreement, leaving this to the parties to reach an agreement as part of the negotiation of a SUFA transaction.

Exclusion of consequential loss

Clause 43.2 of the draft decision pro forma SUFA construction agreement provided that a party to the agreement would generally not be liable for any consequential loss (as defined in the construction agreement) suffered by the other party to the construction agreement. This, however, would also be subject to a number of exceptions (i.e. carve-outs), including that a party

would be liable for any consequential loss arising due to it committing a wilful default, gross negligence, or fraud.

Examples of consequential loss as defined under the draft decision pro forma SUFA construction agreement include (not exhaustive):

- any loss of profits or loss of production
- loss of business opportunities
- loss of or damage to goodwill or reputation
- loss of or damage to credit rating.

Excepted risks

Clause 14.2 of the draft decision pro forma SUFA construction agreement provided that, generally, the contractor should be responsible for the rectification of loss or damage to the works during the construction phase at its cost, except for where caused by a number of excepted risks (i.e. carve-outs) listed in clause 14.3, including, for example, damage caused by negligent act or omission of the principal.

7.7.2 Stakeholders' submissions on the QCA draft decision

Aurizon Network proposed several changes in relation to how consequential loss is dealt with under the draft decision pro forma SUFA construction agreement. In particular, it proposed:

- expanding the definition of consequential loss under the construction agreement to include several additional examples of what is, and what is excluded from, the meaning of consequential loss[124]
- amending the list of exceptions applicable to the exclusion of consequential loss, by removing gross negligence as an exception and providing a different definition of wilful default (rather than using the definition set out in the Extension Project Agreement)[125]
- introducing a proportionality concept within the exclusion of consequential loss provision (for example, if a party commits fraud, that party would only be liable for consequential loss suffered by other parties to the extent the loss is caused by that fraud).[126]

The QRC made several comments about particular clauses of the pro forma SUFA construction agreement relevant to the liability of parties:

- It proposed the contractor's liability cap in the construction agreement should only apply to the liability under the construction agreement (and not with respect to tort, statute or law), and the cap should be set at the contract sum as a default (rather than left undefined).[127]
- It considered the carve-outs to the contractor's liability cap are 'quite restricted' (i.e. where the cap will be waived) and should be amended to include several new additions, including gross negligence and wilful default, death or injury of any person and destruction of any property.[128]

[124] Aurizon Network 2015w: 2–5.
[125] Aurizon Network 2015w: 54.
[126] Aurizon Network 2015a: 70.
[127] QRC 2015: 24.
[128] QRC 2015: 24.

- It considered that several excepted risks listed under clause 14.3 of the construction agreement (for where the principal is liable for rectifying loss or damage to the works during construction) should be removed as they are outside the principal's control (e.g. liability for loss due to disappearance of inventory).[129]

7.7.3 QCA analysis and final decision

In this section, we address liability-related issues specific to the pro forma SUFA construction agreement. The treatment of loss/liability across the SUFA documents is covered more broadly in Chapter 16 of our final decision. The remainder of this section is split into the following:

- contractor's liability cap
- consequential loss
- expected risks.

Contractor's liability cap

In respect of the contractor's liability cap included in the pro forma SUFA construction agreement we consider the following:

- carve-outs and the contractor's liability cap
- restricting the contractor's liability cap to the construction agreement
- nominating a default value for the contractor's liability cap.

Contactor's liability cap and carve-outs

The QRC was of the view the list of exclusions (carve-outs) from the contractor's liability cap should be expanded. The implication of expanding this list would be to increase the number of events where Aurizon Network, as contractor, is subject to unlimited liability (subject to the consequential loss exclusion of liability), thus effectively increasing Aurizon Network's risk exposure.

We have considered whether the list of carve-outs should be expanded and obtained expert legal advice. In light of this advice, we consider it appropriate to expand the list of carve-outs to the contractor's liability cap, to include:

- claims under the intellectual property indemnity provided by Aurizon Network
- the obligation to pay liquidated damages
- wilful default or gross negligence of the contractor
- death or injury of any person
- destruction of any property
- any claim for payment made by contractor employees.

We are of the view that our final decision proposed list of carve-outs contains risks generally out of the principal's control and, to varying degrees, within the contractor's control. We consider the contractor is in the best position to manage the risks associated with these events. We are therefore of the view the expanded list of carve outs provides a more balanced risk allocation.

[129] QRC 2015: 18.

In coming to our final decision we have accounted for the fact that for the SUFA framework to be effective, the only choice for the role of contractor is Aurizon Network. Further, Aurizon Network has an incentive to minimise the extent of any carve-outs in order to reduce its liability as the contractor. Against this background, our view is the list of carve-outs requires sufficient breadth to ensure a suitable backstop position for the principal.

We acknowledge that both SUFA funders and Aurizon Network may have differing views regarding the balance in this regard. Ultimately, however, it is necessary for us, as decision-maker, to define what the balance should be, having regard to the factors in section 138(2) of the QCA Act.

We consider our final position proposal in this matter supports the 'negotiate–arbitrate' principle and appropriately balances the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's business interest as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Our view is it allows for a credible negotiation between the relevant parties to take place or for the pro forma SUFA construction agreement to be adopted if agreement on an alternative arrangement cannot be reached.

Restricting the contractor's liability cap to the construction agreement

We do not agree with the QRC's position the contractor's liability cap should only apply to the contractor's liability under the construction agreement. Based on expert legal advice, we understand the liability cap typically applies to all claims, including in respect to claims in tort and under statute. The possible implication of the QRC's proposal would be to subject Aurizon Network to unlimited liability in respect of claims in tort and under statute. We do not consider the QRC's position reasonable and are of the view that it would not appropriately balance the interests of SUFA funders (access seekers and/or third party financiers) with Aurizon Network's business interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

Nominating a default value for the contractor's liability cap

Our draft decision pro forma SUFA construction agreement did not nominate a default value for the contractor's liability cap. We consider that, in this particular case, our draft decision pro forma SUFA construction agreement did not adequately define what the backstop would be if the parties could not reach an alternative agreement or did not wish to negotiate. Further, our view is that consideration of this issue should account for the fact that in order for the SUFA framework to be effective Aurizon Network is the sole potential contractor.

Aurizon Network has an incentive, in its role as contractor, to minimise the level of the contractor's liability cap. This, coupled with its position as the sole possible contractor, may result in any negotiations regarding the level of the contractor's liability cap being tilted in Aurizon Network's favour, unless the principal has the option to fall back to a credible default value for the liability cap. Our view is that a credible negotiation on this issue requires there to be a legitimate alternative the principal can adopt, as this ensures that any alternative options proposed are reasonable.

Against this background, we agree with the QRC that the contract sum be included in the pro forma SUFA construction agreement as the default value for the contractor's liability cap. We consider the contract sum an objective level for the default liability cap, in the context of the pro forma SUFA construction agreement. Our view is this approach is more certain and transparent than adopting an arbitrary value or percentage of the contract sum as the default liability cap. Based on expert legal advice, we also understand that setting the contract sum as the liability cap is a practice adopted in construction agreements.

Further, we consider that a default value equivalent to the contract sum, places focus on ensuring the evolution of the contract sum, from the development of the feasibility study through to the completion of the project, is prudent and efficient. Our view is this is consistent with the object of Part 5 of the QCA Act, particularly in promoting efficient investments in the CQCN. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Overall, we acknowledge that both SUFA funders and Aurizon Network may have differing views regarding whether there should be a default value for the contractor's liability cap and, if there is one, what the value should be. Ultimately, however, it is necessary for us, as decision-maker, to decide whether there should be a default value and the level, having regard to the factors in section 138(2) of the QCA Act.

In this context, we also consider our final position proposal that the pro forma SUFA construction agreement should include a default value for the contractor's liability cap and the value should be the contract sum, supports the 'negotiate–arbitrate' principle and appropriately balances the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's business interest as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Our view is it allows for a credible negotiation between the relevant parties to take place or for the pro forma SUFA construction agreement to be adopted if agreement on an alternative arrangement cannot be reached.

The amendments we consider appropriate are outlined below.

Final decision 7.7

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the contractor's liability cap regime as drafted in clause 43.1 of the final decision pro forma SUFA construction agreement, including:

- **(a) our proposed list of carve-outs**
- **(b) that the contract sum to be included as the default value for the contractor's liability cap.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Consequential loss

Our draft decision pro forma SUFA construction agreement provided that a party to the agreement would generally not be liable for any consequential loss (as defined in the agreement) suffered by the other party to the agreement. This was subject to a number of exceptions (i.e. carve-outs), including any consequential loss due to a party committing a wilful default, gross negligence, or fraud.

Aurizon Network’s proposed various changes to how consequential loss is dealt with under the pro forma SUFA construction agreement comprise:

- expanding the definition of consequential loss in the pro forma SUFA construction agreement
- amending the list of exceptions to which consequential loss applies

- introducing the concept of proportionality.

These are considered below.

Expanding the definition of consequential loss in the pro forma SUFA construction agreement

Aurizon Network proposed the definition of consequential loss be expanded. It included several additional examples of what is, and what should be excluded from, the meaning of consequential loss. Our view of Aurizon Network's proposals is they increase the set of events for which Aurizon Network will bear no liability for consequential losses.

Unlike the issues surrounding the contractor’s liability cap discussed previously, consequential loss is not entirely construction agreement specific. It is a concept that appears in multiple SUFA template agreements. As discussed in the liability chapter (Chapter 16) of this final decision, our view is it is appropriate for there to be consistency, to the extent practical, in how core liability concepts, such as consequential loss, are dealt with across the SUFA template agreements. We consider this appropriate, in order to reduce the potential for uncertainty and disputes, as a result of differing standards or exclusions of liability for core liability concepts between the SUFA template documents.

Against this background, our final decision does not propose to adopt Aurizon Network's amendments in this regard. We are not satisfied there is sufficient reason to justify differences between the definition of consequential loss under the pro forma SUFA construction agreement and other SUFA template documents. This position is discussed further in Chapter 16 regarding liability.

Amending the list of exceptions to which consequential loss applies

Aurizon Network proposed amendments to the list of events for which Aurizon Network would be liable for consequential loss, as well as providing a definition of wilful default that is different to that set out in the Extension Project Agreement (EPA). Our overall view of Aurizon Network's proposals is that they are seeking to limit its liability as the contractor, through further limiting its liability for consequential loss.

We do not agree with Aurizon Network further reducing its liability for consequential loss under clause 43.2 of the draft decision pro forma SUFA construction agreement. We consider it unreasonable for Aurizion Network to avoid liability for consequential loss that arises out of its ‘gross negligence’, given the extent to which Aurizon Network is grossly negligent is well within its control. Nor is it clear why Aurizon Network considers ‘wilful default’ should have a different definition to that in the EPA.

Introducing the concept of proportionality

Aurizon Network proposed introducing a proportionality concept to its liability for consequential loss in the draft decision pro forma SUFA construction agreement. For instance, if a party commits fraud, Aurizon Network argued that party should only be liable for consequential loss suffered by the other party to the extent the loss is caused by that fraud.

We have sought expert legal opinion in respect of the proportionality concept drafting proposed by Aurizon Network. We consider that Aurizon Network's responsibility should be as provided for under the general law, as amended by the proportionate liability regime under the Civil Liability Act 2003 (Qld). We do not propose to expand upon the proportionate liability rights granted by that Act.

To summarise, our final decision proposes the following in the context of Aurizon Network's comments regarding the consequential loss provisions included in the draft decision pro forma SUFA construction agreement:

- to maintain the definition of consequential loss adopted in our draft decision
- to maintain the list of events for which a party would be liable for the other party's consequential loss in our draft decision
- to not include Aurizon Network's proposed drafting for the concept of proportionality with respect to liability for consequential loss.

Overall, we acknowledge that both SUFA funders and Aurizon Network may have differing views regarding consequential loss. Ultimately, however, it is necessary for us, as decision-maker, to decide on the consequential loss regime included in the pro forma SUFA construction agreement, having regard to the factors in s. 138(2) of the QCA Act.

We consider our final decision proposals regarding consequential loss supports the 'negotiate–arbitrate' principle and appropriately balances the interests of SUFA funders (access seekers and third party financiers), with Aurizon Network's business interest as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Our view is it allows for a credible negotiation between the relevant parties to take place regarding the provisions underpinning consequential loss, or for the pro forma SUFA construction agreement to be adopted if agreement on an alternative arrangement cannot be reached.

The amendments we consider appropriate are outlined below.

Final decision 7.8

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

(a) our proposed definition of consequential loss as drafted in clause 1.1 of the final decision pro forma SUFA construction agreement

(b) our proposed consequential loss regime as drafted in clause 43.2 of the final decision pro forma SUFA construction agreement, including our proposed carve-outs to consequential loss.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Excepted risks

The QRC considered that several excepted risks listed under clause 14.3 of the draft decision pro forma SUFA construction agreement, for which the principal (effectively SUFA funders) is to bear the cost of rectification of the works in the event of loss or damage caused by those risks, should not be allocated to the principal as they are outside the principal's control.

We have reviewed, and sought expert legal opinion, in relation to the list of excepted risks for which the principal is liable for, as per clause 14.3 of the draft decision pro forma SUFA construction agreement. We agree with the QRC that the following excepted risks should be removed from the list:

- loss due to disappearance or revealed by inventory shortage
- liability for loss, damages, destruction, distortion, erosion, corruption or alteration of electronic data.[130]

We consider the removal of these excepted risks from this list reasonable. Our view is these risks are not within the principal's control and are best managed by the contractor. Given this, our final decision proposes that these risks should be allocated to Aurizon Network as the contractor.

We do not, however, agree with the QRC's proposal to make the contractor liable for defects in the design in relation to matters not warranted by Aurizon Network under clause 2 of the draft decision pro forma construction agreement.[131] In our view the introduction of the capacity liquidated damages regime is sufficient to deal issues surrounding the design of a SUFA project. Section 7.4.3 of this chapter provides a detailed discussion in relation to this.

We consider our final decision proposals regarding risk allocation in this regard supports the 'negotiate–arbitrate' principle and appropriately balances the interests of SUFA funders (access seekers and third party financiers), with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Our view is it allows for a credible negotiation between the relevant parties to take place regarding the provisions underpinning risk allocation in this regard, or for the pro forma SUFA construction agreement to be adopted if agreement on an alternative arrangement cannot be reached.

The amendments we consider appropriate are outlined below.

Final decision 7.9

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the list of excepted risks as drafted in clause 14.3 of the final decision pro forma SUFA construction agreement.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.8 Other issues

7.8.1 QCA draft decision

We considered a number of other issues related to the pro forma SUFA construction agreement within our draft decision. A summary of our positions on those issues is included in the table below.

Table 11 QCA draft decision on construction-related issues

Issue	*Draft decision*
Payment term	Clause 36 of the draft decision pro forma SUFA construction agreement specified that payment to the contractor would be made on an 'in arrears' basis.

[130] Clause 14.3(g)–(h) of the draft decision pro forma SUFA construction agreement.
[131] Clause 14.3(f) of the draft decision pro forma SUFA construction agreement.

Issue	*Draft decision*
Security from the principal	Clause 5 of the draft decision pro forma SUFA construction agreement specified that the principal (i.e. the SUFA trustee) should provide the contractor a security over peak termination exposure.
Availability of pricing information	Clause 8.7 of the draft decision pro forma SUFA construction agreement dealt with the availability of pricing information. In accordance with this clause, Aurizon Network would not be required to disclose pricing information in relation to the contract sum to the principal, independent certifier, principal's engineer or the financier's engineer, except for the following circumstances during construction: (a) Disclosure to the principal but only for the purposes of assessing or agreeing to any adjustment to the contract sum or a discretionary variation. The principal would then be allowed to disclose the information to PUHs or access seekers where it is reasonable to provide that information (b) Disclosure to the independent certifier provided such disclosure was necessary for the independent certifier to carry out the independent certifier services (c) Disclosure to the QCA provided that such disclosure was necessary for the QCA to carry out its statutory functions as regulator in respect of the transaction documents.[132] The QCA would then be allowed to disclose the information to PUHs or access seekers where it is reasonable to provide that information.
Role of an independent certifier	The independent certifier under the draft decision pro forma SUFA construction agreement should undertake many, but not all, of the functions of the superintendent in the pro forma SUFA construction agreement, with a view to the SUFA trustee being passive as far as possible. We sought stakeholders' comments on whether the allocation of these functions under the draft decision pro forma SUFA construction agreement was appropriate.
Rectification of works	Clause 34 of the draft decision pro forma SUFA construction agreement set out a process for the rectification of works by the contractor. In summary, if the independent certifier became aware that work done by the contractor did not comply with the agreement: (a) The independent certifier would give the contractor details of the non-compliance. (b) The contractor must record the non-compliance in the defects register. (c) The contractor must rectify the non-compliance at its cost. (d) The contractor would be liable for defects discovered within the defects rectification period (defined in the draft decision pro forma SUFA construction agreement as being 13 months from the date of practical completion).
Flexibility of scope	The draft decision pro forma SUFA construction agreement should not define the level of scope specificity. This should be developed on a project-by-project basis.
Security from the contractor	There is no provision in the draft decision pro forma SUFA construction agreement for the contractor to provide security to the SUFA trustee.
Time and progress	The draft decision pro forma SUFA construction agreement obliged the contractor to ensure the works under the agreement reach practical

[132] Transaction documents are defined in the EPA.

Issue	*Draft decision*
	completion by the date for practical completion.[133] Clause 33 of the draft decision pro forma SUFA construction agreement dealt with delays to the works under the contract. In summary, this included: (a) A process for the contractor to claim an extension of time for carrying out the works under the agreement (including reaching practical completion) if a 'qualifying cause of delay'[134] occurred. To the extent a qualifying and non-qualifying cause of delay overlapped, the independent certifier would apportion the delay to the respective cause's contribution. (b) Payment of liquidated damages to the SUFA trustee by the contractor in the event practical completion was not reached by the date for practical completion. (c) Payment of delay damages to the contractor by the SUFA trustee.
Force majeure	Force majeure has relevance to the draft decision pro forma SUFA construction agreement as both an adjustment event (which entitled the contractor to seek adjustments to the contract price or WUC), and a qualifying cause of delay (which the contractor might claim for an extension of time). The draft decision pro forma SUFA construction agreement specifically defined events that would be considered a 'force majeure event'.[135]

7.8.2 Stakeholders' submissions on the QCA draft decision

Table 12 provides a summary of stakeholders' comments in relation to the 'other issues' as presented in Table 11.[136]

Table 12 Stakeholders' comments on construction-related issues

Issue	*Stakeholders' comments*
Payment term	Aurizon Network did not support the contractor being paid on an 'in arrears basis'.[137] Instead, it proposed the insertion of a 'front-end payment mechanism' to allow Aurizon Network to remain approximately 'cash-flow neutral' on a prospective basis over the construction period, which it considered was not uncommon practice for similar projects in the Australian infrastructure sector.[138] Specifically, it proposed an 'advance payment' (five per cent of the contract price, unless agreed otherwise) be paid after the construction agreement becomes unconditional, with the balance of payments being

[133] Clause 33.1 of the draft decision pro forma SUFA construction agreement.

[134] A qualifying cause of delay is any act, default or omission of the independent certifier, the principal or its consultants, agents or other contractors (not being employed by the contractor) including a delay by the independent certifier in certifying the price of a discretionary variation, or an adjustment event, or any event or delay where the pro forma SUFA construction contract gives rise to an entitlement for the contractor to claim an extension of time.

[135] See clause 1.1 of the draft decision pro forma SUFA construction agreement.

[136] We further note that the QRC has made other suggestions for the amendment of the draft decision pro forma SUFA construction agreement. In our opinion, we have captured the significant amendments above, notwithstanding the QRC's own rating of their amendments. Many of the other amendments we could not accept, as in our view, they either did not appropriately reflect the 'negotiate–arbitrate' principle, were unduly balanced in favour of the SUFA trustee, or did not reflect the structure of the SUFA documents with a (relatively) passive principal. We have, however, accepted some amendments where they assisted in understanding the construction agreement.

[137] Aurizon Network 2015a: 18.

[138] Aurizon Network 2015a: 18.

Issue	Stakeholders' comments
	made on an in arrears basis.[139] Further, it proposed that a 'cash-flow neutral' principle should be reflected in any dispute resolution processes under the access undertaking which governs the setting of the terms of the construction agreement.[140] Aurizon Network considered that both the 'front-end payment mechanism' and the financial security provided by the SUFA trustee were necessary to address two different financial consequences of SUFA for Aurizon Network, namely the credit exposure to the trust and the need for working capital.[141]
Security from the principal	The QRC did not reject the idea of the principal providing the contractor with a security. However, in this context, it said that should the contractor convert the security to cash in circumstances where the contractor is not entitled to the whole of the security, the contractor should hold the balance of the security on a trust on behalf the principal, until such a time as either the contractor has a valid claim on the balance or the balance is returned to the principal.[142]
Availability of pricing information	Aurizon Network opposed allowing 'pricing information' (i.e. pricing or cost information in relation to the conduct of scope)[143] being made available to PUHs and access seekers under the draft decision pro forma SUFA construction agreement. It considered this information was commercially sensitive and that making this information available 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.[144] It considered the independent certifier, trustee and the QCA are the parties that have a 'need to know' pricing information for the purposes of a SUFA transaction and that 'broader dissemination of such information is significantly out of line with normal practice in the Australian construction sector.'[145] The QRC generally accepted the restrictions the draft decision pro forma SUFA construction agreement placed on the disclosure of pricing information, subject to the user funders being able to contribute to the negotiation of scope, price and schedule for the construction agreement, with binding dispute resolution if agreement cannot be reached.[146] However, it considered restrictions on disclosure of pricing information should not extend to any provisional sums in order to provide the SUFA trustee with complete transparency as to how the price of the work differs from the provisional sum included.[147] Anglo American considered that SUFA funders should be entitled to a level of information giving transparency regarding Aurizon Network's expenditure and allowing for accountability in relation to the project. While Anglo American acknowledged Aurizon Network may need to maintain a level of confidentiality around some aspects of a project for commercial reasons, Anglo American noted that, as a natural monopoly business, Aurizon Network does not have any direct competitors (and is unlikely to have any potential future competitors) that would benefit

[139] Aurizon Network 2015a: 19; Aurizon Network 2015w: 43–44.
[140] Aurizon Network 2015a: 19.
[141] Aurizon Network 2015a: 18.
[142] QRC 2015: 15.
[143] See clause 1.1 for the full definition of this term under the draft decision pro forma SUFA construction agreement.
[144] Aurizon Network 2015a: 19–20.
[145] Aurizon Network 2015a: 20.
[146] QRC 2015: 15.
[147] QRC 2015: 15–16.

Issue	***Stakeholders' comments***
	from receiving detailed information about the developments of expansions on the CQCN.[148]
Role of an independent certifier	Aurizon Network supported our position that the independent certifier should undertake many, but not all, of the functions of the superintendent under the AS 4902–2000 template construction agreement.[149] It did not propose any changes with respect to the functions of the superintendent that are allocated to the independent certifier in the draft decision pro forma SUFA construction agreement. Further, other stakeholders did not raise any concerns about how the draft decision pro forma SUFA construction agreement had allocated the superintendent's functions to the parties. However, the QRC did not support the principal being responsible for any interference caused by the independent certifier when the latter accesses the works under the construction agreement in accordance with clause 23.2 of the draft decision pro forma SUFA construction agreement, as the independent certifier is jointly appointed by the principal, the QCA and Aurizon Network, and the principal only has limited control over the actions of the independent certifier.[150]
Rectification of works	Aurizon Network supported our position on the rectification of works.[151] The QRC proposed that a separate defects rectification period should apply to defects which have been rectified by the contractor (with the period not exceeding 24 months from the defects rectification period in total).[152]
Flexibility of scope	Aurizon Network supported our position that the draft decision pro forma SUFA construction agreement should not define the level of scope specificity, with Aurizon Network noting the AS4902–2000 contract template is premised on the contractor having design responsibilities, and full design not being in place as at execution.[153]
Security from the contractor	The QRC considered there should be a requirement for the contractor to provide security to the principal for the due and proper performance of its obligations under the draft decision pro forma SUFA construction agreement.[154]
Time and progress	The QRC proposed a number of amendments to how delays are dealt with under the pro forma SUFA construction agreement, which it considered were necessary to align with market standards and to reflect the critical requirement for on-time completion. These amendments include: amending the extension of time regime under clause 33 of the draft decision pro forma SUFA construction agreement to provide that, where there is an overlap between a qualifying cause of delay and a non-qualifying cause of delay, Aurizon Network should not be entitled to an extension of time: • removing provision for the contractor to receive delay damages in accordance with clause 33.9 of the draft decision pro forma SUFA construction agreement. The QRC considered these damages

[148] Anglo American 2015: 4.
[149] Aurizon Network 2015a: 20.
[150] QRC 2015: 19.
[151] Aurizon Network 2015a: 21.
[152] QRC 2015: 22.
[153] Aurizon Network 2015a: 21–22.
[154] QRC 2015: 15.

Issue	Stakeholders' comments
	represented an 'over-recovery' by the contractor, as the agreement already provides for payment for adjustment events. If delay damages are retained, the QRC considered the clause should ensure no overlap with payments for adjustment events and should specify the basis for calculating delay damages (e.g. delay damages are direct costs only, without mark-up for profit).[155]
Force majeure	Aurizon Network proposed the inclusion of various additional events for inclusion within the meaning of 'force majeure event', including: (a) failure or delay by a supplier, including any supplier of goods, materials, plant or equipment, whether any such cause of failure or delay exists or existed before or after the date of execution of the contract (b) 'act of God' (c) unavailability, or delay in availability, of any goods or materials or any item of plant or equipment (d) train or motor vehicle accident.[156] The QRC considered the draft decision pro forma SUFA construction agreement should be amended so that the principal is not responsible for the contractor's costs relating to force majeure events, as it considered this was not a standard position. It also considered 'storm' should not be listed as a force majeure event, as it considered such a term may capture a rain event which should be the responsibility of the contractor to manage.[157]

7.8.3 QCA analysis and final decision

Payment term and security from the principal

We note Aurizon Network's proposal that there should be a 'front-end payment mechanism' (i.e. advance payment) included in the pro forma SUFA construction agreement. Our final decision is to accept this proposal, rather than require the SUFA trustee to provide security to Aurizon Network (as provided for under cl. 5 of our draft decision pro forma construction agreement).[158]

Whilst Aurizon Network said that a front-end payment mechanism was 'not uncommon' in the Australian infrastructure sector, we note the Australian Standard construction contract on which the pro forma SUFA construction agreement is based specifies the contractor be paid on an 'in arrears' basis. Further, based on expert legal advice, we understand advance payment mechanisms are not common in circumstances where the principal is providing security to the contractor.

However, on reflection, we consider our draft decision proposal to require the SUFA trustee to provide Aurizon Network with security would cause SUFA funders to provide security to both Aurizon Network and the SUFA trustee. Our view is this would create unnecessary barriers to participation in the construction phase of a SUFA transaction. Further, our draft decision proposal does not reflect that, practically, a professional trustee would not enter the arrangement without being confident of sufficient funding to meet the requirements of the construction agreement.

[155] QRC 2015: 20–21.
[156] Aurizon Network 2015w: 6–7.
[157] QRC 2015: 24.
[158] We note that the QRC has provided a comment in relation to the security from the principal. Given that our final decision proposes that such a security should not be provided, the QRC's comment is irrelevant.

In light of this, we consider providing Aurizon Network with pre-payments will move forward the timing of the SUFA trustee's draw down on the PUH loans, but not result in PUHs having to provide additional security, over and above that already being provided to ensure the SUFA trustee is able to meet its obligations under the construction agreement.

Our view is that our final decision proposals regarding payment terms and security from the principal (i.e. the SUFA trustee) appropriately balance the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's interests as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Aurizon Network should have sufficient confidence security exists because a professional trustee would not enter into the arrangement unless it was confident it could meet its obligations. Moreover, this does not preclude parties to a SUFA transaction from negotiating alternative arrangements.

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

The amendments we consider appropriate are outlined below.

Final decision 7.10

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to:

- **(a) adopt the front-end payment term as drafted in clause 36.1A of the final decision pro forma SUFA construction agreement**
- **(b) remove the requirement that the principal provide the contractor with security over peak termination exposure.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Availability of pricing information

We note Aurizon Network’s concerns about pricing information being made available to PUHs and access seekers. We also note its proposed changes to the draft decision pro forma construction agreement which would prevent the SUFA trustee and the QCA from disclosing pricing information to PUHs or access seekers under any circumstances.[159] We do not agree with Aurizon Network's proposed changes and our assessment considers this issue in the following sections:

- PUHs and access seekers
- the QCA.

[159] Aurizon Network 2015w: 19–20.

PUHs and access seekers

We note the pro forma SUFA construction agreement is based on a contract that allows for a lump sum, provisional sums, discretionary variations and adjustment events. Our final decision proposes that, in general, the contractor (i.e. Aurizon Network) should not be required to provide pricing information to the principal (and the SUFA funders) regarding the lump sum once the construction agreement has been executed. The exception to this is if the QCA considers further pricing information should be made available to enable it to carry out its statutory functions, noting the QCA has to abide by various confidentiality provisions (confidentiality provisions are discussed in the next subsection relating to the QCA and pricing information).

The next consideration for our final decision is the extent to which PUHs and access seekers should have access to pricing information regarding provisional sums, discretionary variations and adjustments events. We note that in relation to our draft decision pro forma SUFA construction agreement, the QRC considered restrictions on disclosure of pricing information should not extend to any provisional sums; in order to provide the SUFA trustee, acting in the role of principal, with complete transparency as to how the price of the work differs from the provisional sum included within the construction schedules.

Under the draft decision pro forma SUFA construction agreement, after the agreement has been executed, the principal can only access pricing information necessary for assessing any adjustment to the contract sum or a discretionary variation. Pricing information is not made available to the principal for more general purposes. In our view this means that pricing information regarding provisional sums is not restricted as per the QRC's comment, nor is disclosure of pricing information for discretionary variations and adjustments events, as all involve adjustments to the contract sum.[160] For similar reasons, pricing information can also be requested by the independent certifier to enable it to carry out the independent certifier services.

Further, in relation to provisional sums, discretionary variations and adjustment events, our final decision proposal is that it is not unreasonable for the principal to disclose the pricing information to the relevant parties to the SUFA transaction.

In the context of a SUFA transaction, the PUHs and access seekers are the parties specifically and individually listed as such under the EPA.[161] This is a defined and limited class of persons that have a direct interest in the SUFA project, and does not include stakeholders more generally.

In light of this, we consider it reasonable the principal can make pricing information regarding provisional sums, discretionary variations and adjustment events available to relevant PUHs and access seekers. This is because these are the parties, rather than the principal, that will directly and indirectly be liable for paying these amounts. We are also of the view that relying on the trustee, acting in the role of principal, to scrutinise provisional sums, discretionary variations and adjustment events, on behalf of the interests of the relevant PUHs and access seekers to the EPA, expands the role of the trustee beyond the passive role we consider appropriate.

Further, based on expert legal advice, we consider the disclosure of such pricing information by the principal in these circumstances could be legitimately expected in a standard construction agreement.

[160] However, we have clarified the drafting of clause 8.7 of the draft decision pro forma SUFA construction agreement.

[161] See definition of Access Seeker and Preference Unit Holder in clause 1.1 of the final decision pro forma construction agreement and clause 1.1 of the final decision EPA.

In summary, our final decision proposals regarding the disclosure of pricing information are:

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

We consider our final decision proposals on this matter appropriately balance the interests of access seekers and prospective SUFA funders, with Aurizon Network's business interests as the contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

This is because whilst the parties that will eventually finance the lump sum, provisional sums, discretionary variations and adjustment events do not have access to the pricing of the lump sum[162], they will have sight of the pricing information in respect of adjustments to the contract sum. Meanwhile, Aurizon Network will not, in general, have to disclose the pricing of the lump sum and as such, it does not have to disclose the profit and contingency elements built into this. Further, Aurizon Network can choose in negotiations, and subject to preapproval requirements, the extent to which it wishes to rely on provisional sums, discretionary variations and adjustment events or adopt a lump sum approach. In this regard it can consider any concerns it has regarding the provision of pricing information on a project-specific basis.

We also consider the transparency afforded by our final decision proposal with respect to the disclosure of pricing information supports the object of Part 5 of the QCA Act, particularly in ensuring efficient investment costs in the CQCN. This is because pricing information visibility constrains incentives to adopt unduly high cost proposals. We also note efficient investment in the CQCN is in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

Constraints on the QCA's ability to disclose pricing information

Our final decision does not propose to place any constraints within the pro forma SUFA construction agreement on the QCA's ability to obtain or use pricing information on any aspect of a SUFA transaction. To do otherwise would, in our view, affect our ability to perform our statutory functions effectively. Further, we note the QCA Act contains several obligations on us which prevent us from disclosing confidential information we receive where such disclosure:

- would be likely to damage a person’s commercial activities; and
- would not be in the public interest.[163]

We consider these statutory obligations provide appropriate protections to Aurizon Network’s legitimate business interests, with regard to the QCA disclosing pricing information it has access to, to any of the principal, PUHs or access seekers associated with a SUFA transaction, as well as to any stakeholders in general.

The amendments we consider appropriate are outlined below.

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[162] Unless required by the QCA.
[163] See sections 187, 207 and 239 of the QCA Act.

Final decision 7.11

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the requirements regarding pricing information disclosure as drafted in clause 8.7 in the final decision pro forma SUFA construction agreement, including that:

- **(a) information regarding the lump sum cannot be disclosed, unless required by the QCA**
- **(b) information regarding provisional sums, discretionary variations and adjustment events can be disclosed to the SUFA trustee, acting in the role of the principal**
- **(c) the principal can disclose information regarding provisional sums, discretionary variations and adjustment events to the PUHs and access seekers defined under the EPA**
- **(d) the independent certifier can request pricing information to enable it to carry out independent certifier services**
- **(e) no explicit constraints are placed on the QCA's ability to disclose pricing information.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Role of an independent certifier

Our final decision proposes to maintain the allocation of the functions of the superintendent between the independent certifier and SUFA trustee, as set out in our draft decision pro forma SUFA construction agreement. Our view remains that the independent certifier should be allocated most of the functions of the superintendent from the AS 4902–2000 template contract. This is based on our view that a SUFA trustee should be as passive as possible to avoid it effectively becoming a construction manager, as we consider this would be a difficult role for an independent corporate trustee to perform. We note stakeholders did not raise any concerns with respect to the functions allocated to the independent certifier.

In contrast, the QRC questioned the appropriateness of the SUFA trustee being responsible for interference caused by the independent certifier under clause 23.2 of the draft decision pro forma SUFA construction agreement. Whilst we recognise the SUFA trustee has limited control over the actions of the independent certifier, we do not intend to amend this proposal in our final decision. Ultimately, the functions performed by the independent certifier, such as assessing the works or claims made by Aurizon Network, would be for the benefit of the principal (and effectively SUFA funders) and have the potential to adversely affect the contractor if the exercise of those functions impacts on the contractor's performance. Further, we see no reason why the independent certifier would not be aware of its responsibilities or no reason why a SUFA trustee could not be aware of them from an administrative perspective.

We consider our final decision in this regard assists in ensuring the SUFA framework is effective. In particular, they seek to ensure there is transparency regarding the roles played by the independent certifier and SUFA trustee, and that the SUFA trustee's roles are administrative. We

consider this in the interests of all parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 7.12

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the independent certifier regime as drafted in clause 23.2 of the final decision pro forma SUFA construction agreement.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Rectification of works

We have considered the QRC's comment that a separate defects rectification period should apply to defects which have been rectified by the contractor. Our view is the QRC's suggestion could result in the unwanted consequence of the SUFA trustee not being able to recover rent on assets for an unduly extended period.

Given this, our final decision is to not amend the defect rectification period from that proposed in the draft decision, that is the defect rectification period will end after 13 months from the date of practical completion.[164]

We consider our final decision proposal with respect to defect rectification seeks to ensure a credible backstop position from which it is possible for prospective SUFA funders and Aurizon Network, acting in the role of contractor, to negotiate alternative terms or to adopt the pro forma construction agreement. Our view is this appropriately balances the interests of SUFA funders (access seekers and/or third party financiers) with Aurizon Network's interests as the contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

[164] We note clause 6.1 of the draft decision EISL specified the trustee must rectify the defects at its own cost. We have amended this such that Aurizon Network must rectify the defects, as per the final decision pro forma SUFA construction agreement.

Final decision 7.13

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the defect rectification regime as drafted in clause 34 of the final decision pro forma SUFA construction agreement, including that:

(a) the defect rectification period will end after 13 months from the date of practical completion.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Flexibility of scope

Our view continues to be the pro forma SUFA construction agreement should not define the level of scope specificity. We consider that in most instances, the level of scope definition would be determined through the expansion process and would have to be sufficiently robust to cover the interests of all stakeholders involved in a SUFA transaction, including third party financiers. It would also need to satisfy the QCA, if preapproval were sought.

Nevertheless, we recognise the relevant parties for a particular SUFA project may wish Aurizon Network to design and construct with a high-level scope definition. If preapproval were sought in such a scenario, a lack of scope definition could compromise the likelihood of a successful outcome, unless the risk associated with the lack of scope definition could be mitigated through other provisions in the construction agreement.

Our final decision proposal in this regard is the pro forma SUFA construction agreement should not specify what level of scope definition should be adopted. Scope specificity should be considered on a project-by-project basis and will depend on the preferences of the parties involved and the extent to which preapproval by the QCA is sought. Our view is this provides a level of flexibility that appropriately balances Aurizon Network's interests as contractor and its legitimate business interests, with the interests of the SUFA funders (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 7.14

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to include a pro forma SUFA construction agreement that does not define the level of scope specificity.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Security from the contractor

In clause 5 of the draft decision pro forma SUFA construction agreement, the principal is required to provide security to the contractor, but there is no provision for the contractor to provide security to the principal. Against this background, we have considered the QRC's proposal that the contractor be required to provide security to the principal for the due and proper performance of its obligations under the contract. Our final decision does not propose the pro forma SUFA construction agreement require such security for the reasons set out below.

Unlike the typical situation in a contractor–principal construction agreement, the works will take place on, be attached to and possibly integrated with the contractor's (Aurizon Network's) land and existing infrastructure. Our view is this provides Aurizon Network with an interest in ensuring due and proper performance of its obligations regarding the actual construction. Further, from a financial perspective, we do not consider that Aurizon Network poses a material credit risk to the principal in the event it is liable to pay an amount to the principal under the construction agreement (e.g. liquidated damages or other liability). Also, whilst our final position does not preclude the parties to the SUFA negotiating the inclusion of a contractor's security in the construction agreement, we note this may increase the contract sum if there are costs involved in providing security. Against this background, it is not clear why the pro forma SUFA construction agreement should provide for the contractor to provide the principal with security for the due and proper performance of its obligations under the contract.

Overall, we consider our final position proposal appropriately balances the interest of SUFA funders (access seekers and/or third party financiers) with the interests of Aurizon Network acting in the role of contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Whilst our position does not preclude the option of the contractor providing security to the principal, the pro forma SUFA construction agreement does not explicitly adopt this position.

The amendments we consider appropriate are outlined below.

Final decision 7.15

(1) **After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.**

(2) **The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to include a pro forma SUFA construction agreement that does not require the contractor to provide security to the principal.**

(3) **We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

Time and progress

Whilst Aurizon Network did not indicate any objection to the proposals in our draft decision pro forma SUFA construction agreement, the QRC suggested some amendments to the time and progress clause to reflect market standards and the critical requirement for on-time completion.

Our final decision proposes to broadly maintain the process and provisions related to the treatment of delays outlined in the draft decision pro forma SUFA construction agreement, subject to the following changes:

- That Aurizon Network not be entitled to claim for an extension of time if there is an overlap between a qualifying cause of delay and a non-qualifying cause of delay.
  - In our view, if a non-qualifying cause of delay occurs then work would have been delayed on those days, irrespective of what else is happening. The fact a qualifying cause of delay happened to occur on the same days does not change this, or mean the work would have proceeded without delay but for the qualifying cause of delay. Therefore, as the work would have been delayed on those days because of the non-qualifying cause of delay, we do not consider it appropriate for Aurizon Network to be able to claim for a time extension for any qualifying cause existing simultaneously.
- Amend clause 33.9 of the draft decision pro forma SUFA construction agreement to provide certainty to parties about the definition and boundaries for claims for delay damages.
  - Our view is the delay damages clause should remain in the pro forma SUFA construction agreement, but we agree with the QRC that it should explicitly specify there be no overlap with payments for adjustment events. We also consider that in this particular case the draft decision pro forma SUFA construction agreement did not specify a transparent position regarding the basis for the calculation of delay damages. In light of this, we agree with the QRC's suggestion that delay damages be calculated on the basis of direct costs without mark-up for profit. Our view is this provides a reasonable point from which parties can negotiate alternative terms or accept the provisions in the pro forma SUFA construction agreement.

Our view is the above proposed amendments to the time and progress provisions to the draft decision pro forma SUFA construction agreement assist in ensuring our final decision proposals provide for a transparent and balanced pro forma construction agreement in this regard, and result in a credible backstop from which alternative terms can be negotiated if the parties wish to do so.

For the above reasons, we consider our proposals appropriately balance the interests of SUFA funders (access seeker and/or third party financiers), with the interests of Aurizon Network,

acting in the role of contractor, and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 7.16

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

(a) an extension of time regime as drafted in clause 33 of the final decision pro forma SUFA construction agreement, which provides that the contractor is not entitled to claim for an extension of time if there is an overlap between a qualifying and non-qualifying cause of delay.

(b) a delay damage regime as drafted in clause 33.9 of the final decision pro forma SUFA construction agreement, which requires that there be no overlap of delay damages payments with adjustment event payments and that delay damage payments be calculated on the basis of direct costs without mark-up for profit.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Force majeure

We do not agree with Aurizon Network's proposed changes to the list of force majeure events. We consider the additional inclusions it has proposed, such as, a failure or delay by any one of Aurizon Network's suppliers, represent risks that Aurizon Network, acting in the role of contractor, is expected to manage, and do not generally constitute force majeure events in construction agreements of this nature. We also consider the inclusion of 'any act of God' unnecessary, given the number of natural disasters already listed.

In relation to QRC's proposal to remove the specific reference to 'storm' from the list of force majeure events, we note the draft decision pro forma SUFA construction agreement definition of force majeure events referred to 'storm, surge, …'. We would like to clarify that this was intended to refer to 'storm surge'. This typographical error will be rectified in the final decision pro forma SUFA construction agreement. This means force majeure events will not include a reference to 'storm'. We are of the view the definition of force majeure event does not intend to refer to storms, given clause 36A.1(d) of the draft decision pro forma construction agreement already provides that inclement weather is an adjustment event.

The QRC also said it was not a standard position for the principal to be responsible for the contractor's costs relating to force majeure events.

Our view is that if the pro forma SUFA construction contract did not allow for inclement weather and force majeure events to be adjustment events, the risks associated with these events may be factored into the contingency element of the lump sum. We consider this would create a tension with the object of the third party access regime in the QCA Act, with regard to efficient investment in the CQCN (ss. 69E and 138(2)(a) of the QCA Act). This is because risks priced into the lump sum would be paid-out even if these risks did not materialise. Given this, we consider it may be more

efficient for the SUFA trustee (and effectively SUFA funders) to bear the risk of these events through the adjustment event provisions.

For the reasons outline above, we consider our final decision proposals with respect to force majeure and inclement weather appropriately balance the interests of SUFA funders (access seekers and/or third party financiers), with Aurizon Network's interest as contractor and its legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). Our view is that it seeks to ensure the pro forma SUFA construction agreement provides a transparent credible position, with respect to force majeure events and inclement weather, from which it is possible for parties to a SUFA transaction to negotiate alternative terms or to adopt the pro forma construction agreement depending on their preference on a project-specific basis.

The amendments we consider appropriate are outlined below.

Final decision 7.17

(1) After considering Aurizon Network's 2013 SUFA DAAU PMA and RCA, our final decision is to refuse to approve the contractual arrangements for SUFA construction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

- **(a) the list of force majeure events as drafted in clause 1.1 of the final decision pro forma SUFA construction agreement**
- **(b) the list of adjustment events as drafted in clause 35A of the final decision pro forma SUFA construction agreement.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8 SECURITY AND FINANCEABILITY

For the SUFA framework to allow for third-party financing, security over the cash flows due to the SUFA trustee is required. Further, these cash flows should be stable and predictable. These requirements relate to the credibility and bankability of the SUFA framework. Aurizon Network's 2013 SUFA DAAU does not contemplate security over the cash flows. It also contains a number of provisions that could potentially increase the uncertainty over the rental stream due to the SUFA trustee.

Our final decision proposes:

- *to include a Specific Security Agreement (SSA) in the suite of SUFA pro forma agreements to provide security over the cash flows due to the SUFA trustee*
- *to require the SUFA trustee to make distributions to preference unit holders (PUHs) if there are sufficient funds*
- *to remove the SUFA trustee's obligation to withhold distributions if so required by the ordinary unit holder (Aurizon Network)*
- *to only apply set-offs in the context of the rent adjustment mechanism.*

8.1 Background

Under the 2013 SUFA DAAU Extension Infrastructure Sub-Lease (EISL), the SUFA trustee subleases the SUFA infrastructure to Aurizon Network, and in return, Aurizon Network is required to pay rent to the SUFA trustee. As described in Chapter 5, the 2013 SUFA DAAU EISL sets out a direction-to-pay mechanism for 'linked' access agreements. Under these agreements, Aurizon Network can direct access holders to pay a portion of the access charges directly to the SUFA trustee.

Aurizon Network's 2013 SUFA DAAU did not contemplate security over this rental stream due to the SUFA trustee. Further, under the 2013 SUFA DAAU EISL, Aurizon Network may set off any amounts which it considers are due to it from the SUFA trustee, against amounts payable to the SUFA trustee. This allows Aurizon Network to deduct an amount from the rent payable, via reducing the amount it would otherwise direct a customer to pay into the direction to pay account. These set-off provisions are only applicable to Aurizon Network in the 2013 SUFA DAAU.

Further, under the 2013 SUFA DAAU Subscription and Unit Holders Deed (SUHD) Aurizon Network may (acting as the ordinary unit holder) direct the SUFA trustee not to make distributions to the PUHs (i.e. lock up rent distributions).

8.2 QCA draft decision

8.2.1 Specific Security Agreement

As part of our draft decision, we included the SSA in the suite of pro forma SUFA agreements to provide security over cash flows due to the SUFA trustee. The SSA is an agreement between the SUFA trustee (as the secured party) and Aurizon Network (as the grantor of security). In part, the SSA seeks to ensure that in the event of Aurizon Network insolvency, the SUFA trustee could enforce the security to preserve its rights to the rental income. The SSA also seeks to secure any

rent-equivalent compensation cash flows and detriment amounts the SUFA trustee would be entitled to if the EIHL and/or EISL was terminated due to Aurizon Network's cause.[165]

8.2.2 Lock-up of rent distributions

In the draft decision, we proposed the SUFA framework require the SUFA trustee to make distributions to PUHs (if the SUFA trustee has sufficient funds to make these distributions).[166] We also removed the SUFA trustee's obligation (under the 2013 SUFA DAAU SUHD) to withhold distributions if so required by the ordinary unit holder (Aurizon Network). We considered our proposals increased certainty over the rent payment, and therefore would improve the bankability of the SUFA framework.

8.2.3 Set-off

Rent adjustment mechanism

In our draft decision, we considered the rent adjustment mechanism as set out in the 2013 SUFA DAAU EISL to be an acceptable set-off arrangement. We noted the rent adjustment mechanism would address monthly over- and underpayments of rent, with the purpose of ensuring the flow of rent received by the SUFA trustee follows the pattern of the total access charges paid for a given month. We considered it appropriate, in this specific context, for PUHs to bear a proportion of the cash-flow risk associated with the actual payment of access charges.

We noted the mechanism does not distinguish between material and immaterial amounts—at the extreme it is technically possible that in a given month the SUFA trust would not receive any rent if no access charges are paid. Nevertheless, we considered it a highly unlikely event that access charges would not be paid.

Non-rental immaterial amounts

We formed the view in our draft decision that set-off should only relate to the rent adjustment mechanism. We considered this approach would ensure that SUFA rental streams remain clear and transparent.

We proposed all other immaterial amounts associated with the flow of monies between Aurizon Network and the SUFA trust follow a standard invoicing and payment approach. We were not aware of any legitimate reason regarding the need to set-off these amounts against rental streams.

Non-rental material amounts

We considered that low-probability events related to SUFA, which could result in significant cost impacts on Aurizon Network, should not be subject to set-off, because such events may result in SUFA rental streams being reduced to the point where there are insufficient distributions to cover the principal and interest payments due to financiers.

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[165] Chapter 9 (Termination) discusses rent-equivalent compensation cash flows and detriment amounts in more detail.

[166] We noted in our position paper Aurizon Network would prefer distributions from the SUFA trustee to PUHs be non-mandatory, if Aurizon Network chose to partly fund a SUFA project. This is because it is possible that mandatory distributions would result in preference units being classified as debt, rather than equity on Aurizon Network's balance sheet. We considered if Aurizon Network chose to partly fund a project, parties would be free to negotiate away from the standard pro forma SUFA agreements to allow for a non-mandatory distribution arrangement.

However, we proposed PUHs be responsible for funding any immediate material cash liability, such as a tax liability (where specifically related to SUFA). This would effectively represent a cash payment to Aurizon Network to cover an immediate cash liability. We agreed the PUHs should bear the tax indemnity obligations, rather than the SUFA trustee.

We also formed the view Aurizon Network should be required to seek to change the regulatory tariff to account for at least the amount of that liability attributable to the SUFA infrastructure. That liability would then be refunded back through time to the PUHs as increased rent. We considered this approach aligned with how Aurizon Network would deal with cost impacts due to a change in law (or other significant events) for its existing business.

8.3 Stakeholders' submissions on the QCA draft decision

8.3.1 Specific Security Agreement

With respect to our draft decision SSA, Aurizon Network said its requirements had been met with the exception of:[167]

- definition of default events
  - Aurizon Network said the definition of default events in the SSA should not cover more than Aurizon Network's insolvency events, given the purpose of the SSA is to provide security in the event of Aurizon Network insolvency.
  - Aurizon Network said any broadening of the definition would have the potential to impact adversely Aurizon Network's wider financing arrangements, even though in a SUFA transaction Aurizon Network is not the party raising debt finance.
- acceleration concept
  - Aurizon Network said our draft decision SSA included provisions that could result in Aurizon Network being obliged to pay all future rent as a lump sum upon a default event. It considered this contradictory to the purpose of the SSA, which is to secure the obligation to pay rent as and when it is due.

8.3.2 Lock-up of distributions

Aurizon Network agreed with the removal of the obligation the SUFA trustee withhold distributions if so required by the ordinary unit holder (i.e. Aurizon Network).[168]

8.3.3 Set-off

Rent adjustment mechanism

Aurizon Network supported our draft decision position that the rent adjustment mechanism is an acceptable set-off arrangement in relation to rental streams.[169]

The QRC considered set-off for over- or underpayment of rent unacceptable, given at the extreme it is technically possible the SUFA trustee receives no rent for a given month.[170]

[167] Aurizon Network 2015a: 30–31.
[168] Aurizon Network 2015a: 31.
[169] Aurizon Network 2015a: 31.
[170] QRC 2015: 32.

Non-rental immaterial amounts

Aurizon Network did not support our draft decision position that set-off for immaterial non-rental amounts be excluded.[171] Aurizon Network considered there were various trust liabilities that should fall within the scope of the set-off mechanism that are not covered under the QCA's proposed documentation, including under the QCA draft decision EISL:

- interest payable (cl. 3.7(e)(ii))
- correction of errors (cl. 3.7(h)(ii)).

Aurizon Network said its proposed set-off mechanism would be the only credit support available to address its exposure to the SUFA trust's liabilities.[172] Aurizon Network considered it should have the benefit of a suitable credit support mechanism for each and every liability of the trust to itself, particularly given that the trust is a party that limits its liability to its assets (the assets of the trust), which would be modest as the trust distributes all of its net revenue each month.

Aurizon Network said its proposed set-off mechanism would result in set-offs only being applied to the portion of rent payments the trust owes to Aurizon Network and to which the trust has no economic entitlement. It considered such a mechanism could be readily explained and reasonably acceptable to any debt financiers of the SUFA trust.

Aurizon Network commented that in explaining to its debt financiers why it is reasonable to allow a SSA to operate over some of its access revenues, Aurizon Network will justify the arrangement on the basis the SSA relates to cash to which Aurizon Network has no economic entitlement. Aurizon Network considered each trust should be prepared to make an analogous justification of the set-off mechanism to its debt financiers, as that mechanism would permit Aurizon Network to receive cash to which it has an economic entitlement.

Aurizon Network noted it would be prepared to consider the adoption of any alternative effective support mechanism for the trust's financial obligations to Aurizon Network, but it did not support any arrangement whereby it did not have credit support for all liabilities of the trustee to Aurizon Network under the EISL.

The QRC confirmed its members supported set-offs for immaterial amounts, provided an appropriate low materiality threshold is in place, and single and cumulative set-off amounts are recognised.[173]

Non-rental material amounts

Aurizon Network did not support our draft decision position with respect to set-off for non-rental material amounts.[174] Aurizon Network considered without a full set-off, it would be providing a large, uncapped, long-term and uncompensated underwriting of the 'material liability' funding risk of a SUFA transaction. Aurizon Network considered there was no reasonable basis for the allocation of this funding risk, which arises from a SUFA transaction, to Aurizon Network. [175]

It said while under our proposals the PUHs would be responsible for funding any immediate material cash liability (e.g. a tax liability specifically related to SUFA), the PUHs might not have the

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[171] Aurizon Network 2015a: 31–32.
[172] Aurizon Network 2015a: 31–32.
[173] QRC 2015: 32.
[174] Aurizon Network 2015a: 32–34.
[175] Aurizon Network 2015a: 32–34.

assets to finance such an expense, especially given the SUFA framework does not place any restriction on the creditworthiness of PUHs.[176]

Aurizon Network also noted it expected some, if not all, PUHs following the completion of the project delivery process, would be holding entities with no other business activities or interests. Aurizon Network considered such holding entities had no financial substance, but are a common structuring practice; particularly when there are financial obligations attached to the holding of a project interest. Aurizon Network considered such an entity would have nominal capital and would not be capable of meeting its tax indemnity obligation and would not pay the amount due under its tax indemnity.[177]

Against this background, Aurizon Network said the QCA's proposed financing structure for SUFA would severely impair the effectiveness of the PUHs' tax indemnities to mitigate Aurizon Network's residual tax risk. Therefore, Aurizon Network could ultimately bear part or all of the economic burden of any realised residual tax risk, even though it would still be obliged to pay rent without set-off to the trust to the benefit of PUHs (including defaulting PUHs).

Aurizon Network said that in the interest of facilitating SUFA, it is prepared to fund the tax payments, without reliance on any third party credit support (such as a bank guarantee) regarding the obligations of its SUFA counterparties (each of which potentially has no financial substance) to reimburse those payments. Aurizon Network noted its willingness to do so is contingent on full set-off being in place.[178]

Finally, with respect to seeking a change to the regulatory tariff to account for any such liability that might occur, Aurizon Network suggested the regulatory obligation be framed such that Aurizon Network be required to include the relevant SUFA costs in the RAB, rather than to seek to change the regulatory tariff to account for such costs (cl. 7.7 of the QCA draft decision EISL).[179] Aurizon Network made various points to support its view, which are considered in the analysis and final decision section of this chapter.

8.4 QCA analysis and final decision

8.4.1 Specific Security Agreement

This section comprises our assessment of Aurizon Network's comments and other issues.

Aurizon Network's comments

We acknowledge Aurizon Network's comment that if the definition of default events in the SSA is too broad, it may impact Aurizon Network's ability to raise debt. We also note Aurizon Network's view regarding the SSA appears contradictory. With respect to its comments regarding termination, we note that Aurizon Network has agreed security should be extended to compensation for cash flows and detriment amounts.[180] By contrast, when considering the SSA, Aurizon Network has stated the definition of default events should cover no more than an Aurizon Network's insolvency event.

Regardless of this, we consider our proposed definition of default events reasonable. Our view is the intention of the SSA is to provide security over the cash flows due to the SUFA trustee (which

[176] Aurizon Network 2015a: 32–34.
[177] Aurizon Network 2015a: 32–34.
[178] Aurizon Network 2015a: 39.
[179] Aurizon Network 2015a: 32–34.
[180] Aurizon Network 2015a: 35.

consist of the rental stream and any detriment and rent-equivalent compensation). Therefore, we consider trigger events for enforcement of that security should include the occurrence of events (including the insolvency of Aurizon Network) or certain actions Aurizon Network may take that jeopardise those cash flow, or indicate those cash flows will cease due to Aurizon Network default. Given this, our view is the definition of default event should capture these.

However, we have amended the draft decision SSA so that it provides for an acceleration of rent only in the event of Aurizon Network's insolvency. We consider acceleration necessary in such a scenario in order to maximise the SUFA trustee's rights in such a situation, particularly given that other creditors will be seeking recovery of their debts. This ensures the SUFA trustee benefit from further rights to protect its rental streams, notwithstanding the insolvency.

Other issues

In Chapter 5, we noted that if the CQCN declaration expires or is revoked, customers could enter into CITS-type agreements where Aurizon Network would provide bundled services. Our final decision proposes the SSA and EISL be amended as necessary, to provide for the SUFA trustee (effectively PUHs) to be entitled to a portion of the revenues generated from these CITS-type agreements. We consider for the security arrangements to be effective, they should extend to CITS-type agreements.

Overall and in light of the above analysis, we consider our final decision proposals regarding the SSA appropriate, after having regard to the factors in section 138(2) of the QCA Act. To the extent possible, our proposed SSA supports the bankability and credibility of the SUFA framework. This is because it seeks to provide assurances to those parties financing a SUFA transaction, and PUHs in general, that a SUFA trust has security over the relevant cash flows. Barriers to participation in a SUFA transaction are therefore reduced. This, in turn, can provide greater competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

We have had regard to Aurizon Network's legitimate business interest in developing our final decision proposal (s. 138(2)(b) of the QCA Act). We have been conscious about the potential impacts of the SSA on Aurizon Network's ability to raise debt, and have sought to limit the definition of default events in the SSA, such that it reflects the intention to provide security over cash flows due to the SUFA trustee. We have also clarified the role of the acceleration concept. We consider that our proposed SSA provides an appropriate balance in this regard.

The amendments we consider appropriate are outlined below.

Final decision 8.1

(1) After considering Aurizon Network's 2013 SUFA DAAU, our final decision is to refuse to approve it, given the lack of security arrangements for the cash flows due to the SUFA trustee.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

(a) adopt the final decision Specific Security Agreement (SSA) in the suite of pro forma SUFA agreements; and

(b) adopt the relevant definitions in clauses 1.2, 8.2 and 8.3 of the final decision EISL to cover both access agreements and CITS-type agreements.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8.4.2 Lock-up of distributions

We remain of the view the SUFA framework should require a SUFA trustee to make distributions to PUHs (if a SUFA trustee has sufficient funds to make those distributions). Similar to our draft decision, our final decision proposes to remove the SUFA trustee's obligation (under the 2013 SUFA DAAU SUHD) to withhold distributions if so required by the ordinary unit holder (Aurizon Network). We note stakeholders did not indicate any objection to our proposals.

We consider our final decision proposal improves the bankability and credibility of the SUFA framework because it provides greater certainty over rent distributions. Barriers to participation in a SUFA transaction are therefore reduced. This, in turn, can provide greater competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act). Moreover, increased certainty in this context is in the interest of SUFA funders (access seekers and/or third party financiers) in general and is also not inconsistent with Aurizon Network's legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 8.2

(1) After considering Aurizon Network's 2013 SUFA DAAU SUHD, our final decision is to refuse to approve the arrangements for the rent distributions.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU SUHD is:

(a) to make rent distributions to PUHs mandatory if the SUFA trustee has sufficient funds available, as per clause 14.4(b) of the final decision SUHD

(b) to remove the SUFA trustee's obligation (under the 2013 SUFA DAAU SUHD) to withhold distributions if so required by the ordinary unit holder (Aurizon Network).

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8.4.3 Set-off

In the context of the 2013 SUFA DAAU, set-off remains a topic that polarises views. In coming to our final decision proposals, we have been conscious of Aurizon Network's view regarding what it considers constitutes its legitimate business interests (s. 138(2)(b) of the QCA Act), in the context of developing the SUFA framework. We are, however, also conscious of the need for the SUFA framework to provide a genuine alternative to Aurizon Network's financing proposals for expansions of the CQCN. We consider that if this is not the case, the presence of an ineffective SUFA framework may merely reinforce perceptions regarding Aurizon Network's monopoly power.

On balance, our overarching view is a SUFA framework that offers genuine financing choice for expansions in the CQCN is not compatible with full set-off for Aurizon Network. We consider full set off increases barriers to participation in a SUFA transaction, whilst a viable SUFA framework seeks to reduce such barriers. Lower barriers, in turn, can provide greater competition in the financing of expansions in the CQCN, thereby increasing the likelihood of efficient investment financing. Efficient investments in the CQCN align with the object of the third party access regime of the QCA Act, are in the public interest and the interests of access seekers and access holders (ss. 69E, 138(2)(a), (d), (e) and (h) of the QCA Act).

In light of this, our final decision proposal is the EISL should only allow set-off for the rent adjustment mechanism. Our consideration of stakeholders' comments is provided below.

Rent adjustment mechanism

Our view is the SUFA framework would be most effective if SUFA monthly rental streams are certain. Despite this, our final decision proposal is to adopt the rent adjustment mechanism proposed in Aurizon Network's 2013 SUFA DAAU (as amended in our final decision EISL).[181] We consider it reasonable the SUFA trustee (effectively the PUHs) should bear a proportion of the cash flow risk associated with the actual payment of access charges. This is based upon our understanding that monthly access charge receipts are sufficiently stable. In coming to this final decision proposal, we note the QRC did not support this position, because for a given month the SUFA trustee could, theoretically, receive no rent if no access charges were received. Our view is this is an unlikely event.

[181] There have been minor amendments to the relevant clauses.

Overall, we are not, as yet, aware of any legitimate reason why the SUFA trustee (effectively the PUHs) should have a more favourable risk profile than Aurizon Network, with respect to the actual payment of access charges.[182]

Set-off for non-rental amounts

Our final decision proposal is set-off should not include adjustments, other than those in relation to the rent adjustment mechanism. We consider this approach ensures the rental stream remains as clear and transparent as possible, and remains subject only to variations associated with access charge receipts. For the overarching reasons outlined above, we do not consider this compatible with a bankable and credible, and thus effective, SUFA framework. Our view on Aurizon Network's specific comments are provided below.

Immaterial amounts

When considering non-rental immaterial amounts[183] we continue to be of the view a standard invoicing and payment approach should be adopted for all amounts associated with the cash flows between Aurizon Network and the SUFA trust.

We do not consider the absence of set-off for immaterial amounts necessarily means a SUFA trustee (representing the PUHs) would believe it has an economic entitlement to cash flows that Aurizon Network has a claim over. Further, we do not consider the fact a SUFA trust operates with limited assets inhibits payment of immaterial amounts. We do, however, consider it appropriate for the SUFA trustee (representing the PUHs) to be able to challenge, if it so wishes, Aurizon Network's claims prior to Aurizon Network receiving payment (which would not be the case under set-off). Our view is this ensures Aurizon Network's claims are legitimate, whilst also keeping the rental stream as clear and predictable as possible.

We are also unconvinced there is a correlation or causal link that suggests each SUFA trust should have to justify to financiers of the SUFA trust, debt or otherwise, the adoption of a set-off mechanism on the basis of Aurizon Network's economic entitlement, because Aurizon Network has to explain to its debt financiers why the SSA operates over some of Aurizon Network's access charges. It is also not clear why Aurizon Network considers third-party financiers, whether they be debt-based or otherwise, should find set-off 'reasonably acceptable', given their primary and fundamental asset is the rental stream.

We note Aurizon Network would be prepared to consider alternative approaches other than set-off. We also note Aurizon Network's comments, with respect to security/guarantor arrangements as a possible approach to mitigating Aurizon Network's credit risk exposure across the life of a SUFA transaction.[184] This is considered in the subsequent subsection on set-off for material amounts.

Finally, the QRC commented it supported set-off for immaterial amounts, provided an appropriate low materiality threshold is in place, and single and cumulative set-off amounts are recognised. Our view is what constitutes set-off for an immaterial amount will differ across all the

[182] Further, we do not agree that Aurizon Network should be able to charge interest in respect of any overpayments by Aurizon Network due to variations associated with access charge receipts as Aurizon Network benefits with respect to late payment of access charges under the relevant access agreements.

[183] Aurizon Network provided the example that it bears credit risk exposure to the SUFA trustee with respect to clauses 3.7(e)(ii) and 3.7(h)(ii) of the draft decision EISL that respectively relate to interest payable and correction of errors relating to detriment amounts.

[184] This is discussed further in Chapter 10 regarding differential treatment.

parties involved in a specific SUFA transaction, particularly given our final decision proposal to maintain the rent adjustment mechanism.

Material amounts

Our final decision proposal is set-off should not be applied for non-rental material amounts. We note that Aurizon Network has objected to this, because it considered it would face the potential of a material liability. Further, Aurizon Network considered there is no reasonable basis for such risk allocation, and it is not in Aurizon Network's legitimate business interests to underwrite the 'material' liability funding risk without a full set-off.

Aurizon Network was also of the view the tax indemnity cannot be relied upon. Upon completion of the construction phase of a SUFA transaction, the bank guarantees and security obligations required by PUHs expire. Thereafter, the PUHs could transfer ownership of the relevant preference units and the tax indemnity obligation to holding companies. Aurizon Network considered that such companies would have no financial substance and would not be able to pay an amount that becomes due under the tax indemnity.

Further, Aurizon Network said it would be willing to accept increased credit risk in the absence of full set-off, if all of the following requirements applied:[185]

- Each PUH must either hold an investment-grade credit rating or have the benefit of an unconditional guarantee from a guarantor with that rating throughout the SUFA transaction.
- If a PUH or, as applicable, its guarantor fails to hold that rating, the PUH must promptly obtain one or procure a replacement guarantee of all of that PUH's obligations from a guarantor with such a rating.
- Failure by the PUH to obtain a suitable rating or procure the provision of a replacement guarantee within a specified (and short) timeframe should result in suspension of distributions to that PUH and the compulsory sale by the SUFA trustee of all the PUH's SUFA interests.
- Only a PUH with an investment grade credit rating itself, or with the support of an unconditional guarantee from a party with an investment grade credit rating, would be eligible to be a buyer of the SUFA interests subject to the compulsory sale process.
- Aurizon Network receives a suitable reward for assuming the increased credit risk.

We consider these comments below in the following sections:

- Risk allocation to Aurizon Network
- Appropriateness of the tax indemnity
- Aurizon Network's alternative proposal.

Risk allocation to Aurizon Network

We consider that material set-offs, by definition, can 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 supports third party financing. We consider third-party financing necessary to support a workable, bankable and credible SUFA arrangement.

[185] Aurizon Network 2015a: 39–40.

Further, the section 138(2) matters of the QCA Act, which we are required to have regard to, do not require any specific party be completely isolated from credit risk. We also consider Aurizon Network can choose to avoid this risk by opting to fund the expansion at the regulated rate of return. Whilst this may not be the business choice Aurizon Network would prefer in the context of the SUFA framework, our view is it nonetheless represents a credible and reasonable business choice for Aurizon Network that is compatible with its legitimate business interests, when considered in the context of developing a bankable, credible, and therefore effective, SUFA framework (ss. 138(2)(a), (b), (d), (e) and (h) of the QCA Act). In light of this, we do not consider it inappropriate for Aurizon Network to be allocated this risk.

Appropriateness of the tax indemnity

Our view is Aurizon Network's argument regarding the PUHs' potential use of holding companies represents an alternative form of previous arguments put forward by Aurizon Network, albeit inferring Aurizon Network considered the issue could potentially be of greater scale. That is, Aurizon Network does not want to have credit risk exposure to PUH tax indemnity default. Whilst we acknowledge Aurizon Network's position, for reasons already set out we do not consider it unreasonable for Aurizon Network to be allocated this risk.

Further, there is no clear reason unclear why it should, at the outset, be presumed that those parties who have knowingly accepted the tax indemnity as part of the SUFA transaction would not cover any liability arising from this obligation. We are also of the view the PUHs/SUFA trustee should be afforded the opportunity to challenge, if they so wish, an Aurizon Network’s claim under the tax indemnity, prior to payment. We consider this particularly pertinent, given the impact set-off could have on rental streams in the context of a lump-sum liability.

Moreover, based on expert advice, our understanding is most tax changes occur after an appropriate lead time and should only affect future earnings, rather than being applied retrospectively. In light of this, we consider, Aurizon Network's exposure to an event where a SUFA trustee would be liable for an immediate lump sum tax payment is limited.

Indeed, with the possible exception of an immediate lump-sum tax payment, it is unclear to us there exists an event during the operational phase of a SUFA transaction that would cause a material cash liability directly attributable to the SUFA trustee (effectively PUHs). We consider operational issues that cause material cash impacts on the CQCN are dealt with through undertaking mechanisms that provide for these costs to be recovered via access charges.

In light of the above, we do not consider it appropriate to use set-off to address this issue. Our view is such an approach has material implications for the bankability and credibility, and therefore the effectiveness, of the SUFA framework.

Aurizon Network's alternative proposal

We do not consider Aurizon Network's alternative proposal viable in the context of developing a bankable, credible and therefore effective SUFA arrangement. Our view is that, whilst the alternative proposal would resolve Aurizon Network's concerns regarding holding companies, a requirement that each PUH must at all times be creditworthy, in the terms proposed by Aurizon Network, would increase the barriers to participation in a SUFA transaction in both the construction and operational phases of a SUFA transaction. We consider Aurizon Network's proposal places additional transaction costs upon PUHs over the life of a SUFA transaction, reduces scope for transferring their preference units if they wish to do so, and limits the level of control they have over their investment through the adoption of a compulsory sale process.

Further, the restrictions Aurizon Network has proposed for preference unit ownership in the operational phase of a SUFA transaction are there to mitigate what is, based on our

understanding, a very limited set of low-probability events. We consider these circumstances different to those during the construction phase, where some form of security documentation and bank guarantees to Aurizon Network is reasonable.[186]

Summary

Overall, with respect to our final decision proposals for set-off, we consider we have had regard to both Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act) and the need for the SUFA framework to be workable, bankable and credible. We consider the SUFA framework has to provide a genuine alternative to an Aurizon Network's financing proposal, and note our view that Aurizon Network's proposals regarding full set-off and preference unit ownership restriction compromise this. We further note that although our preference is for certainty over rental streams, we have accepted Aurizon Network's proposal to apply set-off for the rent adjustment mechanism.

Further, to the extent possible, our final decision proposal regarding set-off supports the bankability and credibility of the SUFA framework. We consider our final decision proposal is consistent with the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act). This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

The amendments we consider appropriate are set out below.

Final decision 8.3

(1) After considering Aurizon Network's 2013 SUFA DAAU EISL, our final decision is to refuse to approve the arrangements for set-off.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU EISL is to:

- **(a) only allow for set-off for adjustments related to the rent adjustment mechanism, and not for any other adjustments, as per clause 7.6 of the final decision EISL; and**
- **(b) prohibit the charging of interest in respect of any overpayments by Aurizon Network due to variations associated with access charge receipts, as per clause 8.6(c) of the final decision EISL.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8.4.4 Treatment of non-rental material costs attributable to SUFA infrastructure

Aurizon Network made various observations and suggestions with respect to the requirement in the draft decision EISL (cl. 7.7) that obliges Aurizon Network to seek a change to the regulatory tariff, to account for the amount of any liability paid to Aurizon Network that is specifically associated with the SUFA infrastructure, in the case of a change in law or relevant taxes.[187] Our response to Aurizon Network's comments is provided in the table below.

[186] See sections 7.8.3 (under the sub-heading 'Payment term and security from the principal') and 10.4.2.
[187] Aurizon Network 2015a: 33–34.

Table 13 QCA response to Aurizon Network's comments on the regulatory tariff change obligation

Aurizon Network's comments	*QCA view*
Aurizon Network supported this obligation, subject to it being framed in terms of RAB inclusion, rather than regulatory tariff change. Aurizon Network considered that RAB inclusion and the associated obligation to pay rent are, unlike the determination of the reference tariff, of fundamental importance to PUHs. Reframing this obligation would align it with the regulatory obligation for the inclusion of the project's construction-related costs, as per clause 3.1 of the draft decision Extension Project Agreement (EPA). Aurizon Network considered issues of RAB inclusion and change in regulatory tariff analytically separate. It noted while an access holder not involved with a SUFA transaction may have no concerns about RAB inclusion of tax indemnity amounts, such a party may consider that the tariff implications of that RAB inclusion should be borne solely by the access seekers involved in the SUFA transaction.	Our view is what is of fundamental importance to PUHs is the return of the funding, over a reasonable time period and on a NPV-neutral basis, provided to Aurizon Network to finance the liability. RAB inclusion is not a prerequisite for this to occur. Further, we consider the rent received by the SUFA trustee is based upon access charges. Rent relates to access charge 'capital components'; which are the return on and of capital, as well as the relevant tax allowance (under the existing regulatory regime). Whilst these, in part, relate to RAB inclusion of the original SUFA construction costs, this does not necessarily preclude treating additional funding provided by PUHs in a different manner. We therefore do not consider that the return of the funding provided to Aurizon Network to finance the liability, is necessarily analytically separate from a change in regulatory tariff. Further, our view is proposals with regard to how this cost be distributed would represent part of the regulatory tariff submission.
Aurizon Network considered that it should not be required to assume the obligation for RAB inclusion unless and to the extent it has received the tax indemnity payments due to it.	We agree that as part of any regulatory tariff submission, it would be difficult for Aurizon Network to propose tariff adjustments for payments that have not been received.
Aurizon Network noted, in the context of the phrasing of the draft decision, that Aurizon Network is only liable to pay rent to the SUFA trustee, not the PUHs. Aurizon Network subsequently noted a PUH that fails to make its tax indemnity payment would, in the absence of a suitable commercial mechanism, be entitled to receive its share of increased rents as a result of other PUHs making such tax indemnity payments. However, if Aurizon Network's position on set-off is accepted, then any default by a PUH in meeting its tax indemnity payment would be remedied over a period of time by the set-off arrangements.	We note Aurizon Network's comments regarding set-off and refer to our previous consideration of this. Further, our view is that in the circumstances described by Aurizon Network, it is likely possible the SUFA trustee is capable of adjusting rental streams as necessary. We consider this an issue for the SUFA trustee and PUHs to resolve.
Aurizon Network considered that for the additional RAB inclusion mechanism to be effective, the provisions of clause 7.7 of the draft decision EISL would need to reflect that payments by PUHs to Aurizon Network would be deemed to constitute additional costs relating to the SUFA infrastructure. Further, Aurizon Network suggested these additional costs should be allocated on a pro rata basis across the RAB asset values for those assets. The requested RAB inclusion, if approved by the QCA, would then increase the rent paid to the trust in accordance with the formula in Schedule 2 of the draft decision EISL.	We do not consider this necessary. This option, or alternative approaches, can be proposed as part of the regulatory tariff change submission. As noted previously, our view is what is of fundamental importance to PUHs is the return of the funding, over a reasonable time period and on a NPV-neutral basis, provided to Aurizon Network to finance the liability.

In light of the above, our final decision proposal is to maintain clause 7.7 of the draft decision EISL.

The amendments we consider appropriate are outlined below.

Final decision 8.4

(1) After considering Aurizon Network's 2013 SUFA DAAU EISL, our final decision is to refuse to approve the arrangements seeking a change to the regulatory tariff, to account for the amount of any liability paid to Aurizon Network, that is specifically associated with the SUFA infrastructure in the case of a change in law or relevant taxes.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU EISL is to adopt clause 7.7 of our final decision EISL.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

9 TERMINATION

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

Our final decision proposes the following:

- *A redacted version of the Infrastructure Lease should be available to relevant parties during negotiation of a SUFA agreement to permit, at the very least, sight of all relevant termination provisions, subject to agreement by of the lessor.*
- *Liability for termination of the sublease under the Extension Infrastructure Sub-Lease (EISL) should sit with the party causing the termination.*
- *Aurizon Network should be subject to liability for the consequential loss of the SUFA trustee if Aurizon Network is responsible for the termination of the Infrastructure Lease.*
- *Security should extend to rent-equivalent compensation cash flows in the event the sublease under the EISL terminates.*

9.1 Background

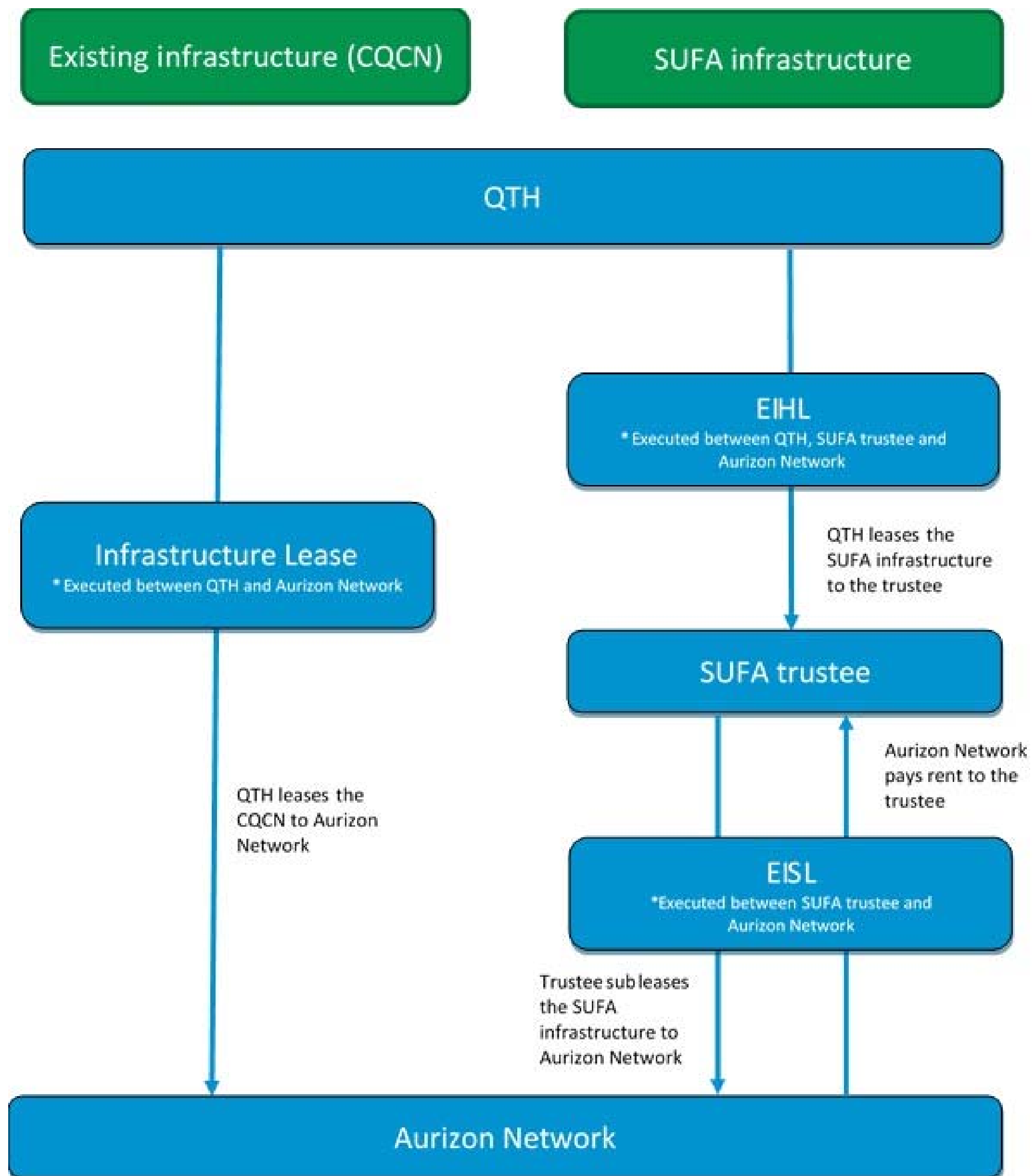
The following leases are relevant to a SUFA transaction:

- Aurizon Network's infrastructure leases with QTH and QR (Infrastructure Lease)[188]
- the Extension Infrastructure Head-Lease (EIHL)
- the Extension Infrastructure Sub-Lease (EISL).

The following figure outlines the leasing framework for a SUFA transaction.

[188] The Infrastructure Lease with QR covers existing infrastructure on the North Coast Line, whereas the Infrastructure Lease with QTH applies to existing infrastructure on the rest of the CQCN. Given the potential location of SUFA assets, we have focused on the Infrastructure Lease with QTH in our decision, although it will also apply to the Infrastructure Lease with QR to the extent relevant.

Figure 6 The SUFA leasing framework



Whilst infrastructure funded by a SUFA transaction will, to the extent applicable, constitute part of the CQCN under the QCA Act, the leasing structure surrounding a SUFA transaction differs from that underpinning the existing CQCN. The Infrastructure Lease pertains only to the existing infrastructure operated by Aurizon Network, not the SUFA infrastructure which is covered under the EIHL and EISL.

The Infrastructure Lease is a confidential document, and includes conditions that can cause termination of the Infrastructure Lease, with the consequential termination of the EIHL and EISL. This is because the EIHL and EISL rely on the Infrastructure Lease being in force. Similarly, the termination of the EIHL (while the Infrastructure Lease remains in force) will also have implications for the EISL.

Given the interrelated aspects to these leases, the circumstances in which these leases may terminate, and the possible implications for a SUFA transaction, could present concerns for potential investors. These concerns need to be satisfactorily resolved, in order to attract both third party financing for SUFA projects and funding from access seekers.

Against this background, our position paper and draft decision considered SUFA funders would need to understand the complete risk portfolio before committing to invest in a SUFA project. As part of this, we noted prospective SUFA funders would consider:

- whether the costs of termination risk could be measured accurately
- the possibility of Aurizon Network triggering a termination being minimised/mitigated
- whether security exists over compensation cash flows, as well as rental cash flows.

9.2 QCA draft decision

Our draft decision considered the following issues:

- termination provisions in the Infrastructure Lease
- termination of the Infrastructure Lease
- termination of the EIHL and the sublease under the EISL
- minimising/mitigating Aurizon Network triggering a termination event.

9.2.1 Termination provisions in the Infrastructure Lease

We noted the confidentiality restrictions proposed by Aurizon Network and QTH in respect of the Infrastructure Lease could deter potential SUFA funders from investing, or lead to the inclusion of additional risk premia in assessing the viability of a SUFA project.

We considered potential SUFA funders would have a legitimate interest in having the Infrastructure Lease made available to them, so they could assess the circumstances in which that lease may be terminated, and then review the complete risk portfolio before committing to invest in a SUFA project.

However, we took into consideration Aurizon Network's (and QTH's) preference for maintaining confidentiality over the terms of the Infrastructure Lease. Given this, our draft decision proposed that a redacted version of the Infrastructure Lease be made available during negotiation of the SUFA agreements, subject to:

- the lessor's consent (either QTH or QR, depending on the applicable Infrastructure Lease)
- the relevant access seekers and financiers entering into a confidentiality agreement.

We considered the redacted leases should be made available to possible access seekers or financiers for a potential SUFA project, noting not all SUFA funders will necessarily be an access seeker (see Chapter 10 for our decision on parties eligible to fund).

9.2.2 Termination of the Infrastructure Lease

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

As described in Chapter 13 of the draft decision regarding liability, the SUFA pro forma agreements seek to allocate risk, including termination risk, to parties best able to manage that risk. The table below summarises the liability provisions for termination of the Infrastructure Lease in the draft decision.

Table 14 Termination and expiration of the Infrastructure Lease

Event	*Outcome*	*Liability*
QTH terminates the Infrastructure Lease	Both the EIHL and EISL terminate.	QTH will pay the SUFA trustee a share of the disposal amount (QTH having first deducted its costs).
The Infrastructure Lease expires	Both the EIHL and EISL terminate.	QTH will pay the SUFA trustee a share of the disposal amount based on the fair market value of the network.
Aurizon Network breaches the Infrastructure Lease	The Infrastructure Lease could terminate. If it does, both the EIHL and EISL terminate.	Aurizon Network is liable for its actions. Liability is not capped.
SUFA trustee causes Aurizon Network to breach the Infrastructure Lease	The Infrastructure Lease could terminate. If it does, both the EIHL and EISL terminate. The SUFA trustee could be liable to Aurizon Network for damages.	The SUFA trustee is liable for its actions, with liability limited by the following: • It knowingly breaches the Infrastructure Lease. • Compensation amount is limited to the amount it receives from QTH as a result of the sale of the CQCN. • It has no liability if it is doing something it is required to do under another SUFA transaction document. • It is liable only to the extent it contributed to the damages/termination. • Liability is capped at the assets of the SUFA trust.

As noted in the table, our draft decision considered the situation where the Infrastructure Lease is terminated due to an Aurizon Network's cause. We noted Aurizon Network has control over its actions and a natural motivation to act in a manner so as not to breach the Infrastructure Lease. We were also of the view the potential of an Aurizon Network's default—no matter how remote it may be—posed a risk for SUFA funders, given the significant consequences it would have for a SUFA transaction and the inability of SUFA funders to manage or control this risk. In light of these factors, we considered Aurizon Network should have uncapped liability to the SUFA trustee in the event the Infrastructure Lease is terminated due to an Aurizon Network cause.

We also considered the potential concern SUFA financiers may have with respect to QTH's right to return any of the SUFA-funded assets upon termination of the Infrastructure Lease. We were of the view our preapproval process provides sufficient checks and balances to ensure only prudently incurred assets are rolled into the RAB. We considered this should provide QTH with the confidence that no SUFA-funded assets need to be returned if the Infrastructure Lease is terminated.

9.2.3 Termination of the EIHL and the sublease under the EISL

If the Infrastructure Lease terminates, the EIHL and EISL will automatically terminate.

However, if the EIHL terminates, and this has not been caused by the termination of the Infrastructure Lease, the SUFA pro forma documents are structured such that:

- only the sublease[189] within the EISL will terminate; and
- all other terms and conditions of the EISL will continue in full force.

In such a scenario, the SUFA infrastructure initially covered under the EIHL will be absorbed by the Infrastructure Lease, which provides that the CQCN (including the SUFA infrastructure subsequent to the termination of the EIHL) is leased by QTH to Aurizon Network. The other provisions in the EISL will continue to apply, with the SUFA trustee entitled to a rent-equivalent cash flow as compensation in lieu of rent.

Additionally, we considered it appropriate the party causing the termination (of the EIHL and the sublease within the EISL) pay a 'detriment amount'[190] to the other party, except:

- if no party is at fault, then neither party receives a detriment amount
- if the termination is caused by Aurizon Network not taking action, then the SUFA trustee is not liable, and Aurizon Network is liable for the detriment amount.

To provide certainty for financiers of a SUFA project, our draft decision also included a requirement for Aurizon Network to grant security (via the SSA) in respect of:

- the rent-equivalent compensation cash flows
- any detriment amounts due from Aurizon Network to the SUFA trustee—where the early termination of the leases are due to Aurizon Network's cause.

9.2.4 Minimising/mitigating Aurizon Network triggering a termination

Our position paper proposed amending the definition of 'Insolvency Event' used in the EIHL to narrow the scope of what constitutes an insolvency event. We considered this had merit in preventing otherwise insignificant events from triggering termination of the lease agreements; thereby reducing the risk of default and rental streams being replaced by compensation payments.

However, taking into account the position of QTH—which we noted would have to consent to such a change, given it is the lessor under the EIHL—the definition of an insolvency event was not amended in our draft decision.

9.3 Stakeholders' submissions on the QCA draft decision

9.3.1 Termination provisions in the Infrastructure Lease

Aurizon Network supported our position about the provision of a redacted version of the Infrastructure Lease to access seekers and SUFA funders during negotiation of a SUFA project, and proposed this be incorporated into the access undertaking as part of the 2014 DAU process.[191]

The QRC did not support our position. It considered requiring the provision of the redacted Infrastructure Lease only during negotiation of a SUFA provided 'insufficient commercial certainty

[189] Clause 3.1 of the draft decision EISL describes the subleasing arrangements of the SUFA assets between the SUFA trustee and Aurizon Network. This clause requires the SUFA trustee to immediately sublease the SUFA assets (that it has leased from QTH) to Aurizon Network. This subleasing arrangement lasts for as long as QTH, via the EIHL, leases the SUFA assets to the SUFA trustee. If the EIHL terminates (for any reason), the subleasing arrangement automatically terminates.

[190] The EISL specifies the approach to detriment amounts.

[191] Aurizon Network 2015a: 35.

for QRC members when considering the draft decision agreements'.[192] It also suggested this would undermine the principle of the 'workability' of the SUFA agreements, as emphasised in the QCA draft decision. This was because QRC members would not be able to satisfy themselves of the suitability of the SUFA documents unless they had access to all essential documents, including the Infrastructure Lease.[193] As a result, the QRC confirmed it had not been possible to 'meaningfully review' provisions of SUFA documents which related to the Infrastructure Lease, particularly with respect to termination.[194]

Nonetheless, the QRC indicated support for the Infrastructure Lease to be 'appropriately redacted.'[195]

9.3.2 Termination of the Infrastructure Lease

Aurizon Network did not support the position it should have uncapped liability for actions in respect of the Infrastructure Lease and the trustee's liability is to be limited as detailed by the QCA.[196] Aurizon Network considered this would mean the SUFA trustee (effectively the PUHs) would face a lower risk profile on its investment than Aurizon Network would face on a comparable investment, even though both would earn the same regulated WACC.[197] Aurizon Network also considered the inclusion of uncapped liability would increase Aurizon Network's risk profile against its will and without any compensation for assumption of that risk.[198]

Aurizon Network said 'it wishes to limit its liability to the trustee in respect of the Infrastructure Lease's termination so that the trustee is entitled only to its [the trustee's] share of the disposal proceeds received from QTH under the Integrated Network Deed following that termination'.[199]

9.3.3 Termination of the EIHL and the sublease under the EISL

Aurizon Network supported the principle that where the EIHL or EISL is terminated but the Infrastructure Lease remains on foot, either Aurizon Network or the SUFA trustee should be liable to pay a detriment amount for that termination (depending on which party caused the termination). Aurizon Network considered the EISL that formed part of our draft decision was consistent with this principle.[200]

However, it sought clarification of our intent, noting there were differences between our position expressed in the draft decision and our position represented by the EISL attached to our draft decision (e.g. our draft decision described liability in terms of a 'breach' of the EIHL, rather than in terms of a 'termination' of the EIHL). It also considered the two exceptions for this liability, as described in our draft decision, were unnecessary.[201]

Aurizon Network also supported extending the security in the SSA to compensation cash flows and any detriment amounts due to the trustee.[202]

[192] QRC 2015: 29.
[193] QRC 2015: 29.
[194] QRC 2015: 29, 33–34.
[195] QRC 2015: 29.
[196] Aurizon Network 2015a: 35.
[197] Aurizon Network 2015a: 35–36.
[198] Aurizon Network 2015a: 37.
[199] Aurizon Network 2015a: 37.
[200] Aurizon Network 2015a: 37–38.
[201] Aurizon Network 2015a: 38.
[202] Aurizon Network 2015a: 35.

The QRC did not support our proposed arrangements for termination of the EIHL and EISL. In particular, the QRC:

- indicated it was of the understanding the trustee would also be entitled to claim uncapped damages where the EIHL is terminated due to the fault of Aurizon Network, but noted this is not reflected in the EIHL[203]
- considered there should be a mechanism for the parties to agree to extend the permitted time period, with respect to the suspension or cancellation of a major authorisation, where appropriate to avoid termination of the EIHL[204]
- opposed drafting which limited the circumstances in which the EIHL and EISL can be terminated, rescinded, frustrated or repudiated[205]
- considered Aurizon Network should have a general liability to the trustee for termination of the EIHL caused by Aurizon Network, rather than Aurizon Network being only liable in specified circumstances.[206]

Anglo American expressed support for the draft decision we have outlined in relation to the termination of SUFA contracts.[207]

9.3.4 Minimising/mitigating Aurizon Network triggering a termination

The QRC reiterated the position from its previous submissions that the definition of Insolvency Event should be narrowed to prevent otherwise insignificant events from triggering termination of the EISL and EIHL. While noting our comments in respect of termination and QTH[208], it considered the definition should be amended nonetheless.[209]

9.3.5 Early termination of a SUFA trust

Aurizon Network opposed the drafting of clause 2.5 of the draft decision Subscription and Unit Holders Deed (SUHD), which would require that parties negotiate a process to address early termination of the SUFA trust, provided (among other things) there is no material disadvantage to Aurizon Network.[210] Aurizon Network noted this provision meant that it could be required to suffer a ‘non-material disadvantage’, which it considered could pose material risks to Aurizon Network. Aurizon Network considered it should not have to suffer any disadvantage under this provision.

9.4 QCA analysis and final decision

9.4.1 Termination provisions in the Infrastructure Lease

We note the QRC’s comment that requiring provision of a redacted version of the Infrastructure Lease only during the negotiation of a SUFA transaction undermines the principle of workability.

[203] QRC 2015: 28.
[204] QRC 2015: 28.
[205] QRC 2015: 28, 32.
[206] QRC 2015: 30.
[207] Anglo American 2015: 7.
[208] In its submission the QRC said this was in respect of 'QTC'. We presume this was a typographical error, and that the QRC meant QTH.
[209] QRC 2015: 26.
[210] Aurizon Network 2015a: 60.

We agree, that in ideal circumstances, potential SUFA funders would have sight of the relevant termination provisions within the Infrastructure Lease at the time befitting their requirements. However, while that may be the ideal, we consider this must be balanced against the confidentiality requested over a commercial document, with the principle of workability accounting for this reality. Essentially, a second-best option is needed and we note the QRC supported the presence of an 'appropriately redacted' Infrastructure Lease.

In coming to our final decision proposal on this matter, we have considered the following:

- Aurizon Network and QTH can require the Infrastructure Lease be kept confidential, but provided to a potential SUFA funder which signs a confidentiality agreement.
- It is reasonable for a potential SUFA funder to be able to sight all relevant termination provisions of the Infrastructure Lease prior to execution of a SUFA transaction. This provides them with the opportunity to understand the termination provisions and measure the costs associated with these more accurately.

In light of this, our final decision proposal is that the Infrastructure Lease should remain confidential but provided to a potential SUFA funder (whether that be an access seeker or a third party financier) agrees to sign a confidentiality agreement, subject to the lessor's consent. Further, all relevant termination provisions in the Infrastructure Lease should not be redacted from the version of the Infrastructure Lease provided, subject to the lessor's consent.

If there is a circumstance where a party considers that all relevant termination provisions in the Infrastructure Lease have not been provided, we consider that party may request more information with respect to the termination provisions.

The access undertaking is best suited to address these provisions. As discussed in section 4.4.2 of this final decision, detailed consideration regarding the extent of any amendments to the 2010 AU would only be finalised if the sunset clause is triggered.

Our view is, given the circumstance surrounding the Infrastructure Lease, our final decision proposal in this specific context appropriately balances the interests of prospective SUFA funders (access seekers and/or third party financiers), with the legitimate business interests of Aurizon Network and the interests of QTH (ss. 138(2)(b), (e) and (h) of the QCA Act). It seeks to provide prospective funders with the opportunity to have sight, on a confidential basis, of the termination aspects of the Infrastructure Lease relevant to their decision to execute a SUFA transaction. It also ensures other aspects of the Infrastructure Lease remain confidential.

Further, our view is our proposal positively seeks the relevant information that prospective SUFA funders require. Given this, we consider this supports a workable SUFA framework that seeks to encourage financing choice for expansion investments in the CQCN. In this context, we are of the view it aligns with the objective of efficient investment in the CQCN, thereby supporting the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act).

9.4.2 Termination of the Infrastructure Lease

As part of the allocation of termination risks, we considered in our draft decision that Aurizon Network has full control of its actions in respect of potential defaults under the Infrastructure Lease and, as such, should accept a measure of risk associated with that control. We proposed that Aurizon Network should have uncapped liability for its actions resulting in the termination of the Infrastructure Lease.

In response, Aurizon Network said our draft decision proposals meant the SUFA trust would face a lower risk profile on its investment than Aurizon Network would face on a comparable investment, while both investors would earn the same regulated weighted average cost of capital (WACC). It provided a theoretical example to demonstrate a SUFA trust would gain benefit via Aurizon Network underwriting it in the case of uncapped liability, thereby providing the SUFA trust an investment advantage over Aurizon Network.[211]

The example was based on Aurizon Network and the SUFA trustee facing a comparable investment (both earning the same regulated WACC, and subject to the same debt–equity split included in the WACC). The example compared equity NPV cash flows with and without Aurizon Network providing uncapped liability to the SUFA trust.

In considering this example, we note a SUFA is necessary to provide a genuine financing alternative when Aurizon Network considers the regulated WACC an insufficient return on its capital (i.e. it would not invest at the regulated WACC). Further, whilst a SUFA transaction earns the headline regulated WACC, this does not mean the actual funding structure, in terms of debt and equity, underpinning any SUFA transaction needs to correspond to that used for the regulated WACC. We therefore view Aurizon Network's theoretical example as unlikely to be comparable to the practical reality of a SUFA transaction and, as such, it does not provide useful guidance for the allocation of risk and liability.

Aurizon Network has also stated the inclusion of uncapped liability would 'increase Aurizon Network's risk profile against its will and without any compensation for assumption of that risk.' Aurizon Network proposed its limit of liability to the SUFA trustee be the SUFA trustee's share of the disposal proceeds received from QTH under the IND following termination. Our final decision proposal does not adopt Aurizon Network's suggestion.

Although the draft decision spoke of the provision of uncapped liability by Aurizon Network to the SUFA trustee, the revised liability structure detailed in Chapter 16 now references Aurizon Network being potentially liable for all losses of the SUFA trustee (including consequential loss) in the event of a termination of the Infrastructure Lease where Aurizon Network has caused that termination. We note that Aurizon Network itself considers it is best able to manage the risk of default of the Infrastructure Lease and would be naturally motivated by its own business interests to avoid such a default.[212] Given this, our view is that the risk of termination is low. By contrast, the SUFA trustee has no ability to mitigate the possibility of Aurizon Network's actions terminating the Infrastructure Lease. Indeed, it has no control at all over Aurizon Network's actions in this regard.

Against this background, we consider the SUFA trust should be compensated if such a termination event occurs, because the SUFA trustee (and effectively PUHs) has no ability to manage termination risk in this context, and Aurizon Network would have to systematically fail to meet standards it knows it is obliged to achieve. Our draft decision proposed this compensation come in the form of uncapped liability, in circumstances where Aurizon Network has caused termination of the Infrastructure Lease.

In light of the above assessment, our final decision proposal is to maintain that from the draft decision and outlined in the previous paragraph but revised as detailed in Chapter 16. That is, Aurizon Network is potentially liable for all losses of the SUFA trustee (including consequential loss), in circumstances where it causes termination of the Infrastructure Lease.

[211] Aurizon Network 2015a: 35–37.
[212] Aurizon Network 2014b: 22.

Overall, the table below summarises our final decision proposals on termination events and liability outcomes with respect to termination of the Infrastructure Lease. Of note, we have maintained our views on the liability outcomes from our draft decision. We have sought to allocate termination risks and liabilities in relation to the Infrastructure Lease to the parties best able to manage those risks.

Table 15 Termination and expiration of the Infrastructure Lease

Event	*Outcome*	*Liability/Outcome*
QTH terminates the Infrastructure Lease	Both the EIHL and the EISL terminate. QTH does not have the right to require the removal of SUFA infrastructure.	QTH will pay the SUFA trustee a share of the disposal amount (QTH having first deducted its costs).
The Infrastructure Lease expires	Both the EIHL and the EISL terminate. QTH has the right to require the removal of SUFA infrastructure.	QTH will pay the SUFA trustee a share of the disposal amount based on the fair market value of the network.
Aurizon Network breaches a provision of the Infrastructure Lease	The Infrastructure Lease may terminate. If it does, both the EISL and the EIHL terminate.	Aurizon Network is liable for its actions and may be liable for all losses of the SUFA trustee (including consequential loss).
SUFA trustee causes Aurizon Network to breach a provision of the Infrastructure Lease.	The Infrastructure Lease may terminate. If it does, both the EISL and the EIHL terminate. The SUFA trustee may be liable to Aurizon Network for damages.	Only Aurizon Network is required to comply with the obligations of the Infrastructure Lease. Under the EIHL, Aurizon Network indemnifies QTH in respect of the SUFA. The SUFA trustee has obligations to QTH under the EIHL. Under the EISL, the SUFA trustee counter indemnifies Aurizon Network, in respect of QTH calling on Aurizon Network's indemnity to QTH under the EIHL, in respect of actions or omissions of the SUFA trustee. The SUFA trustee's liability is capped at the assets of the trust.[213]

In the specific context of Aurizon Network breaching the Infrastructure Lease and causing that lease to terminate, our view is our final decision proposal aligns with the interests of access seekers, third party funders and PUHs throughout the life of the SUFA transaction (ss. 138(2)(e) and (h) of the QCA Act). To the extent possible, we consider Aurizon Network having liability for all losses of the SUFA trustee (including consequential loss) offsets the fact other parties to a SUFA transaction have no control over whether Aurizon Network's actions will terminate the Infrastructure Lease and the subsequent consequences this may have.

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

We also consider that for Aurizon Network to take action that would terminate the Infrastructure Lease would be counter to Aurizon Network's legitimate business interests, given Aurizon

[213] Although the substance of the relevant drafting has not changed between the draft decision and final decision, we believe that the liability outcome set out in this table (Table 15) better reflects the final decision than those of Table 14.

Network's own view that it would be naturally motivated by its own business interests to avoid a default of its Infrastructure Lease (s. 138(2)(b) of the QCA Act).

Regarding QTH terminating the Infrastructure Lease, the Infrastructure Lease expiring and the SUFA trustee causing Aurizon Network to breach a provision of the Infrastructure Lease, we consider our final decision proposals have appropriate regard to the interests of Aurizon Network, access seekers, third party funders and PUHs over the life of a SUFA transaction. Our view is they achieve an appropriate balance of risk and liability across these parties (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 9.1

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals relating to the termination of the Infrastructure Lease, our final decision is to refuse to approve the approach to the termination of the Infrastructure Lease.

(2) The way in which we consider it appropriate for Aurizon Network to amend the 2013 SUFA DAAU is as follows:

(a) If QTH terminates the Infrastructure Lease, QTH does not have the right to require the removal of SUFA infrastructure, as per the deletions of clauses 7.4(b), 9.1 and 9.2 of the 2013 DAAU Integrated Network Deed (IND).

(b) For Aurizon Network, for action in respect of the Infrastructure Lease terminating, Aurizon Network may be liable for all losses of the SUFA trustee (including consequential loss), as detailed in Chapter 16.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

9.4.3 Termination of the EIHL and the sublease under the EISL

In our draft decision, the pro forma SUFA documents were structured such that if the EIHL were to terminate, whilst the Infrastructure Lease remained on foot, the sublease under the EISL would terminate at the same time. All other provisions under the EISL, however, would continue. Aurizon Network would pay rent-equivalent cash flows as compensation to the SUFA trustee, plus, if payable, a detriment amount (if Aurizon Network was at fault), or less a detriment amount (if the SUFA trustee was at fault). If no party was at fault, no detriment amount would be imposed. Both Aurizon Network and the QRC made a number of specific comments on these provisions.

Aurizon Network agreed that where the EIHL or EISL terminates, but the Infrastructure Lease remains on foot, a detriment payment should be paid by the party causing the termination. Aurizon Network also supported extending the security (i.e. the SSA) to compensation cash flows and any detriment amounts due to the SUFA trustee.

Aurizon Network was of the view the specific drafting in the draft decision EISL to give effect to following draft decision proposals with respect to detriment amounts were unnecessary given other clauses in the EISL:

- where neither party is at fault for a termination, neither party receives a detriment amount.
- if Aurizon Network does not take action, and as a result of that inaction, the EIHL is terminated, Aurizon Network is liable for the detriment amount.

We share Aurizon Network's view that our proposals with respect to detriment amounts were already provided for in the drafting of the draft decision EISL, and our final decision proposal is to not include these provisions within the EISL as it is sufficiently clear with regard to liability for detriment amounts in the circumstances detailed. We consider the drafting appropriately balances the interests of Aurizon Network and SUFA funders (access seekers and/or third party financiers) (ss. 138(2)(b), (e) and (h) of the QCA Act).

Additionally, in response to Aurizon Network's request for clarification in respect of differences between our position expressed in the draft decision document and our position as described in the draft decision EISL and EIHL—we confirm that when we describe liability, it is terms of a termination of the agreements, rather than a breach of the agreements. We also confirm that a detriment payment may be payable following a termination of the EIHL where the Infrastructure Lease remains on foot, not a breach of the EISL or EIHL.

The QRC noted it understood that if Aurizon Network caused a termination of the EIHL, the SUFA trustee would be entitled to uncapped damages. We would like to clarify that whilst we propose that Aurizon Network may be liable for all losses of the SUFA trustee (including consequential loss) in the case for termination of the Infrastructure Lease, it is not the case if the EIHL terminates. For termination of the EIHL, rent-equivalent cash flows continue to be paid to the SUFA trustee in compensation, plus a detriment amount (if applicable).

We consider this appropriate because termination of the EIHL due to an Aurizon Network cause does not mean the rent-related aspects of the EISL cease to function or the CQCN stops operating. Given this, our view is provision of the secured rent-equivalent cash flows and any detriment amount is appropriate and beneficial to encouraging third party funding. Indeed, we consider this approach reduces barriers to participation in a SUFA, thereby increasing financing choice for CQCN expansions. This supports efficient investment in the CQCN, thereby aligning with the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act).

In addition to these issues, the QRC also noted that it:

- considered there should be a mechanism for the parties to agree to extend the permitted time period, with respect to the suspension or cancellation of a major authorisation, where this is appropriate to avoid termination of the EIHL
- opposed drafting which limited the circumstances in which the EIHL and EISL can be terminated, rescinded, frustrated or repudiated
- considered Aurizon Network should have a general liability to the SUFA trustee for termination of the EIHL based on an Aurizon Network's cause, rather than Aurizon Network only being liable in specified circumstances.

Regarding the first two points, our final decision proposal is to maintain our position from the draft decision and that QTH's requirements on this matter be respected (s. 138(2)(h) of the QCA Act).

Further, regarding the QRC's final point, our final decision proposal is not to amend the drafting. The QRC's comments relate to clause 3.5(h) of the draft decision EISL. Clause 3.5(h) is triggered by termination of the EIHL, as per clauses 11.4 and 11.5 of the EIHL. In such circumstances the EIHL is terminated but the Infrastructure Lease remains on foot. When this occurs, the EIHL provides for the SUFA infrastructure to form part of the infrastructure under the Infrastructure

Lease.[214] Further, all terms and conditions of the EISL, with the exception of the sublease, continue and Aurizon Network pays the SUFA trustee a rent-equivalent compensation cash flow plus any detriment amount owed. Given this, we are not of the view the existing liability provisions require further amendments.

Overall, given the analysis above, our final decision proposal is to broadly maintain the proposals adopted in our draft decision.

The amendments we consider appropriate are outlined below.

> **Final decision 9.2**
>
> **(1) After considering Aurizon Network's 2013 SUFA DAAU proposal regarding the termination provisions in the EIHL and EISL, our final decision is to refuse to approve the approach adopted in the 2013 SUFA DAAU.**
>
> **(2) The way in which we consider it appropriate for Aurizon Network to amend the 2013 SUFA DAAU is as detailed in our final decision EISL, EIHL and IND.**
>
> **(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

9.4.4 Minimising/mitigating Aurizon Network triggering a termination

We note the QRC has reiterated its position that the definition of Insolvency Event should be narrowed, to prevent insignificant events from triggering termination of the EISL and the EIHL.

Our final decision proposal is to maintain our position from the draft decision that QTH's requirements on this matter be respected (s. 138(2)(h) of the QCA Act).

> **Final decision 9.3**
>
> **(1) After considering Aurizon Network's 2013 SUFA DAAU proposal regarding the definition of Insolvency Event, our final decision is to approve Aurizon Network's proposal in the final decision pro forma SUFA documents where relevant.**
>
> **(2) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

9.4.5 Early termination of a SUFA trust

We note Aurizon Network's position regarding the drafting of clause 2.5 of the draft decision SUHD requiring parties to negotiate a process to address the early termination of the SUFA trust, provided (among other things) there is no material disadvantage to Aurizon Network. This matter is discussed in Chapter 13 (Taxation).

[214] Clause 11.6(a)(ii)(A) of the EIHL.

10 DIFFERENTIAL TREATMENT

All parties need to be satisfied the SUFA arrangements do not give rise to a circumstance whereby Aurizon Network is able to unfairly differentiate.[215]

Our final decision proposes the following decisions and positions:

- *The treatment of SUFA assets should be comparable to the standard required for other assets in the CQCN, and should be defined in the Extension Infrastructure Head-Lease (EIHL).*
- *Aurizon Network should represent and warrant to the SUFA trustee that it has complied with its obligations under the EIHL in this regard and will continue to do so for the term of the SUFA transaction.*
- *Asset condition-based assessments should be available to a SUFA trustee and, by extension, preference unit holders (PUHs) for the relevant SUFA assets, regardless of whether the CQCN declaration expires or is revoked.*
- *The conditions relating to the identity of a preference unit holder (as included in our draft decision Subscription and Unit Holders Deed (SUHD)) should be maintained, as these represent sufficient requirements regarding eligibility to fund a SUFA transaction.*
- *Issues related to cost shifting and potential breaches of ring-fencing are best dealt with via the undertaking.*

10.1 Background

Regarding Aurizon Network's 2013 SUFA DAAU, stakeholders raised concerns about the potential for Aurizon Network to undertake discriminatory behaviour in a SUFA environment. Specifically, the following matters were raised:

- Aurizon Network could treat SUFA-funded infrastructure in a manner different from an asset funded by Aurizon Network.
- Parties eligible to participate in the funding of SUFA projects could be restricted.
- Aurizon Network could use the SUFA framework to advantage its above-rail operator.

Aurizon Network said that it included non-discrimination provisions in its SUFA framework to govern its conduct in certain activities that have the potential to adversely affect the SUFA trust. For instance, Aurizon Network proposed inclusion of a non-discrimination provision which required it to:

> *not impose materially more onerous requirements on a SUFA transaction (or SUFA infrastructure assets) than would apply for a comparable Aurizon Network-funded project (or comparable Aurizon Network-funded assets) in comparable circumstances.*[216]

[215] The QCA Act sets out a regime governing non-discrimination by Aurizon Network, which is characterised by the concept of 'unfair differentiation'.

[216] Aurizon Network 2012c: 18. As noted in Chapter 2 regarding the legislative framework, the Explanatory Notes associated with the 2012 SUFA DAAU formed part of Aurizon Network's 2013 SUFA DAAU.

10.2 QCA draft decision

In our draft decision, we considered the three areas (discussed below) raised by stakeholders: different treatment of SUFA infrastructure; parties eligible to fund a SUFA; and cost-shifting and above-rail advantage.

10.2.1 Different treatment of SUFA infrastructure

SUFA infrastructure, once complete, forms part of the CQCN infrastructure that Aurizon Network operates and maintains.[217] In submissions, stakeholders noted concerns that although built infrastructure did not differ, other than in the source of funding, during the operational phase Aurizon Network would have the discretion to treat the assets differently.

Stakeholders said the SUFA agreements in Aurizon Network's 2013 SUFA DAAU would allow Aurizon Network to maintain SUFA-funded infrastructure at a lower standard than Aurizon Network infrastructure. For example, Anglo American noted:

> *Aurizon Network made the strategic decision to allocate its maintenance allowance to Aurizon Network created assets rather than the SUFA-funded assets. This causes disrepair and potential capacity degradation issues on the SUFA funded assets (which users would undoubtedly be required to pay extra to repair) but does not have any measurable impact on the rent that Aurizon Network is required to pay under the SUFA. Further, Aurizon Network can then degrade the SUFA-funded assets at a much greater rate than its own assets and in some circumstances may have an incentive to optimise the asset out of the RAB as the consequence is that Aurizon will no longer be required to pay rent.*[218]

Aurizon Network considered that during the project delivery phase and the operation phase of the SUFA infrastructure, it would not have an incentive to act in a discriminatory manner as it is in its own interests to maintain SUFA infrastructure to a suitable standard so that it can provide access, as is required under its Infrastructure Lease.[219]

To allow for an assessment of the condition of SUFA and non-SUFA assets, we considered the assessment criteria of the condition-based assessment could be broadened to include a comparison of SUFA assets and Aurizon Network–funded assets. We also considered that if the SUFA assets were treated differently, the assessment and comparison would capture this. Given these points, we identified this as a matter to be considered as part of the 2014 DAU process.

In coming to our draft decision position, we considered the following:

- Aurizon Network's obligations regarding the maintenance and operation of SUFA infrastructure should not be less than those Aurizon Network owes to QTH under its Infrastructure Lease.
- The condition-based assessment should account for differences in condition between SUFA and non-SUFA assets. This assessment should be undertaken on a reasonably aggregated basis (where groups of assets are compared) and regard should be had for Aurizon Network's asset maintenance cycles; it must also be published on Aurizon Network's website.
- A threshold project should not be used as a comparator, or baseline (as was proposed by Aurizon Network). We considered the use of mechanistic thresholds did not provide any

[217] The construction costs associated with a SUFA are included in the RAB, to the extent the QCA deems them prudent and efficient. The SUFA construction costs included in the RAB attract the regulated rate of return.
[218] Anglo American 2013a: 3.
[219] Aurizon Network 2012c: 35.

significant benefit and that a competent expert assessor would be capable of assessing materiality.

10.2.2 Parties eligible to fund

Aurizon Network's 2013 SUFA DAAU proposed that 'preference subscribers' be the only parties eligible to fund a SUFA project. Aurizon Network defined 'preference subscribers' as parties requiring access, or additional access to, Aurizon Network's railway network, in order to transport coal from a coal mine to an unloading point.[220]

We did not see merit in restricting the parties eligible to fund to access seekers only. Rather, our draft decision on Aurizon Network's 2013 SUFA DAAU considered that any party wanting to invest in a SUFA project should be eligible to do so.[221]

We considered that providing for non-access seekers (such as third-party investors) to fund an expansion not only improves funding choice, but also fosters potential competition in finance, improves financing efficiency and leads to greater bankability of the SUFA arrangements.

10.2.3 Above-rail advantage and cost shifting

Stakeholders had previously raised concerns about the potential for the SUFA arrangements to enable Aurizon Network to engage in cost shifting or other discriminatory behaviour to favour its above-rail provider or other related parties.

In our draft decision, we considered issues regarding cost shifting and other discriminatory behaviour are not specific to a SUFA transaction, and as such, it would be more appropriate to consider them as part of the ring-fencing arrangements or expansion process under the access undertaking.[222]

Given this, we considered this matter should be considered further as part of the UT4 process. However, we also sought further information from stakeholders on areas of potential discrimination that could arise, which are specific to a SUFA transaction, rather than issues that could arise regardless of whether an expansion is undertaken via a SUFA.

10.3 Stakeholders' submissions on the QCA draft decision

10.3.1 Different treatment of SUFA infrastructure

Aurizon Network supported our position the potential for discrimination in respect of asset maintenance be considered as part of the broader condition-based assessment process under the 2014 DAU process.[223]

Anglo American also supported our position on this matter.[224] It emphasised the consultant appointed to perform the condition-based assessment should be truly independent from Aurizon Network. It proposed the consultant should be required to disclose to the QCA (and industry): (1)

[220] Aurizon Network 2013j: 1.
[221] We note that both our position paper and draft decision discussion referred this to a 'creditworthy' party.
[222] For example, the concern about whether Aurizon Network would choose an expansion that unreasonably favours its related above-rail operator could arise irrespective of whether the expansion is undertaken via a SUFA.
[223] Aurizon Network 2015a: 39.
[224] Anglo American 2015: 7–8.

any other engagements it has with Aurizon Network; and (2) the global amount paid to the consultant.[225]

Anglo American also considered that if an allegation of discrimination had not been proven, the party alleging discrimination should only bear the costs where the allegation was frivolous, vexatious, or made in bad faith (otherwise each party should bear its own costs).[226]

The QRC suggested the EIHL should place obligations on Aurizon Network to perform its obligations in respect of operation, repair, maintenance and removal in the same manner and to the same standard as it does for the balance of the network.[227] The QRC noted that in addition to having the ability to refer alleged discrimination to the QCA, Aurizon Network must have obligations under the EISL and EIHL to not discriminate. The QRC suggested that any findings of discrimination by the QCA should constitute a wilful default—negating Aurizon Network's limitation of liability.

10.3.2 Parties eligible to fund

Aurizon Network stated it would only support our position on the parties eligible to fund if full set-off is adopted (see Chapter 8 for a discussion of set-off).[228]

In the absence of full set-off, Aurizon Network considered it faced an increased credit risk in SUFA transactions, which it considered could only be mitigated by requiring each preference unit holder (PUH) to be creditworthy at all times.[229] On this point, Aurizon Network noted our position in the draft decision that any 'creditworthy' party should be eligible to invest in a SUFA project but considered that no changes have been made to the SUFA agreements to give effect to this position.[230]

Aurizon Network proposed a series of requirements to mitigate this risk, including requiring each PUH to hold an investment-grade credit rating (or obtain an unconditional guarantee from a guarantor with such a rating), with the suspension, and compulsory sale, of all of the PUH's SUFA interests in the event there is a failure to hold the required credit rating.[231]

The QRC noted that it did not see the requirement for every PUH to provide security over its units and loan proceeds as being necessary (under cl. 4.2 of the draft decision SUHD), as there are already bank guarantee mechanisms to deal with any PUHs which are considered a credit risk, and that provision of security documentation may limit the ability of PUHs to obtain third party funding—or limit the terms on which third party funding is advanced at.[232]

Asciano supported our position that there should not be any restrictions on the parties able to participate in funding a SUFA arrangement.[233]

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[225] Anglo American 2015: 8.
[226] Anglo American 2015: 8.
[227] QRC 2015: 28.
[228] Aurizon Network 2015a: 39.
[229] Aurizon Network 2015a: 39.
[230] Aurizon Network 2015a: 39.
[231] Aurizon Network 2015a: 39–40. This is discussed in more detail in Chapter 8.
[232] QRC 2015: 38–39
[233] Asciano 2015: 6.

10.3.3 Above-rail advantage and cost shifting

Aurizon Network supported our position to assess this matter as part of the 2014 DAU process.[234]

Asciano considered that, in order for the SUFA to be credible and workable, the QCA must ensure there is no potential for actual or perceived discrimination by Aurizon Network through the audit of all SUFA-related processes and assets, with appropriate powers to remedy any breaches.[235] Noting our decision to assess these matters as part of the 2014 DAU process, Asciano sought confirmation from us about the following matters:

- Relevant parts of the access undertaking (such as ring-fencing arrangements), and other regulatory documents and processes (e.g. Aurizon Network's cost allocation manual) will apply to all SUFA extensions and expansions.
- The QCA has the power and ability to audit all SUFA expansions to ensure that no decisions or payments are made which are discriminatory or which breach ring-fencing rules, including the power to remedy any identified breaches and enforce penalties.
- A set of objective criteria will be used to prioritise expansion projects and that this prioritisation will be used by industry participants.[236]

Anglo American did not oppose consideration of discrimination issues as part of the 2014 DAU process, although it suggested we ensure this issue is 'not lost in the broader and complex issues dealt with under the UT4 decision'.[237]

10.4 QCA analysis and final decision

In coming to our final decision proposals on matters related to differential treatment, we note that a number of aspects relate to the undertaking, and that any final decision proposals on these matters will only be considered if the sunset clause discussed in section 4.4.2 of this final decision is triggered. We do, however, outline our position, as it stands, with respect to these issues.

10.4.1 Different treatment of SUFA infrastructure

Stakeholders did not disagree with our positions in our draft decision on the assessment of asset condition. We do, however, note the QRC suggested an alternate method for ensuring comparable treatment of SUFA assets, relative to assets financed by Aurizon Network, which is via the SUFA agreements rather than the access undertaking.

Against this background, our final decision proposes that Aurizon Network should be obligated to treat all assets in a comparable manner, and to meet its obligations under its Infrastructure Lease. This is irrespective of the party who funded the creation of the assets.

Specifically, our final decision proposes the following with respect to the pro forma SUFA documents. Clause 6.1 of our proposed final decision EIHL is unchanged from the 2013 SUFA DAAU EISL, and details the standard Aurizon Network is to meet in the operation, repair, maintenance and removal of SUFA infrastructure. The objective of this obligation is to ensure Aurizon Network treats SUFA funded infrastructure in a manner that can be understood by SUFA funders, who have no visibility as to the standard of maintenance Aurizon Network uses for the CQCN or its obligations under the Infrastructure Lease. In addition, if Aurizon Network complies

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[234] Aurizon Network 2015a: 40.
[235] Asciano 2015: 6.
[236] Asciano 2015: 5.
[237] Anglo American 2015: 8.

with this standard, it is likely that the SUFA funded infrastructure is being managed and maintained in a comparable manner to other infrastructure within the CQCN. To complement this, we have introduced clause 5.9 into our proposed final decision EISL. Under this clause Aurizon Network represents and warrants to the SUFA trustee that Aurizon Network has complied with its obligations under clause 6.1 of the EIHL and will do so for the term of the SUFA agreement.

Our view is the combined implication of these clauses is if Aurizon Network does not maintain SUFA infrastructure in a manner comparable to other infrastructure within the CQCN, it is in breach of its obligations. In such circumstances, the SUFA trustee can claim against Aurizon Network for any loss resulting from the breach, such as a loss in rental income.

Additionally, we have amended clause 5.3 of our draft decision EISL regarding asset condition-based assessment reports. Our final decision proposes to extend this clause to ensure the SUFA trustee, and by extension PUHs, have access to an asset condition-based assessment that specifically identifies the condition of the relevant SUFA infrastructure, regardless of whether the CQCN declaration expires or is revoked.[238]

We consider our position partially reflects views expressed by the QRC—the exception being we do not consider a finding that Aurizon Network has not met its obligations in this regard should automatically constitute wilful default and negate Aurizon Network's limitation of liability. A finding that Aurizon Network has not met its obligations may have well-founded reasons that would be identified in an asset condition-based assessment. Moreover, it may be the case that any breach can be rectified prior to any significant consequence.

Finally, in relation to Anglo American's comments regarding which parties should bear the costs of an allegation about a breach of Aurizon Network's obligations in relation to the operation, repair, maintenance and removal of SUFA assets, our final decision proposal is to adopt our draft decision as we see no reason to change this. Our proposed final decision EIHL states that costs are awarded at the discretion of the arbitrator or, if the dispute arises under the EISL, may be awarded by the expert. Additionally, whilst we acknowledge Anglo American's concerns regarding the independence of any party undertaking a condition-based assessment, we consider it is sufficient that the outcome is subject to dispute resolution.

Overall, our view is our final decision proposals appropriately balance the interests of PUHs (some combination of access seekers and third party financiers), with the legitimate business interests of Aurizon Network (ss. 138(2)(b), (e) and (h) of the QCA Act).

Aurizon Network's obligations in relation to maintaining SUFA infrastructure are comparable with those for other infrastructure in the CQCN; and how Aurizon Network wishes to go about meeting those obligations is entirely within Aurizon Network's control. Meanwhile, whilst the SUFA trust and PUHs have no control over Aurizon Network's actions in this respect, Aurizon Network's actions may have implications for PUHs rights under the pro forma SUFA agreements. In this context, we consider it reasonable the SUFA trustee, and by extension PUHs, have access to information regarding asset condition throughout the life of the SUFA asset. They should also have recourse to measures if Aurizon Network does not meet its obligations, and have access to a dispute resolution process.

Further, our view is that providing transparency in relation to Aurizon Network's obligations regarding operation, repair, maintenance and removal over the life span of a SUFA asset may assist in reducing barriers to participation in a SUFA transaction from the outset, through making

[238] See section 5.3.6 for discussion regarding the QCA's jurisdiction as relating to the impact of the workability, bankability, and credibility of the SUFA framework across regulation and post-deregulation environment.

preference units more tradable. Clarity regarding Aurizon Network's obligations over the life span of a SUFA asset supports the ability of SUFA investors in the construction phase of a SUFA to transfer their preference units if they wish to or need to, as prospective buyers also have clarity regarding Aurizon Network's obligations.

Given this, we are of the view that our position can increase financing choice, which supports the ability to efficiently finance expansions of the CQCN. This, in turn, complements the objective of efficient investment in the CQCN, thereby aligning with the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(b) and (d) of the QCA Act).

Further, and for avoidance of doubt, if the sunset clause is triggered (see section 4.4.2), we do not consider the inclusion of these provisions in the pro forma SUFA documents necessarily precludes subsequent amendments to the undertaking; in the context of considering the comparable treatment of SUFA-funded and Aurizon Network–funded assets.

The amendments we consider appropriate are outlined below.

Final decision 10.1

(1) After considering Aurizon Network's 2013 SUFA DAAU EIHL and EISL, our final decision is to refuse the arrangements governing the treatment of SUFA infrastructure relative to other infrastructure.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the following provisions:

(a) that Aurizon Network represents and warrants to the SUFA trustee that it has complied with clause 6.1 of the final decision EIHL, and will continue to do so for the term of the SUFA agreement (cl. 5.9 of the final decision EISL)

(b) that Aurizon Network will provide asset condition-based assessments over the term of the SUFA agreement (cl. 5.3 of the final decision EISL).

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

10.4.2 Parties eligible to fund

Aurizon Network stated it would only support our position of no restriction on the parties eligible to fund if full set-off is adopted. In the absence of full set-off, Aurizon Network considered it faced an increased credit risk in SUFA transactions, which it considered could only be mitigated by requiring each PUH to be creditworthy at all times. By 'creditworthy' Aurizon Network means each PUH must have an investment-grade credit rating, or obtain an unconditional guarantee from a guarantor with such a rating.

We do not agree with Aurizon Network. As addressed extensively in section 8.4.3, our final decision proposal is set-off should only be allowed for the rent adjustment mechanism during the operational phase. Further, we are of the view that set-off is not necessary in the context of eligibility to fund, and we consider a definition of creditworthy already exists in this context. Our view is eligibility to fund a SUFA is relevant for the construction phase and which parties are considered to be an eligible investor. We consider any party can be considered such, provided they meet the provisions already in place in the draft decision SUHD.

Our final decision proposal maintains the clause 4.2 and Schedule 6 provisions in our draft decision SUHD. Clause 4.2 and Schedule 6 set out the security and credit policies that apply to all preference unit subscribers in the construction phase of a SUFA project.

Clause 4.2 of our draft decision SUHD requires a PUH to execute and deliver to the SUFA trustee security documentation that creates, in favour of the SUFA trustee, a charge over all present and future preference units of that PUH, as well as the loan balance of that preference unit subscriber.[239]

Schedule 6 describes the credit policy in the draft decision SUHD. During the construction period, a PUH is required to hold a bank guarantee, unless that company has a long-term credit rating of at least A– or better from Standard and Poors Rating Services or a long-term credit rating of at least A3 or better from Moody's. Further, if a PUH chooses to transfer its preference units to another party during construction, the same credit policy applies to the new holder of the transferred units.

Against this background, our view is that in the construction phase of a SUFA project, the conditions of participation already provide an appropriate standard that defines what is meant by creditworthy in the context of being eligible to fund a SUFA. However, we do not agree with the QRC that requiring every PUH to provide security over its preference units and loan proceeds is unnecessary, given a bank guarantee mechanism exists to deal with any PUHs which are considered a credit risk. The security permits the trustee to deal with the preference units of a defaulting PUH. Without that security arrangement, the documentation would require significant re-working to deal with default by a PUH and, in our view, the security arrangement is the simplest measure by which a SUFA trustee can manage a PUH default.

Our final decision proposal is that no further restrictions are required regarding the parties eligible to fund the construction of a SUFA project. We consider additional restrictions unnecessary and counter to improving funding choice and fostering potential competition in finance, thereby restricting the SUFA framework's ability to support the objective of efficient investment in the CQCN (an objective we consider to be in the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act)).

We also consider that our final decision proposal appropriately balances the interests of prospective SUFA funders (access seekers and/or third party financiers), with the legitimate business interests of Aurizon Network (ss. 138(2)(b), (e) and (h) of the QCA Act). This is because it provides Aurizon Network with confidence that any prospective SUFA funder that wishes to participate in the construction phase can support its financial commitments. It also ensures that prospective SUFA funders have a clear and transparent understanding of the commitments they are required to make.

The amendments we consider appropriate are outlined below.

[239] Broadly speaking, a preference unit subscriber pays its share of the construction costs in instalments. For each dollar of each instalment it obtains preference units (thereby becoming a PUH). The loan balance relates to the share of funds the preference unit subscriber has yet to pay, relative to its share of the construction costs. Once paid, the loan balance is converted to preference units.

Final decision 10.2

(1) After considering Aurizon Network's 2013 SUFA DAAU provisions regarding eligibility to fund, our final decision is to refuse to approve the eligibility to fund arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt clause 4.2 and Schedule 6 of the final decision SUHD, where:

(a) clause 4.2 relates to the security documentation preference unit subscribers are required to provide to be eligible to fund a SUFA transaction

(b) Schedule 6 relates to the credit policy that PUHs have to comply with in order to be eligible to fund a SUFA transaction.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in the above analysis.

10.4.3 Above-rail advantage and cost shifting

We note stakeholders have not objected to our proposal of addressing cost shifting and above-rail advantage concerns as part of the 2014 DAU process. Given this, we have proceeded on that basis. We note that if the sunset clause (see section 4.4.2) is triggered, we will consider the issues raised in the context of the 2010 AU.

We acknowledge Asciano's concerns and are of the view that for any SUFA-funded infrastructure within the CQCN:

- the access undertaking, including the ring-fencing arrangements, and other regulatory documents and processes apply to SUFA-funded infrastructure
- any QCA ability to audit existing infrastructure or future infrastructure funded by Aurizon Network also extends to any SUFA-funded infrastructure.

Further, the prioritisation of expansion projects may be considered within the remit of an expansion policy within an undertaking.

11 PREFERENCE UNIT TRANSFERS

For each dollar a SUFA funder contributes towards the capital cost of a SUFA project, it receives a preference unit in a SUFA trust. These preference units provide their holders with various rights, including the right to receive distributions from the SUFA trust, in proportion to their respective preference unit holding.

We consider that for the SUFA to be an effective financing arrangement, it should minimise restrictions on who can participate in, and fund, a SUFA. Further, restrictions on a preference unit holder's ability to transfer preference units to another party should only exist to the extent that there is a clear need for them to do so.

Against this background, our final decision proposal regarding Aurizon Network's 2013 SUFA DAAU is to:

- *remove the requirement for 'stapling'*
- *remove the requirement that Aurizon Network should have 'first right of refusal' to acquire preference units being sold by a unit holder*
- *clarify the SUFA documents to ensure that preference unit holders are under no obligation to accept an offer from the ordinary unit holder (Aurizon Network).*

11.1 Background

In the construction phase of a SUFA project, SUFA funders receive a number of preference units according to their contribution to the capital costs of a SUFA project. These units provide their holders with various rights, including the right to a share of the distributions made by the SUFA trustee in proportion to their preference unit holding.

Aurizon Network's 2013 SUFA DAAU proposed to ‘staple’ preference units to access rights.[240] The intention of stapling preference units to access rights was to ‘align’ the commercial interests of parties in the construction phase of a SUFA project. In our position paper, we considered concerns regarding any potential misalignment of interests could be mitigated through the preapproval process. This was because preapproval provides a mechanism to align the interests and expectations of Aurizon Network and SUFA funders regarding the scope, standard, cost, time-to-deliver and expected capacity of a project.

Aurizon Network's 2013 SUFA DAAU also proposed it have ‘first right of refusal’ to acquire any preference units being sold by a unit holder. In our position paper we agreed that Aurizon Network should have the opportunity to acquire preference units but not on a right of first (or last) refusal basis. We considered that such a right could deter parties from bidding—potentially impacting the value of preference units.

[240] In the 2013 SUFA DAAU Aurizon Network adopted the concept of 'stapling'. Stapling means that a SUFA funder must hold both preference units and access rights, or that the parties holding preference units and access rights have shared ownership. Stapling effectively creates a constraint on who can own preferences units.

11.2 QCA draft decision

Our draft decision position was the removal of stapling of preference units and access rights would promote a more effective and bankable SUFA arrangement, because it would allow for a greater number of participants in the provision of finance. We also considered that concerns regarding the misalignment of interests between parties in the construction phase were sufficiently mitigated by the preapproval process, given preapproval aligns the interests and expectations of Aurizon Network and SUFA funders regarding the scope, standard, cost, time-to-deliver and expected capacity of a project.

Rather than having a 'first right of refusal', our view was that Aurizon Network should be given the same opportunity as other potential bidders to bid for preference units being sold by a unit holder. We considered the secondary market for the preference units should be as liquid as possible, as this would attract more third party financing options.

11.3 Stakeholders' submissions on the QCA draft decision

Stapling

Asciano said that it had previously put forward a position favouring stapling of preference units and access rights. It said that, following further consideration, it recognises that removing stapling is more likely to result in bankable arrangements and result in more efficient outcomes.[241]

Aurizon Network agreed that the 2013 SUFA DAAU should be amended such that there is no requirement for stapling.[242]

Priority in bidding for preference units

All stakeholders agreed that Aurizon Network should be able to bid for preference units, without being given priority (see Table 16).

Table 16 Stakeholders' comments on preference unit bidding

Stakeholder	*Comment*
Asciano	No one party should have either a right of first refusal or last refusal for any preference units being traded.[243]
Aurizon Network	The 2013 SUFA DAAU should be amended so Aurizon Network will be permitted to bid for preference units, but it should not have first right of refusal.[244]
QRC	Aurizon Network should not have a first right of refusal in respect of a transfer of preference units. An express statement should be included in the SUHD that the preference unit holder may, but is not obliged to, accept an offer made by the ordinary unit holder.[245]

The QRC also noted that it was not clear what would happen in a circumstance where a preference unit holder received more than one offer from holders of ordinary units (where the holders of ordinary units are tenants in common).[246]

[241] Asciano 2015: 7.
[242] Aurizon Network 2015a: 41.
[243] Asciano 2015: 7.
[244] Aurizon Network 2015a: 41.
[245] QRC 2015: 39.
[246] QRC 2015: 39–40.

11.4 QCA analysis and final decision

Stapling

Our final decision proposal regarding stapling maintains our view that the SUFA will be a more effective and bankable arrangement if the stapling of preference units to access rights is removed. This is because its removal allows preference units to become more tradable, which has the potential to reduce barriers to participation. We are of the view this can increase financing choice, which promotes efficient financing. We consider this meets the object of the QCA Act and the public interest, as it promotes efficient investment in the CQCN (ss. 138(2)(a) and (d) of the QCA Act).

We also consider that the removal of stapling is in the interests of access seekers and third party financiers (ss. 138(2)(e) and (h) of the QCA Act) because the absence of stapling allows access seekers and third party financiers more freedom to trade their preference units, thereby providing greater financing flexibility. Further, we do not consider the removal of stapling impacts the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act), particularly in the context of a preapproval process.

We note that stakeholders did not say they disagreed with the removal of stapling preference units to access rights from Aurizon Network's 2013 SUFA DAAU.

Priority in bidding for preference units

Our final decision proposal regarding priority in preference unit bidding maintains our view that the SUFA will be a more effective and bankable arrangement if Aurizon Network is not afforded preferential treatment in bidding for preference units sold by a unit holder. Our view is this ensures interested parties are not discouraged to bid, which can increase the pool of potential bidders, thereby enhancing the prospect of the true value of the preference units being realised. We consider this reduces barriers to participation and has the potential to increase financing choice, which promotes efficient financing. We are of the view this meets the object of Part 5 of the QCA Act and the public interest (ss. 138(2)(a) and (d) of the QCA Act), as it promotes efficient investment in the CQCN.

We also consider it in the interests of access seekers and third party financiers (ss. 138(2)(e) and (h) of the QCA Act) because it seeks to ensure that the sale of the preference units represents a fair reflection of their value. Further, we consider that as Aurizon Network is afforded the same opportunity as other interested parties to bid for preference units, its legitimate business interests (s. 138(2)(b) of the QCA Act) are not impacted.

We note that stakeholders did not say they disagreed with the proposal that Aurizon Network should be afforded the same opportunity as other interested parties to bid for preference units.

Further, we agree with the QRC's proposal that clause 11.1(c) of the draft decision SUHD be explicit in providing that a preference unit holder may, but will not be obliged to, accept an offer made by the ordinary unit holder (Aurizon Network). This ensures that the SUFA documents are transparent in this regard, thereby reducing transaction costs associated with understanding the SUFA documents. We are of the view this is in the interests of all parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act).

Finally, in our view the QRC's comments in respect of bids from ordinary unit holders that are tenants in common are not relevant in circumstances where an ordinary unit holder does not have a right of first refusal.

The amendments we consider appropriate are outlined below.

Final decision 11.1

(1) After considering Aurizon Network's 2013 SUFA DAAU SUHD, our final decision is to refuse to approve the provisions regarding preference unit transfers.

(2) The way in which we consider it is appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision SUHD, including:

(a) the removal of the requirement to staple preference units and access rights

(b) the removal of the requirement that the ordinary unit holder (Aurizon Network) have a first right of refusal in the process for the transfer of preference units

(c) the inclusion of a statement clarifying that preference unit holders will be under no obligation to accept an offer from the ordinary unit holder (Aurizon Network) for the transfer of preference units, as per clause 11.1(c).

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

12 THIRD PARTY FINANCE

The structure of the SUFA should not place undue restrictions on a SUFA funder's ability to obtain equity and debt as efficiently as possible. Given this, the SUFA framework should not preclude a specific type of finance, as long as the potential investors are willing to pursue that option and the associated risks. The type of financing should be considered on a case-by-case basis.

The design of Aurizon Network's 2013 SUFA DAAU did not easily support third party financing, which is potentially an impediment to its use as an efficient financing tool. We also recognise that a flexible SUFA framework that supported third party financing should provide sufficient protections to Aurizon Network, QTH and the State of Queensland.

Against this background our final decision proposals are:

- *The SUFA framework should not preclude specific types of financing.*
- *Financing choice should be considered on a case-by-case basis and subject to dispute resolution.*
- *A Financing Side Deed (FSD) should be included in the suite of SUFA documents to provide consent for and regulate any security to be provided by the SUFA trustee to third-party financiers through a direct contractual relationship between the third party financiers, Aurizon Network, QTH and the State of Queensland.*

12.1 Background

In its 2013 SUFA DAAU, Aurizon Network proposed that user funders should not be able to raise debt finance at the SUFA trust level. In addition, the SUFA trust should be prohibited from granting a security interest over the SUFA trust or its assets, in order to safeguard Aurizon Network's rights as ordinary unit holder. This effectively reduced financing flexibility. In part, Aurizon Network took this position because the 2013 SUFA DAAU was designed to allow Aurizon Network to participate in a SUFA.

Our position paper proposed that third-party financing may be achievable if rental cash flows and rent-equivalent compensation streams could be secured. The SUFA trust could then raise debt itself. This enhanced funding efficiency through widening the financing choices available to prospective SUFA participants, whilst potentially reducing transaction costs.[247]

We considered that in order to make the SUFA arrangement attractive to a wide range of potential financiers, the SUFA documents should:

- allow the SUFA trust to obtain finance itself
- not restrict the SUFA trust from issuing units to third-party finance entities
- not prevent a financing trust being placed above the trust to allow credit risk pooling
- allow the SUFA trustee to charge its rights in the SUFA documents to ensure that lenders to the SUFA trust are secured creditors of the SUFA trust.

[247] This outcome would require the SUFA framework to be designed as if Aurizon Network was not a participant to a SUFA. In circumstances where Aurizon Network wished to participate in a SUFA, the financing options could be considered on a case-by-case basis.

12.2 QCA draft decision

Our view in our draft decision was the SUFA framework should allow for parties to determine the type of financing for a SUFA on a case-by-case basis, as long as the potential investors were willing to pursue a specific type of financing with the associated risks. Given this, we considered the pro forma SUFA documents should allow for as many types of financing as possible.

We agreed with Aurizon Network's position that any amendments to the Trust Deed (TD) and the Subscription and Unit Holders Deed (SUHD) required to permit a specific type of third-party finance should be negotiated amongst the parties to a SUFA transaction. However, we also considered that Aurizon Network should not be able to unreasonably disagree with the type of finance and financing structure proposed by potential SUFA investors. Therefore, we considered it appropriate for this matter to be subject to binding dispute resolution.

Our draft decision also proposed the FSD. This was designed to provide consent for and regulate any security to be provided by the SUFA trustee to third-party financiers. It was drafted as a means of limiting the rights of the parties benefitting from the security granted by the SUFA trustee, while also addressing the concerns of Aurizon Network and regulating the position of the secured parties with QTH and the State of Queensland.

12.3 Stakeholders' submissions on the QCA draft decision

Choice of finance and binding dispute resolution

Aurizon Network said it supported the position that the template TD and SUHD should be amended to permit third-party finance by negotiation between the parties to a SUFA transaction, subject to financing being undertaken on the basis of either the SUFA template, or a modified version of the template that is agreed amongst the parties (without reference to binding dispute resolution).[248]

Aurizon Network did not agree that where negotiation on the financing type was unsuccessful, the matter can be subject to dispute resolution. Aurizon Network did not accept the concept that a SUFA template agreement can be modified for the purpose of a SUFA transaction (or otherwise) without its agreement. Further, it said the QCA's approach would provide counterparties with:

- the template's risk profile as a floor
- the potential for a significant uncompensated transfer of risk to Aurizon Network on the basis of a dispute resolution outcome that is not in favour of Aurizon Network.

Aurizon Network said, by contrast, it would have no ability to reopen the terms of SUFA template documents as required to permit its own preferred business solutions. It said:

> *Any such negotiations should be conducted on a commercial basis, and without reference to a binding dispute resolution process should agreement not be reached.*[249]

Financing Side Deed

Aurizon Network noted its support for a FSD being included as one of the SUFA documents.[250]

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[248] Aurizon Network 2015a: 42–43.
[249] Aurizon Network 2015a: 42.
[250] Aurizon Network 2015a: 43.

12.4 QCA analysis and final decision

Choice of finance and dispute resolution

Our final decision proposal maintains our view that in order to permit as many types of financing as possible, the standard template agreements should be able to be amended via negotiations by the SUFA parties.

Not only does this allow for flexibility of finance, but we consider it improves the bankability of the SUFA framework. The approach allows for the possibility of the most efficient form of financing for SUFA projects on a case-by-case basis, thereby supporting efficient investment in the CQCN. In turn, we consider this supports the object of the third-party access regime, as well as being in the public interest, the interests of access seekers and third party financiers (ss. 138(2)(a), (d), (e) and (h) of the QCA Act). It also aligns with the interests of access holders and the legitimate business interests of Aurizon Network, to the extent that neither party necessarily benefits from inefficient investment in the CQCN (ss. 138(2)(b) and (h) of the QCA Act).

Further, our final decision proposal also maintains our view that where negotiations amongst the parties to a SUFA arrangement fails to deliver an outcome on amendments required to the standard documents for a specific type of finance, the disagreement be subject to a binding dispute resolution.

Aurizon Network disagreed with the concept that a SUFA template document could be modified for the purpose of a SUFA transaction without its agreement. It considered negotiations should be conducted on a commercial basis without reference to binding dispute resolution if agreement is not reached. Aurizon Network alluded to three specific issues in this regard:

- the SUFA document template risk profile being adopted as a floor
- the potential for significant uncompensated risk transfer to Aurizon Network if the outcome of dispute resolution is not in its favour
- Aurizon Network's inability to reopen the terms of SUFA template documents to permit its own preferred business solutions.

In our view, one of the purposes of the pro forma SUFA documents is to allocate risk in a manner from which it is possible for the relevant parties to undertake a credible negotiation, if they wish to. As such, one of the objectives of the pro forma SUFA documents is to provide a 'floor' risk profile across the relevant parties to a SUFA.

In this context and the context of Aurizon Network's monopoly position, if there were no access to a dispute resolution process, Aurizon Network could effectively refuse any type of finance not specifically contemplated by the pro forma SUFA agreements without having its reasoning subject to scrutiny. We do not consider this is appropriately balanced, because it could unduly restrict a SUFA funder's ability to obtain equity and debt as efficiently as possible. In our view, such an outcome has the potential to conflict with the object of the third party access regime, as well as the public interest (ss. 138(2)(b) and (d) of the QCA Act). Further, it is not in the interests of access seekers or third party financiers (ss. 138(2)(e) and (h) of the QCA Act), because they may not be clear why Aurizon Network is unwilling to adopt their proposals or why they are not afforded the opportunity to have their concerns mitigated. In our view this undermines a workable, bankable and credible SUFA framework.

By contrast, recourse to binding dispute resolution provides a process that Aurizon Network can participate in, and allows for independent experts to consider whether Aurizon Network has genuine reason(s) to refuse a particular type of financing that SUFA funders may wish to adopt. The independent expert's decision will be based on the merits of the case put forward. We

consider that Aurizon Network is well-placed to provide a compelling case as to any genuine reason(s) it has for refusing to adopt a specific form of financing. Indeed, we see no reason why, given Aurizon Network's monopoly position, its opinion should not be assessed by independent experts as part of a dispute resolution process; we do not consider Aurizon Network's concerns regarding a 'significant uncompensated risk transfer' to it due to the outcome of a dispute resolution process compelling.

Additionally, we are also of the view Aurizon Network does have the opportunity to provide its 'own business solution' for a particular expansion. Aurizon Network can choose to either fund the expansion at the regulated rate of return, or propose access conditions. Effectively, the SUFA only comes into play if Aurizon Network's 'business solution' is unlikely to be acceptable to access seekers and they consider that alternative forms of financing, which Aurizon Network has not proposed, may be a more efficient way forward.

Against this background, we consider our proposal appropriately balances the legitimate business interests of Aurizon Network with the interests of access seekers and third party financiers, whilst also having regard to the object of the third party access regime and the public interest, is to provide for binding dispute resolution (ss. 138(2)(b), (d), (e) and (h) of the QCA Act). This is because any financing proposal put forward to Aurizon Network that it opposes can be independently tested to see whether the financing proposal is genuinely not viable, despite the proposal being considered an efficient form of financing by those financing the expansion. We consider this position:

- could discourage Aurizon Network from unreasonably disagreeing with the type of financing and financing structure
- encourages balanced effective credible negotiation.

Financing Side Deed

No significant comments were received on the drafting or content of the FSD, other than in respect of default and liability. Our overall view of liability and default over the suite of pro forma SUFA documents is discussed in Chapter 16. Subject to our view regarding liability, our final decision proposal maintains our view that the FSD, as provided in our draft decision, should be included as part of the suite of pro forma SUFA agreements.

We consider the FSD allows parties to proceed with a SUFA transaction in the knowledge that security can be placed on the relevant cash flows, thereby increasing the SUFA's attractiveness to prospective funders (access seekers and/or third party financiers), whilst also accounting for the interests of QTH and the State of Queensland with respect to this security (s. 138(2)(e) and (h) of the QCA Act).

Our view is the FSD also meets Aurizon Network's legitimate business interests, as it is intended to limit Aurizon Network's concerns including:

- provides the consent of QTH and the State of Queensland to the security to be granted by the SUFA trustee
- the requirement that the third party financiers release their security on the zero value date, even if there is outstanding finance due to them from the SUFA trustee.

Final decision 12.1

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals relating to third party financing, our final decision is to refuse to approve the provisions regarding third party financing.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to:

- **(a) remove any provisions that unduly restrict specific types of financing being adopted, as per the QCA's final decision pro forma SUFA documents**
- **(b) allow for financing choice to be subject to binding dispute resolution, as per the QCA's final decision SUFA documents**
- **(c) include the final decision Financing Side Deed (FSD) within the suite of SUFA documents.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

13 TAXATION

Taxation has been a key issue throughout the many iterations of the SUFA framework. Aurizon Network's 2013 SUFA DAAU is built upon a trust model, as this, theoretically, provides tax efficiency. Without tax efficiency the SUFA framework does not provide a competitive financing alternative to Aurizon Network's financing proposals. If the tax efficiency benefits of the trust structure are to be realised, appropriate tax rulings regarding statutory severance and the transfer of tax depreciation to the SUFA trust are needed from the Queensland Government and Australian Tax Office (ATO) respectively.

Aurizon Network's 2013 SUFA DAAU also proposes SUFA funders provide both Aurizon Network and QTH with comprehensive tax indemnities. Stakeholders and Aurizon Network continue to have contrasting views regarding the inclusion and scope of these tax indemnities.

Our final decision on taxation is:

- *An appropriate form of statutory severance is required for the SUFA framework to be effective, but this can only be granted by the Queensland Government.*
- *The 'in-principle' tax effectiveness of a SUFA should be determined through an Administratively Binding Advice (ABA) from the ATO.*
- *The process, roles/responsibilities and information sharing requirements for obtaining an ABA should be developed in the undertaking, if the sunset clause is triggered.*
- *A Private Binding Ruling (PBR) from the ATO should be a condition precedent for each actual SUFA transaction, unless the parties to the SUFA transaction agree otherwise.*
- *Each party to an actual SUFA transaction should be responsible for obtaining its PBR as and when this is necessary.*
- *Preference unit holders should provide restricted tax indemnities to Aurizon Network and QTH, relative to those proposed in Aurizon Network's 2013 SUFA DAAU*
- *The pro forma Rail Corridor Agreement (RCA) should provide, to the extent practicable, a SUFA trust with a 'quasi-ownership' right over the SUFA infrastructure.*

13.1 Background

Aurizon Network's 2013 SUFA DAAU was developed to ensure cost neutrality. In this particular context, cost neutrality means the construction of infrastructure funded via a SUFA is undertaken at no tax cost to Aurizon Network.[251] In line with this requirement the 2013 SUFA DAAU proposed Aurizon Network be provided with a tax indemnity under a SUFA transaction. A tax indemnity regarding a SUFA transaction was also included for QTH in the 2013 SUFA DAAU. The implication of these tax indemnities is SUFA funders are exposed to the full tax risk associated with the SUFA framework proposed by Aurizon Network.

Our position paper noted a number of practical concerns remained over the tax treatment of a SUFA transaction, and that unless those issues were addressed, the SUFA framework would not be effective. These included:

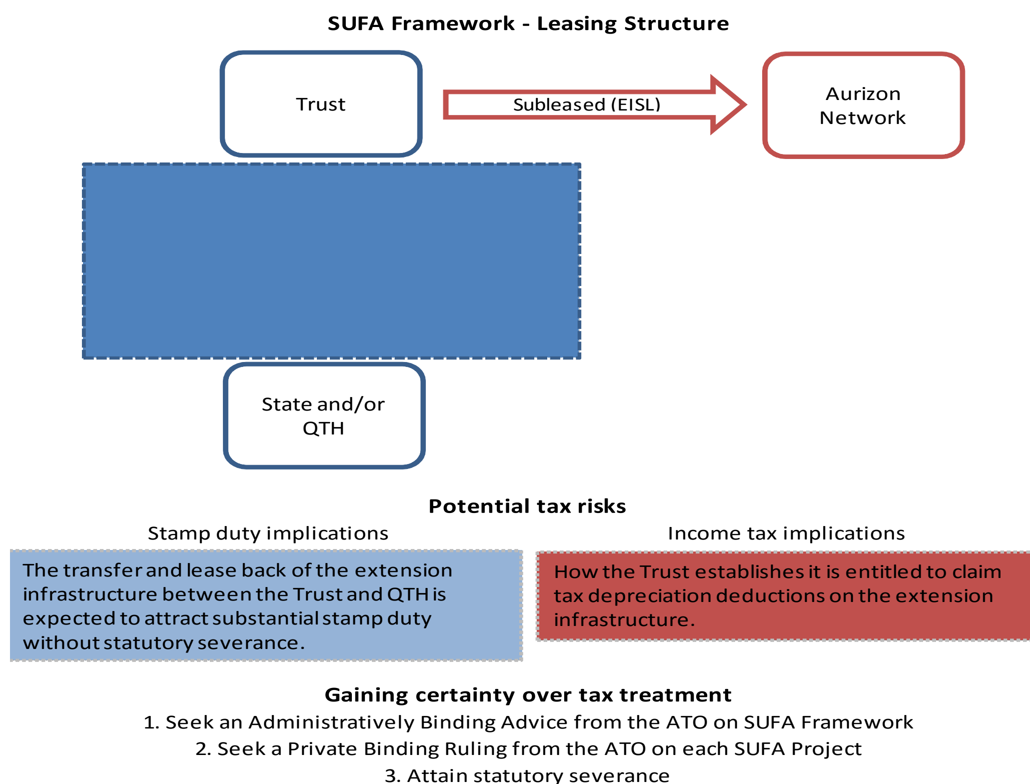
[251] To the extent that Aurizon Network is not legitimately subject to some of the tax liability, which could occur if Aurizon Network held preference units in a SUFA trust.

- SUFA being tax-effective for all parties
- clarification regarding the transfer of the tax depreciation allowance associated with SUFA infrastructure to the SUFA trust
- an appropriate form of statutory severance for the SUFA assets being obtained[252]
- an ABA for the suite of finalised pro forma SUFA documents being obtained
- transparency over roles and responsibilities of parties for obtaining private binding rulings (PBRs) for each individual SUFA
- clarification of risks intended to be covered in the QTH tax indemnity.

13.2 QCA draft decision

Our draft decision discussed the following matters: tax depreciation, tax losses, statutory severance, roles and responsibilities of parties seeking ABAs and PBRs, tax indemnities and tax-related amendments to the Subscription and Unit Holders Deed (SUHD). The following diagram summarises tax risks resulting from the SUFA framework.

Figure 7 Potential tax risks (SUFA)



[252] Aurizon Network's proposed SUFA framework is based on the assumption that the appropriate form of statutory severance will be obtained. Without the appropriate statutory severance, the transfer and lease-back of the infrastructure would attract substantial stamp duty.

13.2.1 Tax depreciation

Aurizon Network said the intended structure includes the SUFA trust being a holder of the infrastructure for tax purposes, which entitles it to claim tax depreciation based upon the costs of construction.

The QRC said the ability of the trust to claim tax depreciation deductions in respect of the SUFA infrastructure is fundamental to the economics of the SUFA structure as a whole, as it is the tax depreciation deductions which allow distributions to preference unit holders to be made in a tax effective manner.[253]

In light of this, our draft decision included the following measures that sought to clarify the SUFA trust as 'holder' of the SUFA infrastructure, thereby enabling the SUFA trust to claim tax depreciation:

- The draft decision RCA was drafted to include a license from the landholder to the SUFA trustee (and its associates) to access and use extension land in accordance with the terms of the RCA. The license allows the SUFA trustee to:
  - access, modify and use the landholder infrastructure
  - keep the SUFA infrastructure on the extension land
  - use the land as required by or permitted in the transaction documents.
- A clause was included in the draft decision RCA giving the SUFA trustee the right to remove any part of the SUFA infrastructure without the prior consent of the landholder at any time.
- To the extent possible, the draft decision RCA retained other clauses that stakeholders considered gave the SUFA trustee a 'quasi-ownership right' of the infrastructure.

13.2.2 Tax losses

We noted in both our position paper and draft decision, our intention to develop SUFA to allow maximum flexibility for parties to determine the type of financing to be utilised on a case-by-case basis (see Chapter 12 of this final decision). In this context, whilst we acknowledged the QRC's concerns[254], our draft decision did not attempt to specifically address issues regarding the generation of tax losses should the SUFA trust raise debt. We considered the ability of a SUFA trust to raise debt (and generate tax losses) is one of the financing choices open to parties participating in a SUFA, and formed the view that should parties choose to pursue debt financing through the SUFA trust, the parties could agree the necessary amendments at that time.

We also noted that our objective (with respect to flexibility in financing) was to ensure there was no contractual prohibition in the SUFA agreements. We did not attempt to remove all commercial (including tax) obstacles to a particular type of financing to the detriment of other forms of potential financing.

13.2.3 Statutory severance

We understand that, as a matter of general law, once infrastructure is built, it is considered to be part of the land. That infrastructure can only be sold (or disposed of) as property separate from the land if the general law principle is displaced by a statutory provision which 'severs' the

[253] QRC 2014b: 2.

[254] In response to our position paper, the QRC noted the SUFA framework had not contemplated a SUFA trust would raise debt.

infrastructure from the land, allowing for transactions where infrastructure can be treated separately from the underlying land. This is what we refer to as statutory severance.

Aurizon Network's 2013 SUFA DAAU is based on the assumption that the appropriate form of statutory severance will be obtained. Without an appropriate statutory severance mechanism[255], the transfer and lease-back of SUFA infrastructure would attract substantial stamp duty. In such circumstances, SUFA would likely be rendered unworkable because a SUFA transaction would not be competitive next to Aurizon Network's financing proposals.

Our draft decision noted that an appropriate form of statutory severance for the SUFA assets is essential. We also noted we would continue to work with the Queensland Government with respect to statutory severance—and that any decision in this area is ultimately a decision for the Government.

13.2.4 Seeking ABAs and PBRs

We understand that advice sought from the Australian Tax Office (ATO) generally comes in the form of a binding ruling. In respect of a User Funding Agreement (UFA), or a suite of project-specific SUFA agreements that have been agreed amongst SUFA parties, a PBR would be sought; as it relates to how a tax law would apply to a specific circumstance.

We also understand that advice from the ATO can be sought on the standard suite of pro forma SUFA agreements. This advice would come in the form of an ABA and would provide an indication of the likely tax treatment of a SUFA transaction.[256]

Our draft decision considered that seeking an ABA on the standardised set of SUFA agreements would benefit from having Aurizon Network, the QRC and the QCA work together on a joint submission. We also considered that where Aurizon Network has sought an ABA from the ATO, we would include the prudent and efficient costs of doing so in its operating costs.

With respect to pursing a PBR (on a project-specific basis), our draft decision agreed with stakeholders that each party to the SUFA should be responsible for pursuing a tax ruling on its respective tax position. We considered there would be considerable merit in parties consulting with each other and coordinating submissions to the ATO.

We noted that we had taken care to ensure the tax effectiveness and tax efficiency of the SUFA framework when proposing our draft decision amendments to Aurizon Network's 2013 SUFA DAAU. However, we also noted that the tax effectiveness of the SUFA, and the treatment of tax depreciation, would ultimately be determined through a PBR—when an UFA transaction arises.

13.2.5 Tax indemnity

Tax indemnity as it relates to Aurizon Network

Given an assumption that a SUFA arrangement would not be entered without a PBR to support it, our draft decision queried the need for the tax indemnity. We noted that if the tax indemnity were to remain in the documents, it should be from the PUHs as the SUFA trust may not be able to meet the tax indemnity if the amount is significant.

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[255] Statutory severance would be provided by the State of Queensland.

[256] Some laws the ATO administers do not allow for it to provide advice in a legally binding form. However, in the interest of assisting taxpayers, the ATO provides administratively binding advice in relation to these laws in limited circumstances. It considers that it is administratively bound by that advice. See: https://www.ato.gov.au/General/ato-advice-and-guidance/ato-advice-products-(rulings)/administratively-binding-advice/.

Tax indemnity as it relates to QTH

Our draft decision noted the QRC's concern that there is still significant uncertainty in respect of what QTH tax risks the tax indemnity is designed to address—specifically whether the indemnity covers:

- duty paid to the Queensland State Treasurer
- amounts paid under the National Tax Equivalents Regime (NTER).

Our draft decision noted that QTH removed its income tax liability which specifically addresses concerns respecting NTER. Further, we considered that if there is an appropriate form of statutory severance in place, thereby reducing stamp duty risk, the indemnity in favour of QTH was acceptable.

13.2.6 Tax related amendments to the SUHD

Clause 2.5 of the draft decision SUHD notes that if the SUFA trust is wound up early and the entitlements to distributions between the preference unit holders and the ordinary unit holder (Aurizon Network) do not equitably reflect their respective financial investments in the SUFA trust, then the parties are to negotiate in good faith to agree a process. That process is not to result in either of the following:

- a party being required to pay a lump-sum, or
- any material disadvantage to Aurizon Network, the Head Company or the ordinary unit holder.[257]

13.3 Stakeholders' submissions on the QCA draft decision

13.3.1 Tax depreciation

The QRC stated that its understanding continues to be that the SUFA trust must establish it is the 'holder' of the SUFA infrastructure in order to claim tax depreciation, which the QRC considered involves:

- the assets comprising the SUFA infrastructure are 'fixed to land'
- the SUFA trust has a 'quasi-ownership right' in respect of that land
- the SUFA trust has the right to remove the SUFA infrastructure.

The QRC welcomed the changes made to the RCA which were intended to confirm the SUFA trust could establish itself as the holder of the SUFA infrastructure. In particular, it noted the strengthening of the SUFA trustee's right to remove any part of the SUFA infrastructure without prior consent of the landholder (in the RCA). It did, however, query whether the drafting suitably strengthens the SUFA trust's ability to establish itself as the 'holder'.

The QRC also stated that clarity on the ATO's views on tax depreciation must be sought in relation to the standard form documents.[258]

Aurizon Network supported the position that:

[257] The 2013 SUFA DAAU provides that Aurizon Network is the ordinary unit holder. However, we note that Aurizon Network may transfer part of the CQCN—the ordinary unit should be transferred to the entity which acquires that part of the CQCN which includes the SUFA.
[258] QRC 2015: 2–3.

> *[t]he effectiveness or otherwise of the SUFA documents to enable the Trust to claim tax depreciation must be tested with the ATO – through an ABA, and a PBR when an actual SUFA transaction arises.*[259]

13.3.2 Tax losses

The QRC noted that it set out its preliminary views on the ability of the SUFA trust to carry forward tax losses in its July 2014 submission. However, due to the tax complexities involved in this matter, the QRC noted it agreed with the QCA's draft decision that the potential issues arising from the use of debt financing are best considered on a case-by-case basis.[260]

Aurizon Network did not respond to this matter.

13.3.3 Statutory severance

Aurizon Network supported the draft decision position that an appropriate form of statutory severance for the SUFA assets is still required.[261]

The QRC agreed with the QCA's view in its draft decision that without statutory severance, a SUFA project is unlikely to proceed. It noted further that if project-specific applications are required with respect to statutory severance, then the PUHs are the most appropriate party to coordinate project-specific applications—as it is the PUHs who are ultimately exposed to this tax risk under the back-to-back tax indemnity (if statutory severance is not obtained).[262]

13.3.4 Seeking ABAs and PBRs

ABAs

Aurizon Network agreed to work on a joint submission to the ATO for an ABA with the QCA and interested parties (such as the QRC), subject to it not being required to share commercially sensitive information with the QCA or any interested party. Aurizon Network also supported the position that efficiently incurred costs in seeking an ABA should be included in its operating costs.[263]

The QRC welcomed the idea of a joint submission for an ABA, but was of the view that further clarification of the roles and responsibilities for seeking ABAs is required. In particular, it considered that one party should be responsible for:

- the preparation of the ABA (in consultation with other parties)
- negotiation with the ATO
- deciding whether the ABA is favourable.

The QRC noted that nominating one party to coordinate the process would provide the most efficient and effective way for the parties to obtain an ABA.

The QRC and Aurizon Network's positions regarding roles and responsibilities for developing an ABA are set out in the following table.

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[259] Aurizon Network 2015a: 44.
[260] QRC 2015: 5.
[261] Aurizon Network 2015a: 44.
[262] QRC 2015: 5.
[263] Aurizon Network 2015a: 44.

Table 17 Aurizon Network's and the QRC's comments on the process to develop an ABA

Responsible party	***Roles and responsibilities***
QRC	Where the ABA is related to tax treatment of the SUFA trust, tax consequences for PUHs or tax issues relevant to QTH, the QRC (acting as a representative of and in conjunction with access seekers) should be responsible. To the extent the ABA relates to the tax treatment or consequences of SUFA for Aurizon Network, Aurizon Network should be responsible for the preparation of the ABA, negotiation with the ATO and deciding whether that ABA is favourable.
Aurizon Network	To the extent the ABA is related to the tax treatment or consequences of SUFA for Aurizon Network (e.g. the deductibility of the rent), Aurizon Network should be responsible.

PBRs

With respect to pursuing PBRs, Aurizon Network agreed that each party should be responsible for pursuing a PBR for its respective tax position, subject to its (Aurizon Network's) efficiently incurred costs being refunded by the SUFA trust—but only to the extent those costs are not separately refunded under a study funding agreement for a project.[264]

The QRC considered that, as it is the PUHs who are ultimately exposed to the tax risk of SUFA, either directly, or indirectly through the tax indemnity provided to Aurizon Network:[265]

- the PUHs should have carriage of the PBR process
- the right to waive a condition precedent to obtain a PBR should ultimately reside with the preference unit holders.[266]

Vale considered there should be an assessment once tax rulings have been obtained.[267] Vale noted the workability of the SUFA model is highly dependent on achieving favourable tax rulings from the ATO. Further, Vale was of the view that, as any unfavourable ruling is likely to have a serious impact on the viability of the SUFA model as a competitive funding option, a review of the model should be initiated if any of the taxation rulings do not receive a favourable response from the ATO.

13.3.5 Tax indemnity

The QRC and Aurizon Network differed on the need for including tax indemnities (see the table below).

Table 18 Aurizon Network's and the QRC's comments on tax indemnities

QRC	***Aurizon Network***
Tax indemnity provided to Aurizon Network	
The tax indemnity is not necessary due to the following:	A satisfactory PBR would substantially address the significant income tax risks associated with a SUFA transaction, but the tax indemnity (in the SUHD) is

[264] Aurizon Network 2015a: 44–45.
[265] QRC 2015: 6–7.
[266] To the extent a PBR relates to the tax treatment of the SUFA trust and tax consequences for PUHs. Conditions precedent are discussed in Chapter 14.
[267] Vale 2015: 2–3.

<table>
<tr><th>QRC</th><th>Aurizon Network</th></tr>
<tr><td>

Each SUFA arrangement is not intended to be entered without a favourable PBR to support it (tax risk should be covered by PBR).
Aurizon Network should not be liable for any tax amount arising under the EIHL (intended to be covered under the tax indemnity) if either of the following also occurs:

The stamp duty indemnity in favour of QTH is removed from the EISL.
Statutory severance is achieved and there is also a blanket carve-out for any income tax or income tax equivalent from the indemnity provided by Aurizon Network to QTH (under the EISL).

If the indemnity is to remain in its current form, the QRC said it welcomed the QCA's proposed amendments to the tax indemnity (provided by the PUHs to Aurizon Network and the SUFA trustee under the SUHD), and proposed further carve-outs from the tax indemnity to ensure appropriate coverage.[268]
</td><td>
needed to address Aurizon Network's residual tax risks, which may include:

income tax risks outside of Federal income tax matters specified in a PBR application
non–income tax risks (such as duty, or land tax)
costs incurred in relation to SUFA tax issues (such as costs associated with a dispute with the ATO)
costs associated with a change in tax law
tax costs applicable after a PBR has expired (which, based on current ATO practice is materially shorter than the expected term of the SUFA transaction)
tax costs that may arise if the PUHs or the SUFA trustee acts inconsistent to the PBR.

Aurizon Network acknowledged there is a low probability of the above tax risks resulting in a tax loss; but said a resulting tax loss could be very large.[269]
</td></tr>
<tr><td colspan="2">Tax indemnity provided to QTH</td></tr>
<tr><td>
The indemnity to QTH is inappropriate and likely to be unattractive to third-party investors (and will likely be rejected by them as a matter of principle). While this indemnity may not be called upon where statutory severance has been obtained, the QRC maintains its position that this indemnity should not exist in the first place

Indemnification of QTH in respect of National Tax Equivalents Regime (NTER) paid to the Queensland State Treasurer is not appropriate, as it does not represent a 'real' loss to QTH.[270, 271]
</td><td>No comment.</td></tr>
</table>

13.3.6 Tax-related amendments to the SUHD

Aurizon Network amended clause 2.5(a)(iv) of our draft decision SUHD to state that if the SUFA trust is wound up early and entitlements to distributions between the PUHs and the ordinary unit holder do not equitably reflect their respective financial investments in the SUFA trust, then parties are to negotiate in good faith to agree a process that does not result in Aurizon Network, Aurizon Network's head company or the ordinary unit holder having any disadvantage—whether financial, tax-related or otherwise.

The amendment changes the impact on Aurizon Network, Aurizon Network's head company or the ordinary unit holder from 'any material disadvantage' to 'any disadvantage'.[272]

[268] QRC 2015: 4–5.
[269] Aurizon Network 2015a: 45.
[270] QRC 2015: 3.
[271] On this point, the QRC requested further clarification as to the policy justification for retaining any liability for income tax, or income tax equivalent where such liability arises as a result of a failure by the SUFA trustee or Aurizon Network to comply with their obligations under the EIHL or the IND.
[272] Aurizon Network 2015e.

13.4 QCA analysis and final decision

13.4.1 Tax depreciation

The QRC queried whether the QCA's amendments to the RCA sufficiently strengthened the SUFA trust's ability to establish itself as the 'holder' of the SUFA infrastructure.

Our view is the inclusion of the license from the landholder to the SUFA trustee, as well as giving the SUFA trustee the right to remove any part of the SUFA infrastructure (without prior consent of the landholder at any time), assists to give the SUFA trust a 'quasi-ownership right' of the SUFA infrastructure for the purposes of the *Income Tax Assessment Act 1997* (Cth) (ITAA); therefore; we anticipate it will allow the SUFA trust to claim tax depreciation.

Given this, we have maintained these provisions in our final decision, noting the need for these to be tested with the ATO. Our view is their inclusion is in the interests of all parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act). This is because they seek to enhance the prospect of the SUFA framework achieving a tax ruling allowing a SUFA trust to claim tax depreciation.

Further, given the necessity for a SUFA trust to be able to claim tax depreciation if the SUFA framework is to offer a competitive alternative to an Aurizon Network financing proposal, we consider our approach aligns with the object the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act), as it seeks to encourage efficient investment in the CQCN through greater financing choice.

Ultimately, however, we agree with statements from the QRC and Aurizon Network that the ability of a SUFA trust to claim tax depreciation depends on the ATO's view. We consider this should be tested as soon as is practical through an ABA application upon finalising the pro forma SUFA documents. Further, once the ATO's views are sought and obtained, the pro forma SUFA documents should be amended (if required and if possible) to establish the SUFA trust as the owner of tax depreciation.

We do not, however, consider these requirements (to seek the relevant rulings) should be included within the pro forma SUFA transaction documents. Our view is they belong within the undertaking—they relate to obtaining in principle advice from the ATO regarding the tax treatment of the proposed pro forma SUFA documents and considering whether these documents will need adjusting in light of that advice, rather than obtaining project-specific tax rulings. Given this, we propose these issues be considered if the sunset clause (see section 4.4.2) is triggered.

The amendments we consider appropriate are outlined below.

Final decision 13.1

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals relating to the role of tax depreciation, our final decision is to refuse to approve the approach adopted towards tax depreciation.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision Rail Corridor Agreement (RCA), such that the RCA:

(a) includes a licence from the landholder to the SUFA trustee (and its associates) to access and use extension land in accordance with the terms of the RCA that allows the SUFA trustee to:

(i) keep the extension infrastructure on the extension land

(ii) use land as required by or permitted in the SUFA transaction documents

as per clause 3.1 of the final decision RCA

(b) provides the SUFA trustee with the right to remove any part of the extension infrastructure without the prior consent of the landowner at any time, as per clause 8 of the final decision RCA

(c) provides the SUFA trustee with a 'quasi-ownership right' of the SUFA infrastructure, as per clause 7 of the final decision RCA.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Further, to summarise our position regarding obtaining an ABA—if the sunset clause is triggered, the 2010 AU should include requirements for obtaining in principle advice via an ABA from the ATO and reviewing the pro forma SUFA documents in light of that advice.

13.4.2 Tax losses

We note the QRC agreed that the potential issues arising from the use of debt financing (and potential associated tax losses) are best considered on a project-specific basis, should parties to a SUFA transaction choose to pursue debt financing through a SUFA trust. Our view is that the pro forma SUFA documents are designed to incorporate flexibility in financing, allowing parties to determine the type of financing on a project-specific basis. Debt financing via a SUFA trust is just one type of available financing that parties to a SUFA transaction can pursue.

In light of this, our final decision is to maintain our proposal to ensure flexibility in the type of financing that can be adopted for a SUFA transaction—and that there is no 'finance-specific' contractual prohibition included in the pro forma SUFA documents.

Within the pro forma SUFA documents, we have not attempted to remove all commercial (including tax-related) obstacles for a particular form of financing (such as debt financing) to the detriment of other forms of financing. We consider such issues should be considered on a project-specific basis, depending on the preferences of the parties to that SUFA transaction; particularly the extent to which they wish to bear both the risks of a specific type of financing and the transaction costs associated with any necessary amendments to the pro forma SUFA documents arising as a result of their financing preference.

We consider this position appropriately balances the interests of all potential parties to a prospective SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act). It allows parties to a SUFA

transaction to agree to an efficient form of financing, as no single type of financing arrangement is catered for within the pro forma SUFA documents. Such flexibility supports the objective of obtaining an efficient form of financing for a particular infrastructure investment in the CQCN. Therefore, our view is it also supports efficient investment in the CQCN, and in that way it aligns with the object of the third party access regime in the QCA Act and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 13.2

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals regarding financing flexibility, our final decision is to refuse to approve the approach adopted towards financing flexibility.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision pro forma SUFA document position to allow for maximum flexibility in the type of financing adopted for a SUFA transaction.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

13.4.3 Statutory severance

We note all parties have agreed that an appropriate form of statutory severance is required for a workable SUFA framework. Further, whilst we will continue to work with the Queensland Government with respect to statutory severance, this is ultimately a decision for the Queensland Government.

We consider the need for an appropriate form of statutory severance is in the interests of all prospective parties to a SUFA transaction. Further, our view is that statutory severance is essential if the SUFA framework is to meet the objective of providing efficient financing options that can compete with an Aurizon Network financing proposal (ss. 69E, 138(2)(a)(b), (d), (e) and (h) of the QCA Act).

Our view is that in the absence of an appropriate form of statutory severance a SUFA financing option is unlikely to be competitive relative to an Aurizon Network financing proposal. This because a SUFA transaction would incur substantial stamp duty costs that an Aurizon Network proposal need not bear.

To summarise our position in respect of statutory severance—an appropriate form of statutory severance for SUFA assets is required if the SUFA framework is to be an effective arrangement. Ultimately, any decision regarding statutory severance is a decision for the Queensland Government and cannot be catered for in the pro forma SUFA documents.

13.4.4 Seeking ABAs and PBRs

Seeking an ABA

Whilst both Aurizon Network and the QRC have agreed to pursue a joint submission to the ATO for an ABA, further structure respecting roles, responsibilities and information sharing has been requested. We also note the QRC's proposal that one party should be primarily responsible for the preparation of the ABA application, negotiations with the ATO and the determination of whether the ABA is favourable.

Our view is that any structure put in place regarding process, roles/responsibilities and information sharing in relation to seeking an ABA should be dealt with in the undertaking, rather than in the pro forma SUFA documents. Consequently, detailed consideration regarding the extent of any such provisions would only be finalised if the sunset clause (see section 4.4.2) is triggered.

We do, however, have some preliminary views. Firstly, we consider Aurizon Network would be best placed to seek an ABA and should do so. This is because Aurizon Network has the relevant information readily available to it. In addition, Aurizon Network is the constant element in any SUFA arrangement and its tax position under a SUFA is critical to allowing SUFA investors to understand their exposure under the tax indemnity. We consider the investors need to understand this before committing to a SUFA (and obtaining a PBR for a particular SUFA).

Further, in preparing its application to the ATO, our view is that Aurizon Network should notify, collaborate with and include the following parties in negotiations with the ATO—access seekers and their customers (if any), as well as any relevant coal industry groups. Further, we consider that Aurizon Network should provide to these parties copies of all correspondence between it and the ATO in respect of the application. We are also of the view the undertaking should specify what the application to the ATO must contain.

In regard to the costs associated with seeking an ABA, our view remains that Aurizon Network's prudent and efficient costs incurred in seeking an ABA can be considered by the QCA for inclusion in Aurizon Network's operating costs.

We consider that such an approach appropriately balances the interests of prospective SUFA funders (access seekers and/or third party financiers), with Aurizon Network's legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). This is because it ensures there is a defined approach for seeking an ABA, whilst allowing Aurizon Network the opportunity to provide the QCA with a claim for assessment, regarding any prudent and efficient operating costs associated with seeking the ABA that Aurizon Network may consider is due.

Further, we consider that seeking an ABA supports the broader interests of promoting efficient investment in the CQCN and the public interest (ss. 69E, 138(2)(a) and (d) of the QCA Act). A clear and transparent understanding of the likely tax treatment of the SUFA framework supports the SUFA's role in providing a financing option to compete against Aurizon Network's financing proposals. This increases the likelihood of efficient financing of investment in the CQCN which, in turn, supports efficient investment in the CQCN.

Against this background, our position is that an ABA should be sought regarding the likely tax treatment of the finalised pro forma SUFA documents. Any specifics regarding the process, roles/responsibilities and information sharing associated will be included within the undertaking, rather than the pro forma SUFA documents. Such issues should only be considered if the sunset clause (see section 4.4.2) is triggered.

Seeking a PBR

We note Aurizon Network has agreed each party to a SUFA arrangement should be responsible for pursuing a PBR on its respective tax position. We also note the QRC submitted that to the extent a PBR relates to the tax treatment of the SUFA trust—and tax consequences for the PUHs—PUHs should have carriage of the PBR process.

We consider that PBRs are project-specific, relate to the final formulation of the SUFA transaction provided to the ATO, and provide valuable information regarding the tax treatment of the actual SUFA transaction. Given this, our final decision proposes to maintain our draft decision proposal—that is, a PBR should be a condition precedent for the SUFA transaction to take place

(cl. 2.1 of the final decision Extension Project Agreement (EPA)) and each party to a SUFA transaction should be responsible for pursuing a tax ruling on its respective tax position on a project-specific basis. We do not consider this would restrict parties waiving the condition precedent to obtain a PBR, if they wished to do so and were able to agree upon any subsequent implications that may have to be accounted for in the SUFA transaction documents.

We consider this position appropriately balances the interests of prospective SUFA funders (access seekers and/or third party financiers), with the legitimate business interests of Aurizon Network (ss. 138(2)(b), (e) and (h) of the QCA Act). This is because once a PBR is a relevant consideration for a SUFA transaction, obtaining transparency regarding the tax treatment of the transaction is important to each party's decision regarding whether or not they wish to take the project further.

The amendments we consider appropriate are outlined below.

Final decision 13.3

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals regarding the role of private binding rulings (PBRs), our final decision is to refuse to approve the approach proposed towards PBRs.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision Extension Project Agreement (EPA), such that a PBR is a condition precedent for a SUFA transaction being executed and that each party to a SUFA transaction is responsible for pursuing a tax ruling on its respective tax position (cl. 2.1 of the final decision EPA).

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Finally, we note Vale's suggestion that an assessment be undertaken once tax rulings have been obtained to ensure the SUFA framework works appropriately and reflects advice obtained from the ATO. Vale went on to note if advice from the ATO results in an unworkable SUFA, an assessment on how to proceed should also be undertaken at that time amongst Aurizon Network, interested stakeholders and the QCA.

Whilst we consider there is merit in Vale's suggestions, our view is they relate to including conditions in the undertaking regarding the ability to review the SUFA framework in light of practical experience of its application. As such, detailed consideration regarding the extent of any such provisions would be finalised if the sunset clause (see section 4.4.2) is triggered.

13.4.5 Tax indemnity

Tax indemnity as it relates to Aurizon Network

Our draft decision queried the need for Aurizon Network to request a tax indemnity, given our view that a SUFA arrangement would not be entered into without a PBR supporting it.

In response to our draft decision, the QRC considered there was no need for an indemnity, as each SUFA arrangement was intended to be entered into with a favourable PBR. However, it also noted that, should the indemnity remain, it welcomed the QCA's proposed amendments and proposed various carve-outs.

By contrast, Aurizon Network's submission noted that while a PBR would substantially address the significant income tax risks associated with a SUFA transaction, a tax indemnity is required

for residual tax risks. Aurizon Network acknowledged that whilst the likelihood of residual tax risks is small, any such risk is likely to be of significant size and impact.

We neither agree nor disagree with Aurizon Network's view that residual tax risks are likely to be low-probability, high-impact events. We are, however, minded to include the tax indemnity in our final decision proposals. Further, we intend to maintain our draft decision proposals that if the tax indemnity is adopted, it should be provided by the PUHs (given the SUFA trust may not be able to meet the indemnified amount).

That being said, we consider the tax indemnity should only apply to the extent that Aurizon Network can suitably demonstrate the tax and financial implication has arisen specifically because of the existence of the SUFA transaction(s). If Aurizon Network cannot clearly demonstrate this, the tax indemnity will not apply. Our view is this reflects the intent underpinning the tax indemnity and mitigates the need to develop carve-outs to the tax indemnity.

We also consider that it should be possible to dispute, under the dispute provisions within the pro forma SUFA documents, whether the tax indemnity should apply.

Our view is this approach appropriately balances the interests of the PUHs, who will be liable for the tax indemnity for the life of the SUFA transaction, with the legitimate business interests of Aurizon Network, who will be the beneficiary of the tax indemnity (ss. 138(2)(b), (e) and (h) of the QCA Act).

Our decision acknowledges Aurizon Network's concern regarding residual tax risks and provides for a tax indemnity in this regard. Meanwhile, the PUHs interests are accounted for, through limiting the tax indemnity such that it only applies to the extent any tax and financial implication can legitimately be attributed to the existence of the SUFA transaction(s). Further, access to dispute resolution by experts, in the event of disagreement, accounts for the interests of all parties.

In coming to our decision, we have had regard to the fact that it does not entirely eliminate any potential risk that Aurizon Network may consider it faces in the event of a disagreement and a subsequent resolution that does not rule in its favour. We have, in this context, also had regard to the possibility the tax indemnity could be used inappropriately to pass unwarranted tax costs onto PUHs. Overall, our view is our approach provides incentives for Aurizon Network to only trigger the tax indemnity when it is confident the tax and financial consequences are attributable to SUFA transaction(s). It also encourages Aurizon Network to effectively and promptly use the dispute resolution provisions, if necessary.

The amendments we consider appropriate are outlined below.

Final decision 13.4

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals regarding the Aurizon Network tax indemnity, our final decision is to refuse to approve the approach proposed towards the Aurizon Network tax indemnity.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision SUHD, such that the Aurizon Network tax indemnity:

(a) only applies to the extent the tax and financial implications have arisen specifically because of the existence of SUFA transaction(s), as per clause 17.1.

(b) is subject to a binding dispute resolution, where the adjudicators are required to be experts, as per clause 17.2.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Tax indemnity as it relates to QTH

We note the QRC's proposal that the carve-out regarding liability for income tax, or income tax equivalents (in cl. 10.2(c) of the draft decision EIHL) should specifically refer to the income tax and income tax equivalent payable under the NTER. We also note the QRC's comments regarding the fact that the inclusion of the QTH tax indemnity will likely be rejected by third party financiers as a matter of principle.

We are not convinced by the QRC's arguments in this regard. Our view is that prospective third party financiers will, when faced with an actual SUFA proposal, consider their risk exposure based on the financial merits of the transaction. Further, we regard risk exposure in the context of the QTH tax indemnity as likely to be low—a view we consider is not dissimilar to that of the QRC. The QRC's position is the QTH tax indemnity is unlikely to be called upon if statutory severance is obtained. As mentioned previously in this chapter, we consider an appropriate form of statutory severance a necessary requirement for the SUFA framework to be effective. We note the QRC is also of the view a SUFA project is unlikely to proceed without statutory severance.

Against this background, if an appropriate form of statutory severance is not obtained, the QTH tax indemnity is likely redundant in any case. If, by contrast, an appropriate form of statutory severance is obtained, by the QRC's own submission, the QTH tax indemnity is unlikely to be called upon. Further, and as discussed in our draft decision, QTH has also removed its income tax liability from the tax indemnity, which specifically addresses concerns in relation to indemnification of QTH in respect of the NTER. Finally, we also note the pro forma SUFA documents can be amended on a project-specific basis and, as such, discussions with QTH regarding the tax indemnity are not precluded.

In light of this, our final decision proposal is to maintain the QTH tax indemnity as per our draft decision. We consider this meets the interests of QTH, whilst having regard to PUHs' interests (ss. 138(2)(e) and (h) of the QCA Act). This is because the QTH tax indemnity is maintained (with the exclusion of the income tax liability) and the pro forma SUFA documents do not preclude discussions regarding the QTH tax indemnity on a transactional basis while actual SUFAs are developed. Additionally, our view is Aurizon Network is appropriately covered through its tax indemnity, thereby catering for its legitimate business interests (s. 138(2)(b) of the QCA Act).

Further, we do not consider our final decision position has a significant impact on barriers to participation in potential SUFA transactions. We consider risk exposure to the QTH tax indemnity low and a second order concern to prospective third party financiers, relative to the requirement to obtain an appropriate form of statutory severance. Given this, we are not of the view that the QTH tax indemnity significantly impacts the ability of the SUFA framework to support efficient investment in the CQCN (ss. 69E and 138(2)(a) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 13.5

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals regarding the QTH tax indemnity, our final decision is to refuse to approve the approach proposed towards the QTH tax indemnity.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision pro forma SUFA document position that the QTH tax indemnity does not extend to QTH's NTER income tax liability.

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

13.4.6 Tax-related amendments to the SUHD

Clause 2.5 of the draft decision SUHD allows parties to negotiate the allocation of distributions (from the SUFA trust) in good faith, should the trust be wound up prior to the zero value date. We also note Aurizon Network would prefer to have the result of a negotiation regarding the allocation of distributions result in it, its head company or the ordinary unit holder not having 'any disadvantage', rather than a 'material disadvantage', whether financial, tax-related, or otherwise. Our final decision proposals maintain those of our draft decision views.

We are not convinced Aurizon Network requires a strengthened requirement that such a negotiation must result in Aurizon Network, Aurizon Network's head company, or the ordinary unit holder not being subject to 'any' disadvantage when balanced against the potentially high cost of maintaining a SUFA trust. We consider Aurizon Network would be well aware of its financial investment in the SUFA trust and would be capable of managing/mitigating risks related to an early wind-up of a SUFA trust. For these reasons, we consider our final decision proposals appropriately account for Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 13.6

(1) After considering Aurizon Network's 2013 SUFA DAAU proposals regarding a SUFA trust being wound up prior to the zero value date, our final decision is to refuse to approve the proposals.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt clause 2.5 of the final decision SUHD, such that parties are to negotiate in good faith and agree to a process that is not to result in either of the following:

- **(a) a party being required to pay a lump sum; or**
- **(b) Aurizon Network, Aurizon Network's Head Company or the ordinary unit holder being at a material disadvantage.**

(3) We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

14 RAB INCLUSION AND OTHER EXTENSION PROJECT AGREEMENT ISSUES

The Extension Project Agreement (EPA) sets out and establishes common terms and conditions that are adopted across the suite of pro forma SUFA documents. It also outlines some key rights and obligations between Aurizon Network, preference unit holders (PUHs), access seekers and the SUFA trustee.

Chapter 16 regarding risk allocation and liability considers the overarching limitation of liability and consequential loss provisions in the EPA. This chapter focuses on other aspects of the EPA. Of particular relevance are the conditions precedent for a SUFA transaction, as well as the obligations relating to including and maintaining SUFA-related capital costs in the regulatory asset base (RAB).

In this regard, our final decision proposes that behavioural obligations on Aurizon Network be included with respect to including and maintaining SUFA-related capital costs in the RAB.

14.1 Background

The EPA was not included in Aurizon Network's 2013 SUFA DAAU. It evolved from the proposals included within the QCA position paper on this submission. The EPA is partly a result of adopting a more standardised approach to the construction agreement, but it also provides consistency across the suite of pro forma SUFA documents in relation to core terms, conditions and obligations impacting Aurizon Network, PUHs, access seekers and the SUFA trustee.

14.2 QCA draft decision

Our draft decision characterised the EPA as a 'wrapper document' that set out and established:

- the common terms and conditions adopted across the suite of pro forma SUFA documents
- key rights and obligations between Aurizon Network, PUHs, access seekers and the SUFA trustee
- the parties entering into linked access agreements.

Whilst the draft decision EPA covers a number of areas, the following are of particular relevance:

- conditions precedent for executing a SUFA transaction
- inclusion of SUFA transaction capital costs into the RAB
- calculation of construction interest
- liability regarding environmental issues
- overarching limitation of liability and consequential loss provisions.

Limitation of liability and consequential loss provisions are considered in Chapter 16 regarding our approach to risk allocation and liability. Other aspects of the EPA are considered in this chapter.

14.2.1 Conditions precedent for executing a SUFA transaction

Our draft decision proposed a number of conditions precedent that have to be either satisfied or waived, for the SUFA transaction to be executed. These conditions precedent relate to:

- **Tax**: primarily, the requirement for statutory severance and all relevant PBRs to be in place, as well as guidance from the Queensland Office of State Revenue regarding the treatment of the actual SUFA transaction agreements under the *Duties Act 2001* (Qld) (the Duties Act).
- **Security and flow of funds to the SUFA trustee**: the parties funding the SUFA project have in place the required security documentation, bank guarantees and have paid their respective initial contribution to the SUFA trustee.
- **Security and flow of funds to Aurizon Network**: provision to Aurizon Network of the security and advance payment required, under clauses 5 and 37.1A respectively, of the construction agreement.
- **Document execution**: with the exception of the AASTDs for the relevant parties, all other SUFA transaction documents have been executed and are in the form equivalent to that annexed to the EPA. With respect to each AASTD that has been executed, it is not materially different to the form annexed to the EPA.[273]
- **Approval**: the QCA has approved the SUFA project in accordance with the expansion process.

14.2.2 Inclusion of SUFA transaction capital costs into the RAB

SUFA rental streams directly relate to the extent to which the capital costs associated with the SUFA transaction are included in the RAB. Clause 3.1 of the draft decision EPA requires that Aurizon Network must seek to include the capital costs[274] of the SUFA transaction and the construction interest on those capital costs[275] into the RAB, as soon as reasonably practicable under the access undertaking.

In doing so, Aurizon Network is required to comply with the following obligations:

- act in the best interests of the SUFA trustee
- promote and encourage the inclusion of the relevant costs into the RAB by the QCA (being the access regulator)
- consult with the SUFA trustee before making any submission
- not do anything which would, or is likely to, prejudice the decision by the QCA to include the relevant costs into the RAB
- not delay seeking the inclusion of the relevant costs into the RAB.

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[273] With the exception of the AASTDs, this requires that the transaction documents appended to the EPA must be in a form equivalent to the relevant pro forma SUFA document, unless the requirement is waived. By contrast, the AASTDs may differ slightly from the AASTD pro forma document because they relate to the specifics of the individual access rights.

[274] Capital costs comprise the trust's capital costs and Aurizon Network's land acquisition costs. Trust capital costs are defined in the SUHD to mean those costs the SUFA trustee determines are capital expenditure.

[275] Clause 3.2 of the draft decision EPA defines how interest during construction should be calculated.

Further, if the QCA included the relevant costs into the RAB, Aurizon Network is obliged to do all things reasonable to ensure that relevant costs remain in the RAB and not to do anything which would, or would be likely to, remove all, or a material part of, the relevant costs from the RAB.

14.2.3 Calculation of construction interest

Clause 3.2 of the draft decision EPA provides the following formula to be adopted when calculating construction interest on capital costs:

$$CI = \left[\sum_{x=1}^{t} CC_x \times (1 + R_{mth})^{t-x+1} \right] - CC$$

The formula's variables are defined in the table below.

Table 19 Variables within the construction interest formula

Variable	*Definition*
CI	The construction interest on the capital costs
CC	The total capital costs incurred by the trustee and Aurizon Network
CC_x	The part of the capital costs incurred by the trustee and Aurizon Network in a particular month x[276]
R	The annual interest rate (expressed as a decimal) that the access regulator (i.e. the QCA) uses to capitalise interest on costs included in the RAB for the expansion
R_{mth}	$(1+R)^{1/12} - 1$
t	The number of months from the date of the first CC_x amount incurred by the trustee or Aurizon Network to the date the capital costs are included in the RAB
x	Each month after the first CC_x is incurred (x = 1 in the first month after the first CC_x amount is incurred by the trustee or Aurizon Network)

14.2.4 Liability regarding environmental issues

The overarching approach to liability for environmental issues in clause 6 of the draft decision EPA. In broad terms, this clause states that, without limiting clause 25A of the draft decision pro forma SUFA construction agreement[277], Aurizon Network is liable for any activity touching and concerning the area of land necessary to construct the SUFA infrastructure:[278]

- that constitutes a breach of any environmental law or environmental authorisation, as per the definitions adopted in the EPA
- which would, or might reasonably be expected to cause: a nuisance, death or injury to any person, damage to any property, or any contamination; as per the definition of contamination adopted in the EPA
- that constitutes a breach of workplace health and safety obligations

[276] A 'Month' is defined in the draft decision EPA as a calendar month.
[277] Clause 25A of the construction agreement outlines the liability regime in this regard between the principal (the SUFA trustee) and the contractor (Aurizon Network).
[278] This term is defined in the Rail Corridor Agreement (RCA).

- that would entitle a government agency to issue a notice, order or direction under an environmental law or environmental authorisation and may require the SUFA trustee to undertake any action or work.

Further, Aurizon Network is liable for non-compliance with directions, notices and orders given or made under any environmental law, environmental authorisation or other obligation imposed by law.

Aurizon Network's liability is, however, subject to the extent any of the matters above are caused by the SUFA trustee, or the failure of the SUFA trustee or its associates to comply with the landholder requirements when accessing and using the specified land (cl. 3.5(a) of the draft decision RCA).

14.3 Stakeholders' submissions on the QCA draft decision

Stakeholders’ comments focused on the detail of the provisions within the EPA, rather than the concept of the agreement. Their comments are considered below in the following categories:

- conditions precedent for executing a SUFA transaction
- inclusion of SUFA transaction capital costs into the RAB
- liability regarding environmental issues
- other issues.

14.3.1 Conditions precedent for executing a SUFA transaction

Aurizon Network was of the view the list of conditions precedent in the draft decision should be amended as follows:

- Exclude the condition precedent regarding satisfactory correspondence from the Queensland Office of State Revenue regarding the liability of the transaction documents to duty under the Duties Act.[279]
- Include as a condition precedent the execution of the FSD.[280]
- Amend the condition precedent regarding approval, to relate to the granting of preapproval in respect of the prudency of scope and cost of the expansion in accordance with the expansion process; rather than approval only relating to the expansion being in accordance with the expansion process.

Aurizon Network considered the draft decision EPA should be amended to also require notification of a waiver of a condition precedent, rather than only requiring notification of a conditions precedent being met.[281]

14.3.2 Inclusion of SUFA transaction capital costs in the RAB

Both the QRC and Aurizon Network provided extensive comments on this issue. These are outlined below.

[279] Aurizon Network 2015o.
[280] Aurizon Network also proposed amending the definition of the FSD, to reflect the fact the FSD cannot practically come into existence until the Integrated Network Deed (IND) has been executed. (Aurizon Network 2015a, Appendix 2, Item D; Aurizon Network 2015o).
[281] Aurizon Network 2015a, Appendix 2.

QRC

The QRC considered that Aurizon Network:

- should be required to comply with reasonable directions given by the SUFA trustee to Aurizon Network, in connection with the inclusion of capital costs and construction interest on the capital costs into the RAB, and/or, Aurizon Network should grant a power of attorney to the SUFA trustee; which the SUFA trustee could exercise in the event, acting reasonably, it considered Aurizon Network not to be acting in accordance with its obligations under clause 3.1(b)
- should be required to provide copies of proposed correspondence and submissions to the SUFA trustee for review at least 10 business days before the RAB submission is proposed to be lodged with the QCA
- should be required to provide to the SUFA trustee copies of all correspondence between Aurizon Network and the QCA, in connection with the inclusion of capital costs and construction interest on the capital costs into the RAB.[282]

The QRC also proposed various drafting amendments to the existing draft decision EPA clauses, as summarised in the table below.[283]

Table 20 QRC's proposed amendments to the draft decision EPA

Draft decision EPA clause	***QRC's proposed amendment***
Clause 3.1(b)(i)	Clause 3.1(b)(i) requires Aurizon Network to act in the best interests of the SUFA trust when seeking to include the SUFA trust's capital costs and construction interest on the capital costs into the RAB. The QRC proposed this clause specify what constitutes a SUFA trust's best interests should be determined by the SUFA trustee.
Clauses 3.1(b)(ii), (iv), (vi) and (vii)	The QRC was of the view that where these clauses refer to 'Construction Interest', this should be amended to 'Construction Interest on the Capital Costs'.
Clause 3.1(vi)	The QRC was of the view the use of 'reasonably necessary' in this clause should be replaced by 'necessary'.

Aurizon Network

Aurizon Network opposed the approach adopted in the draft decision EPA because it fettered Aurizon Network's contractual rights to put forward its own position regarding the extent to which the SUFA trust's capital costs and construction interest on the capital costs should be included in the RAB. Aurizon Network stated an obligation on it to act in the interests of a SUFA trustee was against its legitimate business interests and the public interest more generally.[284]

In light of this, Aurizon Network proposed a complete redrafting the draft decision EPA in relation to clause 3.1 of the draft decision EPA (see the table below).

[282] QRC 2015: 40–41.
[283] QRC 2015: 41.
[284] Aurizon Network 2015a: 59.

Table 21 Aurizon Network's proposed amendments to the draft decision EPA

Draft decision EPA	*Aurizon Network proposal*[285]
3.1 Inclusion into Regulatory Asset Base (a) Aurizon Network must seek to include: (i) the Trust Capital Costs (Capital Costs) (ii) the Aurizon Network Land Acquisition Costs (also Capital Costs); and (iii) the Construction Interest on the Capital Costs, into the Regulatory Asset Base as soon as reasonably practicable under the Access Undertaking. (b) Without limiting clause 3.1(a), Aurizon Network must: (i) act in the best interests of the Trust; (ii) do all things which it reasonably can do (including the making of submissions to the Access Regulator) to promote and encourage the making of a decision by the Access Regulator to include the Capital Costs and Construction Interest into the Regulatory Asset Base; (iii) act reasonably and in good faith and consult with the trustee before making any submission referred to in clause 3.1(b)(ii) (including consulting with the trustee about the context of any submission); (iv) not do anything which would, or would be likely to, prejudice the making of a decision by the Access Regulator to include the Capital Costs and Construction Interest in the Regulatory Asset Base; (v) not delay seeking the inclusion of the Capital Costs and Construction Interest in the Regulatory Asset Base; (vi) if the Access Regulator makes a decision to include the Capital Costs and Construction Interest in the Regulatory Asset Base, do all things reasonable to ensure that such costs remain in the Regulatory Asset Base; and (vii) not to do anything which would, or would be likely to, have the effect of removing all or a material part of the Capital Costs and Construction Interest from the Regulatory Asset Base.	**3.1 Inclusion into Regulatory Asset Base** (a) Subject to the Trustee providing Aurizon Network with the information required to be provided to it under clause 3.1(b), Aurizon Network must prepare, and lodge with the Access Regulator, a submission (RAB Inclusion Submission) which seeks the inclusion of: (i) the Trust Capital Costs (Capital Costs); (ii) the Aurizon Network Land Acquisition Costs (also Capital Costs); (iii) the Construction Interest Capital Costs, into the Regulatory Asset Base as soon as reasonably practicable under the Access Undertaking. (b) The Trustee must prepare, and provide to Aurizon Network, information for inclusion in the RAB Inclusion Submission in relation to the inclusion into the Regulatory Asset Base of: (i) the Trust Capital Costs (Capital Costs); and (ii) the Construction Interest on the Capital Costs referred to in clause 3.1(b)(i). (c) Aurizon Network must ensure that the information provided by the Trustee under, and in accordance with, clause 3.1(b) is included in the RAB Inclusion Submission in full and without modification (other than in relation to formatting) by Aurizon Network. (d) The Parties acknowledge and agree that any Party may, as it sees fit in its absolute discretion, separately make submissions to, and otherwise engage with, the Access Regulator in relation to: (i) the inclusion of the Trust Capital Costs, Aurizon Network Land Acquisition Costs and Construction Interest on the Capital Costs into the Regulatory Asset Base; and (ii) the value of, the inclusion of any costs in, or the exclusion of any costs from, the Regulatory Asset Base at any time.

Aurizon Network's proposed amendments to the draft decision EPA embody its view that:

- the trustee should prepare all information for inclusion in the initial RAB submission, in respect of the SUFA trust's capital costs and construction interest on the capital costs. This is

[285] Aurizon Network 2015o.

because the relevant amounts will include 'Trust-level' costs about which Aurizon Network has no information and it is the trustee that takes the regulatory risk on the RAB inclusion of these amounts.

- Aurizon Network should prepare all information for the initial RAB submission in relation to Aurizon Network's land acquisition costs, since Aurizon Network controls the land acquisition process and is taking the regulatory risk on RAB inclusion of these land costs.
- Aurizon Network should not be required to endorse or support that part of the initial RAB inclusion submission that has been prepared by the trustee. Similarly, the trustee should not be required to endorse or support that part of the initial RAB inclusion submission prepared by Aurizon Network.
- Aurizon Network should submit the complete initial RAB inclusion submission to the QCA, without modification, but only 'stand behind' the part related to Aurizon Network's land acquisition costs. The trustee would 'stand behind' the aspects associated with the trust's capital costs and construction interest on the capital costs.

Aurizon Network stated under this proposal it would be able, as is the case for any other stakeholder, to make submissions to the QCA about the RAB value of the SUFA assets, whether at the time of the initial RAB submission or subsequently. The trustee could also do the same, for example, regarding land acquisition costs.[286]

The more detailed arguments put forward by Aurizon Network to support its proposal are discussed in section 14.4 (QCA analysis and final decision).

14.3.3 Calculation of construction interest

The QRC had a number of queries regarding the specification of the formula and the interpretation of various variable definitions.

In relation to the specification of the formula, the QRC suggested that, for clarity, the indexation of the ($1+R_{mth}$) term, specified in the form 't–x+1', should be expressed as '(t–x)+1'. The QRC noted that if 't–x+1' was interpreted as 't–(x+1)' then a different and presumably unintended outcome is reached. By way of example, the QRC alluded to the outcomes where both t and x equal one.

Regarding the annual interest rate (R), the QRC queried whether it is possible the regulator might apply different interest rates at different periods of time, particularly if it takes a prolonged period of time for the costs to be included in the RAB. The QRC was of the view that if this was the case, the definition should be amended to reflect this.[287]

The QRC also noted the definition referring to the monthly capital cost incurred by the trustee and Aurizon Network (CC_x) specifically related to calendar months (Months being a defined term in the draft decision EPA), rather than 'months'. If this is adopted, the QRC considered the definitions of 'x' and 't' should be revised as follows.[288]

Table 22 QRC's comments on variables within the construction interest formula

Term	*Definition (draft decision EPA)*	*Definition (QRC proposal)*
x	Each month after the first CC_x is incurred (x=1 in the first month after the first CC_x	Each Month after the first CC_x amount is incurred by the Trustee or Aurizon Network (expressed as a

[286] Aurizon Network 2015a: 57–59.
[287] QRC 2015: 41.
[288] QRC 2015: 42.

Term	Definition (draft decision EPA)	Definition (QRC proposal)
	amount is incurred by the Trustee or Aurizon Network).	number, where x=1 in the Month during which the first CC_x amount is incurred by the Trustee or Aurizon Network and x=2 in the Month immediately following the Month in which the first CC_x amount is incurred by the Trustee or Aurizon Network, and so on).
t	The number of months from the date of the first CC_x amount is incurred by the Trustee or Aurizon Network to the date the Capital Costs are included in the Regulatory Asset Base.	The number of Months from the date that the first CC_x amount is incurred by the Trustee or Aurizon Network to the date that the Capital Costs are included in the Regulatory Asset Base, provided that: (a) the Month in which the first CC_x amount is incurred by the Trustee or Aurizon Network is counted as one Month (even if the date the first CC_x amount is incurred is not the first day of the month); and (b) the Month in which the Capital Costs are included in the Regulatory Asset Base is counted as one Month (even if the date that the Capital Costs are included in the Regulatory Asset Base is not the last day of the relevant Month).

14.3.4 Liability regarding environmental issues

Stakeholders commented upon the definitions of the environment, environmental authorisation and environmental law within the draft decision EPA, as well as operation of clause 6 of the EPA.

Comments regarding the definitions are summarised in the table below.

Table 23 Stakeholders' comments on definitions within the draft decision EPA

Definition	Stakeholders' comments
Environment	Aurizon Network considered the phrase:[289] *Environment means the physical, biological and social aspects of a particular area, including ...* should be replaced by: *Environment means the physical, biological and social aspects of a particular geographic location, including ...*
Environmental Authorisation	The QRC noted with regard to the phrase[290] *... obtained or entered into in respect of any of the properties or any Activity pursuant to an Environmental Law ...* that 'Activity' was not a defined term and it was unclear what 'any of the properties' meant': Meanwhile, Aurizon Network proposed the deletion of the phrase 'any of the properties' and 'Activity' be restated as 'activity'.
Environmental Law	The QRC proposed the following part of the definition:[291] *... components of the earth, including:* *(a) land, air and water; and*

[289] Aurizon Network 2015o: 36.
[290] QRC 2015: 44; Aurizon Network 2015o: 37.
[291] QRC 2015: 44.

Definition	Stakeholders' comments
	(b) any layer of the atmosphere; and *(c) any organic or inorganic matter and living organism; and* *(d) human made or modified structures and areas;* *and includes interacting natural ecosystems that include components referred to in paragraphs (a) to (d) of this definition.* be replaced by the phrase 'the Environment'.

In the context of the actual operation of clause 6 of the draft decision EPA, Aurizon Network commented that:

- the opening paragraph of clause 6 should limit liability to be between Aurizon Network and the trustee; because it is possible a third party, such as a train operator or a pipeline operator, may have liability for the relevant contamination[292]
- the drafting between clause 6(b) and 6(c) identifies when the exclusion of Aurizon Network's liability operates. This requires the matters Aurizon Network is liable to, to not have been caused by the trustee itself or by the trustee's failure to comply with clause 3.5(a) of the RCA.[293] Aurizon Network was of the view this did not account for the fact the trustee's actions may not cause contamination, but could contribute to it; and therefore a proportionality concept of responsibility is appropriate.[294]

Aurizon Network also commented the trustee is not responsible for contamination arising from all of its acts, whereas Aurizon Network is. Aurizon Network stated it did not understand the basis for the trustee not being responsible for contamination due to its mistakes, incompetence and mishaps. Aurizon Network noted it did not receive compensation for taking this risk.[295]

Meanwhile, the QRC considered that clause 6(a) of the draft decision EPA should replace the phrase 'touching and concerning' in relation to the Extension Land, with 'in connection with'. It also queried how access seekers are kept whole in the event the trustee is liable, rather than Aurizon Network.[296]

Other issues

Stakeholders' comments were received on various other aspects of the draft decision EPA. These and our final decision proposals with respect to each are outlined in Appendix B.

14.4 QCA analysis and final decision

14.4.1 Conditions precedent for executing a SUFA transaction

Aurizon Network proposed including the FSD as a condition precedent and excluding the requirement for satisfactory correspondence from the Queensland Office of State Revenue regarding the liability of the transaction documents to duty under the Duties Act. Aurizon Network also proposed amending the condition precedent regarding approval, to relate to the granting of preapproval in respect of the prudency of scope and cost of the extension in

[292] Aurizon Network 2015a, Appendix 2: 66.
[293] Clause 3.5(a) of the RCA requires the trustee or its associates to comply with the landholder requirements when accessing and using the specified land
[294] Aurizon Network 2015a, Appendix 2: 67.
[295] Aurizon Network 2015a, Appendix 2: 67.
[296] QRC 2015: 44.

accordance with the expansion process, rather than approval only relating to the extension being in accordance with the expansion process.

Our final decision proposal is the FSD should be included as a condition precedent, with Aurizon Network having the right to waive this requirement. We also consider the supporting amendments Aurizon Network proposed to the definitions[297] should be adopted. Our reasoning is the FSD is required where an external financier is taking security over the SUFA trustee's rights in the transaction documents, in which case the consent of the State and QTH is required. However, we consider a SUFA trustee also should have the right to waive this condition precedent because the FSD is of benefit to its secured parties as it provides consents for their security and grants them rights in the event of SUFA trustee default.

Our final decision proposal is to maintain the requirement to understand the liability of a SUFA transaction to the Duties Act as a condition precedent. Our view is this can provide parties to a SUFA transaction with beneficial knowledge, if they wish to acquire it, regarding an actual SUFA transactions liability under the Duties Act. In this regard, we note this condition precedent can be waived, if both Aurizon Network and the SUFA trustee agree to do so.

Further, our final decision proposal is not to amend the condition precedent regarding approval. Our view is it is not appropriate, given the need for a prudency and efficiency assessment prior to the inclusion of SUFA related capital costs into the RAB, that preapproval of prudency of scope and cost be given as a condition precedent to a SUFA transaction.

For the reasons outlined above, our view is our approach to the conditions precedent appropriately balance the interests of all parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act).

Additionally, our final decision proposal is for the EPA to be amended to require notification of both a condition precedent being met or a waiver being adopted, rather than just a condition precedent being met. We consider this provides greater clarity and transparency, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.[298]

[297] Amendments to the definition of the FSD and the inclusion of the definition of Financing Party.

[298] In addition, we have also removed the condition precedent with regard to security and flow of funds to Aurizon Network. This is discussed in section 7.8.3 in the context of the SUFA pro forma construction agreement, with respect to the subsection 'Payment term and security from the principal'.

Final decision 14.1

(1) After considering Aurizon Network's 2013 SUFA DAAU our final decision is to refuse to approve the contractual arrangements regarding the conditions precedent for a SUFA transaction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to:

(a) include the definition of Financing Party in clause 1 of the final decision Extension Project Agreement (EPA)

(b) include executing the FSD as a condition precedent for the SUFA transaction as per clause 2.1 of the final decision EPA, with a right for both Aurizon Network and the trustee to waive it as a condition precedent

(c) adopt clause 2.4 of the final decision EPA to reflect the requirement that each party must notify other parties of a waiver.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in the analysis above.

14.4.2 Inclusion of SUFA transaction capital costs in the RAB

Stakeholders have expressed strongly opposing views regarding Aurizon Network's obligations, with respect to both the inclusion of capital costs associated with a SUFA project in the RAB, and Aurizon Network's responsibilities to maintain those costs within the RAB once included. Against this background, we consider Aurizon Network's and other stakeholders' comments prior to outlining our final decision proposals on this matter.

Aurizon Network's comments

Aurizon Network's observations are summarised in the table below.[299]

Table 24 Aurizon Network's comments on the inclusion of SUFA transaction costs in the RAB

Area	*Aurizon Network's comments*
An obligation to act in the best interests of the SUFA trustee in respect of RAB inclusion	This restricts Aurizon Network's ability to pursue its business interests as it sees fit in respect of the RAB of the coal system, upgraded by the SUFA transaction for the life of that transaction. Aurizon Network considered this adversely affected its rights to procedural fairness when the QCA makes regulatory decisions.
An obligation to do all things reasonable to ensure ongoing RAB inclusion and not to do anything which would have the effect of removing costs from the RAB	Any inclusion of costs in, or removal from, the RAB is subject to the approval of the QCA, which should be mindful of the views of all stakeholders, including any SUFA trust and PUHs.
Asymmetric obligations on Aurizon Network and the SUFA trustee	The contractual fetter placed on Aurizon Network is imposed on an asymmetric basis because the SUFA trustee is not contractually barred at any point from making submissions to the QCA on the RAB value of Aurizon Network's land acquisition costs or Aurizon Network funded assets of the coal system upgraded by the SUFA transaction.

[299] Aurizon Network 2015a: 57–59.

Area	Aurizon Network's comments
	The SUFA trustee is not subject to the requirement to act in Aurizon Network's best interests, or to the RAB inclusion and removal obligations upon Aurizon Network.
QCA decision-making capabilities and stakeholder information provision	The constraints placed on Aurizon Network could result in adverse effects on the QCA's decision making due to the withholding of relevant information from it. In Aurizon Network's view, the QCA, as economic regulator, should be in a position to receive submissions from any stakeholder as that party sees fit, so the QCA is as well informed as possible. Aurizon Network did not understand why, from a policy perspective, the QCA is seeking to ensure Aurizon Network, which is subject to the QCA's regulation and has expertise in all aspects of the access provision business, should be contractually fettered from providing information to the QCA over the life of a SUFA transaction, which will amount to several decades. The proposed treatment for RAB inclusion in the draft decision EPA prevents Aurizon Network from answering QCA requests for information about the SUFA project if Aurizon Network considered that doing so would likely result in costs not being included in the RAB. This treatment could also prevent Aurizon Network from pointing out errors or misleading statements in the initial RAB inclusion submission.
Inconsistency in approach	The 2010 AU expressly prohibits Aurizon Network from seeking to impose any: *Access condition that restricts Access Seekers or their Customers from raising disputes with the QCA or disclosing proposed Access Conditions or other contract terms to the QCA.* Aurizon Network noted the 2014 DAU included a similar provision and stated that it did not understand the policy consistency between: • the QCA's prohibition on Aurizon Network under the 2010 AU from contractually restricting parties' dealings with the QCA; and • the QCA proposal in the draft decision that Aurizon Network should be contractually restricted in its dealings with the QCA.

We address Aurizon Network's comments in the following sections:

- Initial RAB inclusion submission
- Future submissions on SUFA assets within the RAB
- Asymmetric obligations
- Consistency of approach.[300]

Initial RAB inclusion submission

As noted in our discussion of the assessment process to date and the proposed approach to construction (Chapters 3 and 6 respectively), in order for the SUFA framework to be effective, Aurizon Network has been provided with control over construction. The SUFA trustee takes on a passive role, undertaking administrative duties, which, in the construction phase, largely relate to dealing with the flow of funds from those parties financing the construction to Aurizon Network as contractor.

[300] Aurizon Network's comments regarding the QCA's decision-making capabilities and stakeholder information provision are addressed in the discussions in the first two of these sections.

In light of this, Aurizon Network is responsible for how the majority of the funding it has been provided with is actually spent, either via any necessary land acquisition or through its role as contractor of SUFA projects. Aurizon Network is also the party with access to all the information regarding the construction process of the SUFA project.

Against this background, we note Aurizon Network's view that it has expertise in all aspects of the access provision business, which, in our view, would extend to dealing with an access regulator and constructing infrastructure to meet the prudency and efficient requirement. We consider the SUFA trust, and SUFA funders through the SUFA trust, should be able to draw upon this expertise, given they have no choice but to use Aurizon Network as contractor if the SUFA framework is to be effective (ss. 138(2)(e) and (h) of the QCA Act). Aurizon Network having obligations to act in the interests of the SUFA trust when seeking to initially include the capital costs of a SUFA project in the RAB gives effect to this.

Such an obligation does not merely support the 'paper exercise' of providing an initial RAB submission. The obligation embodies the practical requirement that as contractor and land acquirer, Aurizon Network's behavioural focus should be ensuring construction and land acquisition costs are prudent and efficient. This increases the likelihood of the capital costs of the SUFA project being deemed prudent and efficient, which, in turn, supports efficient investment in the CQCN, the public interest and SUFA funder's future rental streams not being impacted through asset exclusion (ss. 69E, 138(2)(b), (d) and (f) of the QCA Act).

Further, we do not agree with Aurizon Network that acting in the interests of a SUFA trustee with respect to the initial RAB submission necessarily means it cannot provide its own submission. Clause 3.1 does not prohibit Aurizon Network from providing any submission it wishes. Our view, however, is there could only be a material difference between any submission Aurizon Network provides on its own behalf and that provided in the best interests of the SUFA trust if Aurizon Network were of the view its own actions, as contractor, did not result in a prudent and efficient outcome. This would be unexpected for the parties funding the SUFA project, given Aurizon Network is well aware of the requirements for capital costs to be included in the RAB.

Indeed, we do not agree with Aurizon Network that in the specific context of RAB inclusion submissions associated with SUFA transactions, the QCA's decision making capability is somehow diminished by Aurizon Network having an obligation to act in a SUFA trust's interest. Our view is, as it undertook the construction and land acquisition, Aurizon Network is the party best placed to respond to any detailed information requests the QCA may have. It is, however, unclear to us why the responses to these requests would not seek to corroborate how the funding Aurizon Network had requested from the SUFA funders, via the SUFA trustee, had been utilised in a prudent and efficient manner.

Finally, part of Aurizon Network's reasoning for why the SUFA trustee should solely bear the risk that construction costs, excluding land acquisition costs, are not deemed prudent and efficient and excluded from the RAB is that Aurizon Network does not have knowledge of the capital costs associated with SUFA trustee's administrative operations. Our view is it is straightforward for the SUFA trustee to provide information on what are relatively immaterial capital costs relative to the construction costs Aurizon Network controls, in its roles of land acquirer and contractor of SUFA assets.

Overall, we do not share Aurizon Network's view that it should not act in the interests of the SUFA trust; in the context of a RAB inclusion submission associated with a SUFA transaction. Nor do we consider clause 3.1 of the draft decision EPA necessarily precludes Aurizon Network providing its own submission regarding the inclusion of the capital costs of a SUFA transaction into the RAB if it so wishes. Further, whilst we acknowledge Aurizon Network considers clause 3.1 of the draft

decision EPA contrary to its legitimate business interests (s. 138(2)(b) of the QCA Act), it is necessary to weigh Aurizon Network's legitimate business interests against the other matters in section 138(2) of the QCA Act, as, in our view, the analysis above does.

Future submissions on SUFA assets included in the RAB

Our draft decision EPA stated that for SUFA assets included in the RAB, Aurizon Network must:

- if the access regulator makes a decision to include the capital costs and construction interest in the RAB, do all things reasonable to ensure that such costs remain in the RAB (cl. 3.1(b)(vi)); and
- not do anything which would, or would be likely to, have the effect of removing all or a material part of the capital costs and construction interest from the RAB (cl. 3.1(b)(vii)).

Our understanding is Aurizon Network interprets these clauses as meaning it cannot provide the QCA with submissions concerning SUFA-related RAB issues over the life of the relevant SUFA transaction. Further, Aurizon Network considers these obligations could prevent it from answering QCA requests for information about SUFA assets, if Aurizon Network considered doing so would likely result in SUFA-related capital costs not being included in the RAB.

We do not share Aurizon Network's view that these clauses stop Aurizon Network providing submissions on SUFA assets included in the RAB. Nor do they preclude Aurizon Network providing information on SUFA assets in the RAB, if that could result in SUFA asset costs being excluded from the RAB. We consider these clauses relate to behavioural obligations, not the provision of information or submissions to a regulatory authority that may or may not be related to those behavioural obligations.

In this light, we do not agree with Aurizon Network that our draft decision proposals suggest the QCA would not be mindful of the views of all stakeholders when considering submissions and information provided in the context of SUFA assets. We do, however, note there is benefit in ensuring transparency and clarity of the drafting of clause 3.1 of the EPA in this regard, as this is the interests of the parties to the EPA (ss. 138(2)(b), (e) and (h) of the QCA Act).

Asymmetric obligations

In relation to the provision of submissions regarding the initial inclusion of a SUFA asset's capital costs into the RAB and ongoing SUFA-related RAB issues, Aurizon Network commented that its obligations, relative to those of the SUFA trustee, were asymmetric; inferring the obligations were less constraining/onerous for the SUFA trustee and this was inappropriate.

Our view, having regard to the matters in section 138(2) of the QCA Act, is that there is no requirement for obligations on parties to be symmetric or asymmetric. Further, we do not consider clause 3.1 of the draft decision EPA places any restrictions on any party, with respect to providing submissions or information on SUFA-related RAB issues; after RAB inclusion. In the section above, we have dealt with the initial SUFA-related RAB submission.

Consistency of approach

Aurizon Network states it does not understand the policy consistency between:

- our position in the draft decision on the 2013 SUFA DAAU that Aurizon Network is contractually restricted in its dealings with the QCA; and
- the 2010 AU access condition provision that prohibits Aurizon Network from contractually restricting parties dealing with the QCA.

Our view is Aurizon Network is not contractually restricted in its dealings with the QCA. As noted in the previous sections, clause 3.1 of the draft decision EPA does not technically prevent Aurizon Network from providing submissions and information to the QCA. It requires Aurizon Network provides an initial SUFA-related RAB submission acting in the best interests of the SUFA trust. Notwithstanding specific information requests from the QCA, we consider it is at Aurizon Network's discretion as to any other submissions and information it wishes to provide in regard to the initial SUFA-related RAB submission and subsequent submissions on SUFA-related RAB issues. Any submissions provided by Aurizon Network will be considered by the QCA as the existing access regulator.

Other stakeholders' comments

The QRC proposed various amendments to Aurizon Network's obligations with regard to the initial RAB submission. These broadly relate to:

- strengthening the requirement for Aurizon Network to comply with the conditions in clause 3.1(a) of the draft decision EPA
- introducing more explicit information-sharing requirements on Aurizon Network regarding the RAB submission and the correspondence between Aurizon Network and the QCA in this regard (see section 14.3.2 of this chapter).

Our view is the EPA draft decision is sufficiently robust. Clauses 3.1(b)(i) and (iii), require Aurizon Network to act in the best interests of the SUFA trust, as well as to act in good faith and to consult with the SUFA trustee before making the initial RAB submission. This includes consulting with the SUFA trustee about the context of any submission. We consider this provides sufficient opportunity for the SUFA trustee to comment upon and have sight of the initial RAB submission, whilst also ensuring any information that is legitimately confidential remains so.

The QRC also proposed specific amendments to the existing draft decision EPA clauses. In this context, we agree the use in clause 3.1(b) of 'Construction Interest' should be replaced by 'Construction Interest on the Capital Costs' where applicable. Our view is this aids clarity and transparency, which is the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

However, we do not consider clause 3.1(b)(i) needs to explicitly state what constitutes a SUFA trust's best interests should be determined by the SUFA trustee. Our view is the obligations in clause 3.1(b) as a whole cover this. Finally, we do not consider it appropriate for clause 3.1(vi) to be amended to require that Aurizon Network 'do all things necessary' to ensure SUFA capital costs remain in the RAB. We consider requiring Aurizon Network 'do all things reasonable' more balanced.

Overall, our final decision proposal, in the context of the stakeholders' comments received regarding the process for including the capital costs of SUFA assets into the RAB and the obligations thereafter for keeping them in the RAB, is to maintain the provisions in our draft decision EPA, subject to:

- replacing as and where necessary in clause 3.1(b) of the EPA, the term 'Construction Interest', with the term 'Construction Interest on the Capital Costs'
- clarifying that clause 3.1(b)(vi) and(vii) contain behavioural obligations that in no way constrain any party's ability to provide submissions on, and information to, the access regulator regarding the value of SUFA assets included in the RAB.

For the reasons set out above, we consider our final decision proposal in this regard appropriately supports the interests of access seekers and third party funders (ss. 138(2)(e) and (h) of the QCA Act). Clause 3.1 provides assurance that Aurizon Network acts in the interests of the SUFA trust when seeking to include and maintain SUFA-related capital costs in the RAB. In turn, such assurance provides practical behavioural incentives for Aurizon Network, as the monopoly provider of contractor services, to drive for a prudent and efficient outcome. This increases the likelihood the funding provided will be recovered through rental payments and also encourages efficient investment; our view is efficient investment is in the public interest (ss. 69E and 138(2)(a), (d), (f) and (h) of the QCA Act).

In having regard to Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), we note the SUFA framework can only be effective if Aurizon Network acts in the role of contractor. We also note Aurizon Network, as a regulated entity, knows only efficient and prudent capital costs will be included in the RAB, and that including and maintaining the value of SUFA-related assets in the RAB is integral to SUFA rental streams. Given this, our view is there is a reasonable expectation that, in this context, Aurizon Network will act in the interests of the SUFA trust.

Other issues

Further, the fact it is the SUFA trustee, rather than Aurizon Network, that bears the risk if some or all the capital costs associated with the SUFA asset not included in the RAB, is, in our view, another reason why Aurizon Network should act in the interests of the SUFA trustee. This is because, if Aurizon Network is obliged to act in the interests of a SUFA trust, the SUFA trustee may have recourse to seek compensation outside of the regulatory process, in the event capital costs are excluded from the RAB as a consequence of Aurizon Network not acting in the best interests of the trust. We consider this strengthens Aurizon Network's incentives, acting in the role of contractor, to ensure it constructs the SUFA assets in a prudent and efficient manner.

The amendments we consider appropriate are outlined below.

Final decision 14.2

(1) After considering Aurizon Network's 2013 SUFA DAAU our final decision is to refuse to approve the contractual arrangements regarding the obligations associated with, initially including the capital costs of a SUFA transaction within, and thereafter maintaining the capital costs of a SUFA transaction within the regulatory asset base (RAB).

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt the final decision EPA, including that:

(a) the term 'Construction Interest' in clause 3.1(b) of the EPA, is replaced, where necessary, with the term 'Construction Interest on the Capital Costs'

(b) clauses 3.1(b)(vi) and(vii) of the EPA are clear that behavioural obligations are in no way constrain any party's ability to provide submissions on, and information to, the access regulator regarding the value of SUFA assets included in the RAB.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in the analysis above.

14.4.3 Calculation of construction interest

With respect to the QRC's concerns regarding the specification of the formula and the interpretation of various variable definitions, our final decision proposals are:

- to amend the indexation term 't–x+1' to the term ($1+R_{mth}$), to '(t–x)+1', which in our view is clearer
- to amend the definition of the annual interest rate (R), in order for there to be no doubt the annual interest rate may vary, at the discretion of the access regulator
- to amend the definitions of the 'x' and 't' terms as per the QRC's proposals, which in our view aligns the formula such that the terms are operating in calendar months.

We also propose an additional clause to clarify the following:

- The formula only applies in the context of a SUFA transaction.
- Construction interest only applies to the capital costs the access regulator includes in the RAB. Our view is other capital costs are not considered prudent and efficient, should not have occurred and, therefore, should not attract construction interest.
- Construction interest on the capital costs included in the first and last calendar month may be adjusted by the access regulator, to reflect the fact that if these are not full calendar months, construction interest on the capital costs may only be applicable to a proportion of the month.
- Construction interest on the capital costs included in the RAB may be adjusted by the access regulator, at its discretion, to exclude construction interest for the period of any unnecessary time delay that has occurred in the making the submission to include the capital costs in the RAB.
- Construction interest on the capital costs included in the RAB does not apply to the extent the access regulator, at its discretion, considers any delay in making a decision on the inclusion of the capital costs in the RAB is deemed to have been caused through the provision of inaccurate, incomplete or misleading information

We consider the inclusion of this formula necessary to provide clarity and transparency to prospective SUFA funders, in the specific context of the approach in the SUFA pro forma documents. Our proposed clarifications seek to mitigate any confusion regarding when the formula applies and to what it applies.

They also seek to make clear that construction interest costs will not be included in the RAB, in particular circumstances. Our view is this approach provides the appropriate incentives to ensure the RAB inclusion submission is timely, clear, accurate and complete.

We consider our final decision proposal lends greater transparency and clarity to the drafting of clause 3.2 of the draft decision EPA, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 14.3

(1) After considering Aurizon Network's 2013 SUFA DAAU our final decision is to refuse to approve the contractual arrangements regarding the calculation of construction interest on the capital costs of a SUFA transaction.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

- **(a) clause 3.2 of the final decision EPA, such that the indexation term 't–x+1' to the term ($1+R_{mth}$), reads '(t–x)+1'**
- **(b) the definition of the annual interest rate (R) in clause 3.2 of the final decision EPA, to explicitly state the annual interest rate may vary, at the discretion of the access regulator**
- **(c) the definitions of the 'x' and 't' terms in clause 3.2 of the final decision**
- **(d) clause 3.3 of the final decision EPA, clarifying that:**
  - **(i) the construction interest on the capital cost formula only applies in the context of a SUFA transaction**
  - **(ii) construction interest on the capital costs only applies to the capital costs the access regulator includes in the RAB**
  - **(iii) construction interest on the capital costs included in the first and last calendar months may be adjusted by the access regulator, to reflect the fact they may not be full calendar months**
  - **(iv) construction interest on the capital costs included in the RAB may be adjusted by the access regulator, at its discretion, to exclude construction interest on the capital costs for the period of any unnecessary time delay that has occurred in making the submission to include the capital costs in the RAB**
  - **(v) construction interest on the capital costs included in the RAB does not apply to the extent the access regulator, at its discretion, considers any delay in making a decision on the inclusion of the capital costs in the RAB is deemed to have been caused through the provision of inaccurate, incomplete or misleading information.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in the analysis above.

14.4.4 Liability regarding environmental issues

Stakeholders commented on proposed amendments to the definitions of environment, environmental authorisation and environmental law; and on proposed amendments to the operation of clause 6 of the draft decision EPA.

Our final decision proposal is to accept all the amendments proposed by Aurizon Network and the QRC in relation to the definitions of environment, environmental authorisation and environmental law. Our view is the amendments improve the transparency and clarity of the definitions, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

With regard to the operation and drafting of clause 6 of the draft decision EPA, Aurizon Network's proposals can be summarised as follows:

- The EPA should limit liability to be between Aurizon Network and the SUFA trustee.
- The exclusion of Aurizon Network's liability should also operate where the SUFA trustee's actions may not cause contamination, but could contribute to it.
- The SUFA trustee should be responsible for contamination due to its mistakes, incompetence and mishaps.

Our final decision proposes to accept Aurizon Network's amendments. Clause 6 of the EPA is intended to allocate liability as between the SUFA trustee and Aurizon Network. We consider it reasonable that account be taken of the extent to which a SUFA trustee may have contributed to an event causing a breach of Aurizon Network's environmental obligations, and that a proportionality concept of responsibility is appropriate in such circumstances. Further, we accept Aurizon Network should not, in the context of clause 6 of the EPA, be responsible for acts or omissions of a SUFA trustee or its officers, employees, agents or contractors; to the extent these parties are not Aurizon Network.

Further, as per the QRC's suggestion, our final decision proposal is to amend clause 6(a) of the draft decision EPA by replacing 'touching and concerning' in relation to the extension land to 'in connection with'. We consider the phrase 'for any activity in connection with the Extension Land' provides more clarity regarding the actions the clause seeks to encompass than the phrase, 'for any activity touching and concerning the Extension Land'.

Overall, we consider our final decision proposals more accurately cover the scope and responsibilities underpinning the intended operation of clause 6 of the EPA and appropriately balance the interests of the main parties to the EPA (Aurizon Network, relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

Finally, in relation to the QRC's query regarding how access seekers are kept whole in the event the SUFA trustee, rather than Aurizon Network, is liable—our view is this is a matter for relevant access seekers, PUHs and the SUFA trustee to resolve.

The amendments we consider appropriate are outlined below.

Final decision 14.4

(1) After considering Aurizon Network's 2013 SUFA DAAU our final decision is to refuse to approve the contractual arrangements regarding liability for environmental issues.

(2) The way in which we consider it appropriate that Aurizon Network amend its 2013 SUFA DAAU is to adopt:

(a) the definitions of environment, environmental authorisation and environmental law in clause 1 of the final decision EPA

(b) clause 6 of the final decision EPA.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in the analysis above.

15 OPERATING AND PERFORMANCE RISK ALLOWANCE

Aurizon Network's 2013 SUFA DAAU proposed the adoption of an operating and performance risk allowance (OPRA). Aurizon Network considered that in return for operating and maintaining the infrastructure associated with a SUFA transaction, a proportion of the rental payment attributable to the SUFA trustee should be transferred to Aurizon Network.

Our final decision proposes to remove the concept of OPRA from the suite of pro forma SUFA documents and the rental example documents/spreadsheets.

15.1 Background

The 2013 SUFA DAAU EISL provides for deductions to the SUFA rental payments, for the recovery of an OPRA for Aurizon Network's provision of railway manager services associated with SUFA assets.[301]

Aurizon Network submitted that, following a SUFA transaction, its risk as the railway manager of the CQCN would increase, and it should be appropriately compensated, through an OPRA, for this risk change.[302] In particular, Aurizon Network said the increase in operating cost requirements due to SUFA infrastructure would increase the materiality of potential variance between revenue and costs.[303] Further, Aurizon Network said this risk is likely to be skewed in favour of the downside, given the absence of direct and reliable comparators for cost benchmarking available to the regulators.[304]

Aurizon Network said that in a competitive market, the price of providing the railway manager services would be determined by market forces.[305] Aurizon Network considered the regulatory precedents noted in the Deloitte Access Economics report[306] are relevant in assessing what a reasonable margin might represent.

Aurizon Network also provided justifications for OPRA in the context of the cost of capital.[307] It argued that a SUFA transaction would increase its operating leverage, and as a result its asset beta would increase. This is because, according to Aurizon Network, following a SUFA transaction its cash operating costs would increase (to accommodate train services arising from the SUFA infrastructure) without any commensurate increase in its EBIT (due to the rental stream payable to the SUFA trustee). It said, as a consequence, under the SUFA framework the SUFA trustee would bear a lower asset beta relative to Aurizon Network, given its role as the railway manager of SUFA assets. Aurizon Network said the difference between the two asset betas represents the asset beta relevant to systematic operational risks.[308]

[301] The detailed justifications for OPRA were provided in Aurizon Network's regulatory notes to the 2012 SUFA DAAU (which contained similar OPRA provisions as the 2013 SUFA DAAU).
[302] Aurizon Network 2012c, Attachment A: 1.
[303] Aurizon Network 2012c, Attachment A: 4.
[304] Aurizon Network 2012c, Attachment A: 3.
[305] Aurizon Network 2012c, Attachment A: 5.
[306] Aurizon Network 2012c, Attachment A: 12–36
[307] Aurizon Network 2012c, Attachment A: 6.
[308] Aurizon Network 2012c, Attachment A: 7.

15.2 QCA draft decision

Our draft decision did not accept that part of the return on SUFA infrastructure (i.e. the rent income) should be attributable to Aurizon Network for the provision of railway manager services. Nor did we consider it appropriate to include a margin for the operation of SUFA infrastructure.

We said that the SUFA is a financing arrangement—its objective is to allow for financing alternatives if Aurizon Network decides not to fund an expansion at the regulated rate of return. We did not consider that adopting the SUFA to fund an expansion should be interpreted as a trigger for some form of operational 'service agreement' with Aurizon Network.

We were of the view that SUFA infrastructure should be operated holistically with Aurizon Network's infrastructure in order to maximise operational efficiency. We noted the SUFA infrastructure would attract operating and maintenance cost allowances to account for its operational impact. These allowances should reflect any objectively justified changes in risk resulting from the SUFA infrastructure.

15.3 Stakeholders' submissions on the QCA draft decision

Aurizon Network did not support our draft decision position.[309] Aurizon Network did not consider it would be compensated for all risks and costs associated with managing SUFA assets and complying with SUFA documents. Aurizon Network said its decision to fund or not fund an expansion is irrelevant to the consideration of OPRA.

Aurizon Network considered the QCA draft decision position had assumed the provision of operations and maintenance is a riskless activity.[310] It said the QCA had not identified where and how Aurizon Network would be compensated for the risks associated with operating SUFA assets. It also said the QCA had not recognised the significant working capital implications, associated with increasing the scale of operating and maintenance costs, on Aurizon Network's return on assets. Aurizon Network considered the QCA draft decision was inconsistent with the QCA's own research on the split cost of capital, saying the QCA's paper on the split cost of capital[311] acknowledged the risk associated with operating the network.[312]

Anglo American supported our draft decision position.[313] It agreed with our view that SUFA assets should function as part of the CQCN. Anglo American considered that any payments beyond the normal operating and maintenance allowances would constitute double recovery of costs.

15.4 QCA analysis and final decision

We remain of the view it is not appropriate for part of the SUFA rental streams to be attributable to Aurizon Network in the form of an OPRA. Our assessment discusses the following matters:

- expansions and the notion of additional risk
- operating leverage and asset betas
- operation, maintenance and risk

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[309] Aurizon Network 2015a: 55.
[310] Aurizon Network 2015a: 55.
[311] QCA 2014aa.
[312] Aurizon Network 2015: 55.
[313] Anglo American 2015: 7.

- split cost of capital
- business models and compensation.

Expansions and the notion of additional risk

Aurizon Network has argued for an OPRA on the basis of 'additional risk' that would be borne by Aurizon Network, following a SUFA transaction. Based on our understanding of Aurizon Network's position, this 'additional risk', in Aurizon Network's view, primarily relates to the materiality of the potential difference between allowed revenue and actual costs. However, we consider Aurizon Network has provided insufficient economic reasoning and evidence to support such a proposition. It is not clear to us how operating a larger network would necessarily imply there is a material increase in the expected variance between allowed revenue and actual costs.

Operating leverage and asset betas

Aurizon Network has argued that following a SUFA transaction, its operating leverage would increase. As a result, the SUFA trustee would bear a lower asset beta relative to itself, which justifies an OPRA-type allowance. We do not agree with Aurizon Network.

We consider it useful to initially reflect on the purpose of the SUFA trustee and the role it plays in a SUFA transaction. Our view is a SUFA trustee exists for reasons of tax efficiency. It is a passive entity that undertakes administrative tasks, primarily associated with the transfer of cash flows between Aurizon Network and preference unit holders (PUHs). A SUFA trustee or PUH has no control over the actions of Aurizon Network in the operational phase of a SUFA transaction, despite the fact that these actions can have implications for their fundamental asset—rental streams.

In light of this, our view is that conceptually the asset beta for the SUFA trustee may not be a particularly meaningful measure. It is therefore doubtful that the difference between the asset betas of the SUFA trustee and Aurizon Network could be meaningful or provide any useful practical guidance regarding risk allocation and compensation, in the context of a SUFA transaction.

Furthermore, whilst a higher operating leverage, in principle, could suggest a higher asset beta for Aurizon Network, practical circumstances have to be accounted for. In this context, we note Aurizon Network is subject to cost-based regulation with a revenue cap and consider this largely breaks the link between operating leverage and the asset beta.[314] Our view is this regulatory approach implies that even if there was an increase in Aurizon Network's operating leverage as a result of a SUFA transaction, the impact on Aurizon Network's cost of capital (specifically asset beta) would likely be immaterial.[315]

We do, however, acknowledge the regulatory regime could change. As noted in Chapter 5 regarding SUFA rental streams, if a change to the revenue cap approach was contemplated, it would be necessary to consult upon this and provide appropriate natural justice. Our view is that any such process would inevitably require consideration of the implications for existing and potential future SUFA transactions. Chapter 5 also notes the outcome of such deliberations would be at PUHs' risk. Further, as also discussed in Chapter 5, in the event the CQCN declaration expires

[314] We note there has been extensive discussion regarding the cost of capital and asset betas in the 2014 DAU process running in parallel to this process, and refer to Incenta (2015).

[315] We also note that Incenta (2015) found Aurizon Network's operating leverage to be lower than the operating leverage of its closest comparators.

or is revoked, it would be necessary to review the approach to rental streams This would be subject to dispute resolution.

In light of the above, we do not consider that Aurizon Network currently has a compelling case to include an OPRA within the SUFA transaction documents on the basis of differential asset betas. Moreover, we note nothing precludes reassessment of this position if there are subsequent changes to the regulatory environment.

Operation, maintenance and risk

Our position with respect to OPRA does not necessarily assume the provision of railway manager services is riskless, as submitted by Aurizon Network. We consider the existing regulatory framework already adequately addresses Aurizon Network's risks associated with managing the CQCN, to the extent this is appropriate and efficient. For example:

- Aurizon Network is provided operating and maintenance allowances that seek to reflect efficient costs of providing the railway manager services.[316] These allowances, amongst others, provide for Aurizon Network to adopt operational practices to mitigate its operational risks (to the extent practical and efficient) and cover Aurizon Network's self-insurance costs.
- The access undertaking contains a number of provisions (e.g. the review event and MCI true-up mechanism) that reduce Aurizon Network's risks specific to the operation of the CQCN.

Given the existing regulatory regime, it is unclear to us what additional risks specific to SUFA infrastructure and the provision of access that Aurizon Network is seeking to be compensated for. Particularly, we do not consider it appropriate Aurizon Network be compensated for the 'risk' that its cost proposals are not accepted by the QCA.

Any QCA review of Aurizon Network's proposals typically follows an extensive consultation process. Aurizon Network, as the operator of the CQCN, is in the best position to provide evidence to support its cost proposals. If the QCA rejects Aurizon Network's cost proposals, the QCA considers there is a lack of evidence from Aurizon Network to support its proposals. We consider it inappropriate to compensate Aurizon Network for bearing a 'risk' that largely depends on its own actions and ability to support its own proposals.

Split cost of capital

We note Aurizon Network considered our draft decision was inconsistent with our own research on the split cost of capital. The split cost of capital report clearly states it is an information paper. To date, it is not a QCA policy and we have not implemented such a concept. Given this, the information paper does not reflect current QCA policy on WACC.

We do, however, acknowledge the split cost of capital concept bears some similarities to Aurizon Network's proposed OPRA. That is, the concept seeks to separately quantify a regulated entity's risk profiles for different activities (e.g. the ownership of the assets, maintenance and operations of the assets, and major capital investment).

However, we note that, even if the split cost of capital model was current QCA policy, Aurizon Network's proposal only seeks to apply it in the context of its role as the operator of SUFA infrastructure, rather than to its other activities as well. That is, a consistent application of the

[316] We note that Aurizon Network has raised the point about the implications of SUFA for its working capital requirements. We consider the access undertaking already provides for an appropriate allowance to address Aurizon Network's working capital requirements.

split cost of capital model requires it also be applied to the entire CQCN. Aurizon Network has proposed applying the split cost of capital model to SUFA expansions but not to the existing assets—this is an inconsistent application of the split cost of capital model.

Nevertheless, current QCA policy does not attempt to disaggregate these risks in this way and compensate them by applying varying WACCs to different activities. Rather, the same WACC is applied where the underlying asset beta is determined by a number of factors.

Business model and compensation

In support of its position on the OPRA, Aurizon Network noted precedence for businesses obtaining margins for providing railway manager services. Whilst such a business model exists, our view is Aurizon Network is required to maintain and operate the CQCN as an integrated whole, in order to maximise operational efficiency. The regulatory framework applied to the entire CQCN does not adopt a margin approach to compensation.

We consider if Aurizon Network wishes to adopt a margin approach, this should apply to the CQCN as an integrated whole. Any such proposal can be put forward by Aurizon Network. It would be considered on its merits and be subject to the standard consultation and natural justice considerations required under the QCA Act. We further note that in the event the CQCN declaration expires or is revoked, nothing precludes Aurizon Network proposing such an approach.

Overall, our view is that, on balance, Aurizon Network has not provided a compelling case for the inclusion of OPRA. This is despite Aurizon Network's view that its business choice of whether or not to fund an expansion is irrelevant to the consideration of OPRA.

For the reasons outlined above, our final decision proposal is for the concept of an OPRA to be removed from the SUFA transaction documents and rental example documents/spreadsheets. In coming to this view we have had regard to Aurizon Network's legitimate business interest (s. 138(2)(b) of the QCA Act).

Further, we consider the OPRA, through seeking to appropriate some of the rental stream attributable to the SUFA trustee and PUHs, reduces the attractiveness of the SUFA framework to access seekers and third party financiers. In this sense, it acts as a barrier to participation, whilst the SUFA framework seeks to reduce such barriers. The reduction of such barriers, in turn, can provide greater competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest, and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

The amendments we consider appropriate are outlined below.

Final decision 15.1

(1) After considering Aurizon Network's 2013 SUFA DAAU, our final decision is to refuse to approve the inclusion of an OPRA.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to remove all references to an OPRA from the suite of the pro forma SUFA documents and the rental example documents/spreadsheets.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

16 LIABILITY

For the SUFA framework to be workable, amongst other things, the pro forma SUFA documents should be sufficiently clear and certain and provide an appropriate allocation of risk and liability.

Our final decision proposals regarding the overarching liability provisions, whilst broadly similar to those in our draft decision, include the following:

- *an addition to the EPA limitation of liability provisions, to clarify their interaction with the liability provisions included within an access undertaking or access agreement*
- *various amendments and additions to the limitation of liability provisions in the Extension Project Agreement (EPA) and Subscription and Unit Holders Deed (SUHD), to accommodate the capacity obligations included in the Construction Agreement*
- *an amendment to the definition of consequential loss in the EPA, to account for loss of revenue and wasted overhead*
- *an amendment to the exclusion of consequential loss provisions in the EPA to deal with any potential conflict across consequential loss provisions throughout the suite of pro forma SUFA documents*
- *amendments to the Integrated Network Deed (IND), Extension Infrastructure Head-Lease (EIHL) and Financing Side Deed (FSD), to ensure the provisions limiting loss under those documents apply to those documents only.*

Appendix C provides a summary of the liability regime proposed in this final decision.

16.1 Background

Risk allocation, liability and compensation represented a significant area of contention with regard to Aurizon Network's 2013 SUFA DAAU. Whilst Aurizon Network considered its proposals achieved an acceptable balance between the interests of Aurizon Network and preference unit holders (PUHs) for a 'base case' SUFA transaction, this view was not shared amongst stakeholders.

Stakeholders generally held the view the 2013 SUFA DAAU favoured Aurizon Network with respect to risk allocation and compensation, with Aurizon Network's SUFA documents lacking commercial balance. An underlying theme was the 2013 SUFA DAAU had regard to the interests of Aurizon Network and provided it with significant control and discretions, resulting in risk being passed onto coal producers; even in instances where they were unable to mitigate the extent of the risk.

Further, with regard to limitation of liability, there was concern Aurizon Network proposed to limit its liability to $1.00 under the EISL and the Umbrella Agreement. Moreover, the interaction between the definition of consequential loss and a claim under Aurizon Network's 2013 SUFA DAAU, created uncertainty as to whether it would be possible to determine whether any loss was recoverable from Aurizon Network where it had caused, or contributed to, the loss, regardless of the legitimacy of the claim.

16.2 QCA draft decision

We considered the proposed liability regime under the 2013 SUFA DAAU, as a whole, did not provide for a balanced allocation of risk or compensation.

In forming this position on liability, we worked from the general principle that 'the party that controls the risk should generally carry the risk.' We also used the following principles with respect to the allocation of liability:

- It is not appropriate to limit liability where the risk is wholly within a party's capability to manage its exposure.
- Except for consequential loss arising from third party claims in respect of damage to people and property and from other specific causes, neither party should bear consequential loss of an economic nature.
- To avoid unnecessary disputes, there should be consistent treatment of loss/liability across all documents.

The following is a summary of our overall view of the liability and compensation regime in the draft decision.[317]

16.2.1 Allocation of risk

In our draft decision, we amended the suite of SUFA documents to provide what we considered to be an appropriate allocation of risk. This allocation was based on the principle of allocating risk/liability to the party best able to manage that risk, which we considered would improve the workability, bankability and credibility of the SUFA documents.

Accordingly, we made a number of changes to the risk allocation under the 2013 SUFA DAAU, including, for example:

- providing for Aurizon Network to carry risks associated with construction, given it can control its ordinary course of activities, construction and terms and conditions of entry to its construction sites
- allocating the SUFA trustee liability for its own breach of the RCA, given it can manage its actions when on the construction site, or when removing the SUFA asset.

16.2.2 Limitation of liability

Whilst specific issues regarding liability in particular circumstances have been considered in other chapters of this final decision[318], the principal liability provisions[319] are contained in clause 7 of the draft decision EPA and comprise the following:

- liability in relation to capacity
- SUFA trustee's liability in relation to the timeliness of construction
- SUFA trustee's limitation of liability
- consequential loss.

The liability in relation to capacity, and the SUFA trustee's liability in relation to construction timeliness, and limitation of liability aspects of clause 7 of the draft decision EPA are:

[317] See Chapter 13 and Appendix C of the draft decision for more detail on our position.
[318] For instance, details surrounding termination risk and the associated liability provisions are considered in Chapter 9 (Termination).
[319] The EPA provisions do not prevail over all the documents, only some (e.g. they do not prevail over the documents with the State and QTH, such as the EIHL, IND and FSD).

Table 25 QCA draft decision on liability

Clause in draft decision EPA	*Operation/purpose*
Clause 7.1: Liability in relation to capacity	Under the draft decision EPA, Aurizon Network has no liability to a SUFA trustee, PUH or access seeker regarding the level of capacity created by the SUFA infrastructure, except to the extent of any liability Aurizon Network may have under the access undertaking or an access agreement.
Clause 7.3: SUFA trustee's limitation of liability	A SUFA trustee's liability reflects the passive role it has in the SUFA transaction. Its liability under and in connection with the draft decision EPA is limited to the extent that its liability can be covered out of the property of the SUFA trust. In cases where the SUFA trustee has committed fraud, gross negligence, wilful default, breach of trust or breach of the Trust Deed (TD) or SUHD; this limitation of liability does not apply. We considered this a standard position for a professional trustee. Finally, when acting in the role of principal under the construction agreement, a SUFA trustee's liability for breach of the warranty in clause 14 of the EPA is limited to the amount the SUFA trustee recovers under the liquidated damages regime outlined in clause 33.7 of the construction agreement.[320]
Clause 14: SUFA trustee's liability for timeliness of construction	Under the draft decision EPA, a SUFA trustee warrants to each access seeker party to an Access Agreement Specific Terms Deed (AASTD) as to when practical completion will occur. This permits the access seekers to claim for loss arising from late completion. A SUFA trustee's liability under this warranty is limited, as described above.

16.2.3 Consequential loss

The provisions in the draft decision EPA limiting the right of a party to claim consequential loss under the SUFA documents comprise the definition of consequential loss and the operation of clause 7.2 of the EPA.

Definition of consequential loss

Our draft decision EPA considered that, aside from consequential losses that arise from third party claims of damage to people and property and from other specific causes, neither party should bear consequential losses of an economic nature (e.g. loss of coal, loss of profit or loss of a deal). Our view was this acknowledged neither party should be underwriting the profits of the other party. As such, we considered the loss of the SUFA trust (and the PUHs) should be limited to recovery of the value of its investment and should not extend to recovery of the value of an investment in an associated coal mine.

Our draft decision definition of consequential loss also considered the ability to recover direct loss should be real and not limited by a widely drafted definition of consequential loss. As such, our proposed definition of consequential loss was intended to permit the recovery of losses that a lender would expect to recover.[321]

[320] The replacement of the Project Management Agreement (PMA) with the construction agreement provides Aurizon Network with control over construction. Given this, we considered Aurizon Network should carry the risk associated with construction or ordinary course of activities. Our view was compensation for this risk is defined through the construction agreement and is project-specific. We also considered that after construction, the risk Aurizon Network bears is no different to the risk it carries on the rest of the CQCN, and compensation for this risk was through the operation and maintenance charge.

[321] The definition of consequential loss in the draft decision differed from the standard definition of consequential loss used by Aurizon Network in other documents (such as the standard access agreements).

Exclusion of consequential loss

The definition of consequential loss applies, such that any party to the draft decision EPA (Aurizon Network, the SUFA trustee, PUHs and access seekers that are party to an AASTD) are not liable for consequential loss, as defined under the EPA:

- arising under or from the transaction documents, or any claim in connection with or by reason of these documents
- under an indemnity given by one party to the EPA to another party to the EPA.

This is the case unless:

- the consequential loss relates to a claim for consequential loss where the party is insured under an insurance policy required by the transaction documents, and then only to the extent the party receives the proceeds from the insurance policy
- the consequential loss relates to any entitlement of the party to recover a loss from another party under, and subject to the terms of, another transaction document
- the exclusion of consequential loss is prohibited by law
- the consequential loss is caused or contributed to by the party committing fraud, gross negligence or wilful default.

16.3 Stakeholders' submissions on the QCA draft decision

Stakeholders' comments are split into the following sections:

- allocation of risk
- the role of the EPA and limitation of liability
- limitation of liability regarding capacity
- limitation of liability regarding the SUFA trustee and Aurizon Network
- consequential loss
- other issues regarding the liability framework.

16.3.1 Allocation of risk

Aurizon Network made a number of comments in relation to our position on risk allocation, at both an overarching and specific level.

Overarching level[322]

Aurizon Network noted that throughout the development the SUFA arrangements and its engagement with industry participants and the QCA, it had expressed its willingness to accept voluntarily some costs and risks under the SUFA arrangements, provided it received an appropriate reward for doing so.

Aurizon Network provided, by way of example, that it had been and remained willing to deliver the works for each SUFA project on the basis that Aurizon Network would accept industry risks and associated costs under a design and construction contract consistent with the template construction agreement. Aurizon Network stated it was prepared to do this on the basis the

[322] Aurizon Network 2015a: 10.

construction agreement for each SUFA transaction incorporated pricing terms in accordance with construction industry norms for comparable projects.

Aurizon Network stated that, consistent with the QCA Act, it may volunteer to accept risks and costs of expanding its network; however, it cannot be compelled to do so. Consequently, Aurizon Network's willingness to accept certain costs or risks is not an indication that it is willing to accept other costs or risks (even if it were proposed that it would receive a reward or be otherwise compensated for doing so).

Aurizon Network noted the QCA's draft decision interim position was to refuse to approve the 2013 SUFA DAAU. Aurizon Network considered that, in large part, this proposed refusal appeared to be because the QCA wished Aurizon Network to assume a different risk and cost allocation to that which Aurizon Network is willing to assume in its 2013 SUFA DAAU.

Aurizon Network said for the purposes of advancing SUFA, it is willing to accept in the SUFA template documentation the costs and risks set out in its response to the draft decision. Aurizon Network noted that, for each SUFA transaction, it was prepared to negotiate with the relevant access seekers changes to the approved SUFA template's risk allocation, to reflect the particular needs of those access seekers and/or project-specific issues. Where the parties agree on a commercial basis mutually acceptable risk and reward changes to the approved SUFA template, Aurizon Network was prepared to accept those risk changes. Aurizon Network stated this approach toward the pricing of cost exposures and risks is consistent with standard business practise for commercial enterprises in a market economy.

Specific level

In addition, Aurizon Network reiterated the above sentiment in a number of specific points regarding the risk allocation principles proposed in the draft decision. Other Aurizon Network comments included:

- It considered the risk allocation principles we adopted should not apply to the construction agreement, since the allocation of risk under the contract should be consistent with construction industry norms.[323]
- In reference to the principle ‘the party that controls the risk should generally carry that risk', it noted this is frequently adopted within a commercial setting, yet SUFA is being developed within a regulatory setting. Aurizon Network said it is ‘prepared to accept risks arising from a SUFA transaction where it volunteers to do so, and not otherwise’.[324]
- It considered that, if it were to bear greater risk, the additional risk should be priced and reflected within its charges, as is standard business practice for commercial enterprises in a market economy.[325]
- In reference to our view that ‘it is not appropriate to limit liability where the risk is wholly within a party’s capability to manage its exposure’, Aurizon Network considered it common practice for commercial agreements to limit the liability of a provider of a good or service in respect of a risk, even if it is the only party capable of managing the relevant exposure.[326]

By contrast, Anglo American supported our position in relation to the allocation and acceptance of risk throughout the SUFA documents, including the principle that ‘the party that controls the

[323] Aurizon Network 2015a: 53.
[324] Aurizon Network 2015a: 53.
[325] Aurizon Network 2015a: 53.
[326] Aurizon Network 2015a: 53–54.

risk should generally carry the risk', particularly in light of the control Aurizon Network would have over the construction and operation of SUFA assets.[327]

16.3.2 The role of the EPA and limitation of liability

The QRC did not support clause 7 of the draft decision EPA, with respect to limitation of liability applying to other agreements 'mutatis mutandis'. It considered this created an 'unacceptable level of uncertainty' concerning interpretation. The QRC also considered it meant the concerns expressed in relation to the clause 7 draft decision provisions regarding limitation of liability flowed through into the other SUFA pro forma documents, to the extent they are relevant.[328]

16.3.3 Limitation of liability regarding capacity

Regarding liability in relation to capacity, the QRC commented clause 7.1 of the draft decision EPA should be expressed as not limiting Aurizon Network's liability in relation to environmental issues under clause 6 of the same agreement. Further, the QRC considered, in the context of its comments on limitation of liability regarding capacity, that Aurizon Network should at least be liable to the access seekers for loss suffered or incurred by the access seekers, arising in connection with any breach of the EPA, wilful default, gross negligence or fraud.[329]

16.3.4 Limitation of liability regarding the SUFA trustee and Aurizon Network

Aurizon Network focused its comments on its limitation of liability. Aurizon Network proposed to accept the draft decision EPA, subject to the following:

- adopting Aurizon Network's proposals regarding the treatment of consequential loss
- the introduction, in the absence of full set-off, of a suite of guarantor requirements for PUHs, over the construction and operational phases of a SUFA transaction[330]
- if the Infrastructure Lease is terminated due to Aurizon Network cause, Aurizon Network's liability is limited to the trustee's share of the disposal proceeds received from QTH under the IND.[331]

Aurizon Network also proposed the clauses listed in Table 26 be maintained.

Table 26 Aurizon Network's comments on the draft decision EPA

Draft decision clause	***Purpose***
Clause 21.9 of the SUHD	This limits Aurizon Network's liability to a PUH in respect of a claim arising out of, or in any way related to, a transaction document, other than the SUHD or TD, to $1.00.
Clause 5.2 of the AASTD	This limits Aurizon Network's liability to a access seeker in respect of a claim arising out of, or in any way related to, a transaction document, other than AASTD, to $1.00.

[327] Anglo American 2015: 3–4.
[328] QRC 2015: 33, 35.
[329] QRC 2015: 44–45.
[330] Aurizon Network's proposals regard guarantors are outlined in Chapters 8 (Security and financeability) and 10 (Differential treatment).
[331] This is discussed in more detail in Chapter 9 (Termination).

Draft decision clause	***Purpose***
Clause 3.5(h) of EISL[332]	This states that, except as provided in clause 3.5 of the EISL, Aurizon Network has no liability to the trustee in connection with a termination of the EIHL under clause 11.4 of the EIHL, where such termination was caused by an act or omission of Aurizon Network, or the EIHL terminating automatically under clause 11.5 of the EIHL by reason of the SUFA trustee terminating the EISL under clauses 12.1 or 12.2 of the EISL, or any event, or circumstance ,or act or omission, of Aurizon Network giving rise to such termination.[333]

Further, when taking into account the SUFA trustee's role as principal under the construction agreement, the QRC queried how, given the trustee's limitation of liability, the access seeker would be compensated if the Date of Practical Completion is later than the Due Date, due to acts or omissions of the principal.[334]

By contrast, Anglo American supported our position on the limitation of liability in the SUFA framework. It considered the limitation of liability clause sought by Aurizon Network was 'not market standard nor reflective of a competitive market'.[335] Anglo American considered there should not be a limit on Aurizon Network's liability at any stage of a SUFA project (i.e. at the construction or operational phases). It also agreed with our position on the liability of a SUFA trustee.[336]

16.3.5 Consequential loss

Aurizon Network proposed a substantive reworking of the consequential loss provisions within the EPA. Aurizon Network stated it agreed with the QCA's principle included in the draft decision (section 13.4.3 of the draft decision), where the QCA stated:

> *Aside from consequential losses that arise from third party claims of damage to people and property, neither party should bear consequential losses of an economic nature. For example: loss of coal, loss of profit or loss of a deal. We acknowledge that neither party should be underwriting the profits of the other party. As the SUFA arrangement is intended to be a funding solution, we consider the loss of the Trust (and Preference Unit Holders) should be limited to recovery of the value of its investment and should not extend to recovery of the value of an investment in an associated coal mine.*

Against this background, Aurizon Network stated it did not volunteer to assume risks and costs which arose from the QCA's proposed changes to the consequential loss definition. Aurizon Network considered such changes result in it bearing risk inconsistent with the above principle.[337] In light of this, Aurizon Network proposed various amendments to the draft decision EPA definition of consequential loss. The key changes comprised incorporating the following losses into the meaning of consequential losses:

- loss of revenue or wasted overheads
- any loss arising out of any claim by a third party.

[332] Aurizon Network's submission on the draft decision refers to clause 3.5(h) of the EIHL. We note the draft decision EIHL does not have a clause 3.5(h) but the EISL does; we assume Aurizon Network was referring to the EISL.
[333] This relates to the situation where the EIHL terminates but the SUFA trustee still receives a rent-equivalent compensation cash flow and a detriment amount; if applicable. See Chapter 9 (Termination) for more detail.
[334] QRC 2015: 45.
[335] Anglo American 2015: 5.
[336] Anglo American 2015: 5.
[337] Aurizon Network 2015a: 54.

With regard to the exclusion of consequential loss provisions within the EPA, Aurizon Network proposed a rewrite of clause 7.2 of the draft decision EPA. Aurizon Network's proposal is provided in the table below.

Table 27 Aurizon Network's proposed amendments to the draft decision EPA

Draft decision EPA	***Aurizon Network proposal*[338]**
7.2 Exclusion of Consequential Loss under the Transaction Documents A party will not be liable for any Consequential Loss: (a) arising under or from the Transaction Documents; nor (b) arising from any Claim in connection with or by reason of the Transaction Documents; and (c) under an indemnity given by a Party to another Party, save and except for Consequential Loss where: (d) any Claim for Consequential Loss is one which the Party is insured under an insurance policy required under the Transaction Documents and then only to the extent the Party receives the proceeds of the policy of insurance; (e) any entitlement of the Party to recover a loss from another Party under another Transaction Document (subject to the terms of that Transaction Document); (f) such exclusion is otherwise prohibited by law; or (g) the Consequential Loss is caused or contributed to by that Party committing: (i) fraud; (ii) Gross Negligence; or (iii) a Wilful Default.	**7.2 Exclusion of Consequential Loss under the Transaction Documents** (a) Except as expressly otherwise provided under a Transaction Document a Party will not be liable to any other Party for any Consequential Loss: (i) arising under or from the Transaction Documents; (ii) arising from any Claim in connection with or by reason of the Transaction Documents; (iii) under an indemnity given by a Party to another Party under the Transaction Documents. (b) A reference to 'Transaction Document' in this clause 7.2 does not include the Trust Deed, Unit Holders Deed, Extension Infrastructure Head Lease, the Integrated Network Deed, the Construction Agreement or the Financing Side Deed.

In contrast to Aurizon Network's comments, the QRC targeted specific aspects of the drafting of clause 7.2 of the draft decision EPA.

The QRC noted clause 7.2(d) of the draft decision EPA regarding the relationship between consequential loss and insurance policy proceeds required further consideration. Further, in relation to clause 7.2(c) of the draft decision EPA regarding the requirement that a party not be liable to consequential loss under an indemnity given by a party to another party, the QRC considered the phrase 'under any transaction documents' should be inserted at the end of the clause. Finally, the QRC noted it considered clause 7.2(e) of the draft decision EPA incomplete.[339]

Anglo American supported narrowing the definition of consequential loss so as not to exclude the recovery of losses a lender would expect to recover. In particular, Anglo American considered that recoverable loss should include:

- interest on finance that accrues because of delays to the construction process

[338] Aurizon Network 2015o.
[339] QRC 2015: 45.

- losses incurred because the construction manager did not take reasonable steps to mitigate damage
- any other forms of potential damage to lenders the QCA feels is appropriate and is within the control of Aurizon Network.[340]

16.3.6 Other issues regarding the liability framework

The QRC considered there should be an acknowledgement the limitations of liability in clause 7 of the draft decision EPA do not limit Aurizon Network's liability under the access undertaking or an access agreement.[341]

16.4 QCA analysis and final decision

Our analysis and final decision section is split into the following sections:

- allocation of risk
- the role of the EPA and limitation of liability
- limitation of liability regarding capacity
- limitation of liability regarding the SUFA trustee and Aurizon Network
- consequential loss
- other issues regarding the liability framework.

16.4.1 Allocation of risk

Aurizon Network made various comments regarding the approach we have adopted to risk allocation from both an overarching and specific level. These are considered below.

Overarching level

Aurizon Network comments can be broadly split into two areas, comprising:

- Aurizon Network's willingness to accept costs and risk
- construction and risk allocation.

Aurizon Network also discussed construction and risk allocation in its specific comments. This will be considered in the context of the specific comments.

Aurizon Network stated that, whilst it was willing to voluntarily accept some costs and risk under the SUFA arrangement, it did not consider, under the QCA Act, that it could be compelled to accept risks and costs of expanding its network. Aurizon Network stated it was willing to accept the cost and risks in the SUFA template documentation it proposed in response to our draft decision. Aurizon Network also considered that our refusal of its 2013 SUFA DAAU appeared to be largely because we wished Aurizon Network to assume a different risk and cost allocation to that which Aurizon Network is willing to assume in its 2013 SUFA DAAU.

Whilst we note Aurizon Network's position, we do not consider the QCA Act necessarily requires us to agree to Aurizon Network's proposals, in terms of cost and risk allocation. Section 143(2) of the QCA Act states we may approve the 2013 SUFA DAAU, only if we consider it appropriate to do so, having regard to each of the matters set out in section 138(2) of the QCA Act. In having

[340] Anglo American 2015: 6–7.
[341] QRC 2015: 44.

regard to these matters, our view is it is open to us to decide whether to approve Aurizon Network's proposals in its 2013 SUFA DAAU and any subsequent proposals it provides thereafter. If we refuse to approve Aurizon Network's proposals, we are required to provide guidance on what we would accept.

In light of this, our view is our final decision proposals can adopt a different allocation of risk and costs to that volunteered by Aurizon Network, if we consider it appropriate. Further, our view is we have to be conscious of the need for the SUFA framework to provide a genuine alternative to Aurizon Network's financing proposals for expansions of the CQCN, if it is to be bankable and credible. We consider if this is not the case, the presence of an ineffective SUFA framework may merely consolidate perceptions regarding Aurizon Network's monopoly power.

In this context, we note Aurizon Network's comments with regard to adopting alternative risk allocations to those in the pro forma SUFA documents, on the basis of commercial negotiation. We also note Aurizon Network's view that this is standard business practice for commercial enterprises in a market economy. Our view is this presupposes competition in the supply of the particular good/service exists. This is not the case in this context because Aurizon Network is a monopoly supplier.

Indeed, we consider for any negotiation to take place from a reasonable position, the benchmark allocation of risk and cost between parties within the pro forma SUFA documents has to be reasonable and credible. Our view is this need not conform to the risk and cost profile Aurizon Network volunteers.

Specific level

Our comments on Aurizon Network's specific comments regarding risk allocation are provided in the table below.

Table 28 QCA response to Aurizon Network's comments on risk allocation

Aurizon Network comment	*QCA response*
Aurizon Network considered the risk allocation principles we adopted should not apply to the construction agreement, since the allocation of risk under the construction agreement should be consistent with construction industry norms.	We note for the SUFA framework to be effective, Aurizon Network is afforded a monopoly position as the constructor. Given this, our view is the pro forma construction agreement need not correspond to 'industry norms'. This is because, to the extent practicable, the pro forma construction agreement seeks to provide prospective SUFA funders with a credible backstop position. This aims to mitigate the possibility of Aurizon Network seeking to lever it monopoly position in negotiations. Chapters 6 and 7 provide more detail regarding our proposed approach to construction in this final decision.
Aurizon Network considered that, if it were to bear greater risk, the additional risk should be priced and reflected within its charges, as is standard business practice for commercial enterprises in a market economy.	We refer to our previous discussion in relation to Aurizon Network's overarching comments regarding risk and cost allocation.
In reference to the principle 'the party that controls the risk should generally carry that risk', Aurizon Network noted this is frequently adopted within a commercial setting, yet SUFA is being developed within a regulatory setting. Aurizon Network said it	We refer back to our previous discussion in relation to Aurizon Network's overarching comments regarding risk and cost allocation. We also note Aurizon Network's position appears to be at odds with its preference for 'standard

Aurizon Network comment	QCA response
is 'prepared to accept risks arising from a SUFA transaction where it volunteers to do so, and not otherwise'.	business practice' and 'industry norms' associated with the outcomes of market economy dynamics.
Aurizon Network noted that in reference to our view that 'it is not appropriate to limit liability where the risk is wholly within a party's capability to manage its exposure', it considered it common practice for commercial agreements to limit the liability of a provider of a good or service in respect of a risk, even if it is the only party capable of managing the relevant exposure.	Whilst we note Aurizon Network's comment, our view is that, whilst in general there is no overall cap on liability (other than for specific documents, such as the construction agreement), the only material liability Aurizon Network could face for its breach of a transaction document is for the termination of the Infrastructure Lease due to Aurizon Network cause. We consider this reasonable, given the specific circumstances associated with such a default. As noted in Chapter 9 regarding termination, a SUFA trustee and PUHs have no control over Aurizon Network's action in the operational phase of a SUFA transaction. Aurizon Network also accepts it is not in its business interest for its actions to terminate its Infrastructure Lease. In light of this, our view is the SUFA trustee should be entitled to consider whether, in the event the Infrastructure Lease terminates due to Aurizon Network cause, Aurizon Network has wilfully defaulted on its covenant in the EISL to comply with its obligations under the Infrastructure Lease. This provides a SUFA trustee with the possibility to claim for consequential loss, if it wishes to.

Overall, in light of the above, whilst we note and have had regard to Aurizon Network's comments, we consider the approach we adopted regarding risk allocation in the draft decision continues to be appropriate.

We consider through seeking to allocate risk to the party best able to manage it, whilst also having regard to Aurizon Network's monopoly position, our approach to risk allocation appropriately balances the interests of the parties to a prospective SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act).

We are also of the view our approach to risk allocation enhances the workability, bankability and credibility of the SUFA framework. As such, we consider our final decision proposal is consistent with the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act). This is because it seeks to provide competition in the financing of expansions in the CQCN, thereby increasing the likelihood of the financing cost of the expansion being priced efficiently. Efficient investments in the CQCN are in the public interest (s. 138(2)(d) of the QCA Act) and the interests of access seekers and access holders (ss. 138(2)(d), (e) and (h) of the QCA Act).

16.4.2 The role of the EPA and limitation of liability

The regime within the EPA seeks to provide clarity and transparency regarding the principal limitation of liability provisions across the suite of pro forma SUFA documents. This seeks to avoid, where it is possible, having differing limitation of liability regimes across each pro forma SUFA document. We consider our approach assists in mitigating protracted legal debates between parties, in the event a dispute arises regarding liability. This is because it reduces the likelihood of disagreement with respect to which SUFA transaction document is relevant and what limitation of liability regime would apply.

In this context, we do not agree with the QRC that applying the limitation of liability regime in the EPA across other pro forma SUFA documents 'mutatis mutandis' creates an ‘unacceptable level of uncertainty’, in regard to interpretation. We consider the converse is true, that various bespoke limitation of liability regimes across the suite of pro forma SUFA documents would create more uncertainty.

We also note the QRC's concerns regarding its view that inappropriately drafted content within the limitation of liability clauses in the EPA could flow through into the other SUFA pro forma documents. In this context, we note the final decision proposals can legitimately differ from the QRC's view in terms of content.

In light of the above, we do not intend to amend our overarching approach to limitation of liability. Our view is the approach we have adopted creates less opportunity for dispute and minimises uncertainty, to the extent possible over the suite of pro forma SUFA documents. We consider this in the interests of all parties to a SUFA transaction (ss. 138(2)(b), (e) and (h) of the QCA Act). We are also of the view it assists in developing a workable, bankable and credible SUFA framework.

16.4.3 Limitation of liability regarding capacity

As discussed in Chapters 6 and 7 regarding our approach to construction and the specifics of the construction agreement, whilst our position has consistently been Aurizon Network should be required to provide some form of up-front capacity commitment, our final decision proposes this be dealt with via the construction agreement; rather than the access undertaking. As such, obligations in respect of capacity have been included within the pro forma construction agreement.[342] This results in drafting changes to the suite of pro forma SUFA documents, rather than the 2010 AU. Our reasoning for adopting this approach and its relation to the section 138(2) matters of the QCA Act is discussed in the chapters cited at the start of this paragraph. The remainder of this section outlines how the obligations in respect of capacity flow through the pro forma SUFA documents.

To reflect the introduction of the capacity obligations in the construction agreement, clause 7.1 of the draft decision EPA has been amended, to state Aurizon Network has no liability to the SUFA trustee or PUHs regarding the capacity delivered via a SUFA transaction; except to the extent of any liability it may have under the access undertaking, an access agreement or any liability to the SUFA trustee under the construction agreement. In addition to this, clause 14(b) has been introduced into the final decision proposals for the EPA. Under this clause the SUFA trustee warrants, to each PUH and relevant access seeker, the capacity created via the SUFA transaction will be sufficient to meet the train service entitlements agreed, as per the capacity obligations in the construction agreement.[343]

Together, these amendments form the footing from which the payment of net liquidated damages, payable for breach of the capacity obligations in the construction agreement, flow from Aurizon Network to the PUHs and access seekers.

Firstly, net liquidated damages are payable by Aurizon Network, acting in its role as contractor under the construction agreement, to the SUFA trustee, acting in its role as principal under the construction agreement, if Aurizon Network does not meet its agreed contractual commitments under the construction agreement regarding capacity delivery. In this context, we have included

[342] See section 7.4 for further details.

[343] This is complemented by an amendment to clause 17.1 of the Trust Deed (TD) that ensures the SUFA trustee is liable for a breach of the warranty under clause 14(b) of the EPA.

clause 7.3(e) in the final decision EPA. This provides for the SUFA trustee's liability, in relation to the warranty it has provided regarding the capacity delivered by the SUFA transaction, to be limited at the net liquidated damages it actually recovers. This reflects the fact the SUFA trustee is a passive entity in a SUFA transaction.

Secondly, clause 7.3(e) of the final decision EPA also prioritises the payment of net liquidated damages, relative to the claims received from PUHs and access seekers. PUHs receive their share of the net liquidated damages recovered first and, thereafter, access seekers receive any share of any remaining net liquidated damages that they have made a claim for. The reason for this process is to ensure PUHs, to the extent they differ from access seekers, have priority, given they have provided the funding for the SUFA transaction.

The final amendment proposed relates to clause 21.9 of the SUHD. In the draft decision, this clause limits Aurizon Network's liability to PUHs to $1.00. The amendment adopted introduces a carve-out to this, whereby the $1.00 limit does not apply to any claim a PUH may have against a SUFA trustee, in respect of a breach of the SUFA trustee's warranty regarding the capacity delivered by the SUFA transaction. This amendment provides clarity regarding the application of the $1.00 liability threshold, in the context of the capacity obligations in the construction agreement.

In relation to the QRC's comments regarding the capacity delivered via a SUFA transaction, our view is the capacity obligations in the construction agreement and the potential flow of liquidated damages from Aurizon Network to the PUHs and the access seekers detailed above, provide a degree of recourse to access seekers regarding the capacity delivered by a SUFA transaction that is in line with their financial commitment to the SUFA transaction.

Finally, we do not agree with the QRC that clause 7.1 of EPA regarding liability for capacity delivery should be expressed as not limiting Aurizon Network's liability in relation to environmental issues under clause 6 of the same agreement. We consider the drafting of the EPA clearly provides that they are distinct issues.

The amendments we consider appropriate are outlined below.

Final decision 16.1

(1) After considering Aurizon Network's 2013 SUFA DAAU limitation of liability provisions regarding capacity delivery, our final decision is to refuse to approve these provisions.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to adopt the final decision EPA, SUHD and TD, including:

(a) clause 7.1 of the EPA, which reflects the inclusion of the capacity warranty

(b) clause 14(b) in the EPA, which reflects the SUFA trustee's warranty as to capacity to PUHs and access seekers

(c) clause 17.1 of the TD, which is to ensure the SUFA trustee is liable for a breach of its warranty as to capacity under clause 14(b) of the EPA

(d) clause 7.3(e) in the EPA, which is regarding the limitation of the SUFA trustee's liability in relation to a breach of its warranty as to capacity to PUHs and access seekers

(e) clause 7.3(e) in the EPA, which includes the prioritisation of the proceeds of claims relating to the SUFA trustee's capacity warranty to PUHs and access seekers

(f) clause 21.9 of the SUHD, which is to reflect the fact Aurizon Network's $1.00 limitation of liability to PUHs does not apply in the context of Aurizon Network's obligations, acting in the role of contractor, in respect of capacity.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

16.4.4 Limitation of liability regarding the SUFA trustee and Aurizon Network

Our assessment is split into the following sections:

- Aurizon Network's limitation of liability
- SUFA trustee's limitation of liability

Aurizon Network's limitation of liability

Aurizon Network proposed various requirements be met for it to accept the draft decision proposals in the EPA. These comprised:

- adopting Aurizon Network's proposals regarding the treatment of consequential loss
- the introduction, in the absence of full set-off, of a suite of guarantor requirements for PUHs over the construction and operational phases of a SUFA transaction
- if the Infrastructure Lease is terminated due to Aurizon Network cause, Aurizon Network's liability is limited to the SUFA trustee's share of the disposal proceeds received from QTH under the IND
- the specific limitation of liability provisions in clause 21.9 of the SUHD, clause 5.2 of the AASTD and clause 3.5(h) of EISL apply.

Our final decision proposals do not include full set-off or Aurizon Network's proposed guarantor requirements. Nor do they adopt Aurizon Network's approach to liability, if the Infrastructure Lease is terminated due to Aurizon Network's cause. Chapters 8, 9 and 10 in relation to security

and financeability, termination, and differential treatment provide our reasoning and how we consider this relates to the matters in section 138(b) of the QCA Act.

With regard to clause 21.9 of the SUHD, we refer to the amendment proposed in the previous section, regarding Aurizon Network's obligations, and the SUFA trustee's warranty, in respect of capacity. In relation to clause 5.2 of the AASTD our final decision proposes this is revised, such that Aurizon Network's liability is limited to $1.00 under any transaction document, other than the AASTD, the EPA and any access agreements (default or otherwise) entered into under the AASTD; rather than just the AASTD. Our reasoning and how we consider this relates to the matters in section 138(2) of the QCA Act is provided at Appendix A, Item 20. In relation to clause 3.5(h) of the EISL, no changes are proposed. Consequential loss is considered in a subsequent section in this chapter.

SUFA trustee's limitation of liability

With regard to the SUFA trustee's limitation of liability, other than the proposed inclusion of clause 7.3(e) in the final decision EPA, no substantive amendments are proposed to the provisions included in the draft decision EPA. Clause 7.3(e) is discussed in the section regarding liability for capacity.

With respect to construction of a SUFA asset, we note the QRC's query regarding how, given the SUFA trustee's limitation of liability, an access seeker would be compensated if the date of practical completion is later than the due date, due to acts or omissions of the principal (the SUFA trustee)[344]. Our view is, given the passive nature of the SUFA trustee; such as event is unlikely. If it does occur, we consider it at the PUHs and SUFA trustee's discretion, in terms of how they wish to resolve this; noting the limitation of liability provisions of the SUFA trustee under the SUFA transaction documents.

Against this background, our view is, with the exception of the amendments to deal with the introduction of the capacity obligations in the construction agreement, our final decision proposals regarding the primary limitation of liability regime within the EPA should reflect our draft decision EPA. We do not consider stakeholders have provided any specific reason for us to amend this. Further, our view is the provisions in the EPA are clear and transparent, which is in the interests of the parties to EPA (ss. 138(2)(b), (e) and (h) of the QCA Act). We are also of the view that such transparency assists in developing a workable, bankable and credible SUFA framework.

In this context, we note Anglo American's support for the general approach to the limitation of liability in our draft decision on the 2013 SUFA DAAU.

16.4.5 Consequential Loss

Our assessment of consequential loss broadly covers two areas, comprising:

- proposed amendments to the draft decision EPA
- other amendments.

The other amendments seek to clarify the consequential loss provisions across the suite of pro forma SUFA documents, in order to make it clear when a party to a SUFA transaction could be liable for the consequential loss of another party.

[344] QRC 2015: 45.

Proposed amendments to the draft decision EPA

Aurizon Network suggested various amendments to the definition of consequential loss and rewrote clause 7.2 of the draft decision EPA regarding the operation of the exclusion of consequential loss provisions.

Regarding Aurizon Network's amendments to the definition of consequential loss, our view is Aurizon Network's proposal to include 'loss of revenue and wasted overhead' as part of the meaning of consequential loss does not unduly widen the scope of the definition of consequential loss. This is because we consider, to a greater or lesser extent, this to be subsumed by the 'any loss of profit or loss production' condition; already included within the meaning of consequential loss.

By contrast, we do not consider Aurizon Network's proposal to include 'any loss arising out of any Claim by a third party' as part of the meaning of consequential loss appropriate. We note in support of its overarching argument to amend the definition of consequential loss, Aurizon Network stated our proposed definition of consequential loss in the draft decision was inconsistent with our statement that:

> *[a]side from consequential losses that arise from third party claims of damage to people and property, neither party should bear consequential losses of an economic nature. For example: loss of coal, loss of profit or loss of a deal. We acknowledge that neither party should be underwriting the profits of the other party. As the SUFA arrangement is intended to be a funding solution, we consider the loss of the Trust (and Preference Unit Holders) should be limited to recovery of the value of its investment and should not extend to recovery of the value of an investment in an associated coal mine.*

It is, however, unclear to us why our draft decision proposal, which does not include any loss arising out of any claim by a third party as part of the definition of consequential loss, is incompatible with the above principle. Our view is precisely who could constitute a third party, in the context of a legitimate claim for loss, is wider than the parties alluded to in the above principle. Further, we are also of the view the losses stated in the above principle are covered by the draft decision definition of consequential loss and need not be accounted for through the notion of third party claims.

Moreover, we also note that given the passive nature of the SUFA trustee throughout the life of a SUFA transaction, it is likely any third party claim for loss will occur as a result of Aurizon Network's actions. As such, Aurizon Network has an incentive to define all loss from third party claims as consequential loss, in order to reduce the potential scope of its liability.

Given the above, we do not consider Aurizon Network's argument to include any loss arising out of any claim by a third party within the meaning of consequential loss compelling. Further, we also note Aurizon Network stated it did not volunteer to assume risks and costs which arose from the QCA's proposed changes to the consequential loss definition. In this context we refer back to our discussion regarding risk allocation.

In addition to changing the definition of consequential loss, Aurizon Network also rewrote the exclusion of consequential loss provision at clause 7.2 of the draft decision EPA. The outcome of Aurizon Network's proposed drafting is to limit the transaction documents to which the exclusion of consequential loss provisions in the EPA apply and to delete the carve-outs to this exclusion (i.e. the conditions under which the exclusion of consequential provision would not apply and the party contributing to or causing the loss would be liable for another party's consequential loss).

Our view is the deletion of the carve-outs is inappropriate. This is because the implication of this deletion is that the exclusion of consequential loss provision is widened, for no apparent reason. Indeed, given the passive nature of the SUFA trustee we note it is Aurizon Network that is most

likely to face a claim for loss and, therefore, Aurizon Network that is likely to benefit the most through the deletion of the carve-outs.

Further, with regard to limiting the application of the EPA's exclusion of consequential loss provisions to certain SUFA documents, whilst we acknowledge Aurizon Network's proposal appears to seek to split out transaction documents which may have a differing consequential loss regime to that in the EPA, our view is such an approach may make it more difficult to claim for consequential loss. This is because in the event a dispute regarding consequential loss arises, we consider it possible Aurizon Network's proposal may lead to protracted legal debates between parties, with regard to which SUFA transaction document and consequential loss provisions should apply. We do, however, recognise that because certain SUFA documents adopt differing consequential loss provisions, some form of prioritisation in the event of a conflict is beneficial.

Consequently, our final decision proposes to include clauses 7.2(b) and 7.2(c) as part of the exclusion of consequential loss provisions in the EPA. Clause 7.2(b) states that if any provision in a transaction document conflicts with the operation of the working of the exclusion of consequential loss provisions in clause 7.2(a) of the EPA, then the conflicting provision in the other transaction document prevails, but only to the extent they conflict.[345]

With regard to the QRC's comments, we note its view that clause 7.2(d) of the draft decision EPA, which relates to the exclusion of consequential provision not applying to the extent proceeds received from an insurance policy are available to cover all or part of the loss, requires further consideration. However, in the absence of any specific concerns we do not propose to amend this clause.[346]

In summary, our final decision proposes the following amendments to the draft decision EPA consequential loss provisions:

- include, as part of the meaning of consequential loss, loss of revenue and wasted overhead and the other minor amendments to the definition proposed by Aurizon Network, other than those pertaining to third parties
- include clause 7.2(b) as part of the exclusion of consequential loss provisions in the EPA, which provides transparency in the event there is a conflict regarding the exclusion of consequential loss provisions in the EPA, and any specific exclusion of consequential loss provision within a specific SUFA agreement
- include clause 7.2(c) as part of the exclusion of consequential loss provisions in the EPA, which provides transparency as to the effect of clause 7.2(a) on clause 10 of the EPA.

We consider our approach to the definition of consequential loss and the exclusion of consequential loss provisions within the EPA ensures that legitimate claims for consequential loss from either Aurizon Network or the SUFA trustee are not otherwise excluded. We consider this in the interests of the SUFA trustee, access seekers and PUHs, as well as in the legitimate business interests of Aurizon Network (ss. 138(2)(b), (e) and (h) of the QCA Act). We note that whilst it may be in Aurizon Network's business interests to broaden the consequential loss provisions to the extent it becomes, from a practical perspective, difficult to make what is a reasonable claim for consequential loss; we do not consider this a legitimate business interest in the context of the

[345] Further, clause 7.2(c) disapplies clauses 7.2(a)–10 of the RCA, under which provides Aurizon Network indemnifies the SUFA trustee for contamination claims and losses.
[346] We also note QRC's minor drafting issues concerning clause 7.2(c) and (d) of the draft decision EPA and have addressed these where we consider necessary.

QCA Act and likely to be counter to developing a workable, bankable and credible SUFA framework.

In this context, we note Anglo American's support for narrowing the definition of consequential loss, so as not to exclude the recovery of losses a lender would expect to recover.

The amendments we consider appropriate are outlined below.

Final decision 16.2

(1) After considering Aurizon Network's 2013 SUFA DAAU consequential loss provisions, our final decision is to refuse to approve the consequential loss provisions.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to adopt the consequential loss definition and exclusion of consequential loss provisions in the final decision EPA, such that:

- **(a) loss of revenue and wasted overhead and the other minor amendments to the definition proposed by Aurizon Network other than those pertaining to third parties, are included as part of the meaning of consequential loss**
- **(b) clauses 7.2(b) and 7.2(c), are included as part of the exclusion of consequential loss provisions in the EPA.**

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Other amendments

QTH and the State of Queensland are parties to some, or all, of the following SUFA agreements, the Integrated Network Deed (IND), Extension Infrastructure Head-Lease (EIHL) and Financing Side Deed (FSD) (if the FSD is applicable for a given SUFA transaction).

We have sought to clarify the drafting within the pro forma SUFA documents to ensure that the provisions relating to consequential loss within the documents only apply to those documents and only as between QTH and the State of Queensland and the other parties to those documents. In this context, our final decision proposals are outlined in the table below.

Table 29 QCA final decision on consequential loss

SUFA agreement	*Final decision proposal*
IND	The IND is an agreement between QTH, the State of Queensland, Aurizon Network and a SUFA trustee. **Background, part F and clause 19.1**: These have been added or amended to clarify the IND, EIHL and FSD regulate the rights of QTH, the State of Queensland, Aurizon Network and the SUFA trustee but do not regulate the rights between Aurizon Network and the SUFA trustee with respect to the other SUFA agreements. **Clause 19.16**: This clause has been amended so that it is explicit that under the IND: (a) QTH and the State of Queensland are not liable for any consequential loss suffered or claimed by Aurizon Network, a SUFA trustee or each other; and (b) a SUFA trustee and Aurizon Network are not liable for any consequential loss suffered or claimed by QTH and the State of Queensland.
EIHL	The EIHL is an agreement between QTH, Aurizon Network and a SUFA trustee.

SUFA agreement	***Final decision proposal***
	Clause 20.1(a)(ii): This clause has been amended so that it is explicit the EIHL, IND and any relevant FSD are not intended to override any of the other SUFA transaction documents.
FSD	The FSD is an agreement between QTH, the State of Queensland, Aurizon Network, a SUFA trustee, any secured party of the SUFA trustee and any facility agent. **Clause 13.16**: This clause has been amended so it is explicit that under the FSD: (a) QTH, the State of Queensland, any secured party of the SUFA trustee and any facility agent are not liable for the consequential loss suffered or claimed by QTH, the State of Queensland, any financier trustee and any facility agent or each other; and (b) a SUFA trustee and Aurizon Network are not liable for any consequential loss suffered or claimed by QTH, the State of Queensland, any secured party of the SUFA trustee and any facility agent.

Our view is the cumulative impact of these proposed amendments is the QTH, the State of Queensland, any secured party of the SUFA trustee and any facility agent are quarantined from liability for consequential loss, with respect to the SUFA documents they are required to be parties to.

Further, we consider these proposed amendments also assist in clarifying precisely when Aurizon Network and a SUFA trustee may be liable for consequential loss suffered or claimed by another party. This is because the proposed amendments seek to limit ambiguity with respect to the application of any specific consequential loss provisions across the IND, EIHL and FSD.

In particular, they mean that neither Aurizon Network nor the SUFA trustee, can fall back on the specific consequential loss provisions within the IND, EIHL and FSD, in the event Aurizon Network or the SUFA trustee considers it has a legitimate claim for consequential loss against the other party.

Overall, we consider this lends greater clarity to the drafting, application and intent of the specific consequential loss framework across the EIHL, IND and any relevant FSD. Given this, our view is this meets the interests of the parties to these agreements, as well as the interests of PUHs and access seekers (ss. 138(2)(b), (e) and (h) of the QCA Act). We are also of the view that such transparency assists in developing a workable, bankable and credible SUFA framework.

The amendments we consider appropriate are outlined below.

Final decision 16.3

(1) After considering Aurizon Network's 2013 SUFA DAAU consequential loss provisions, our final decision is to refuse to approve the consequential loss provisions.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to adopt the final decision IND, EISL and FSD, such that:

(a) the IND reflects our final decision proposed drafting regarding part F of the background section, the definition of Other Transaction Documents, and clauses 19.1 and 19.16

(b) the EIHL reflects our final decision proposed drafting for the definition of Other Transaction Documents and clause 20.1(a)(ii)

(c) the FSD reflects our final decision proposed drafting for clause 13.16.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

16.4.6 Other issues regarding the liability framework

We agree with the QRC's suggestion that there should be an acknowledgement that the limitations of liability in clause 7 of the draft decision EPA do not limit Aurizon Network's liability under the access undertaking or an access agreement. We consider this lends greater clarity to the drafting and is the interests of the parties to EPA (ss. 138(2)(b), (e) and (h) of the QCA Act). We are also of the view such transparency assists in developing a workable, bankable and credible SUFA framework.

Given this, our final decision proposes to include this acknowledgement as clause 7.5 of the final decision EPA. This clause requires Aurizon Network to agree and acknowledge that clause 7 of the EPA, regarding limitation of liability, does not apply to, or limit any claim against or liability of Aurizon Network, under the access undertaking or access agreement.

The amendments we consider appropriate are outlined below.

Final decision 16.4

(1) After considering Aurizon Network's 2013 SUFA DAAU limitation of liability provisions, our final decision is to refuse to approve the limitation of liability provisions.

(2) The way in which we consider it appropriate for Aurizon Network to amend its 2013 SUFA DAAU is to include clause 7.5 of the final decision EPA.

(3) We consider it appropriate to make this decision having regard to each of the other matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

ACRONYMS

A	
AASTD	Access Agreement Specific Terms Deed
2010 AU	Aurizon Network's current Access Undertaking, approved by the QCA on 1 October 2010, together with any subsequent changes made by the QCA
ABA	Administratively Binding Advice
Aurizon Holdings	Aurizon Holdings Ltd
Aurizon Network	Aurizon Network Pty Ltd (formerly known as QR Network Pty Ltd)
ATO	Australian Tax Office
AU	Access Undertaking
B	
BMA	BHP Billiton Mitsubishi Alliance
BMC	BHP Billiton Mitsui Coal
C	
cl., cls.	clause, clauses
CQCN	central Queensland coal network
D	
DAU	Draft Access Undertaking
DAAU	Draft Amending Access Undertaking
Duties Act	Duties Act 2001 (Qld)
E	
EIHL	Extension Infrastructure Head Lease
EISL	Extension Infrastructure Sub-Lease
EPA	Extension Project Agreement
EPCM	Engineer, Procure, Construct and Manage
F	
FSD	Financing Side Deed
G	
H	
I	
ITAA	*Income Tax Assessment Act 1997* (Cth)
IND	Integrated Network Deed
J	

K	
L	
M	
N	
NPV	Net present value
NTER	National tax equivalent regime
O	
OPRA	Operating and performance risk allowance
P	
PBR	Private Binding Ruling
PMA	Project Management Agreement
PUH	Preferential unit holder
Q	
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997*
QR	Queensland Rail
QRC	Queensland Resources Council
QTH	Queensland Treasury Holdings
R	
RAB	Regulatory asset base
RCA	Rail Corridor Agreement
S	
s., ss.	section, sections
SAR	System allowable revenue
SSA	Specific Security Agreement
SUFA	Standard User Funding Agreement
SUHD	Subscription and Unit Holders Deed
T	
TD	Trust Deed
U	
UA	Umbrella Agreement
UT3	The third access undertaking covering the CQCN
UT4	The fourth access undertaking covering the CQCN

V

W

WACC	Weighted average cost of capital
WUC	Work under contract

X

Y

Z

APPENDIX A: FINAL DECISION PROPOSALS ON THE ACCESS AGREEMENT SPECIFIC TERMS DEED (AASTD)

The pro forma SUFA template documents include the Access Agreement Specific Terms Deed (AASTD). The AASTD provides for the access seeker and Aurizon Network to enter into an access agreement to secure access rights to Aurizon Network's infrastructure, including the SUFA infrastructure (extension infrastructure). The QRC has provided a number of comments on the draft decision AASTD.[347] Our view is the majority of these relate to specific drafting of the AASTD. By contrast, Aurizon Network, on the other hand, had only one comment on the AASTD. Our final decision proposals regarding the AASTD are included in the table below.

Stakeholders' comments on the draft decision AASTD	***QCA response and final decision proposals***
Aurizon Network	
Item 1: Aurizon Network proposed that clause 6.6(c), regarding stamp duty, be deleted.	Our final decision in relation to the AASTD removes clause 6.6(c), in order to remove the overlap with clause 6.6(b). We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD[348] (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
QRC	
Item 1: The QRC noted the AASTD requires the access seeker to enter into an access agreement with Aurizon Network within a specified timeframe. The QRC noted that some access seekers will, at the time of entering such an access agreement, be a party to access agreements with Aurizon Network for other parts of Aurizon Network's railway network (excluding the extension) which may ultimately interface, via connecting infrastructure, with the extension. The QRC queried how the access agreement entered into pursuant to the AASTD will interact with the access seeker's existing access agreements to ensure complete alignment of access rights for the operation of train services that traverse the SUFA infrastructure and existing railway network.	Whilst we acknowledge the QRC's comment, we consider it relates to efficient network planning (and not contractual arrangements), which involves all parties operating and using the CQCN. As such, our view is it is not a SUFA-specific issue. We note the conditions in the undertaking seek to support efficient network planning and, in turn, the object of the third party access regime in the QCA Act (ss. 69E and 138(2)(a) of the QCA Act).

[347] Throughout the detail of its submission, the QRC adopted the acronym ASD to refer to the AASTD.
[348] We note the SUFA trustee is a signatory to the AASTD, but has a passive role.

Stakeholders' comments on the draft decision AASTD	***QCA response and final decision proposals***
Item 2: The QRC noted that clause 2(a) provides that the AASTD commences on the conditions precedent satisfaction date (which is the date of the satisfaction or waiver of the last condition precedent outstanding under the Extension Project Agreement (EPA)). The QRC also noted that clause 2(b) provides that the AASTD will terminate if the EPA has not been signed by all the parties by the end date or due to a failure to satisfy the conditions precedent under the EPA. The QRC queried how the termination events in clause 2(b) might arise if the AASTD does not actually commence until the conditions precedent satisfaction date under the EPA and what the clause is intended to achieve.	We consider the relationship between these clauses is insufficiently clear and have amended the drafting for our final decision. The revised drafting ensures that clause 2(b) of the AASTD is effective from the date the AASTD commences, whilst all other clauses in the AASTD only commence on the conditions precedent satisfaction date within the EPA. This provides for the automatic termination of the AASTD in the event: • the EPA has not been executed by all parties by the required date; or • the EPA is terminated due to an inability to meet any condition precedent. Our view is this meets the interests of the main parties to the AASTD (Aurizon Network and the access seeker) as it ensures certainty as to the status of the AASTD, which, in turn, ensures transparency and clarity of the AASTD (ss. 138(2)(b) and (e) of the QCA Act) in this regard.
Item 3: The QRC noted that paragraph (b) of the definition of 'Pro Forma Access Agreement' implies, by referring to nominated access rights that are not otherwise the subject of an access holder access agreement or an operator access agreement referred to in clause 3.1, that the access agreements for part of the nominated access rights could be entered into under clause 3.1. The QRC considered this created a termination risk. Clause 2(a)(i) provides that the AASTD will terminate when an access agreement or access agreements which meet the criteria in clause 3.1 have been entered into. If an access agreement for part of the nominated access rights is taken to meet the criteria in clause 3.1 then the AASTD will terminate, which is not an appropriate outcome. The QRC considered that the interaction between clause 3.1 and clause 2(a) needs to be clarified.	Our view differs from the QRC's and our final decision is that no clarification is necessary. We consider the drafting within the AASTD transparent and clear, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act). Clause 3.1 refers to the whole of the nominated access rights. If access agreement(s) have been entered into satisfying that clause, then clause 2(a)(i) applies. By contrast, if the access agreement(s) that have been entered into do not cover the whole of the nominated access rights, then clause 3.3 relating to a default access agreement applies to the residual nominated access rights. In this case 2(a)(ii) applies. This means that for any part of the nominated access rights for which no access agreement is in place, the default access agreement is triggered. Given this, there is no point at which the nominated access rights are not covered by an access agreement of some form and no termination risk.
Item 4: The QRC noted the timeframe for entering into an access agreement is the six-month period ending on the due date (which is the latest date for practical completion for all separable portions to be carried out on the access seeker segments). Under the construction agreement, the date for practical completion will move if extension of times are directed, granted or allowed in accordance with the construction agreement. Accordingly, the six-month period for entering into an access agreement will also move as the date for practical completion moves. The movement of the six-month period creates a risk that an access agreement that is entered into in compliance with the original six-month period might fall outside the	Our view is that it would not be necessary to enter into a new access agreement, hence no need to terminate the original access agreement. In light of this, our final decision is not to amend the drafting of the draft decision AASTD in this regard. The date at which the access rights under the access agreements are to be available to the access holder (the commitment date) is the later of the various dates in Item 4 of Part 2, Schedule 1 of the AASTD. The obligation to enter into an access agreement is mandatory within the six-month period prior to the due date but does not stop an access agreement being entered prior to that period. That is, if an access agreement is entered into prior to the six-month (mandatory)

Stakeholders' comments on the draft decision AASTD	***QCA response and final decision proposals***
revised six-month period, depending on when the access agreement was executed and how far the date for practical completion moves. If this happens, the QRC queried whether it is proposed that a further access agreement will be entered into and the original access agreement terminated.	period, (e.g. due to the extension of time of the last date of practical completion), then the mandatory obligation in clause 3.1(a) does not arise. Against this background, we consider the drafting within the AASTD transparent and clear, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 5: The QRC noted that in order to comply with clause 3.1, the access seeker is dependent on Aurizon Network executing the relevant access agreement. If Aurizon Network declines to sign the relevant access agreement or is slow to sign the access agreement and does not sign within the required period, then the access seeker will be taken to have failed to comply with clause 3.1 and the default access agreement regime in clause 3.3 will apply. The detriment for the access seeker is that it loses the right to nominate a railway operator (under cl. 3.2(a)(ii)) and will be a party to a potentially incomplete access agreement. The QRC considered that Aurizon Network should at least be obliged to use reasonable endeavours to assist the access seeker to comply with this clause.	Our final decision is that the obligation in clause 3.1(a)(i) be strengthened to require that the access seeker and Aurizon Network must enter into an access holder access agreement for the whole of the nominated access rights for each access period during the access agreement term. We also consider this should be complemented with a reasonable endeavours obligation upon Aurizon Network to assist an access seeker to comply with clause 3.1 in relation to entering an access agreement. Our view is this appropriately balances the interests of the access seeker, with the legitimate business interests of Aurizon Network, in the specific context of clause 3.1 of the AASTD (ss. 138(2)(b) and (e) of the QCA Act). Whilst it places obligations on Aurizon Network, we do not consider these obligations unduly onerous and they support the access seekers interest in executing an access agreement promptly; in order to provide greater assurance regarding its access rights.
Item 6: The QRC noted the access agreements referred to in clause 3.1 are for the whole of the nominated access rights. However, paragraph (b) of the definition of 'Pro Forma Access Agreement' implies, by referring to nominated access rights that are not otherwise the subject of an access holder access agreement or an operator access agreement referred to in clause 3.1, that the access agreements for part of the nominated access eights could be entered into under clause 3.1. The QRC queried whether it is the case that the access seeker may enter into access agreements under clause 3.1 for part of the nominated access rights. If so, the QRC considered that this should be clarified in clause 3.1 and that clause 2(a)(i) will need to be amended (see Item 3).	The QCA refers to its response in relation to Item 3.
Item 7: The QRC stated that under Schedule 1, Part 2, Item 6, the access seeker authorises Aurizon Network to complete the schedules and attachments to the access agreement to be entered into between Aurizon Network and the access seeker. Aurizon Network is required to act reasonably and in good faith in carrying out this obligation. However, there seems to be no ability for Aurizon Network and the access seeker to agree the content of the schedules or for the access seeker to give Aurizon Network any directions as to the content of the schedules. The schedules are likely to include key	We consider the draft decision AASTD does allow an access seeker to input into the content of an access agreement on commercial matters. Clause 3.2 of the AASTD relates to completion and modification of an access agreement and confirms that Aurizon Network must act reasonably and in good faith in completing and modifying the access agreements.

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commercial matters such as access charges, rollingstock configurations and performance levels. The QRC considered the access seeker should have input into the content of the access agreement, particularly with respect to key commercial matters.	In addition, clause 3.2 contains a drafting note. This drafting note allows an access seeker to provide a near-complete version of the access agreement that could be annexed to the AASTD. A further drafting note to Part 1, Schedule 1 of the AASTD supports this. This drafting note requires all details of the train service entitlements associated with nominated access rights be included as part of the train service description, included in Part 3 of Schedule 1 of the AASTD and specified in the access agreement. Such details would relate to origin, destination, section run time, train configuration, and so forth. Given the standard form of the SUFA suite of documents, we consider it appropriate that these matters are negotiated at the time of entry into a SUFA arrangement as they are particular to the relevant access seeker and expansion project. However, if parties cannot agree on the above-mentioned specific details (e.g. because there is insufficient information available to the parties to enable these to be negotiated at the time of entry into the SUFA), the obligation on Aurizon Network to act reasonably and in good faith protects the access seeker's interests. In light of this, our final decision is to maintain the AASTD with respect to this issue. We consider the drafting within the AASTD appropriately balances the interests of the access seeker, with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act). An access seeker is entitled to provide input on commercial matters, but must do so in a clear and comprehensive manner, in order for Aurizon Network to meet its obligations.
Item 8: The QRC noted the AASTD does not seem to provide the access seeker with any guarantee that it will have first priority to the 'Nominated Access Rights' and that the 'Nominated Access Rights' will be available for Aurizon Network to grant to the access seeker during the six-month period during which the access seeker must sign an access agreement. There is no restriction on Aurizon Network dealing with the nominated access eights. If the nominated access eights are not available, whether because insufficient capacity has been created by the extension or because the rights have been granted to a third party, then the access seeker (through no fault of its own) cannot comply with its obligations under the AASTD. The QRC queried what process should be followed if the whole, or any part of the nominated access eights, are not available to the access seeker.	Our view is that, to the extent possible in the pro forma SUFA documents, our proposed amendment to clause 3.1(a)(i) discussed at Item 5 provides a degree of assurance to an access seeker of its standing in relation to the nominated access rights. We consider this final decision appropriately balances the interests of the access seeker, with the legitimate business interests of Aurizon Network, in the specific context of clause 3.1 of the AASTD (ss. 138(2)(b) and (e) of the QCA Act). Whilst it places obligations on Aurizon Network, we do not consider these obligations unduly onerous; they support the access seekers interest in executing an access agreement promptly, in order to provide greater assurance regarding its access rights. Notwithstanding this, our view is the undertaking would require amending to give the access seeker an unambiguous right of first priority to the nominated access rights. This is because it would be necessary to ensure the queuing provisions within the undertaking do not override that allocation of the nominated access rights. As discussed in section 4.4.2 of this final decision, if the sunset clause is triggered, the necessary amendments to the 2010 AU will be considered.

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Item 9: The QRC considered it unclear whether the default access agreement will be modified and completed in accordance with clause 3.2. The definition of 'Pro Forma access agreement' indicates that this will be the case, however clause 3.3(b)(iii) indicates this might not be the case because of the reference to 'whether or not the details referred to in clause 3.2 … have been completed'. If the details in the default access agreement have not been completed at the date of execution by the access seeker, the QRC queried how the access seeker ensures the details are completed in accordance with its requirements.	We consider clause 3.3(b)(iii) of our draft decision AASTD unclear and unnecessary. Our final decision in this regard is to remove this clause from the AASTD. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 10: The QRC noted that, despite clause 3.3(b)(i), whether there is any risk that the default access agreement could be considered void for uncertainty requires further consideration.	We note the QRC's comment. However, in the absence of any specific concern regarding precisely how the QRC considers the default access agreement would be 'void for uncertainty'; it is unclear what, if any, amendments to our draft decision AASTD the QRC is proposing. In light of this, our final decision is not to make any amendments to the AASTD in this particular regard.
Item 11: In relation to clause 3.3(c), the QRC considered Aurizon Network should be required to provide the default access agreement to the access seeker within a specified timeframe and if Aurizon Network fails to provide the access agreement within the specified timeframe then the access seeker should have the right to execute the default access agreement for and on behalf of both itself and Aurizon Network (pursuant to a power of attorney granted by Aurizon Network under the AASTD).	Our final decision in relation to clause 3.3(c) of the AASTD is that both Aurizon Network and the access seeker should coordinate their activities, such that after the due date, Aurizon Network promptly delivers a copy of the default access agreement to the access seeker, who promptly executes it and returns a copy to Aurizon Network. We do not consider it appropriate to provide the access seeker with the ability to create or execute the default access agreement on behalf of both parties. Our view is that under clause 3.3, from the due date, the default access agreement has full force and effect and binds both Aurizon Network and the access seeker. This is regardless of whether both parties have properly executed the document. Overall, we consider our final decision in this regard appropriately balances the interests of an access seeker, with the legitimate business interests of Aurizon Network's because it requires both parties to act promptly to execute an agreement they are both signatories to (ss. 138(2)(b) and (e) of the QCA Act).
Item 12: Regarding the default access agreement, the QRC considered that Aurizon Network should also be required to execute the document within a specified period after the access seeker executes the document.	The QCA refers to its response in relation to Item 11.
Item 13: Regarding clause 3.4 in relation to dispute resolution, the QRC noted the term 'CEO Process' is not defined in the AASTD or the EPA. The QRC queried whether this clause should refer to the process under clause 5.2 (Chief executive officer resolution) of the EPA.	Our final decision is that the inclusion of clause 3.4 is unnecessary and it should be deleted. The reason is it resulted in two clauses within the AASTD dealing with dispute resolution. dispute resolution is now dealt with via clause 6.2 of the AASTD, which reverts to the overarching dispute resolution process in the EPA; this process allows for CEO resolution.

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The QRC also queried what is meant by 'the requirements imposed on Aurizon Network under this clause …'	We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 14: The QRC noted the access seeker effectively has no right to terminate the AASTD given the termination right in clause 2(b) seems to be ineffective and the termination right in clause 4.1 is only for the benefit of Aurizon Network. The QRC considered the access seeker may wish to have the right to terminate the AASTD if: • an Insolvency Event occurs in respect of Aurizon Network or the trustee; or • subject to the outcome of negotiations with respect to the assignment clause, Aurizon Network or the trustee breaches its respective assignment obligations. The QRC noted the consequences of termination of the AASTD by the access seeker require further consideration.	Our view is access seekers should, like Aurizon Network, have a right to terminate the AASTD if an insolvency event occurs. Our final decision amends clause 4.1 of the AASTD to give this effect. We do not, however, consider it appropriate the access seeker have a right to terminate in respect of the breach of assignment obligations. There is no corresponding right in the EPA and we are unclear what benefit would be derived from such a right. Our view is this final decision appropriately balances the interests of the access seeker, with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act). This is because it provides both parties with symmetric rights to terminate if an insolvency event occurs; which we consider appropriate in the specific context of the AASTD. With respect to the QRC's comment regarding the consequences if an access seeker chooses to terminate the AASTD, our view is this a decision for the access seeker if an insolvency event occurs. Further, we consider that such a decision would likely be made for the entire SUFA arrangement and be based upon weighing the relevant risks at that time. Further, for purposes of clarity and transparency, our final decision includes an additional clause. This states the AASTD automatically terminates, with no need for notice by the access seeker or Aurizon Network, on the date the SUFA trust is wound up according the requirements of the Trust Deed (TD) and Subscription and Units Holders Deed (SUHD). We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 15: Regarding clause 5.1(a) in relation to the trustee's limitation of liability, the QRC noted a cross-reference to clause 12.2 of the EPA is incorrect as this clause prescribes how notices are to be given under the EPA rather than trustee warranties. The QRC requested clarification regarding the warranties that are to be given in relation to the trustee's capacity.	The cross-reference has been amended. Clause 5.1 of our final decision AASTD refers to the relevant clause in our final decision EPA regarding trustee warranties.
Item 16: In relation to the trustee's limitation of liability, the QRC noted clause 5.1(c) refers to 'Wilful Default, breach of trust; or breach of the TD or the Unit Holders Deed'. The term 'Wilful Default' extends to all transaction documents (although the AASTD ceases to be a transaction document on termination or expiry of the AASTD). The QRC considered this clause should be amended to clarify that the term 'Wilful Default' in this	We consider the term Wilful Default is not limited in its application to the TD and SUHD. In relation to this, we have proposed an amendment in our final decision to clause 4.3(a) of the draft decision EPA, which relates to the termination of the AASTD. The proposed amendment effectively means if the AASTD terminates and ceases to be defined as a transaction document, this will not apply when terms used in AASTD are used in the definitions of Gross Negligence and Wilful Default.

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clause is not limited in its application to the TD and the Subscription and Unit Holders Deed (SUHD).	Our view is this provides clarity that these terms are not limited in their application. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 17: Regarding the trustee's limitation of liability, the QRC noted clause 5.1(c) refers to 'Gross Negligence' and 'Wilful Default' which in turn refers to transaction documents. The QRC noted the AASTD ceases to be a transaction document on termination or expiry of the AASTD. The QRC considered the exclusion from the trustee's limitation of liability under clause 5.1(c) should continue to apply in respect of the AASTD despite the termination or expiry of the AASTD.	The QCA refers to its response in relation to Item 16.
Item 18: Regarding Aurizon Network's limitation of liability at clause 5.2, the QRC considered this clause should be amended to expressly clarify the limitations of Aurizon Network's liability in the AASTD in no way limit Aurizon Network' liability under any access agreement(s) entered into pursuant to, or in connection with, the AASTD.	Our view is it is not the intent of the AASTD to limit Aurizon Network's liability under any access agreement(s). Our final decision in this regard amends clause 5.2 to ensure that this is clear and transparent. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 19: Regarding the application of the EPA to the AASTD (cl. 5.3 of the AASTD), the QRC considered that clause 7.3 of the EPA regarding the trustee's limitation of liability, should not apply to the AASTD on the basis that this limitation is already covered by clause 5.1(c) of the AASTD.	Our final decision is that clause 7.3 of the EPA should not apply to the AASTD, given clause 5.1(c) of the AASTD. Clause 5.3 of the AASTD has been amended to give this effect. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 20: Regarding the application of the EPA to the AASTD (cl. 5.3 of the AASTD), the QRC noted the breadth of the limitation of liability in clause 7.1 of the EPA means that Aurizon Network effectively has no liability to the access seeker under the AASTD. The QRC considered that Aurizon Network and the trustee should at least be liable to the access seeker for loss suffered or incurred by the access seeker that arises in connection with any breach of the AASTD, wilful default, gross negligence or fraud.	Our view is clause 5.2 of the draft decision AASTD does not imply Aurizon Network has no liability to the access seeker under the AASTD. Further, we consider that Aurizon Network is liable for wilful default, gross negligence or fraud. Clause 5.2 of the draft decision AASTD states Aurizon Network's liability is limited to $1.00 under any transaction document, other than the AASTD. Under clause 5.3 of the draft decision AASTD, Aurizon Network's liability under the AASTD is subject to the limitations and provisions in clause 7 of the draft decision EPA. We consider the cumulative effect of these clauses is that under the draft decision AASTD, Aurizon Network is liable for a breach of the AASTD, but not liable for consequential loss (as defined in the EPA). We do, however, consider that clause 5.2 of the AASTD is not sufficiently clear regarding the fact Aurizon Network is liable under the EPA, as well as the AASTD. In light of this, our

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	final decision is to amend clause 5.2 to clarify that Aurizon Network's liability is limited to $1.00 under any transaction document, other than the AASTD and the EPA. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 21: Regarding Aurizon Network's limitation of liability at clause 5.2 of the AASTD, the QRC queried why Aurizon Network's liability in respect of claims arising out of transaction documents other than the AASTD is specified here.	The QCA refers to its response in relation to Item 20.
Item 22: Regarding clause 6.4 of the AASTD (Assignment), the QRC noted the AASTD does not impose any restrictions on the assignment of the AASTD by Aurizon Network or the trustee. The QRC considered that restrictions on Aurizon Network and the trustee, similar to those specified in the Integrated Network Deed (IND), should be included in the AASTD.	Our view is assignment is dealt with at clause 11.3 and 11.4 in the EPA. Our final decision is to maintain the position in the draft decision EPA in this regard. We consider it provides clear and transparent assignment rights and obligations for a SUFA trustee and Aurizon Network, which is in the interests of the main parties to the AASTD and EPA (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act). The assignment rights and obligations in the EPA include that Aurizon Network may assign all or part of its liabilities under a transaction document in accordance with clause 16.4 of the IND. In relation to a SUFA trustee, if the SUFA trustee is replaced by a new trustee, the SUFA trustee, with effect from the appointment of a new trustee, is to transfer its rights and liabilities under the transaction documents to the new trustee. This aligns with the SUFA trustee's requirement under clause 16.5 of the IND.
Item 23: Regarding 6.4(b)(i) and 6.4(b)(ii)(B) of the AASTD (Assignment) the QRC noted that if the access seeker and its assignee intend to (and agree in favour of Aurizon Network that they intend to) enter into an operator access agreement, the QRC queried why should it be assumed that the access seeker will enter into an access holder access agreement.	Our view is clause 6.4(b)(i) and 6.4(b)(ii)(B) should not assume an access holder access agreement will be entered. Our view is that doing so does not lend clarity and transparency to the AASTD. Our final decision removes these aspects of the relevant clauses from the AASTD. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 24: Regarding 6.4(e) of the AASTD (Assignment), the QRC queried why the listing is limited to the Australian Stock Exchange Limited. The QRC considered that this provision should be expanded to include foreign exchanges recognised under the Corporations Act.	Our view is, in this particular context, reference to the Australian Stock Exchange is unduly constraining. Our final decision proposes to amend this clause, such that it relates to a recognised stock exchange; rather than just the Australian Stock Exchange. We consider this in the interests of access seekers and, given the reference relates to a recognised stock exchange, our view is it appropriately accounts for Aurizon Network's legitimate business interests (ss. 138(2)(b) and (e) of the QCA Act).

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Item 25: Regarding clause 6.4(e) of the AASTD (Assignment), the QRC noted there appear to be formatting errors in this clause which change the intended operation of the clause. This clause appears to be based on clause 21.2(e) of Aurizon Network's 2010 'Operator Access Agreement Coal' and should be reformatted in the same way in order to achieve the intended operation of the clause.	Our final decision for the AASTD amends the formatting errors. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 26: Regarding clause 6.6(c) of the AASTD (Stamp Duty), the QRC noted there seems to be some overlap and inconsistency between clauses 6.6(b) and 6.6(c).	Our final decision for the AASTD removes clause 6.6(c), in order to remove the overlap with 6.6(b). We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 27: Regarding clause 6.7 of the AASTD (Survival), the QRC considered that clauses 3.4, 4.3, 6.2, 6.3, 6.5 and 6.9 should survive termination of the AASTD.	Our view is the draft decision AASTD is insufficiently clear regarding which clauses in the AASTD survive its termination. The QRC considered the following should survive - dispute (3.4), no prejudice as to right to damages (4.3), confidentiality (6.2), notices (6.3), GST (6.5) and applicable law (6.9). Clause 3.4 regarding disputes is no longer relevant, given our final decision proposal discussed at Item 13. Regarding the remaining clauses proposed by the QRC, our view is that the following should survive termination of the AASTD—clause 1 (which is the interpretation and definition clause), clause 4.3 (which relates to right to damages), clause 5 (which relates to measurement of damages, that is, limitation of liability) and clause 6 (which gives the operational basis for claiming damages following termination). We consider this addresses the concerns raised and provides greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 28: Regarding Schedule 1, Part 2 of the AASTD (Modification to terms of Access Agreement)—the QRC noted that Part 2 does not refer to the modification to the terms of a train operations agreement where Aurizon Network and the access seeker enter into an access holder access agreement. The QRC queried whether the reason for this omission is because it is assumed the train operations agreement will be an annexure to the access holder access agreement and will thereby be amended via amendments to the access holder access agreement.	We confirm this is the intent.
Item 29: Regarding Schedule 1, Part 2, Item 2 of the AASTD (Modification to terms of Access Agreement)—the QRC noted whether the default term of ten years for an access agreement is commercially acceptable requires further consideration.	We do not agree the default term requires further consideration. The default term reflects the used in the standard access agreement. Further, access holders have renewal rights.

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	The default term does not preclude parties negotiating an alternative arrangement. In order to ensure clarity and transparency in the AASTD in this regard, our final decision for the AASTD includes, at Item 3(a), Part 2, Schedule 1 of the AASTD, a drafting note explicitly stating an alternative time period can be agreed on a transaction-by-transaction basis. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of them main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 30: Regarding Schedule 1, Part 2, Item 4(b) of the AASTD (Modification to terms of Access Agreement)—the QRC noted the definition of 'Required Mine Specific Infrastructure' is critical to the definition of commitment date. Given the importance of this definition, the QRC considered the template document should allow the definition of 'Required Mine Specific Infrastructure' to identify the actual infrastructure more clearly.	We consider there is benefit in defining required mine specific infrastructure with greater clarity and transparency. Our final decision for Item 4(b) of the AASTD stipulates the required mine specific infrastructure be clearly differentiated from any other required infrastructure needed to connect the access seeker's mine to the CQCN. This seeks to provide clear delineation between the SUFA infrastructure (e.g. the CQCN expansion), the required mine specific infrastructure (e.g. the spur to reach the CQCN) and any other infrastructure required to connect this to the CQCN. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 31: Regarding Schedule 1, Part 2, Item 4(a)(iii) of the AASTD (Modification to terms of Access Agreement)—the QRC considered that in paragraph 4(a)(iii), the reference to 'any other enhancements (other than the Extension) required to Aurizon Network's Railway Network' is very broad and should be limited to specified enhancements relevant to the nominated access rights.	Item 4(a) relates to the commitment date, which is the date at which the access rights must be available to the access holder. This is the later of three dates, with Item 4(a)(iii) defining one of these dates. Specifically, Item 4(a)(iii) relates to the date at which Aurizon Network, acting reasonably, is satisfied the connecting infrastructure and any other enhancements needed to connect the required mine specific Infrastructure to the CQCN are completed. This does not relate to the actual SUFA infrastructure itself. Against this background, the QRC is of the view that only 'specified enhancements' relevant to the nominated access rights should apply to the definition of the Commitment Date, rather than the 'required enhancements' Aurizon Network, acting reasonably, considers appropriate. Our final decision is to maintain our draft decision AASTD in this particular context. Our view is there can be legitimate practical and safety related grounds why the date at which the 'required enhancements' Aurizon Network considers appropriate may differ from the 'specific enhancements' the QRC alludes to.

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	We consider our final decision in this regard appropriately balances the interest of an access seeker/holder, with Aurizon Network's legitimate business interests (ss. 138(2)(b), (e) and (h) of the QCA Act). It represents an objective test that meets the needs of operator of the CQCN (Aurizon Network), whilst accounting for the interest of the access seeker/holder. This is because the test only relates to additional 'required enhancements' associated with connecting the mine specific infrastructure to the CQCN, not enhancements in general. Further Aurizon Network is obliged to act reasonably in its considerations in this regard.
Item 32: Regarding Schedule 1, Part 2, Item 4(a)(iii) of the AASTD (Modification to terms of Access Agreement)—the QRC noted this item provides the commitment date for derivative access agreement will be the day following the date of the expiration or termination of the access agreement which the subsequent derivative access agreement is replacing. With respect to derivative access agreements that are entered into as a consequence of the transfer of the access rights under an access agreement, the QRC considered the reference to the termination of an access agreement which the subsequent derivative access agreement is replacing does not seem to work.	We consider our draft decision drafting in this regard insufficiently clear and transparent. Our final decision has amended this clause to explicitly state that any subsequent derivative access agreement entered into replaces an expired or terminated access agreement. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 33: Regarding Schedule 1, Part 2, Item 5 of the AASTD (Completion of matter prior to Commencement of train services)—the QRC noted that whether, on the basis of the usual matters the access holder is required to do before the commencement of train services, a three-month period is too far out from the commitment date and requires further consideration. The QRC notes that matters that are not likely to be done until much closer to the commitment date would potentially put the access agreement at risk of termination if the reference to 'three months' is retained requires further consideration.	We note the QRC's comment. However, in the absence of any proposal regarding precisely what period the QRC considers appropriate and why, our final decision proposal is not to make any amendments to the AASTD in this particular regard.
Item 34: Regarding Schedule 1, Part 2, Item 8 of the AASTD (Right of renewal)—the QRC noted that whether a period of not more than 36 months and not less than 12 months before expiration would be more appropriate (as per cl. 7.3(f) of the 2014 DAU) requires further consideration.	As noted in Chapter 2 regarding the legislative framework, the 2013 SUFA DAAU is being assessed under the 2010 AU, not the 2014 DAU. In light of this, we consider the drafting of the AASTD should reflect the 2010 AU, as this is the undertaking on foot. In light of this, our final decision maintains our draft decision AASTD in this regard. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act). We do, however, recognise that Aurizon Network may need to review the AASTD as part of it finalising the 2014 DAU.

Stakeholders' comments on the draft decision AASTD	*QCA response and final decision proposals*
Item 35: Regarding Schedule 1, Part 2, Item 8 of the AASTD (Right of renewal)—the QRC noted that whether Item 8(a)(i) should be the lesser of 10 years and the remaining life of the relevant mine (as per cl. 7.3(f) of the 2014 DAU) requires further consideration.	The QCA refers to its response in relation to Item 34.
Item 36: Regarding Schedule 1, Part 2, Item 8(f) of the AASTD (Right of renewal)—the QRC noted a renewal application must be for the existing mine which receives the benefit of the access rights or a replacement mine. This requirement deviates from the criteria specified in clause 7.3(b) of the 2014 DAU which allow the origin to be different, provided that the mainline paths are the same and the origin for the renewal application is located in the same track segment as the existing origin. The QRC queried why the requirements with respect to the origin are more onerous in the AASTD.	The QCA refers to its response in relation to Item 34**.**
Item 37: Regarding Schedule 1, Part 2, Item 8(f) of the AASTD (Right of renewal)—the QRC considered the restrictions on Aurizon Network entering into an access agreement for capacity that will become available as a result of the access agreement expiring (specified in cl. 7.3 of the 2014 DAU) should be included in the AASTD.	The QCA refers to its response in relation to Item 34.
Item 38: Regarding Schedule 1, Part 2, 8(g) of the AASTD (Right of renewal)—the QRC considered that where a capitalised term used in Item 8 (such as 'Access Agreement') is defined in the 2010 AU but also defined in the AASTD, the capitalised term should have the meaning given in the AASTD rather than the current access undertaking. The QRC requested clarification of this rule of interpretation.	Our final decision in this regard amends Schedule 1, Part 2, 8(g) of the AASTD to clarify this. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 39: Regarding Schedule 1, Part 2, Item 8(g) of the AASTD (Right of renewal)—the QRC considered that where a capitalised term used in Item 8 (such as 'Central Queensland Coal Region') is defined in the 2010 AU but is not defined in the current access undertaking (see 2014 DAU for example), the capitalised term should have the meaning given in the 2010AU. The QRC requested clarification of this rule of interpretation.	The QCA refers to its response in relation to Item 34.
Item 40: Regarding Schedule 1, Part 2, Item 9 of the AASTD (Obligation to pay 'Take or Pay' charges)—the QRC noted the access seeker's obligation to pay take-or-pay charges may commence if Aurizon Network is not satisfied that the connecting infrastructure and other enhancements have been completed by a certain date.	Our final decision regarding the definition of 'Required Mine Specific Infrastructure' and the reference to 'any other enhancement' have been discussed at Items 30 and 31 respectively. In light of this, we consider there are two additional concerns alluded to by the QRC comprising: • Liability for take-or-pay charges, connecting infrastructure and other enhancements

<table>
<tr><th>Stakeholders' comments on the draft decision AASTD</th><th>QCA response and final decision proposals</th></tr>
<tr><td>The QRC considers that the access seeker should not be liable to pay take-or-pay charges if the reason that the Connecting Infrastructure and other enhancements have not been completed is not due to the acts or omissions of the access seeker.

In addition, given the potentially significant liability for the access seeker, the QRC considers that the definition of 'Required Mine Specific Infrastructure' should be clarified (see Item 30) and the reference to 'any other enhancements' should also be clarified (see Item 31).

The QRC also noted in Item 7, the access seeker has no visibility on the amount of the charges, including the take-or-pay charges. The QRC considered that information in relation to the charges should be specified in the AASTD or another transaction document and referred to in the AASTD.</td><td>• Visibility of take-or-pay charges.

Liability for take-or-pay charges, connecting infrastructure and other enhancements

Our view is the extent to which take-or-pay charges will be incurred prior to the access rights being available is dependent on the date agreed at Item 9(a)(ii)(B) of Schedule 1, Part 2. We consider this date can either specify a calendar date, or the date at which a particular event occurs; neither is precluded.

In light of this, our view is it is open for the access holder to set this date at the date at which Aurizon Network, acting reasonably, is satisfied the connecting infrastructure and other required enhancements are complete. This date could also be adopted for Item 4(a)(ii) of Schedule 1, Part 2 in relation to the commitment date. We consider that if an access holder chooses the date in this manner, it is not liable for take-or-pay charges until it can use the access rights. Further, as Aurizon Network cannot gain any take-or-pay or access charges until the access holder can use the access rights, it has an incentive to complete the relevant work promptly but to the required standard.

Further, we note this does not preclude adopting an alternative date, on the basis the access holder is willing to accept the risks associated with it.

In light of this, our final decision in this regard is to maintain the draft decision AASTD. We consider this appropriately balances the interests of the access holder, with the legitimate interests of Aurizon Network (ss. 138(2)(b) and (h) of the QCA Act). This is because the provisions provide the access holder with the ability to manage its take-or-pay risk, whilst also ensuring the operator of the CQCN (Aurizon Network) has the appropriate incentive to ensure the connecting infrastructure and other required enhancements not only operate as required but are completed promptly.

Visibility of take-or-pay charges

Whilst we note the QRC's view that the draft decision AASTD provides no visibility of take-or-pay charges or other charges, and information regarding these charges should be specified in the AASTD (or another transaction document and referred to in the AASTD); we are not in agreement.

Our view is specifics regarding the methodological underpinning of take-or-pay charges are an issue for the undertaking. Further, under existing methodologies take-or-pay charges are dependent on the variability of actual-to-forecast volumes. Consequently, it is unclear how take-or-pay charges, which vary year-on-year, based on actual to forecast volume throughput, can be made visible in the AASTD or any SUFA transaction document.</td></tr>
</table>

Stakeholders' comments on the draft decision AASTD	*QCA response and final decision proposals*
	In light of this, our final decision in this regard is that specifics about take-or-pay methodologies and take-or-pay charges are an undertaking issue and should not be included in the SUFA transaction documents.
Item 41: Regarding Schedule 1, Part 2, Item 9(a)(iii) of the AASTD (Obligation to pay 'Take or Pay' charges)—the QRC considered that in Item 9(a)(iii) the reference to 'any other enhancements (other than the extension) required to Aurizon Network's Railway Network' is very broad and should be limited to specified enhancements relevant to the nominated access rights.	The QCA refers back to its response in relation to Item 31.
Item 42: Regarding Schedule 1, Part 2, Item 9(a)(ii)(B) of the AASTD (Obligation to pay 'Take or Pay' charges)—the QRC noted the access seeker should not be liable to pay take-or-pay charges before the earliest date the commitment date can occur. Therefore, the date specified in Item 9(a)(ii)(B) should not be earlier than the date specified in Item 4(a)(ii) and this requirement should be specified in Item 9(a)(ii)(B).	Our final decision in this regard is to include a drafting note at Item 9(a)(ii)(B) requiring this date be equivalent to that in Item 4(a)(ii), Part 2, Schedule 1 of the AASTD. We consider this lends greater transparency and clarity to the drafting within the AASTD, thereby meeting the interests of the main parties to the AASTD (Aurizon Network and the access seeker) (ss. 138(2)(b) and (e) of the QCA Act).
Item 43: Regarding Schedule 1, Part 2 (Modifications to terms of Access Agreement)—the QRC queried whether there will be any modifications to the following standard access agreement terms: • security • resumption of access rights • reduction of conditional access rights due to capacity shortfall • reduction of nominated monthly train services if maximum payload exceeded • access holder initiated increases to maximum payload • reduction of nominated monthly train services if nominal payload increased • relinquishment of access rights • transfer of access rights.	Our view is the SUFA template documents do not directly impact the standard access agreement. Our final decision, in this regard, is the terms and conditions of a standard access agreement are a matter for the undertaking. We do, however, note this does not preclude the parties to a SUFA transaction negotiating alternative terms.
Item 44: Regarding Schedule 1, Part 2 (Modifications to terms of Access Agreement)—the QRC noted whether there are any other terms of the standard access agreement the access seeker wishes to modify requires further consideration.	The QCA refers to its response in relation to Item 43.

APPENDIX B: EXTENSION PROJECT AGREEMENT (EPA)—OTHER STAKEHOLDER ISSUES

This appendix outlines various other stakeholder issues associated with the EPA and our final decision proposals.

Issue	*Stakeholders' comments on the draft decision EPA*	*QCA final decision proposal*
Reference to documents	Aurizon Network proposed inclusion of an additional clause in the EPA, explicitly specifying what a transaction document means before and on/after execution of that document.[349]	Our view is Aurizon Network's proposal creates, within the EPA, a clear delineation between what constitutes a SUFA pro forma transaction document and an actual executed User Funding Agreement (UFA) transaction document. Our final decision proposes to give effect to this proposal in clause 1.3 of the final decision EPA. We consider this lends greater transparency and clarity to the drafting within the EPA, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and preference unit holders (PUHs)) (ss. 138(2)(b), (e) and (h) of the QCA Act).
Aurizon Network's costs for obtaining private binding rulings (PBRs)	Aurizon Network proposed the costs it incurs in obtaining a PBR be paid by the trustee, within 10 business days upon receipt of invoice. Thereafter, if these costs are not included in the RAB, Aurizon Network must pay to the trustee the portion of the PBR costs excluded from the RAB, within 10 business days upon receipt of invoice.[350]	In principle, we consider Aurizon Network's proposal reasonable, given the stipulation Aurizon Network refunds any proportion of the PBR costs not included in the RAB back to the SUFA trustee. We are, however, of the view: • The provision is better placed in the Subscription and Unit Holders Deed (SUHD), given the SUHD deals with the flow of funds from PUHs in the initial phases of a SUFA transaction. • The drafting of the provision should clearly specify these costs represent part of a SUFA trust's capital costs, in order to ensure that, to the extent they are included in the RAB, they attract a rental stream. We consider the above appropriately balances the interests of the relevant access seekers and PUHs, with the legitimate business interests of Aurizon Network in the specific context of Aurizon Network's costs for obtaining PBRs (ss. 138(2)(b), (e) and (h) of the QCA Act). Our final decision proposes to give effect to this proposal in clause 18.2 of the final decision SUHD.

[349] Aurizon Network 2015o.
[350] Aurizon Network 2015o.

Issue	***Stakeholders' comments on the draft decision EPA***	***QCA final decision proposal***
Chief Executive officer dispute resolution	The QRC noted the operation of clause 5.2(b) of the Chief Executive Officer dispute resolution process depends on the parties complying with clause 5.2(a) and making the necessary referral. If any party fails to make the required referral, clause 5.2(b) cannot be triggered and the dispute resolution process will be at a standstill. In light of this, the QRC considered clause 5.2(b) be amended so the timeframe is counted from the date the dispute notice is given.[351]	We do not consider it appropriate that Chief Executive Officer dispute resolution is hindered because a party does not make the necessary referral. Our final decision proposal is to remedy this is by amending clause 5.2(a), to require that Chief Executive Officer resolution can be triggered by any person referred to in clause 5.1 of our final decision EPA. This ensures no relevant party can impair the use of this avenue for dispute resolution. Given this, we consider our final decision proposal appropriately balances the interests of access seekers and PUHs, with the legitimate business interests of Aurizon Network, in the specific context of the Chief Executive Officer dispute resolution provisions included in the EPA (ss. 138(2)(b), (e) and (h) of the QCA Act).
Expert determination	Regarding clause 5.3(g), relating to the provision of price-sensitive information for dispute resolution and the requirement for the expert to enter into a confidentiality agreement with respect to that information—the QRC considered the provisions should be reciprocal, rather than only applying to information provided by Aurizon Network. Further, the QRC considered where price-sensitive information informs an expert's resolution of a dispute, the access seeker should have the right to appoint its own expert (who is subject to a confidentiality agreement in favour of Aurizon Network), who can review the price-sensitive information in the context of the dispute (without disclosing such information to the access seeker), and make submissions to the expert on behalf of the access seeker (in accordance with the access seeker's instructions).[352]	Our view is the requirement for the expert to enter into a confidentiality agreement regarding the provision of price sensitive information should be extended to apply to all parties to the EPA; rather than only applying to Aurizon Network. Our final decision EPA proposal amends clause 5.3(g) to give this effect. In this specific context, we consider a symmetric obligation upon the expert appropriately balances the interests of access seekers and PUHs, with the legitimate business interests of Aurizon Network (ss. 1382(b), (e) and (h) of the QCA Act). In contrast, we do not consider it appropriate that an access seeker should have the right to appoint its own expert to confidentially review price sensitive information, in the context of the dispute; and on the access seeker's behalf. Our view is it is unclear what benefit there is to adopting this additional step, given the provisions already proposed for the expert determination process. Our final decision proposal for the expert determination process in the EPA is that, with the exception of the proposed amendment to clause 5.3(g) outlined above, no further amendments be made to the draft decision EPA in this regard.

[351] QRC 2015: 42.
[352] QRC 2015: 43.

Issue	*Stakeholders' comments on the draft decision EPA*	*QCA final decision proposal*
Costs	With respect to the provisions in clause 5.6(a) regarding costs of a Dispute, the QRC considered the expert should be given a right to make an alternative determination in relation to how the parties will bear the costs of the expert in respect of the dispute where, for example, the dispute has been pursued vexatiously; or otherwise without any reasonable foundation.[353]	Our view is allowing the expert to decide how the parties to a dispute will bear the costs of its services, may, to an extent, encourage the parties to ensure they only use expert determination dispute resolution when they have reasonable foundation. In light of this, our final decision proposal is to amend clause 5.6(a) of the draft decision EPA to allow the expert such discretion. We consider that, in this specific context and for the reasons outlined above, this appropriately balances the interests of access seekers and PUHs, with the legitimate business interests of Aurizon Network (ss. 138(2)(b), (e) and (h) of the QCA Act).
Determination by court	In relation to recourse to court action, the QRC queried whether it is intended the expert determination process, where it is required under a transaction document, is a condition precedent to litigation. If this was the case, the QRC considered this needs clarification in the drafting.[354]	Clause 5.7(a) of the draft decision EPA states that: *If any Dispute under a Transaction Document is not otherwise resolved in accordance with this clause 5, then the Dispute may be referred by any party to the relevant Transaction Document to one of the courts of the State having jurisdiction, and sitting in Brisbane.* We consider this clearly indicates a party to the EPA can only refer to the relevant courts once is it not possible to resolve a dispute under clause 5 of the EPA. Our final decision proposal in this regard is not to clarify the drafting. We consider the drafting transparent, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).
Time bar	In relation to the time bar of 12 months for giving a dispute notice, the QRC considered the period of time for the time bar should commence on the date the party becomes aware of the liability. The QRC stated this is relevant where the full extent of the liability arising from an event or circumstance is not known, until more than 12 months after the party becomes aware the event	Our view is, in this specific context, the time bar for giving a dispute notice should be extended. We agree it necessary to account for the fact the full extent of the impact of certain events/circumstances may legitimately take longer than 12 calendar months to become fully apparent. We do not consider it in the interests of any party to the EPA for the time bar to be unduly constraining (ss. 138(2)(b), (e) and (h) of the QCA Act). If it is, it may encourage parties to unnecessarily raise disputes, in order to meet the time bar; whilst having limited knowledge of the impact of the

[353] QRC 2015: 43.
[354] QRC 2015: 43.

Issue	***Stakeholders' comments on the draft decision EPA***	***QCA final decision proposal***
	or circumstance has occurred; for example, an environmental incident. The QRC also noted audits are allowed to be carried out not more than once a year, so the time bar of 12 months creates a risk that claims will be extinguished before the audit determines the full extent of the relevant issue. In light of this, the QRC noted that whether the period of 12 months is acceptable requires further consideration. The QRC considered there should also be an acknowledgement the time bar does not, in any way, limit Aurizon Network's liability under the access undertaking or under an access agreement.[355]	event/circumstance being disputed. This may increase the likelihood of disputes being unfounded. Against this background, our final decision proposal is to amend clause 5.9 of the draft decision EPA so the time bar for disputes is within 36 calendar months after the date the party becomes aware of the occurrence of the event or circumstances giving rise to the dispute. We consider this in the interests of all parties to the EPA, as it provides a pragmatic timeframe within which the impact of certain events/circumstances can be ascertained (ss. 138(2)(b), (e) and (h) of the QCA Act). In relation to including an explicit acknowledgement that the time bar does not, in any way, limit Aurizon Network's liability under the access undertaking or an access agreement, our view is, in this specific context, such an acknowledgement is appropriate as the time bar is intended to apply only to disputes under the SUFA documents. We consider this in the interests of all parties to the EPA, as it provides clarity to the intent of the drafting (ss. 138(2)(b), (e) and (h) of the QCA Act).
Trustee and Preference Unit Holder risk acknowledgement	Clause 8(b) requires the trustee and PUHs to agree and acknowledge that Aurizon Network will not be liable to the trustee and PUHs if the quantum of rent is less than might otherwise be expected, as a consequence of various factors. The QRC queried why Aurizon Network is not liable to the extent the reduction in rent is due to circumstances within Aurizon Network's control.[356]	We consider the QRC's concern is suitably mitigated within the SUFA framework. Our view is, having regard to the matters outlined in 138(2)(b) of the QCA Act and to the extent practicable, safeguards have been put in place through the operation of the direction-to-pay mechanism, security arrangements and set-off provisions, to ensure monthly rental streams are as certain and accurate as possible, and that volatility is minimised. These measures are considered further in this final decision in Chapters 5 and 8, regarding SUFA rental streams, security and financeability.
Confidentiality	Clause 9.2(c) of the draft decision EPA relates to the disclosure of confidential information to the employees, professional advisors (including legal advisors) and consultants of the recipient of that information. Clause 9.2(f) relates to the disclosure of confidential information to the recipient's (or their related body corporate thereof) bank or other financial institution (including its professional advisors and any security trustee or agent for it) in connection with and	Our view is, in this specific context, the confidentiality obligations should extend to the people referred to in the QRC's submission, as it provides certainty that confidential information disclosed to them will be subject to confidentiality obligations. time bar for giving a dispute notice should be extended. We consider this in the interests of all parties to the EPA for the reasons given (ss. 138(2)(b), (e) and (h) of the QCA Act). In relation to your response to the QRC's comment regarding 9.2(m)(ii), we consider that such notification is not required, as the recipient of the

[355] QRC 2015: 43–44.
[356] QRC 2015: 46.

Issue	***Stakeholders' comments on the draft decision EPA***	***QCA final decision proposal***
	for the purpose of arranging loans and other financial accommodation for the recipient (or their related body corporate thereof). In both cases the QRC considered the people referred to in these clauses should be under a duty of confidentiality to the recipient. In relation to disclosure of confidential information to another Party not listed in clause 9 but reasonably required for the purposes of a transaction document (cl. 9.2(m)(ii)). The QRC queried whether, prior to disclosure of confidential information, which the recipient determines is 'reasonably required for the purposes of the Transaction Document', the recipient should be required to notify the disclosing party of the proposed disclosure.[357]	confidential information will be subject to the confidentiality obligations detailed in the clause 9.2 of the EPA. We consider the drafting is sufficient, thereby and meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).
Survival	In relation to clauses that survive the termination of the EPA, the QRC queried whether clauses 7 (Limitation of liability), 9 (Confidentiality), 10 (GST), 12 (Notices) and 19 (Applicable Law) should survive termination.[358]	Our final decision for the EPA in this specific context is the following clauses should survive termination of the EPA: 1 (Agreed Terms), 5 (Disputes), 7 (Limitation of Liability), 9 (Confidentiality), 10 (GST), 12 Notices, 15 (General), 16 (Counterparts), 18 (Stamp Duty) and 19 (Applicable Law). We consider this addresses the concerns raised and provides greater transparency and clarity to the drafting within the EPA, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).
Appended transaction documents	Aurizon Network proposed the Trust Deed (TD) and Subscription and Unit Holders Deed (SUHD) should not be appended to the EPA and the Financing Side Deed (FSD) be appended.[359]	Our final decision for the EPA in this specific context is the following SUFA documents should be appended to the EPA—AASTD, construction agreement, EISL, RCA, EIHL, IND, SSA and FSD. As the TD and UHD are executed prior to the EPA and other SUFA transaction documents, they do not need to be appended to the EPA. We consider this addresses the concerns raised and provides greater transparency and clarity to the drafting within the EPA, thereby meeting the interests of the main parties to the EPA (Aurizon Network, the relevant access seekers and PUHs) (ss. 138(2)(b), (e) and (h) of the QCA Act).

[357] QRC 2015: 46.
[358] QRC 2015: 46.
[359] Aurizon Network 2015o.

APPENDIX C: LIABILITY FRAMEWORK

The following table provides the details of our final decision proposals regarding liability, as it relates to the parties of a SUFA transaction. In drafting the SUFA agreements, we have undertaken to allocate risk to parties best able to manage that risk, and, thereby, balance the associated risks and liabilities amongst the parties. Our view is as follows:

- The party that controls the risk should generally carry the risk. It is not appropriate to limit liability to $1.00 where the risk is wholly within the party's capability to manage its exposure (whether that is by performing the obligations or backing off the risk to other parties, such as contractors).
- During construction:
  - Aurizon Network is compensated for the risk it will carry under the construction agreement, through its contract sum for the works under the construction agreement. Aurizon Network's maximum liability should be limited to the contract sum in the construction phase.[360]
  - The SUFA trustee is relatively passive so, provided it complies with the construction agreement, it is unlikely to cause harm to Aurizon Network. However, to the extent it does, it should be liable to Aurizon Network for Aurizon Network's loss.
- After construction:
  - The risk to Aurizon Network is no different to the risk it bears on the rest of the CQCN. It is compensated for that risk through the operation and maintenance element of access charges.
  - The opportunity for the SUFA trustee to cause Aurizon Network harm is remote. Harm to Aurizon Network could arise as a result of the termination of the Infrastructure Lease or tax costs.
- Aurizon Network should bear all risk associated with the land (extending to the state of the land at the commencement of the RCA and including risk arising because of the SUFA trustee's actions, where the SUFA trustee complied with the RCA terms) but, as the SUFA trustee can ensure it does not breach its obligations under the RCA, the SUFA trustee should be responsible for Aurizon Network's loss arising out of the SUFA trustee's breach of the RCA.
- Except for loss arising from personal property damage and personal injury including that of third parties (being parties outside of the contract to which the relevant limitation applies) and other specific exceptions, no party should be liable for the consequential loss (such as loss of coal, loss of profits or loss of business opportunities) of another party, unless it arose as a consequence of certain acts (for instance wilful default).

[360] As detailed in section 7.7.

- Consequential loss should be defined with particularity and not with reference to undefined terms such as 'special, indirect or consequential loss'. In our view, the interaction between the definition of Consequential Loss (under Aurizon Network's 2013 SUFA DAAU) and Claim meant that it would be nearly impossible to determine any loss that was recoverable.
- QTH, the State of Queensland, any secured party of a SUFA trustee and any facility agent are not liable for consequential loss in any circumstance.
- To avoid unnecessary dispute, the pro forma SUFA documents should feature a consistent treatment of loss and liability, with any points of difference to be contained in the relevant documents.
- As is common for trustees (whether professional or otherwise), the SUFA trustee's liability should be limited to the assets of the trust.

Summary of liability regime

Party	***Activity***	***Draft decision position***	***Final decision position***
Construction and ordinary course activities			
Aurizon Network	• Construction • Terms and conditions for entry to construction site	Aurizon Network should carry risk associated with construction or ordinary course activities. Aurizon Network is likely to be compensated for the risk it will carry through the construction agreement.	Aurizon Network is to bear the risk of construction or ordinary course activities. Aurizon Network will be compensated for the risk it will bear through the contract sum under the construction agreement.
Trustee	Breaches of the RCA	The SUFA trustee is relatively passive, so it is unlikely it will cause damage. However, to the extent it does, it should be liable for direct damage. The SUFA trustee can control negligence or wilful acts or omissions in breach of the RCA and, as such, should carry the risk of default.	The SUFA trustee can ensure that it does not breach its obligations under the RCA and should be responsible for Aurizon Network's loss arising out of the SUFA trustee's breach of the RCA.
After construction			
Aurizon Network	Ordinary course activities	The risk Aurizon Network carries after construction is no different to risk it carries on the rest of its network. It is compensated for that risk through the operation and maintenance charges.	The risk Aurizon Network bears after construction is no different to the risk it carries on the rest of the CQCN. It is compensated for that risk through the operation and maintenance element of access charges.
Trustee	Causing damage	The opportunity for the SUFA trustee to cause damage is remote. Damage that could arise includes: termination of the Infrastructure Lease, and tax.	The opportunity for the SUFA trustee to cause Aurizon Network harm is remote. Harm to Aurizon Network could arise as a result of the termination of the Infrastructure Lease (discussed below) or tax costs (discussed below).

Party	***Activity***	***Draft decision position***	***Final decision position***
Breach or termination of lease agreements			
Aurizon Network	Actions in respect of the QTH Infrastructure Lease	Liability is not capped.	Under the EISL, Aurizon Network covenants to comply with its obligations under the Infrastructure Lease. The SUFA trustee may claim that Aurizon Network wilfully defaulted in respect of that obligation if the Infrastructure Lease is terminated as a consequence of Aurizon Network's breach of that lease. In such case, the exception to the limitation on consequential loss may apply, opening Aurizon Network to a claim for consequential loss (as well as non-consequential loss) by the SUFA trustee.
Trustee	Actions in respect of the QTH Infrastructure Lease	Liability is limited by the following: • It knowingly breaches the QTH Infrastructure Lease. • Compensation amount is limited to the amount it receives from QTH as a result of the sale of the CQCN. • It has no liability if it is doing something it is required to do under another document. • It is liable only to the extent it contributed to the damages / termination. • Liability is capped at the trust's assets.	Only Aurizon Network is required to comply with the obligations of the Infrastructure Lease. Under the EIHL, Aurizon Network indemnifies QTH in respect of the SUFA. Under the EISL, the SUFA trustee counter indemnifies Aurizon Network in respect of actions or omissions of the SUFA trustee, for which QTH calls on Aurizon Network's indemnity to QTH under the EIHL. The SUFA trustee's liability is capped at the assets of the trust.
Trustee/Aurizon Network	Breach of the EISL or the EIHL (Infrastructure Lease remains)	The party that caused the breach must pay a detriment amount to the other party, except in the following instances: • If no party is at fault, neither party receives a detriment amount. • If the breach is caused by Aurizon Network not taking action, the SUFA trustee is not liable, and Aurizon Network is liable for the detriment amount.	The party that caused the breach must pay a detriment amount to the other party, except in the following instances: • If no party is at fault, neither party receives a detriment amount. • If the breach is caused by Aurizon Network not taking action, the SUFA trustee is not liable, and Aurizon Network is liable for the detriment amount.
SUFA cause or impact on another SUFA			
Trustee/Aurizon Network	Actions of other SUFAs—for example, the SUFA trustee is penalised if another SUFA brings down the transaction	Neither party is liable to the other.	Neither party is liable to the other.

Party	Activity	Draft decision position	Final decision position
Trustee	Liable for consequential loss where suffered by Aurizon Network where those actions have impacted another SUFA	• Consequential loss is limited to damage to people and property and does not extend to loss, profits or the deal. • Liability for consequential losses only arises where the terms of the other SUFA are on the same terms (in respect of liability for people and property) as the standard SUFA.	• Recoverable consequential loss is limited to mitigation costs, personal property damage and personal injury (including that of third parties), liquidated damages, fines and penalties, and, in the case of the construction agreement, the break fee. Other consequential losses (such as loss of coal, loss of profits or loss of deal) may be claimed if the loss was as a consequence of certain acts (for instance wilful default). • Unless loss is a third party loss or falls within the exception to the non-recoverability of consequential losses, the SUFA trustee will not be liable for the losses of other SUFAs.
Limitation of liability			
Aurizon Network	Capacity	Aurizon Network will not have any liability to the SUFA trustee or the unit holder in respect of the capacity created by the extension, except for any liability it may have under the access undertaking or under an access agreement.	Aurizon Network will be liable to the SUFA trustee for failing to deliver the agreed capacity under the construction agreement, through net liquidated damages.
Consequential loss			
Trustee/Aurizon Network	Consequential loss	No party will bear consequential loss of an economic nature (such as loss of coal, loss of profit, and loss of deal), aside from consequential loss arising from third party claims in respect of damage to people or property.	Unless the loss was as a consequence of certain acts (for instance wilful default), no party is liable for consequential loss of an economic nature (such as loss of coal, loss of profits or loss of business opportunities), aside from consequential loss arising from mitigation costs, personal property damage and personal injury (including that of third parties), liquidated damages, fines and penalties, and, in the case of the construction agreement, the break fee.
Environment and land issues			
Aurizon Network	Any activity concerning the extension land	Aurizon Network carries all risk for matters related to land, except where the SUFA trustee fails to comply with the RCA (cl. 3.5(a)), has wilfully defaulted, is grossly negligent or is acting in bad faith.	Aurizon Network carries all risk for matters related to land, except where, and to the extent that, the SUFA trustee (or any associate) fails to comply with the RCA (cl. 3.5(a)), or the loss arose as a consequence of an act or omission of the SUFA trustee (or its related parties), other than as a result of the design, construction and commissioning of the extension infrastructure or the use of the extension infrastructure permitted by the EISL.

Party	*Activity*	*Draft decision position*	*Final decision position*
Optimisation risk			
Trustee	Inclusion of capital costs and construction interest on capital costs into the RAB	The SUFA trustee bears all the risk of optimisation of capital costs and construction interest on capital costs with respect to inclusion into the RAB. However, in making the application to the QCA for their inclusion into the RAB, Aurizon Network is to act, amongst other obligations, in the best interests of the trust.	The SUFA trustee bears all the risk of optimisation of capital costs and construction interest on capital costs with respect to inclusion into the RAB. However, in making the application to the QCA for their inclusion into the RAB, Aurizon Network is to act, amongst other obligations, in the best interests of the trust.
Tax			
Trustee	Activities under a SUFA	The SUFA trustee indemnifies Aurizon Network for residual tax risks, subject to the dispute mechanism.	The SUFA trustee indemnifies Aurizon Network for residual tax risks, subject to the dispute mechanism.

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