

# Aurizon Network Submission 2017 Standard User Funding Agreement (SUFA) Draft Amending Access Undertaking

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# 1. Introduction and Executive Summary

The availability of a workable Standard User Funding Agreement (SUFA) framework is a priority for Aurizon Network and its coal supply chain partners as it allows for parties other than Aurizon Network to be able to fund expansion based projects within the Central Queensland Coal Network (CQCN).

The SUFA framework represents an alternative approach to funding the expansion and growth of the CQCN and will provide additional choice of project funding sources for access seekers. The development and subsequent regulatory approval of an effective SUFA framework is of importance to both the Queensland coal industry and Aurizon Network, as that template will enable Access Seekers and/or third party financiers to invest in the expansion of the CQCN.

The development of the SUFA model commenced during UT3 with Aurizon Network's submission of an initial SUFA Draft Amending Access Undertaking (DAAU) in December 2010.

The development of SUFA involved extensive engagement with:

- > coal industry representatives;
- > the Queensland Resources Council (QRC), through a QRC working Group;
- > Access Holders; and
- > the QCA.

This engagement process resulted in agreed positions being reached with stakeholders, and Aurizon Network subsequently withdrew the SUFA DAAU and re-submitted a SUFA DAAU in July 2013 that reflected these agreed positions. Further engagement occurred after this re-submission and the QCA issued:

- > Position Papers - June 2014 and April 2016
- > Draft Decision – October 2014; and
- > Final Decision - June 2016

This submission is a voluntary DAAU under section 142 of the QCA Act, and satisfies Aurizon Network's obligation under clause 8.8.3(a) of the 2016 Access Undertaking (UT4). Accordingly this UT4 SUFA DAAU provides a:

- > proposed SUFA that is based on the SUFA developed and submitted to the QCA for approval under UT3 and taking into account the QCA's Final Decision in respect of that document; and
- > DAAU incorporating amendments to UT4 that Aurizon Network considers reasonably necessary.

This submission reflects the learnings from the substantial engagement process undertaken during UT3. It takes the UT3 SUFA FD into account and accepts the majority of the QCA's policy positions including:

- > the trust based structure;
- > Aurizon Network's roles as the trust's construction contractor;
- > an umbrella structure of documentation with the Expansion Project Agreement being the overarching agreement;
- > the funding party need not be the party that obtains access rights; and
- > unrestricted preference unit trading.

This UT4 SUFA DAAU adopts those agreed positions, and also includes other positions that differ from those in the UT3 SUFA FD. Aurizon Network adopted these different positions in order to:

- > align SUFA with the provisions of UT4 (whereas the QCA decision was aligned with UT3);
- > improve the workability of the SUFA framework; or
- > address certain positions in the UT3 SUFA FD that Aurizon Network is not prepared to volunteer and that would be beyond the power of the QCA to require.

Aurizon Network considers that this submission sets out a workable user funding structure that will provide a new funding option for a CQCN Expansion.

This UT4 SUFA DAAU is submitted for approval by the QCA. In this regard, Aurizon Network notes that:

- > to the extent that the SUFA template documents match the positions in the corresponding documents in the UT3 SUFA FD, the QCA has already considered those positions in its previous decisions;
- > where differences from the SUFA decision are proposed to effect alignment with UT4, those differences are necessary as SUFA is required to be aligned with UT4; and
- > where differences from the SUFA decision are proposed to improve workability, the template agreements are better than those included in the UT3 SUFA FD.

This UT4 SUFA DAAU also proposes differences from the SUFA decision to address positions that Aurizon Network is not prepared to volunteer and are beyond the power of the QCA to require.

After taking into account all of these matters, Aurizon Network considers that this UT4 SUFA DAAU is appropriate for the purpose of section 143 of the QCA Act.

As discussed above, the earlier development of SUFA involved detailed engagement with stakeholders. These stakeholders and Aurizon Network have been heavily involved in consultation on the recent UT5 submission. This has not allowed time for consultation on this submission in advance of lodgement. Aurizon Network is committed to a post lodgement engagement program with stakeholders, including the QCA. Aurizon Network will also work with stakeholders to resolve any competing priorities between this submission and other regulatory matters, particularly UT5.

This submission is structured as follows:

- > Executive Summary (Section 1);
- > Legislative Framework (Section 2);
- > a SUFA overview, including a discussion of the key differences from the QCA decision (Section 3);
- > a table of other differences from the QCA decision (Schedule 1);
- > the proposed UT4 drafting changes to implement SUFA (Schedule 2); and
- > a set of SUFA template documents in clean and mark-up against the QCA decision versions (Schedule 3).

Aurizon Network will issue to the QCA by the end of January 2017 a table that explains briefly each difference between the drafting in this set of SUFA template documents and the drafting in the QCA decision versions of those documents. Upon request from any stakeholder, Aurizon Network will provide it with a copy of this table after its issue to the QCA.

## 2. Legislative Framework

Under section 143, the QCA may approve a Draft Amending Access Undertaking (**DAAU**) only if the QCA considers it “*appropriate to do so having regard to*” the factors listed in sections 138(2)(a) to (h) of the QCA Act (**Section 138(2) Factors**).

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

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

In this connection, the QCA does not have a power to refuse to approve a DAAU that it considers appropriate having regard to the Section 138(2) Factors because it may prefer a different DAAU that it considers is also appropriate having regard to the Section 138(2) Factors. This is because the QCA Act does not provide the QCA with a discretion to withhold approval of a DAAU that is appropriate on the basis that the QCA considers that there is a putative DAAU that the QCA considers is more appropriate.<sup>2</sup> Put another way, the question is whether the DAAU is appropriate – not what access undertaking would be more appropriate, or most appropriate – having regard to each of the Section 138(2) Factors.<sup>3</sup>

The correct application of this test is particularly important in the context of this UT4 SUFA DAAU, which seeks to put into place a standard-form “safe harbour” framework for expansion projects that will vary in scope and nature. There is no single appropriate approach to transaction documentation for such projects, let alone to standard-form documents intended to operate as a “safe harbour” framework. Aurizon Network has worked with the QCA and other stakeholders over some years to develop template SUFA documents that are appropriate, having regard to each of the Section 138(2) Factors.

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

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

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

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

The overarching result is that this UT4 SUFA DAAU provides a suite of SUFA template documents that, if implemented for a SUFA Expansion, would bind Aurizon Network to obligations that could not be imposed on it by the QCA in the context of either a compulsory DAU or DAAU process, or an access determination.

In Aurizon Network's view the QCA should consider that this UT4 SUFA DAAU is appropriate in respect of the Section 138(2) Factors and therefore must approve this UT4 SUFA DAAU.

## 3. SUFA Overview

### 3.1 Background to SUFA

The SUFA framework represents an innovative approach to funding a CQCN Expansion, and will provide Access Seekers with an additional project funding option. The development and subsequent regulatory approval of a workable, bankable and credible SUFA template is of critical importance to both the Queensland coal industry and Aurizon Network, as that template will enable Access Seekers and/or third party financiers to invest in the expansion of the CQCN.

Aurizon Network is aligned with the QCA's goal of developing a framework that allows multiple funding options for, and a range of potential funders of, a CQCN expansion project on a cost effective basis.

Aurizon Network commenced development of SUFA in 2010. SUFA's development has continued until its most recent milestone - the QCA's release of the UT3 SUFA FD on 14 June 2016. Stakeholders have actively engaged in this development process both through the QCA's regulatory process and directly with Aurizon Network.

UT4 provides an obligation<sup>4</sup> for Aurizon Network to submit, within 3 months of UT4's approval,

- > a proposed SUFA that is based on the SUFA developed and submitted to the QCA for approval under UT3 and taking into account the QCA's decision in respect of that document, and
- > a draft amending access undertaking incorporating amendments to UT4 that Aurizon Network considers reasonably necessary

This UT4 SUFA DAAU fulfils that obligation.

### 3.2 Structure of SUFA

SUFA is a template transaction that is comprised of 12 inter-related legal documents, which cover all aspects of the construction, funding and operation of a SUFA Expansion. A list of those legal documents is set out in Schedule 3.

Under the SUFA model the schedules of these template documents are intended to be negotiated to address project specific issues as part of the Expansion Process. This negotiation process is expected to occur during the conduct of the feasibility study for the applicable proposed Expansion and thereafter. The feasibility study deliverables are required to enable the finalisation of the negotiation of the schedules of the template documents.

Should one or more SUFA Expansions occur, Aurizon Network will continue to:

- > have a lease interest (or other property right) in;
- > operate; and
- > provide access for

all of the CQCN, including the assets delivered by each SUFA Expansion. The SUFA model provides an effective mechanism for parties other than Aurizon Network to provide funding for an Expansion and earn appropriate returns for providing that funding.

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<sup>4</sup> Clause 8.8.3(a) of UT4

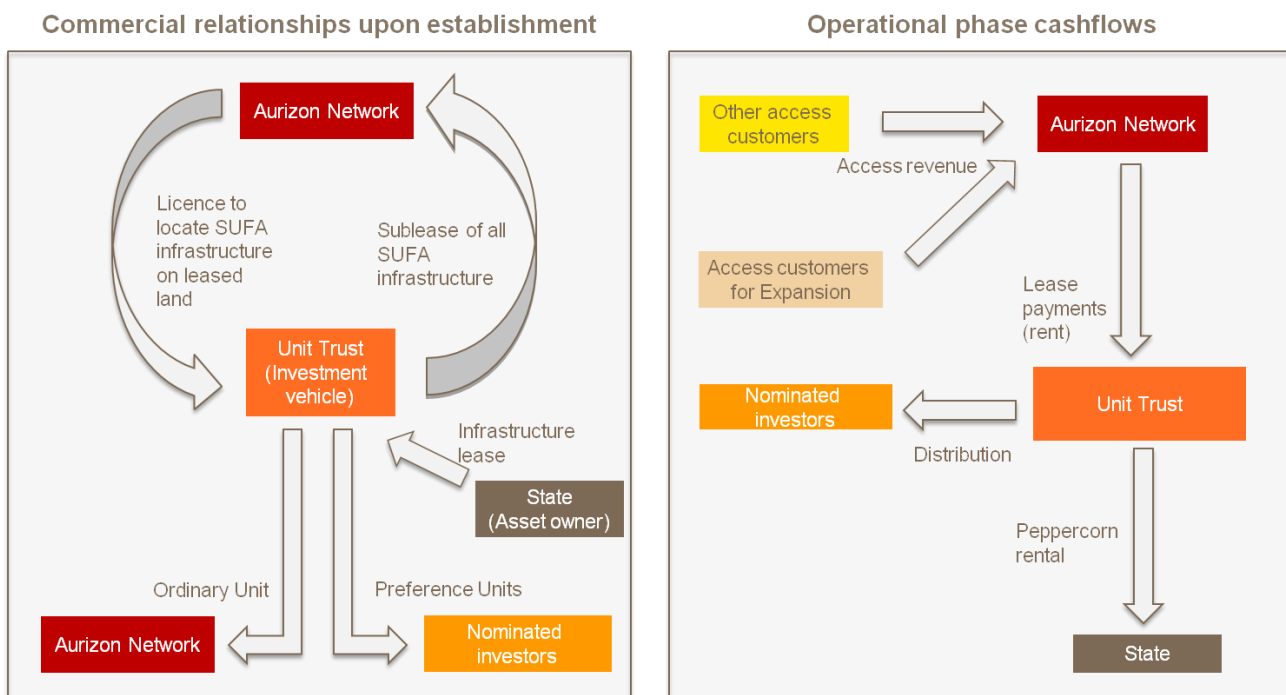
The SUFA Expansion lifecycle is summarised in figure 1 below. It provides an explanation of the SUFA model during the lifespan of SUFA-funded assets.

**Figure 1 – SUFA Expansion Lifecycle**

Stage	Activity
Pre-construction	<ul style="list-style-type: none"> <li>&gt; Aurizon Network establishes unit trust &amp; independent trustee appointed</li> <li>&gt; Virtually all of the trust’s equity is in the form of preference units (PUs), which are owned by Access Seekers or their nominated investors</li> <li>&gt; Aurizon Network owns one ordinary unit of nominal value, which grants certain negative control rights and rights upon termination</li> </ul>
Construction	<ul style="list-style-type: none"> <li>&gt; Capital received from investors as subscriptions for PUs</li> <li>&gt; Trust (as principal) engages Aurizon Network as construction contractor and uses the subscription funding to pay for the Expansion’s works</li> <li>&gt; Construction contract will be on a commercial basis and will be priced in accordance with applicable construction industry norms for comparable contracts</li> </ul>
Operation	<ul style="list-style-type: none"> <li>&gt; Trust transfers constructed infrastructure to the State infrastructure lessor, leases it back and then sub-leases it to Aurizon Network</li> <li>&gt; Aurizon Network receives revenue from all system users under access agreements</li> <li>&gt; Aurizon Network pays rent (as lease rental) to trust in the amount of the capital component of Aurizon Network’s access revenue that relates to the Expansion</li> <li>&gt; This capital component is not fixed and will depend on Aurizon Network’s regulatory regime</li> </ul>
End of life (~50 years)	<ul style="list-style-type: none"> <li>&gt; Trust assets have no Regulated Asset Base (RAB) value at this point and therefore earn no regulatory return</li> <li>&gt; All PUs will be mandatorily redeemed for nil consideration plus an amount equal to any residual cash balance in the trust</li> </ul>

The SUFA investors hold preference units in a trust that is entitled to receive a rental payment stream from Aurizon Network. The operational phase commercial relationships and cash flows are as summarised in figure 2 below.

**Figure 2 – SUFA Relationships and Cashflows**





### 3.3 Comparison with the UT3 SUFA Final Decision

This UT4 SUFA DAAU fulfils the UT4 process obligation to submit a SUFA DAAU, as stated in Section 3.1 above.

This UT4 SUFA DAAU incorporates most of the policy positions proposed in QCA's various decisions on SUFA. This section 3.3 discusses the key issues on which Aurizon Network has adopted a policy position that is different from the policy position proposed by the QCA. For each of these issues, the discussion

- > sets out the issue;
- > provides an overview of Aurizon Network's policy position;
- > describes the SUFA decision treatment;
- > provides Aurizon Network's assessment of the SUFA decision treatment; and
- > sets out the treatment in this UT4 SUFA DAAU.

In the light of the involvement of stakeholders in earlier SUFA regulatory and stakeholder engagement processes, this Section 3.3 is intended to provide a convenient and concise overview of the substantive policy issues.

This UT4 SUFA DAAU is in a suitable form for approval by the QCA as:

- > to the extent that the SUFA template documents match the positions in the corresponding documents in the QCA decision, they should be approved by the QCA without further policy consideration;
- > where differences from the SUFA decision are proposed to effect alignment with UT4, they should be approved by the QCA as SUFA is required to be aligned with UT4;
- > where differences from the SUFA decision are proposed to improve workability, the template agreements have improved upon the QCA decision and they should be approved by the QCA; and
- > where differences from the SUFA decision are proposed to address matters that Aurizon Network is not prepared to volunteer and are beyond the power of the QCA to require, the QCA should approve them as it cannot require Aurizon Network to adopt the positions in the SUFA decision.

### 3.3.1 Capacity Warranty

#### Issue

Whether Aurizon Network provides a capacity warranty in respect of and under the contractual provisions of each SUFA transaction.

#### Overview of Aurizon Network's policy position

This UT4 SUFA DAAU does not feature, whether in the SUFA template documentation or in the changes to UT4 to give effect to SUFA, a capacity warranty by Aurizon Network. However the existing capacity shortfall provisions of UT4 would continue to apply in respect of any Expansion.

#### SUFA Decision Treatment

The SUFA decision contemplated that Aurizon Network would provide a capacity warranty as part of its general warranties under the Construction Agreement. More specifically, the SUFA decision contemplated that Aurizon Network would warrant<sup>5</sup> that the Construction Agreement works, when completed, would be

- fit for their stated purpose and
- comply with all requirements of the Construction Agreement

without an exclusion in respect of capacity outcomes, as was previously proposed by Aurizon Network.<sup>6</sup>

Should Aurizon Network's capacity assessment, which is conducted shortly after the delivery of the SUFA infrastructure, determine that the contracted capacity has not been fully delivered, then the SUFA decision contemplated that Aurizon Network would have

- (i) the obligation to make liquidated damages payments to the trustee
  - a. in respect of,
  - b. to the extent of, and
  - c. for the duration ofthe shortfall, after taking into action any rectification arising under items (ii) and/or (iii) below,
- (ii) if the shortfall exceeds a transaction specific threshold, the obligation to rectify the shortfall to the extent of that excess, and
- (iii) the right to rectify all or part of that part of the shortfall that does not exceed this threshold, which would reduce the liquidated damages payments due under item (i) above.

The SUFA decision also contemplated that the liquidated damages payment obligation would be subject to a transaction specific cap, and the liquidated damages rate would also be specific to the transaction.<sup>7</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

Aurizon Network considers that the SUFA template should not include a capacity warranty on four separate grounds, each of which is sufficient on its own is adequate to justify the non-inclusion of that warranty. They are addressed in turn below.

#### UT4 already addresses capacity shortfalls

UT4 already provides that Aurizon Network has a capacity shortfall rectification obligation that applies to all Expansions, including SUFA Expansions. It would be entirely inappropriate to have two overlapping and different capacity shortfall rectification obligations, one under an Access Undertaking and the other under SUFA transaction documentation, to apply in respect of a capacity shortfall for a SUFA Expansion. Furthermore, the transfer of capacity shortfall risk to the construction contractor under the SUFA model would unfairly favour the SUFA project funding

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<sup>5</sup> Clause 2.2 of the form of the CA that was part of the UT3 SUFA FD

<sup>6</sup> Clause 2.2(b) of the form of the CA that was part of Aurizon Network's submission in response to the UT3 SUFA DD

<sup>7</sup> Clause 25 of the form of the CA that was part of the UT3 SUFA FD

model over the Aurizon Network-funded project funding model at the point when Access Seekers are selecting their project funding model under the Expansion Process.

Any capacity shortfall should be addressed solely under the applicable Access Undertaking, and should be treated without regard to the identity of the funder of the applicable Expansion.

### A mandatory capacity warranty is against the interests of Access Seekers and Aurizon Network

As part of the Expansion Process Aurizon Network will advise Access Seekers for a proposed expansion about the trade-off (the 'Scope/Certainty Trade-Off') between

- (i) a lean project scope that minimises capital cost and therefore the consequential access charge for the Access Seekers, and provides a lesser degree of certainty that there will be no capacity shortfall, and
- (ii) an ample project scope that has a higher capital cost, and therefore will result in a higher consequential access charge for the Access Seekers, and provides a higher degree of certainty that there will be no capacity shortfall.

Although option (i) would result in a lower access charge, it would however provide a lower degree of certainty of obtaining contracted capacity requirements than is available from option (ii).

The Access Seekers will then be in a sound position to make an informed business decision about which project scope they prefer. Aurizon Network considers that its provision of choice over project scope to Access Seekers is in their interests. The inclusion of a mandatory capacity warranty in the SUFA template is likely to result in Aurizon Network being reluctant, on an entirely proper and prudent basis for the two reasons set out below, to agree to the inclusion of a lean project scope in the SUFA transaction documentation. This potential reluctance would be against the interests of both

- (a) the Access Seekers, as it would fetter their ability to manage the Scope/Certainty Trade-Off, and
- (b) Aurizon Network itself, as its ability to meet its customers' needs would be impaired.

Aurizon Network would be reluctant to adopt a lean project scope because it would face an unacceptable risk profile, in the event that a capacity shortfall arises, due to Aurizon Network's rectification and/or liquidated damages payment obligations. Another reason for this reluctance is that Aurizon Network may consider that the lean project scope will not deliver the required capacity, notwithstanding the Access Seekers' preference for that scope. If Aurizon Network were to make the warranty in these circumstances, it would be knowingly and deliberately making a false representation, and doing so may constitute '*misleading and deceptive conduct in trade or commerce*' under the Competition and Consumer Act 2010 (*Cth*). Aurizon Network will not make a warranty that it knows to be false.

Aurizon Network has a legitimate business interest in not being required, should a lean project scope be adopted, to face an unacceptable risk profile or to make a false representation.

### Aurizon Network should not be required to provide a capacity warranty of a scope imposed on it by binding dispute resolution

If Access Seekers were to prefer a lesser project scope than is proposed by Aurizon Network, then they are free to invoke the UT4 dispute resolution mechanism. In these circumstances the QCA would be free to make a determination that imposes a lesser scope, even if Aurizon Network considered that the imposed scope was inadequate. This determination could result in Aurizon Network facing an adverse risk profile and making a false representation, both of which are unacceptable outcomes as explained above.

### No power to impose rectification and/or liquidated damages payment obligations

Should a capacity shortfall arise for a SUFA Expansion, any rectification of it would give rise to costs of that Expansion. Similarly any liquidated damages payments to the SUFA trustee in respect of that capacity shortfall would constitute costs of that Expansion.

The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion. Aurizon Network does not volunteer under this UT4 SUFA DAAU either to bear the cost of rectifying any capacity shortfall for a SUFA Expansion or to make any liquidated damages payments in respect of

such a capacity shortfall.

For the avoidance of doubt, this UT4 SUFA DAAU does not change the existing UT4 treatment of capacity shortfalls arising from Expansions in general, as set out in sections 8.9.3, 8.9.4 and 8.9.5 of UT4.

### **Treatment in UT4 SUFA DAAU**

This UT4 SUFA DAAU does not feature, whether in the SUFA template documentation or in the changes to UT4 to give effect to SUFA, a capacity warranty by Aurizon Network. However the existing capacity shortfall provisions of UT4 would continue to apply in respect of any Expansion.

### 3.3.2 Credit Exposure on construction contract

#### Issue

Aurizon Network's credit exposure to the trustee under the Construction Agreement.

#### Overview of Aurizon Network's policy position

The trustee, as the Construction Agreement's principal, is required to provide a bank guarantee during the Construction Agreement's term that is adequate to ensure that Aurizon Network will be able to recover all amounts due to it under the Construction Agreement should the trustee default on its payment obligations and the Construction Agreement be consequently terminated by Aurizon Network.

#### SUFA Decision Treatment

The trustee, as the Construction Agreement's principal, is not required during the Construction Agreement's term to provide Aurizon Network with a bank guarantee in respect of Aurizon Network's trade credit exposure to the trustee.<sup>8</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

The UT3 SUFA FD proposes that Aurizon Network undertakes the Construction Agreement on 'open account', i.e. without credit support.<sup>9</sup> However Aurizon Network considers that this trade credit arrangement could result, in the event that a SUFA trust experiences corporate failure when construction is underway, in the trust being liable to pay Aurizon Network as much as 20 – 30% of the Construction Agreement's contract sum. For a \$1 billion project, this amounts to \$200 - 300 million. By any measure, this is a material trade credit exposure.

The magnitude of this potential credit exposure arises from several features of the Construction Agreement. For example, it features a complex payment process that entails a significant time gap between Aurizon Network incurring costs and Aurizon Network being paid.<sup>10</sup> Also, if the trustee defaults on its Construction Agreement payment obligation, Aurizon Network is required to continue its construction works and incur the associated costs until it has implemented mandatory 'show cause' and suspension provisions, both of which have notice periods, as preconditions of its termination of the Construction Agreement.<sup>11</sup> Following that termination, Aurizon Network as construction contractor would also bear considerable extra costs from the early termination of sub-contractor and supplier contracts.

In response to Aurizon Network's earlier concerns about trade credit exposure, the UT3 SUFA FD states that 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*'.<sup>12</sup> Aurizon Network understands that the UT3 SUFA FD's reference to 'security' in the cited text is a reference to 'certainty of payment'.

Aurizon Network has no control over the financial activities of a SUFA trust. Due to the SUFA trust's nature as a 'pass-through' entity that has no capital base and retains no cashflow, it is not a creditworthy entity at any point over the lifecycle of a SUFA transaction. Should the trustee enter into a SUFA transaction with confidence that the trust could meet its financial obligations and that confidence turn out to be misplaced, there is no sound basis for Aurizon Network to bear the risk of that faulty decision of the trustee by being unable to recover all amounts due to it under the Construction Agreement.

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<sup>8</sup> Final decision 7.10(2)(b) of the UT3 SUFA FD (on page 109)

<sup>9</sup> Clause 5 of the CA, the subject matter of which is the CA principal's provision of security to the CA contractor, is not used in the form of the CA that was part of the UT3 SUFA FD

<sup>10</sup> Clause 36 of the form of the CA that is part of this UT4 SUFA DAAU

<sup>11</sup> Clause 38 of the form of the CA that is part of this UT4 SUFA DAAU

<sup>12</sup> Page 109 of the UT3 SUFA FD

No well-managed Australian commercial enterprise would choose to adopt the practice that it can rely on its commercial counterparty to meet its payment obligations when they fall due simply on the basis that the counterparty would not enter into the applicable commercial/financial arrangement unless it was confident it could meet its obligations. This practice would constitute a reckless approach to the management of credit exposure. Accordingly Aurizon Network considers that the absence in the Construction Agreement of trade credit protection against a 'pass-through' entity of no financial substance would be against Aurizon Network's legitimate business interests.

Should a trust payment default arise in respect of a SUFA Expansion, Aurizon Network's credit loss of the net Construction Agreement revenue amounts due to it but not received by it following termination of that Construction Agreement (such a loss being the 'Credit Loss') would constitute a cost of that Expansion. The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion.

Aurizon Network volunteers to bear the cost of any Credit Loss if and only if the Construction Agreement requires the principal to provide a bank guarantee as specified in the form of the Construction Agreement that is part of this UT4 SUFA DAAU.

### **Treatment in UT4 SUFA DAAU**

The trustee, as Construction Agreement principal, is required to provide a bank guarantee in respect of the estimated maximum amount due to Aurizon Network under the Construction Agreement if it is terminated due to the principal's default.<sup>13</sup>

This bank guarantee is required to be provided soon after the conditions precedent of the SUFA transaction have been satisfied (or waived) and terminates when Aurizon Network's trade credit exposure becomes zero. The amount of the bank guarantee decreases in progressive steps as the SUFA project proceeds through its delivery phase and Aurizon Network's maximum trade credit exposure declines.<sup>14</sup>

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<sup>13</sup> Clause 5 of the form of the CA that is part of this UT4 SUFA DAAU, together with associated definitions in clause 1.1

<sup>14</sup> Clause 5.4 of the form of the CA that is part of this UT4 SUFA DAAU, together with associated definitions in clause 1.1

### 3.3.3 Determination of Construction Agreement Schedules by the QCA

#### Issue

How the QCA shall determine a dispute over the completion of the schedules to the template Construction Agreement for a particular SUFA transaction.

#### Overview of Aurizon Network's policy position

Under this UT4 SUFA DAAU, when the QCA is determining a dispute over the completion of the schedules to the template Construction Agreement for a particular SUFA transaction (a 'CA Schedule Dispute'), the QCA shall make its determination in accordance with the then applicable market practice in the Australian construction industry, as detailed in dispute guidance provisions that relate to CA Schedule Disputes and are to be included in UT4.

#### SUFA Decision Treatment

The QCA does not consider that a '*consistent with market practice*' principle *[should] be included in an access undertaking's expansion process*'.<sup>15</sup> The QCA would therefore determine a CA Schedule Dispute in accordance with the existing dispute resolution provisions of UT4.

#### Aurizon Network's assessment of the SUFA Decision Treatment

During the UT3 SUFA DAAU process Aurizon Network consistently stated that, when the approved SUFA template '*is converted into a construction contract for a particular SUFA project, that contract's risk/reward profile should reflect industry-standard risks and rewards for similar projects*'.<sup>16</sup> Aurizon Network also stated in its response to the UT3 SUFA DD that the '*consistent with market practice*' principle *should be incorporated into the Expansion Process appropriately to govern the formulation of the CA for each SUFA transaction*.<sup>17</sup>

Aurizon Network considers that the 'consistent with market practice' principle is appropriate as it is intended to simulate as closely as possible the construction contract that would be available to the SUFA trustee from competition between several tenderers for the SUFA Expansion's works on the (theoretical) assumption that Aurizon Network was not the only construction contractor.

In the UT3 SUFA FD the QCA disagrees with the inclusion of this principle in the Expansion Process for two reasons.

#### Expansion process 'not directly related to a SUFA transaction'

The first reason is that the expansion process '*in itself, is not directly related to a SUFA transaction or the pro forma SUFA construction agreement*'.<sup>18</sup> This reason does not apply in respect of UT4, as distinct from UT3, and UT4 is the only Access Undertaking relevant to this UT4 SUFA DAAU. To the contrary, Part 8.2.2 of UT4 expressly governs the manner in which SUFA schedules, including Construction Agreement schedules, are to be determined in the event of a dispute.<sup>19</sup>

#### Criteria for inclusion of capital expenditure into the RAB

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<sup>15</sup> Page 85 of the UT3 SUFA FD

<sup>16</sup> Page 10 of Aurizon Network's submission in response to the QCA's May 2014 Position Paper on the UT3 SUFA DAAU and page 21 of Aurizon Network's submission in response to the UT3 SUFA DD

<sup>17</sup> Page 21 of Aurizon Network's submission in response to the UT3 SUFA DD

<sup>18</sup> The third sentence of the paragraph commencing 'In relation to...' on page 85 of the UT3 SUFA FD

<sup>19</sup> Clauses 8.2.2(a)(iii) & 8.2.2(b)(ii)(D) of UT4

The second reason given relates to the criteria for inclusion of capital expenditure into the RAB.<sup>20</sup> Although the pricing of the Construction Agreement is relevant to RAB inclusion, there are other factors relevant to RAB inclusion that are unrelated to the Construction Agreement, such as the projected utilisation and pricing of the access rights to be created as a result of the SUFA Expansion, and these factors are not relevant to Aurizon Network in its capacity as construction contractor under the Construction Agreement. RAB inclusion is a matter for the SUFA investors and the trust, and should not affect the pricing of the construction contract with Aurizon Network, just as it should not affect the pricing of the trust's contracts with other service providers, such as the trustee or auditors.

This distinction between the value of an investment and the cost of that investment follows normal business practice in unregulated industries. For example, assume that a company wishes to develop a new asset and thereafter receive net operational revenue from it after its completion. When that company is seeking to enter into a contract for the construction of that new asset, the pricing of that contract (and therefore the cost to the company of its investment) will reflect pricing in the market of construction industry services, and will not reflect the expected value of that investment, as at the time of entry into the construction contract.

Aurizon Network considers that the QCA has not set out any logical basis in the UT3 SUFA FD for the QCA's view that the criteria for RAB inclusion of a SUFA Expansion should be relevant to the pricing of the construction contract that delivers that Expansion's assets.

Consequently Aurizon Network does not consider that the QCA's opposition to the 'consistent with market practice' principle for Construction Agreement pricing is soundly based.

The entry into a Construction Agreement in respect of a SUFA Expansion would give rise to the construction costs of that Expansion being borne by Aurizon Network. Depending on the delivery outcome of the construction works for that Expansion, Aurizon Network may incur net costs (i.e. its costs under the Construction Agreement exceed its Construction Agreement revenues). The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion.

Aurizon Network volunteers under this UT4 SUFA DAAU to enter into a form of the template Construction Agreement, which entails bearing any construction costs arising as a result of it, if and only if UT4, as modified by the expansion-specific dispute provisions provided in Schedule 2 of this UT4 SUFA DAAU, requires the QCA to determine any CA Schedule Dispute on a 'consistent with market practice' principle.

### **Treatment in UT4 SUFA DAAU**

Under this UT4 SUFA DAAU, when the QCA is determining a CA Schedule Dispute, the QCA shall make its determination in accordance with the then applicable market practice in the Australian construction industry, as detailed in dispute guidance provisions that relate to CA Schedule Disputes and are to be included in UT4. These provisions, which are set out in Schedule 2 of this UT4 SUFA DAAU, modify the dispute part of the Expansion Process (clauses 8.2.2 of UT4). The 'consistent with market practice' principle is spelt out in some detail in Schedule 2 of this UT4 SUFA DAAU.

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<sup>20</sup> The fourth sentence of the paragraph commencing 'In relation to...' on page 85 of the UT3 SUFA FD



### 3.3.4 Consequential loss liability

#### Issue

The consequential loss liability of each party to a SUFA transaction to one another.

#### Overview of Aurizon Network's policy position

Each non-State party to a SUFA transaction is not liable for consequential loss to each other such party, except to the extent that a SUFA document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss.

In particular, if QTH terminates Aurizon Network's existing CQCN infrastructure lease (such event being a 'Base Lease Termination') and a SUFA transaction is consequently terminated, the trustee of that SUFA transaction will receive only the amount paid to it by QTH under the Integrated Network Deed. Under this scenario no non-State party to that SUFA transaction has any liability to any other such party.

#### SUFA Decision Treatment

Under the SUFA documents that form part of the UT3 SUFA FD, the exclusion of consequential loss liability of each non-State party to a SUFA transaction to each other such party is subject to various exceptions. One exception relates to the financial payment regimes described above. Another relates to the fraud, gross negligence or wilful default of the first-mentioned party. Accordingly Aurizon Network would bear consequential loss liability, under the form of the Extension Project Agreement that was part of the UT3 SUFA FD, in respect of a Base Lease Termination that arises from Aurizon Network's fraud, gross negligence or wilful default.<sup>21</sup>

In respect of a Base Lease Termination, the UT3 SUFA FD states that '...Aurizon Network may be liable for all losses of the SUFA trustee (**including consequential loss**)....' (emphasis added).<sup>22</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

Aurizon Network has accepted a range of risks and liabilities under the SUFA template documents that form part of this UT4 SUFA DAAU. Aurizon Network has done so to provide a balance between meeting its objective of making the SUFA model an effective funding model and safeguarding its legitimate business interests. In developing this balance Aurizon Network has been mindful that the QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of an Expansion.

The financial consequences of a Base Lease Termination are already addressed in the Integrated Network Deed. It provides that QTH is required to pay each CQCN investor, being Aurizon Network itself and any SUFA trustee, its applicable share of QTH's net proceeds from the disposal of the CQCN. This approach to the distribution of the CQCN disposal proceeds treats all investors equally; this approach is an appropriate treatment as the investors earn the same returns and should therefore be subject to the same risks. The concept that one investor (Aurizon Network) may be liable to bear the consequential loss of another investor (a SUFA trustee) is unacceptable to Aurizon Network.

Aurizon Network acknowledges that it is in a better position to control the risk of a Base Lease Termination than the trustee of a SUFA transaction. Aurizon Network also agrees with the QCA's general principle on liability, as set out in the UT3 SUFA FD<sup>23</sup>, that the 'party that controls the risk should **generally** carry the risk' (emphasis added), but only if another general principle, that the party bearing the risk receives suitable compensation for doing so, also applies. Nonetheless, Aurizon Network does not volunteer under this UT4 SUFA DAAU to bear the cost that could arise from assuming the QCA-proposed consequential loss liability for a Base Lease Termination.

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<sup>21</sup> Clause 7.2(a)(vii) of the form of the EPA that was part of the UT3 SUFA FD

<sup>22</sup> Final decision 9.1(2)(b) of the UT3 SUFA FD (on page 143)

<sup>23</sup> Page 207 of the UT3 SUFA FD

## Treatment in UT4 SUFA DAAU

Under this UT4 SUFA DAAU:

- no non-State party to a SUFA transaction is liable for consequential loss to any other such party, except and to the extent that a SUFA document expressly establishes a financial payment regime in respect of an eventuality that may give rise to consequential loss. An example of such a regime is the Construction Agreement's liquidated damages payment obligation in respect of delay in reaching practical completion; and
- in the event of a Base Lease Termination, the trustee of that SUFA transaction will receive the amount paid to it by QTH under the 'disposal distribution' provisions of the Integrated Network Deed.

For absolute clarity over risk allocation, the SUFA template documents that form part of this UT4 SUFA DAAU establish<sup>24</sup> that, should a Base Lease Termination occur during the term of a SUFA transaction,

- the trustee's sole entitlement is its right to receiving a 'disposal distribution' payment from QTH, and
- each of the parties to the Extension Project Agreement, which collectively comprise the non-State parties to the SUFA transaction, has no liability to each other such party.

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<sup>24</sup> Clause 7.4 of the form of the EPA that is part of this UT4 SUFA DAAU

### 3.3.5 Acceleration

#### Issue

If Aurizon Network experiences insolvency, whether it is required to pay to the SUFA trustee on an accelerated basis the rental payments that would have been due to it subsequently had the insolvency not occurred.

#### Overview of Aurizon Network's policy position

If Aurizon Network experiences insolvency, it is liable to pay rental thereafter on the basis that applied before the insolvency occurred. There is no acceleration of rent under any SUFA template document under any circumstance.

#### SUFA Decision Treatment

The QCA considers that acceleration of rent is necessary in the event of Aurizon Network's insolvency *'..in order to maximise the SUFA trustee's rights in such a situation, particularly given that other creditors will be seeking recovery of their debts.'*<sup>25</sup>

Under the form of the Specific Security Agreement that forms part of the UT3 SUFA FD, the Secured Money becomes immediately due and payable on demand in the event of Aurizon Network's insolvency.<sup>26</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

Aurizon Network considers that the SUFA model should provide investors in a SUFA Expansion with investment risks and returns that match those of Aurizon Network arising from an Expansion that it funds. Aurizon Network does not consider that the SUFA model should place SUFA investors in a privileged position so that their downside risk is protected by Aurizon Network in the event of its insolvency. Self-evidently this protection is not available to Aurizon Network in respect of an Expansion that it funds.

Aurizon Network considers that the QCA's view of acceleration is based on a misunderstanding of the acceleration concept in Australian business practice. The concept is only used in respect of financial indebtedness; under the SUFA model, Aurizon Network is not financially indebted to any party. The concept is not applied in Australian business practice to 'trade' arrangements, such as leases or agreements for the supply of goods or services. In the event of Aurizon Network's insolvency its 'trade' providers, such as electricity and consumable suppliers, will not be entitled to seek payment in respect of future supply because that supply has yet to occur, so there is no question of other trade creditors seeking recovery of their 'debts' (sic).

The Integrated Network Deed already provides that, in the event that Aurizon Network's base infrastructure lease from QTH is terminated, whether for insolvency or any other reason, the SUFA trustee is entitled to receive from QTH the trustee's share of QTH's net proceeds from the disposal of the CQCN.<sup>27</sup> In a scenario where Aurizon Network experiences insolvency and its base infrastructure lease is terminated, the acceleration proposed in the UT3 SUFA FD would provide a completely unjustifiable 'double dip' remedy to the SUFA trustee at Aurizon Network's expense.

Should Aurizon Network pay accelerated rent or accelerated 'Secured Money' under a SUFA Expansion, any such payment would constitute costs of that Expansion. The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion. Aurizon Network does not volunteer under this UT4 SUFA DAAU to pay accelerated rent or accelerated 'Secured Money' under any SUFA template

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<sup>25</sup> Page 124 of the UT3 SUFA FD

<sup>26</sup> Clause 6.1(a) of the form of the SSA that was part of the UT3 SUFA FD

<sup>27</sup> Clause 7 of the form of the IND that was part of the UT3 SUFA FD

document under any circumstance.

### **Treatment in SUFA DAAU**

Under this UT4 SUFA DAAU there is no acceleration of rent or 'Secured Money' under any SUFA template document under any circumstance. Should Aurizon Network experience insolvency, the trustee's sole entitlement is its right to receive a 'disposal distribution' payment from QTH.<sup>28</sup>

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<sup>28</sup> Clause 7.4 of the form of the EPA that is part of this UT4 SUFA DAAU

### 3.3.6 Binding dispute resolution for proposed modification to SUFA template

#### Issue

If there are unsuccessful negotiations over the proposed modification of the terms of the approved SUFA template to give effect to a financing option chosen by proposed user funders, whether and if so how that proposed modification is subject to determination by a binding dispute resolution process.

#### Overview of Aurizon Network's policy position

This UT4 SUFA DAAU does not include the binding dispute resolution process proposed in the UT3 SUFA FD.

#### SUFA Decision Treatment

The QCA considers that '*...where negotiations amongst the [proposed] 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 [should] be subject to a binding dispute resolution.*'<sup>29</sup>

The QCA took this position on the basis that

- binding dispute resolution allows '*...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*',<sup>30</sup> and
- an independent test should be available to Access Seekers that propose a form of financing to see whether it '*is genuinely not viable, despite the proposal being considered an efficient form of financing by those financing the expansion.*'<sup>31</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

The SUFA decision treatment is contrary to the long-established practice of Aurizon Network's Access Undertakings establishing 'safe harbour' templates for access and other commercial agreements. That practice was adopted and clearly documented in UT4, as approved by the QCA on 11 October 2016. Furthermore UT4 also expressly provided that a dispute over the proposed modification of the terms of the SUFA template (once approved) is **not** a dispute for the purpose of UT4's dispute resolution provisions.<sup>32</sup>

Aurizon Network does not understand the policy basis on which the QCA has made formal decisions

- in the UT3 SUFA FD in June 2016 that the terms of Aurizon Network's SUFA template (once approved) **should** be subject to modification by binding dispute resolution instigated by Access Seekers but not the access provider, and
- in the UT4 FD in October 2016 that the terms of Aurizon Network's SUFA template (once approved) **are not** subject to modification by binding dispute resolution.

The principle of establishing a 'safe harbour' template agreement is that it represents the outcome of contributions from all affected parties, with a degree of compromise by all parties. The development and approval of a 'safe harbour' template agreement is intended to avoid the vast duplication of effort that would be required if each access seeker and Aurizon Network were to develop a commercial agreement from a blank sheet of paper, and to restrict the scope of the binding dispute resolution process to transaction specific matters. The adoption of a binding dispute resolution process as proposed in the UT3 SUFA FD would provide a 'one-way' bet for Access Seekers, since that process is only available to them, and thereby provide them with an opportunity to improve their position against Aurizon Network even though it has already made concessions in settling the SUFA template.

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<sup>29</sup> Page 161 of the UT3 SUFA FD

<sup>30</sup> Page 161 of the UT3 SUFA FD

<sup>31</sup> Page 162 of the UT3 SUFA FD

<sup>32</sup> Clause 11.1.1(b) of UT4, and the definition of 'Standard Agreement' in clause 12.1 of UT4

Aurizon Network considers that the QCA's proposed arrangement of

- the availability of the approved template SUFA,
- the availability to Access Seekers of a binding dispute resolution process so that they can seek a better position than is available under the template, and
- the non-availability to Aurizon Network of a binding dispute resolution process so that it can seek a better position than is available under the template

would be against Aurizon Network's legitimate business interests.

Should UT4 incorporate a binding dispute resolution process in respect of making amendments required to the SUFA template documents to give effect a specific type of finance nominated by the proposed user funders, as is proposed in the SUFA decision, the application of that process may result in Aurizon Network incurring costs that would constitute costs of that Expansion. The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion.

Aurizon Network does not volunteer to bear any cost arising from the application of the binding dispute resolution process to a failure to agree on a commercial basis amendments required to the SUFA template documents to give effect a specific type of finance nominated by the proposed user funders. Accordingly Aurizon Network does not volunteer in this UT4 SUFA DAAU to extend the scope of the UT4 dispute resolution process as was proposed in the UT3 SUFA FD.<sup>33</sup>

#### **Treatment in UT4 SUFA DAAU**

This UT4 SUFA DAAU does not modify the existing dispute resolution arrangements of UT4. As stated above, those arrangements provide that a dispute over the proposed modification of the terms of the (approved) SUFA template is not a dispute for the purpose of UT4's dispute resolution provisions.

As a consequence, should Aurizon Network not agree by negotiation with proposed user funders amendments required to the SUFA template documents to give effect a specific type of finance nominated by the proposed user funders, that absence of an agreement could not constitute a dispute under the U4 dispute resolution provisions that are contemplated by this UT4 SUFA DAAU. In this scenario the proposed modification of the approved SUFA template could therefore **not** be subject to a binding dispute resolution process.

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<sup>33</sup> Final decision 12.1(2)(b) of the UT3 SUFA FD (page 163)

### 3.3.7 Rental following deregulation

#### Issue

The process by which SUFA rental payments to the trustee are determined if the provision of access on the CQCEN ceases to be regulated.

#### Overview of Aurizon Network's policy position

Under this UT4 SUFA DAAU there is a detailed post-deregulation rental mechanism (the 'PDR Mechanism') that governs rental due to the SUFA trustee as a result of Aurizon Network's provision of

- (1) CQCEN access services,
  - (2) 'commercially integrated transportation services' that entail transportation on the CQCEN, such as a haulage service, or
  - (3) a mixture of the services under items (1) and (2)
- to its customers.

The PDR Mechanism is intended to ensure that following deregulation Aurizon Network pays rental to the SUFA trustee that is equal to the return earned on the assets funded by the SUFA trustee.

#### SUFA Decision Treatment

The QCA does not agree with the post-deregulation rental mechanism previously put forward by Aurizon Network and has proposed in the UT3 SUFA FD that Aurizon Network replace it *'with drafting that reflects the discussion in [the] 'Summary and conclusion' section of [the] final decision.'*<sup>34</sup>

That discussion in the UT3 SUFA FD contemplates that, before or upon deregulation, Aurizon Network should provide *'an indication of the post-deregulation rental approach an integrated Aurizon entity wishes to adopt. .... 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.'*<sup>35</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

Aurizon Network considers that the SUFA decision treatment is inappropriate on two separate grounds, each of which is sufficient on its own is adequate to justify the omission of that treatment from this UT4 SUFA DAAU. They are addressed in turn below.

#### The QCA's proposal would result in a high level of uncertainty about the rental payment stream

The three post-deregulation rental objectives proposed in the UT3 SUFA FD<sup>36</sup> are vague in nature and reliance on a dispute process guided by them would result in the trustee and Aurizon Network facing a high level of uncertainty about the post-deregulation rental payment stream. Due to the lack of specificity in these objectives, it is very likely that a negotiation between the trustee and Aurizon Network would turn out to be unsuccessful and that binding dispute resolution by *'the panel of three experts with globally recognised expertise'* would be required, as is proposed in the UT3 SUFA FD<sup>37</sup>. By contrast, the PDR Mechanism would provide a higher level of certainty to both Aurizon Network and the trustee about the post-deregulation rental payment stream, as that mechanism is more specific in nature.

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<sup>34</sup> Final decision 5.(2) of the UT3 SUFA FD (on page 58)

<sup>35</sup> Page 56 of the UT3 SUFA FD

<sup>36</sup> The three bullet points on page 56 of the UT3 SUFA FD

<sup>37</sup> The first paragraph on page 57 of the UT3 SUFA FD

In respect of the SUFA trustee, Aurizon Network considers that the lower level of certainty available from the QCA's proposal on post-deregulation rental is against the trustee's interests. Aurizon Network notes that the report by Grant Samuel emphasised '*the need to provide third-party financiers with a high level of certainty as to the level of income earned by the SUFA Trust.*'<sup>38</sup> In this light, Aurizon Network does not understand the basis on which the QCA considers that the trustee should have lesser certainty over the post-deregulation rental payment stream than is proposed by Aurizon Network.

In respect of its own position, Aurizon Network considers that it would be imprudent to accept a template that addresses the risk of deregulation in the open-ended and imprecise approach proposed by the QCA. Take a scenario in which

- Aurizon Network adopted the QCA's approach,
- several ~\$1 billion SUFA transactions were entered into, and
- deregulation occurred.

In this scenario, Aurizon Network would have very considerable liabilities that would be unknown, unquantifiable and unknowable until protracted negotiation and, if necessary, dispute processes are completed. This lack of certainty about the magnitude of these liabilities would adversely affect the risk profile of Aurizon Network, and would consequently tend to increase its costs of equity and debt. For these reasons, Aurizon Network considers that the adoption in the SUFA template of the QCA-proposed post-deregulation rental regime would be against Aurizon Network's legitimate business interests.

#### The QCA does not have the power to reject the SUFA DAAU on the grounds of its treatment of the post-deregulation rental payment stream

Aurizon Network acknowledges and agrees with the statement in the UT3 SUFA FD, in response to Aurizon Network's assertion that the QCA does not have the power to make decisions that relate to periods beyond the period of the CQC's declaration, that '*...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*' (emphasis added).<sup>39</sup> Aurizon Network also acknowledges and welcomes the QCA's statement that '*...the QCA does not seek to **impose** an outcome in a post-deregulation environment*' (emphasis added).<sup>40</sup>

In this light Aurizon Network continues to believe that it is beyond the QCA's power to impose, as part of the SUFA template, any rental arrangement that relates to periods extending beyond the life of the CQC's declaration.

#### Treatment in UT4 SUFA DAAU

The PDR Mechanism provides that, following deregulation, Aurizon Network will ensure that

- (a) any new access agreement, and
  - (b) any new 'CITS Agreement' (being a transport services agreement under which Aurizon Network provides below-rail and other transportation services to a customer on a commercially integrated basis)
- will feature a no more favourable pricing regime (from the customer's perspective) for the provision of access over SUFA assets on a 'Section' (being the rail infrastructure between any two points of the CQC) than applies to the provision of access over other assets on that Section.

Also following deregulation, Aurizon Network will pay to the trustee the percentage of 'Capital Revenue' (as defined below) attributable to each Section on the basis that would have applied at the time that Aurizon Network earned that Capital Revenue had the regulatory regime in place immediately before deregulation continued to apply.

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<sup>38</sup> Page 5 of the Grant Samuel Report entitled 'Standard User Funding Agreement for Aurizon Network Pty Ltd, High Level Discussion Paper for the Queensland Competition Authority' and dated 4 March 2014

<sup>39</sup> Page 49 of the UT3 SUFA FD

<sup>40</sup> Page 58 of the UT3 SUFA FD



Capital Revenue means, in respect of a Section, the aggregate of

- (i) where access is provided as a separate commercial service, Aurizon Network's actual access revenue, and
- (ii) where access is provided under a CITS Agreement, 'Notional Access Revenue' (as defined below), less Aurizon Network's operating and maintenance expenditure.

Notional Access Revenue means, in respect of a CITS Agreement, the lesser of

- (1) the amount that would have been payable to Aurizon Network had the regulatory regime in place immediately before deregulation continued to apply; and
- (2) the revenue received by Aurizon Network under that CITS Agreement less the determined cost of providing the 'other than below-rail' transportation services.

If, following reregulation, the trustee and Aurizon Network are unable to agree suitable changes to the rent calculation methodology to reflect the rental objective specified in the previous three paragraphs, this dispute will be referred to a special dispute resolution process<sup>41</sup>, and its outcome will be binding on the trustee and Aurizon Network.

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<sup>41</sup> That process is set out in clause 9.8 of the form of the EISL that is part of this UT4 SUFA DAAU

### 3.3.8 Credit exposure during SUFA's operational phase

#### Issue

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

#### Overview of Aurizon Network's policy position

Under this UT4 SUFA DAAU all amounts due to Aurizon Network from the SUFA trustee under a user funding transaction are subject to set-off against Aurizon Network's rental payments to the SUFA trustee under that transaction. This enables Aurizon Network to reduce, but not eliminate, its credit exposure to the trustee during the operational phase of a SUFA transaction.

#### SUFA Decision Treatment

The UT3 SUFA FD contemplates that Aurizon Network's right to set-off any amounts due to it against its rental payment obligation under the Extension Infrastructure Sub-Lease only applies if these amounts are rental adjustments under that document.<sup>42</sup>

#### Aurizon Network's assessment of the SUFA Decision Treatment

In the normal course of business the principal cashflow stream during the operational phase of a SUFA transaction will be the rental payments by Aurizon Network to the trustee under the Extension Infrastructure Sub-Lease. However the trustee is obliged, should various contingencies arise, to make payments to Aurizon Network under the Extension Infrastructure Sub-Lease and other SUFA documents.

In order to address Aurizon Network's credit risk to the SUFA trustee, Aurizon Network considers that it requires either a full set-off right across the SUFA transaction or a bank guarantee in respect of the trustee's contingent financial obligations.

Aurizon Network has no control over the financial activities of a SUFA trust. Due to the SUFA trust's nature as a 'pass-through' entity that has no capital base and retains no cashflow, it is not a creditworthy entity at any point over the lifecycle of a SUFA transaction. In the absence of a bank guarantee from the trustee, a set-off right is required to ensure that Aurizon Network can receive the amounts due to it from the trustee.

The critical issue is what happens if the trustee does not rectify a non-payment to Aurizon Network of an amount due to Aurizon Network under a SUFA transaction document. If the approach set out in the UT3 SUFA FD were to be adopted, Aurizon Network would need to continue to pay the trustee the full rental amount even though the trustee had failed to comply with its own payment obligation. The trust is a 'flow-through' entity of no financial substance and the trustee itself may be structured as a '\$2 company', so the pursuit by Aurizon Network of a legal remedy for breach of contract is not an attractive option.

Aurizon Network considers that it is entirely unreasonable that it should be expected to continue to pay the trust when the trust is not paying Aurizon Network in order to make a SUFA transaction more favourable to third party financiers.<sup>43</sup> It is not Aurizon Network's role to be a contingent financier of the SUFA trust so that it can obtain more favourable terms from its third party financiers.

The adoption of the limited set-off approach proposed by the QCA in the UT3 SUFA FD could result in Aurizon Network bearing costs in excess of the costs that would apply under the set-off approach proposed by Aurizon Network in this

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<sup>42</sup> Final decision 8.3(2)(b) of the UT3 SUFA FD, and clause 7.6 of the form of the EISI that was part of the UT3 SUFA FD

<sup>43</sup> Final paragraph on page 128 of the UT3 SUFA FD

UT4 SUFA DAAU. Any such additional costs borne by Aurizon Network would constitute a cost of the Expansion. The QCA Act does not permit the QCA to impose an obligation on an access provider such as Aurizon Network to pay any cost of any Expansion. Aurizon Network does not volunteer to bear any additional costs of the Expansion arising from the set-off approach proposed by the QCA in the FD.

Aurizon Network volunteers under this UT4 SUFA DAAU to bear any cost of the Expansion arising from Aurizon Network's credit exposure to the trustee during an Expansion's operational phase if and only if the set-off approach proposed in this UT4 SUFA DAAU is adopted.

#### **Treatment in UT4 SUFA DAAU**

Under this UT4 SUFA DAAU all amounts due to Aurizon Network from the SUFA trustee under the applicable SUFA transaction are subject to set-off against Aurizon Network's rental payments to the SUFA trustee.

## Glossary

Item	Meaning
AASTD	Access Agreement Specific Terms Deed
Access Seeker	Either (a) a proposed party to a SUFA transaction that would obtain contingent access rights under an AASTD to which it would be a party, or, as the context requires, (b) a party to a SUFA transaction that has obtained contingent access rights under an AASTD to which it is a party
Access Undertaking	Has the meaning given to that term in the QCA Act
CA	Construction Agreement
CQCN	Central Queensland Coal Network
DAAU	Draft Amending Access Undertaking
DAU	Draft Access Undertaking
EIHL	Extension Infrastructure Head-Lease
EISL	Extension Infrastructure Sub-Lease
EPA	Expansion Project Agreement
Expansion	Has the meaning given to that term in UT4 as at 11 October 2016
Expansion Process	Part 8 of UT4
FIA	Formal Instrument of Agreement (in respect of the construction contract that includes the CA)
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QTH	Queensland Treasury Holdings Pty Ltd
RAB	Regulated Asset Base
RCA	Rail Corridor Agreement
SSA	Specific Security Agreement
Secured Money	Has the meaning given to that term in the SSA
SUFA	Standard User Funding Agreement
SUFA Expansion	An Expansion that is funded by a SUFA transaction
UHD	Subscription and Unit Holders Deed
UT3	The Access Undertaking of Aurizon Network that was approved by the QCA on 1 October 2010, together with any subsequent changes approved by the QCA
UT3 SUFA DAAU	The SUFA DAAU submitted by Aurizon Network to the QCA on 22 July 2013
UT3 SUFA DD	The draft decision of the QCA in respect of the UT3 SUFA DAAU, which was released on 31 October 2014

Item	Meaning
UT3 SUFA FD	The final decision of the QCA in respect of the UT3 SUFA DAAU, which was released on 14 June 2016
UT4	The Access Undertaking of Aurizon Network that was approved by the QCA on 11 October 2016, together with any subsequent changes approved by the QCA
UT4 FD	The final decision of the QCA in respect of Aurizon Network's Amended 2014 DAU, which was released on 11 October 2016
UT4 SUFA DAAU	This DAAU
UT5	The Access Undertaking of Aurizon Network that, upon approval by the QCA, will supersede UT4
UT5 DAU	The DAU in respect of UT5 that was submitted by Aurizon Network to the QCA on 30 November 2016



Each reference to a SUFA template document in the table below relates to the version of that document that forms part of this UT4 SUFA DAAU, except where

- that reference occurs in the 'SUFA decision reference' column, in which case that reference is to the version of that document that forms part of the UT3 SUFA FD; or
- another version of that document is specified.

In the table below, details for each item are provided in six columns, as detailed below.

Column 1

Reference name and number for each item.

Column 2

A brief specification of the issue for that item.

Column 3

A cross-reference to the QCA's position, whether specified in the UT3 SUFA FD and/or the applicable SUFA document that formed part of the UT3 SUFA FD.

Column 4

A concise description of the treatment of the applicable issue in this UT4 SUFA DAAU.

Column 5

A cross-reference to Aurizon Network's documentation of that treatment in a SUFA document that forms part of this UT4 SUFA DAAU.

Column 6

A concise explanation of that treatment in this UT4 SUFA DAAU.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
EPA issues					
EPA1	Condition precedent in the EPA about Office of State Revenue correspondence	EPA clause 2.1, Condition precedent 5	There is no condition precedent in the EPA about Office of State Revenue correspondence	No such condition precedent	<p>Condition precedent 5 in the form of the EPA that was part of the UT3 SUFA FD is not required as Condition precedent 1 (in the same document) requires statutory severance to be in place. Once severance has occurred, it is unlikely that stamp duty will be payable.</p> <p>In addition the Office of State Revenue is not empowered to bind itself.</p>
EPA2	Condition precedent in the EPA about the QCA's approval of the Extension	EPA clause 2.1, Condition precedent 6	Access Regulator pre-approval in respect of the prudence and efficiency of the capital expenditure of the Expansion in accordance with clause 2.2 of Schedule E of UT4 is a condition precedent of the EPA	EPA clause 2.1, Condition precedent 5	<p>Condition precedent 6 in the form of the EPA that was part of the UT3 SUFA FD addressed Access Regulator approval of the Extension in accordance with the Expansion Process. There is no mechanism in UT4 for the QCA to approve an Extension, whether in accordance with the Expansion Process or otherwise, so this condition precedent is inappropriate.</p> <p>The QCA may however pre-approve capital expenditure on an Expansion, as set out in clause 2.2 of Schedule E of UT4. This UT4 SUFA DAAU documents such a pre-approval as a condition precedent in the EPA.</p>
EPA3	Aurizon Network's obligations in respect of both the initial RAB inclusion of the project costs, and their retention in the RAB.	Section 14.4.2 of FD, p191 - 196  Final decision 14.2(2) of FD, p197	Initial RAB inclusion  In respect of the initial RAB inclusion submission, Aurizon Network has a process obligation to make such a submission, the substantive element of which is prepared by the trustee and included without change by Aurizon Network.	EPA clause 3.1	<p>Initial RAB inclusion Aurizon Network is not prepared either</p> <ul style="list-style-type: none"> <li>(i) to act in the best interests of the trust, or</li> <li>(ii) to do everything that it reasonably can do to promote and encourage initial RAB inclusion,</li> </ul> <p>in respect of the initial RAB inclusion submission, as was proposed in the form of the EPA that was part of the UT3 SUFA FD. Aurizon Network takes this view as those obligations would entail it putting the trust's interests</p>



#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
		EPA clause 3.1			<p>ahead of its own interests and thereby could result in a material adverse effect on Aurizon Network's interests.</p> <p>Aurizon Network also considers that the regulatory process will operate most effectively if every stakeholder is free to express its case freely and without being subject to a contractual gag. In this regard, Aurizon Network does not understand the apparent internal inconsistency between</p> <ul style="list-style-type: none"> <li>(a) the QCA-approved UT4 prohibition of any contractual obligation by Access Seekers in favour of Aurizon Network not to disclose proposed Access Conditions or other contract terms to the QCA (see clause 6.13.3(a) of UT4), and</li> <li>(b) the QCA-proposed contractual obligation on Aurizon Network under the SUFA model not to make a RAB inclusion submission to the QCA where doing so is not in the best interests of the trustee.</li> </ul> <p>As the QCA considered in its approval of UT4 that contractual gagging by Aurizon Network is inappropriate, it is unclear why the QCA considers in its UT3 SUFA DAAU that contractual gagging by the trustee is appropriate.</p> <p>Aurizon Network considers that it is against the public interest for any stakeholder, especially a well-informed and experienced party such as Aurizon Network, to be contractually gagged from making a submission to the QCA that the stakeholder considers may be of value to the QCA in making a regulatory decision.</p> <p>Aurizon Network's provision of the trustee's RAB inclusion documentation to the QCA without change will commence the regulatory process of RAB inclusion and will allow the trustee to ensure that all matters that it considers relevant are subject to the QCA's consideration, with Aurizon Network and all other stakeholders free to make submissions as they see fit.</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
			Retention of project costs in RAB In all other respects, Aurizon Network, like any other stakeholder, is free to make any submission as it sees fit to the QCA.		Retention of project costs in RAB As the QCA has provided in the form of the EPA that was part of the UT3 SUFA FD (see clause 3.1(c)) that any party to the EPA should be free to make any regulatory submission about inclusion or exclusion from the RAB as it sees fit, there is no sound basis for Aurizon Network to be obliged  (a) to do all things reasonable to keep the SUFA project's costs in the RAB (see clause 3.1(b)(vi) of that document), or  (b) not to do anything that would have the effect of removing any of those costs from the RAB (see clause 3.1(b)(vii) of that document).  A simpler, clearer and more rigorous approach is to remove these two retention RAB obligations, so that each party to the EPA, as well as each other stakeholder, is free to pursue its business interests as it sees fit in respect of the RAB.  In summary, the form of Aurizon Network's obligations in respect of both the initial RAB inclusion of the project costs, and their retention in the RAB, in the form of the EPA that was part of the UT3 SUFA FD is against Aurizon Network's legitimate business interests, and also against the public interest.
EPA4	Time bar in respect of disputes for User Funding Agreements that use the SUFA model	Appendix B of FD, time bar item in table, p245-246  EPA clause 5.9	Disputes must be notified by a party within 12 months of that party becoming aware of the occurrence of the event or circumstances giving rise to the dispute	EPA clause 5.9	12 months is an ample period of time for a party to consider the circumstances giving rise to the dispute and decide whether or not to notify a dispute. It is unreasonable for a party to be exposed to disputes raised by another party in respect of events known by the second party for one to 3 years. The disputes process should be more timely.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
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Aurizon Network does not understand the apparent internal inconsistency between the QCA's view that

- (i) a 12 month time bar commencing from the date of knowledge of an event in the EPA is too short and should rather be a 36 month time bar, and
- (ii) a 'hard' time bar of 28 days from the commencement of an adjustment event is appropriate (see clause 35A.2 of the form of the CA that was part of the UT3 SUFA FD).

Indeed, as knowledge of the applicable adjustment event may occur later than its commencement, this time bar may provide Aurizon Network as CA contractor with even less than 28 days to act.

**UHD issues**

UHD1	The 'keep whole' provision that applies when a trust is wound up other than in accordance with the transaction documents	Section 8.4.1 of FD, p123-124  Final decision 8.1(2)(a) of FD, p125  UHD clause 2.5(a)(iv)	Aurizon Network is not required to agree a process which results in any disadvantage, not just any material disadvantage.	UHD clause 2.5(a)(iv)	<p>Aurizon Network does not volunteer to assume the risk of incurring any cost disadvantage below the threshold of a material advantage (the 'Below Threshold Cost') if a SUFA trust is wound up other than in accordance with the transaction documents.</p> <p>The acceptance of the risk of a Below Threshold Cost may lead to additional cost being borne by Aurizon Network, whether now or in future. Aurizon Network does not agree to volunteer to assume this additional cost.</p> <p>In this UT4 SUFA DAAU the risk of a Below Threshold Cost is allocated to the trust, which is appropriate as the existence of the SUFA trust would have created the risk to Aurizon Network in the first place. It is not Aurizon Network's role to subsidise a SUFA transaction.</p>
UHD2	Payment responsibility for stamp duty on	n/a	The trustee shall pay all stamp duty payable in relation to the issue of the ordinary unit.	UHD clause 18.1(c)	This stamp duty only arises because of the applicable SUFA transaction. The party(ies) seeking to enter a user funding transaction (represented in the UHD by the trustee) should be allocated responsibility to pay all costs

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
	issue of the ordinary unit				<p>associated with establishing a user funding transaction, including any stamp duty associated with the issue of the Ordinary Unit. It is not Aurizon Network's role to subsidise the establishment of a SUFA transaction.</p> <p>Aurizon Network does not volunteer to incur the costs of any such stamp duty.</p>

### EISL issues

EISL1	The nature of Aurizon Network's insurance obligations under the EISL	<p>EISL clause 4.12(a)(i) &amp; (ii)</p> <p>EISL clause 4.12(e)</p>	<p>Non-SUFA infrastructure</p> <p>Aurizon Network does not assume any insurance obligation to the trustee in respect of non-SUFA infrastructure.</p> <p>Disputed non-provision of required insurance</p> <p>Where the trustee considers that Aurizon Network has not provided a required insurance policy, <u>and</u> Aurizon Network is required to hold an equivalent insurance policy under its 'base' CQCN infrastructure lease or the applicable EIHL because Aurizon Network was unable to satisfy QTH about Aurizon Network's self-insurance arrangements, (this scenario being the 'Disputed Non-provision Scenario')</p> <p>the trustee may invoke a dispute resolution mechanism under the EISL, but may not effect insurance at Aurizon Network's expense unless the outcome of that dispute resolution</p>	<p>EISL clause 4.12(a)(i) &amp; (ii)</p> <p>EISL clause 4.12(e)</p>	<p>Non-SUFA infrastructure</p> <p>It would be commercially unreasonable and inconsistent with good business practice for Aurizon Network to assume insurance compliance obligations to the trustee in respect of the non-SUFA infrastructure, which are assets in which the trustee has no insurable interest.</p> <p>Disputed non-provision of required insurance</p> <p>Aurizon Network considers that the trustee's purchase of insurance in respect of CQCN assets and land in the event of a Disputed Non-provision Scenario would adversely affect Aurizon Network's ability to purchase its own insurance in respect of CQCN infrastructure and land, as insurance providers would be understandably confused and concerned by multiple parties seeking to purchase insurance in respect of those assets.</p> <p>The trustee's entitlement to purchase insurance required under the EISL should only arise after a determination under the mentioned dispute resolution mechanism that Aurizon Network has failed to provide a required insurance policy. This is the best approach in the event of a Disputed Non-provision Scenario.</p>
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#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
			<p>mechanism is that Aurizon Network has not provided the required insurance policy.</p> <p>Insurance policy documentation requirements</p> <p>The insurance policy documentation requirements on Aurizon Network shall only apply if and to the extent that they are in accordance with good insurance industry practice, and they are permitted by law at the time at which those requirements are due to be discharged.</p>		<p>Insurance policy documentation requirements</p> <p>In the form of the EISL that was part of the UT3 SUFA FD Aurizon Network has a firm obligation to meet these insurance policy documentation requirements, provided they are permitted by law, for the multi-decade life of a SUFA transaction. As a consequence Aurizon Network would still be required to meet this obligation even if insurance market norms were to change at some point in the future so that it is no longer practicable, though still permitted by law, to meet those requirements.</p> <p>Aurizon Network is unaware of the nature of insurance policy documentation practice 30, 20 or even 10 years hence. Accordingly Aurizon Network's EISL obligation to meet these insurance policy documentation requirements should only apply to the extent that they are consistent with good insurance industry practice at the relevant time.</p>
EISL2	Provision of condition based assessment to the Trustee	EISL clause 5.3	If Aurizon Network is required under its then applicable Access Undertaking to make available a condition based assessment in respect of the CQC (the 'Base Assessment') to the QCA and stakeholders, as is the case under UT4 (see clause 10.4.3(j) of UT4), Aurizon Network will make available a further condition based assessment that specifically identifies the Total Extension Infrastructure (the 'Further Assessment') to the trustee within 5 business days of the Base Assessment being made available to stakeholders.	EISL clause 5.3	<p>While Aurizon Network is regulated, it should only be required to prepare a Base Assessment where it is required to do so by its then applicable Access Undertaking. Furthermore there is no need for Aurizon Network to provide the Base Assessment to the trustee since Aurizon Network is already obliged under UT4 to make it available to stakeholders (see clause 10.4.3(j)(ii) of UT4).</p> <p>In its Further Assessment provision obligation under the EISL, Aurizon Network should not be required to breach confidentiality obligations just as it is not required under UT4 to breach such obligations in its Base Assessment provision obligation.</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
			<p>That Further Assessment will be subject to the same redaction requirements that apply in respect of the provision of the Base Assessment to stakeholders (see clause 10.4.3(j)(ii) of UT4).</p> <p>If Aurizon Network ceases to be regulated, Aurizon Network will provide the trustee upon deregulation and each four years thereafter a condition based assessment comprised of the Base Assessment and the Further Assessment, provided that the trustee reimburses all of the reasonable costs incurred by Aurizon Network in preparing that assessment.</p>		<p>Following deregulation Aurizon Network has no regulatory arrangement for the recovery of the costs of preparing either of the two assessments. Should the trustee wish to receive them, it should reimburse Aurizon Network for the costs of preparing them.</p>
EISL3	Excess Payment provision in the EISL	EISL clause 8.4 (f)	<p>In clause 8.4(e), Excess Payment means:</p> <p>(i) if the amount referred to in clause 8.4(e)(i) is greater than or equal to the amount referred to in clause 8.4(e)(ii), the amount referred to in clause 8.4(e)(ii); or</p> <p>(ii) otherwise, the amount referred to in clause 8.4(e)(i)</p>	EISL clause 8.4 (f)	<p>The Excess Payment definition is intended to capture the lesser of the amounts determined in clause 8.4(e)(i) and (ii).</p> <p>The drafting in the SUFA FD version of the EISL always sets Excess Payment at the amount referred to in clause 8.4(e)(ii) and does not deal with the circumstances where the amount referred to in clause 8.4(e)(i) is less than the amount referred to in clause 8.4(e)(ii). Such circumstances should be addressed in the EISL.</p>
EISL4	Aurizon Network's obligation in respect of rail infrastructure manager accreditation	EISL clause 15.1(b)(ii)	While SUFA infrastructure is leased to Aurizon Network, it has a reasonable endeavours obligation to be accredited as rail infrastructure manager for railway operations in respect of that infrastructure.	EISL clause 15.1(b)(ii)	<p>The reasonable endeavours obligation applies only to infrastructure that is leased under the lease (the EISL).</p> <p>Aurizon Network does not volunteer to assume an accreditation obligation to the SUFA trustee in respect of rail infrastructure in which the SUFA trustee has no lease or economic interest.</p>
EISL5	Inclusion of OPRA in the SUFA template	Section 15 of the FD, p201-205	The OPRA concept and drafting is included in the EISL (and addressed in the UHD tax indemnity)	EISL clause 1.2 and schedule 2	The very nature of a user funding expansion splits the roles of investor, revenue recipient, project developer (or principal of the expansion's construction works) and

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
		Final decisions 15.1(1) and (2) of FD, p205		UHD clause 17.1(f)	operator/maintainer that are combined when an Aurizon Network-funded expansion project occurs. In the latter case the approved MAR provides an aggregate reward for the performance of all of these roles, and accepting all of the risks associated with them.
		EISL Schedules 1 and 2			<p>When the roles are split between two or more parties, as is the case for a SUFA transaction, a split of both the aggregate risk and aggregate reward between those parties is also required. The SUFA framework provides such a split. At a high-level, the split of reward is simple – the SUFA investor receives a payment stream equal to the returns on and of the initial asset investment (or a proxy for them) and Aurizon Network (fulfilling all the other roles) receives the balance of the incremental revenue arising from the SUFA transaction.</p> <p>Given the nature of the risk split inherent in this complex structure finance template, it is possible but unlikely that the simple split of reward is 100% correct in allocating the reward to the party that bears the risk. It is more likely that some of the risks that relate to investment are allocated to Aurizon Network without the associated transfer of reward.</p> <p>The nature and extent of such uncompensated risks will depend on the final approved form of the SUFA template and the transaction specific nature of a user funding transaction based on the SUFA model, both of which are not known now and indeed are incapable of being known now.</p> <p>Aurizon Network seeks to have the flexibility within the SUFA framework to allow for reward to be transferred to Aurizon Network to compensate it for the risk transferred to it. Aurizon Network acknowledges that the value (if any) of OPRA will be determined periodically by the QCA</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
					<p>after consideration of submissions from all interested stakeholders.</p> <p>It would be unreasonable of the QCA not to approve SUFA on the basis it includes a structure that allows for the transfer of reward to match the transfer of risk.</p>
<b>EIHL issues</b>					
EIHL1	Provision of EIHL information by Aurizon Network (as Sublessee) to the trustee (as the Lessee)	EIHL clause 7.2	<p>Aurizon Network is to provide the trustee with a copy of any information provided to QTH in response to its request under this clause</p> <p>The trustee has no right to request information under this clause</p>	EIHL clause 7.2	<p>The SUFA decision version of the EIHL provided that the trustee is able to obtain information from Aurizon Network on the same basis as QTH is able to obtain it from Aurizon Network.</p> <p>The establishment of this information right of the trustee is inconsistent with the fundamental nature of the SUFA model – the lease structure only arises from the adoption of the unit trust structure. Also the establishment of this information right could result in an unreasonable and uncompensated administrative burden for Aurizon Network.</p> <p>QTH has an EIHL information right due to its legal ownership interest in the EIHL assets and its business interests in the event of the CQCN leasing arrangements being terminated prior to their expiry dates. Neither of these matters applies to the trustee. Its economic interest is in the rent being paid, and the information that is capable of being provided under the EIHL is not relevant to the rental payment stream.</p>
<b>RCA issues</b>					
RCA1	Aurizon Network's indemnity of the trustee in	RCA clause 10(a)	The indemnity applies in respect of claims from, or loss incurred by the trustee to, a third party.	RCA clause 10(a)	The form of the EPA in this UT4 SUFA DAAU provides that a party to the EPA is not liable to any other such party for consequential loss 'except as expressly otherwise provided under a Transaction Document' (see clause 7.2



#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
	respect of contamination				<p>of that form of the EPA). Elsewhere in that form of the EPA the Trustee and each Preference Unit Holder accepts risk over the quantum of rent payable to the Trustee 'except as expressly otherwise provided under a Transaction Document' (see clause 8).</p> <p>In the absence of this modified treatment, should contamination occur in or on the Extension Land and it is not caused by the Trustee (or its officers, agents, etc), Aurizon Network would be liable for consequential loss liability to the Trustee and would therefore be taking risk over the quantum of rent payable to the Trustee. This situation would arise under the forms of the SUFA documents that were part of the UT3 SUFA FD because clause 10 of the RCA that was part of the UT3 SUFA FD would operate as an 'express provision' to the contrary, as was contemplated in clauses 7.2 and 8 of the form of the EPA that was part of the UT3 SUFA FD.</p> <p>Aurizon Network's treatment in this UT4 SUFA DAAU protects the Trustee from contamination claims made by third parties, and retains the EPA as the prevailing SUFA document that addresses Aurizon Network's liability to the Trustee in respect of losses by itself, Access Seekers and Preference Unit Holders.</p>

#### AASTD issues

AASTD 1	Conformity with UT4	AASTD various clauses	The AASTD has been brought into line with the approved forms of access agreements under UT4.		Some provisions of the form of the AASTD that is part of the UT3 SUFA FD need to be modified to reflect the UT4 forms of access agreements.
AASTD 2	Trigger to pay take-or-pay charges	AASTD, Schedule 1, Part 2, item 9(a)(iii)	The trigger event for the take-or-pay payment obligation to commence is set out in item 9(a) of Part 2 of schedule 1 of the AASTD. Each of three specified conditions must be addressed for the trigger event to occur. The issue at	AASTD, Schedule 1, Part 2, item 9(a)(iii)	Under the form of the AASTD that is part of the UT3 SUFA FD the third condition is met when the Connecting Infrastructure was not completed 'for reasons primarily attributable to the act or omission of the Access Holder'.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
			<p>stake is about the third condition, namely the non-completion of the 'Connecting Infrastructure'.</p> <p>That third condition is met when Aurizon Network is not satisfied that the Connecting Infrastructure has been completed, <u>and</u> the reason for that 'non-completion' is not primarily attributable to any default by Aurizon Network in the performance of its legally binding obligations in respect of the Connecting Infrastructure.</p>		<p>Aurizon Network considers that the third condition is met in all circumstances when the Connecting Infrastructure is not completed except when Aurizon Network is in default (of its obligation in respect of the Connecting Infrastructure). The risk of timely completion of the Connecting Infrastructure is best allocated to the Access Seeker.</p>

### SSA issues

SSA1	Events of default in the SSA	<p>Section 8.4.1 of FD, p123-124</p> <p>Final decision 8.1(2)(a) of FD, p125</p> <p>SSA clause 5</p>	<p>The sole event of default is an 'Insolvency Event' (as defined in the form of the SSA that is part of the UT3 SUFA FD) in respect of Aurizon Network</p>	<p>SSA clauses 1.3, 1.4 &amp; 5.1.</p>	<p>Aurizon Network considers that the three events of default in addition to the 'Insolvency Event' event of default proposed in the form of the SSA that is part of the UT3 SUFA FD are inappropriate. They are included as if Aurizon Network were the borrower under a structured finance transaction, whereas Aurizon Network is not a borrower under the SUFA model.</p> <p>Aurizon Network is not prepared to include events of default in the SSA that, over the multi-decade life of a SUFA transaction, could adversely affect</p> <ul style="list-style-type: none"> <li>(a) Aurizon Network's ability to raise new debt facilities,</li> <li>(b) Aurizon Network's ability to stay in good standing in existing or new debt facilities, or</li> <li>(c) the cost of those debt facilities.</li> </ul> <p>This adverse effect arises from Aurizon Network's management of the risk of a default under a SSA triggering a cross-default provision under an Aurizon Network debt obligation, in which case all debt would be due and payable.</p>
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#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
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The inclusion of these three events of default may lead to additional cost being borne by Aurizon Network, whether now or in future. Aurizon Network does not agree to volunteer to assume this additional cost.

### CA & FIA issues

CA1	Insolvency event definition in the CA	CA, clause 1.1, definition of insolvency event	This definition has been made consistent with the corresponding definition in the EISL template.	CA, clause 1.1, definition of insolvency event	A consistent approach should be adopted across the SUFA documentation suite.
CA2	Aurizon Network's provision of a 'fit for stated purpose warranty' as to the CA works	Section 7.4.3 of FD, p87-88  Final decision 7.3(2)(a) of FD, p91  CA clause 2.2	Aurizon Network provides a 'fit for stated purpose' warranty as to the CA works, other than in respect of any scope that has been imposed on Aurizon Network by the QCA under the UT4 dispute resolution mechanism, and requires Aurizon Network to construct works that is not in accordance with its standards, safety management system requirements and other requirements ('Contractor's Requirements'), such scope being 'Imposed Scope'.	CA clauses 2.2(a) & (c)	<p>Aurizon Network considers that a carve-out from the 'fit for stated purpose' warranty is required for Imposed Scope.</p> <p>For example, Aurizon Network may propose rail of a certain mass/unit of length for an expansion, but the Access Seekers associated with that expansion may consider that rail of a lesser mass/unit of length should be adopted. If the UT4 dispute resolution mechanism is applied and the QCA determines that rail of the lesser mass/unit of length should be used in the expansion, Aurizon Network should not be required to make a 'fit for stated purpose' warranty in respect of the Imposed Scope, being the rail of a lesser mass/unit of length.</p> <p>By contrast, there is no such carve-out when the QCA, acting in its dispute resolution capacity, imposes a lesser scope, eg 4 duplications rather than the 6 proposed by Aurizon Network, when that lesser scope is consistent with the Contractor's Requirements.</p> <p>In a situation where the QCA, acting in its dispute resolution capacity, sees fit to overrule the Contractor's Requirements, it would be unreasonable and perverse for</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
					Aurizon Network to be required to warrant that the Imposed Scope is 'fit for [its] stated purpose' as in this circumstance Aurizon Network would not consider that the Imposed Scope is 'fit for [its] stated purpose'. Aurizon Network may suffer both financial and non-financial consequences (including reputational damage from knowingly making a false warranty).
CA3	Availability of construction documents to CA principal	CA clause 8.4	Construction documents, including those relating to the manufacture of off-site works under the contract, will be available on site until practical completion and then for a period of 7 years at an office of the contractor in Brisbane.  The construction documents will not be available at other locations.	CA clause 8.4	Railways are built on site where they are required. Sometimes these locations are remote. In nearly all circumstances there are no permanent buildings in the location of the works.  Neither the trustee nor Aurizon Network is likely to have offices or staff located on site following practical completion. The trustee will have better access to documents located in Brisbane and can request access to them and review them prior to any site visit.
CA4	Confidentiality obligation in the CA	CA, clause 8.5(a)(i)	This obligation has been modified to reflect the parties' rights and obligations under the other SUFA template documents.	CA, clause 8.5(a)(i)	The confidentiality obligation in the form of the CA that is part of the UT3 SUFA FD should take into account the existence of the SUFA transaction as a whole, and the two parties to the CA being parties to other SUFA template documents.  By way of example, without this change the trustee would not be permitted to use information received under the CA for the purposes of drawing down funds from Preference Unit Holders or debt providers.
CA5	Pricing Information availability	CA clause 8.7	Pricing Information will be made available to the trustee where required for it (as CA principal) to assess or agree any adjustment to the contract sum in respect of adjustment events and provisional sums.	CA clause 8.7	Aurizon Network acknowledges that Pricing Information is necessary to assess, and reach agreement on, adjustments to the contract sum in respect of adjustment events and provisional sums.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
			<p>The trustee can only disclose the Pricing Information to employees or agents on a need to know basis.</p> <p>The trustee can share that information with</p> <p>the Principal's Engineer if it requires that information to carry out its duties properly, but only if the Principal's Engineer is contractually required not to disclose it to any person other than the Independent Certifier, and the Financier's Engineer on the basis set out in item (a) above.</p> <p>If both the Principal's Engineer and the Financier's Engineer are subject to these non-disclosure obligations, then they may share the Pricing Information with one another.</p> <p>Pricing Information will also be shared with the Independent Certifier as is necessary for the Independent Certifier to perform its role.</p> <p>Pricing Information will also be provided to the QCA when requested in writing, subject to the QCA first entering into a confidentiality agreement.</p> <p>The Pricing Information should not be provided to the Preference Unit Holders or the Access Seekers.</p>		<p>Aurizon Network therefore proposes to make this information available to the trustee, the Principal's Engineer, the Financier's Engineer, the Independent Certifier and the QCA, being all of the parties with an active role in assessing any adjustment to the contract sum in respect of an adjustment event or a provisional sum.</p> <p>The Pricing Information will include unit rates of the CA contractor and any subcontractor. This is information that contractors customarily treat as confidential because wider knowledge of their previously adopted unit rates is detrimental to their ability to tender and negotiate future contracts. In addition the principals of construction contracts customarily do not disclose this information, whether to other construction industry participants or in the public domain.</p> <p>The subcontractors for the CA works are likely to be competing for other works contracts that are awarded by companies who own and operate coal mines and above rail activities (ie including SUFA investors and Access Seekers). So the contractors will be reluctant to provide unit rate information to Aurizon Network that may be disclosed to would-be customers of those contractors.</p> <p>If Preference Unit Holders and Access Seekers were able to receive the Pricing Information, it is likely that fewer subcontractors will be prepared to submit tenders to Aurizon Network and/or the pricing of submitted subcontract tenders will be higher than it would otherwise be. The associated increase in construction cost would not be in the business interests of Access Seekers.</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
CA6	Adjustment Event treatment of changes in legislative requirements during the CA term, where those changes could have been reasonably anticipated before the date of contract	CA clause 11.2	<p>Any change in a legislative requirement after the date of the contract which necessitates a change causing Aurizon Network to incur more or less cost than it would otherwise have incurred shall be treated as an Adjustment Event.</p> <p>This applies regardless of whether that change in the legislative requirement could have been anticipated as at the date of the contract, as no risk contingency in respect of future changes to legislative requirements will be included in the contract sum.</p>	CA clause 11.2	<p>The function of the Adjustment Event mechanism is to transfer to the CA principal the risk (and cost) of elements not priced into the lump sum.</p> <p>The CA contractor will not price any potential future changes in legislative requirements into the lump sum price, so it is reasonable to treat any actual changes in legislative requirements during the life of the contract, being the period from the date of contract to the date of practical completion, as an Adjustment Event.</p> <p>If for a particular user funding transaction the CA principal and the CA contractor decide to negotiate the pricing of anticipated future legislative changes into the CA lump sum, then the parties would need to negotiate a customised CA, which would expressly provide that the occurrence during the CA term of an anticipated future legislative change would not give rise an adjustment event (in other words clause 11.2 of the CA would not apply to that occurrence).</p>
CA7	Insurance requirements for the CA contractor's (Aurizon Network's) use of the CA works	CA clause 23.1	The CA contractor's right, prior to the date of practical completion, to use the works for the purpose of running trains on the operational railway network is not conditional upon the CA contractor meeting any CA insurance requirements in respect of that use.	CA clause 23.1	The EISL has separate insurance requirements in respect of the running of trains (see clause 4.12). It is not necessary for the CA to address such requirements.
CA8	Notification of Latent Conditions by the CA contractor	CA clause 24.2	Where the CA contractor provides a notice under clause 35A.2(a) in respect of a Latent Condition, that notice will be taken to have satisfied the written statement requirement under clause 24.2.	CA clause 24.2	There should not be a requirement to make a claim under clause 35A.2(a) in order to satisfy the written statement requirement under clause 24.2.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
	(Aurizon Network)				
CA9	Contamination obligation in the CA	CA, clause 25A(a)(i)	The CA contractor is required to comply, and to ensure its employees, subcontractors and suppliers comply, with all legislative requirements in relation to contamination.	CA, clause 25A(a)(i)	The contamination obligation in the SUFA decision form of the CA imposes an exceedingly onerous standard that would result in a very high cost of delivering the works, which would not be in the business interests of the Access Seekers.
CA10	Adjustment event notification and claim process in the CA	CA, clauses 35A.2 & 35A.4	<p>The CA contractor must notify the CA principal of an adjustment event within 14 days of the date it became aware (or ought to have become aware) of that adjustment event ('the Reference Date').</p> <p>Following that initial notification of an adjustment event to the CA principal, the CA contractor must issue a subsequent notice within 42 days of the Reference Date, and as necessary a follow-up notice every 28 days thereafter. Each of these notices must provide detailed particulars, as they are known at the time, to the CA principal about the adjustment event and its effects on the project delivery process.</p>	CA, clauses 35A.2 & 35A.4	<p>The SUFA decision form of the CA required the CA contractor to issue to the CA principal a notice by 14 days after the commencement of the adjustment event, even if the Contractor was not aware of that event. If the CA contractor failed to meet this deadline due to lack of knowledge, then a time bar prevents it from making any claim under the CA.</p> <p>Similarly the SUFA decision form of the CA required the CA contractor to notify the CA principal about the detailed particulars about the adjustment event by 28 days after the commencement of the adjustment event, and barred the CA contractor from making any claim at all about that adjustment event if it did not issue these particulars, even if they were not known at the time of that notification.</p> <p>Aurizon Network considers that a deadline of 42 days after the Reference Date for the submission of the first 'detailed particulars' notice to the CA principal is more reasonable and practicable than the 28 days proposed in the SUFA decision form of the CA.</p>
CA11	Inclusion in Payments Claims of the 'cost of plant and materials not incorporated	CA clause 36.1(b)	Each payment claim should be for all 'work under the Contract' (or 'WUC') carried out to the date of the payment claim, other than WUC already included in previous payment claims. All WUC comprised of plant and materials not incorporated into the	CA clause 36.1(b)	It is customary under design and construction contracts in the Australian market for procurement to constitute part of WUC, and for principals to make payments to contractors in respect of procurement activities. This practice enables contractors to fund their purchase of materials.

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
	into the Works (sic)		Extension Land shall be included on the same basis as all WUC that is incorporated into the Extension Land.		<p>The form of the CA that is part of the UT3 SUFA FD, except in respect of the second sentence of clause 36.1(b), is consistent with this practice. That form provides that:</p> <ul style="list-style-type: none"> <li>• Aurizon Network may make a payment claim in respect of WUC (clause 36.1(b), first sentence),</li> <li>• WUC is defined as the 'work' required under the contract (clause 1.1, definition of WUC), and</li> <li>• 'work' includes the provision of materials (clause 1.1, definition of 'work')</li> </ul> <p>Aurizon Network does not volunteer to provide additional working capital finance to the trustee, and incur greater credit risk, by deferring inclusion in payment claims of the cost of plant and materials until they are incorporated into the Extension Land.</p>
CA12	Advanced deduction amount mechanics	CA clause 36.1(f)(ii)	Each Progress Certificate shall include a deduction equal to the Advance Deduction Amount for that progress Certificate until such time as the aggregate of all Advance Deduction Amounts that have been included in Progress Certificates equals the Advance Payment	CA clause 36.1(f)(ii)	<p>This mechanism is intended to deduct amounts from Progress Certificates in order to 'true-up' the Advance Payment to the CA contractor (Aurizon Network). This deduction arrangement will apply until the aggregate of the deductions equals that Advance Payment.</p> <p>Should there be any further Progress Certificates, there will be no further reduction as the Advance Payment has already been fully 'trued-up'.</p>
CA13	Rectification remedy for CA contractor under the CA	CA, clause 38.4	The CA principal may only terminate the CA if, within 30 days of its suspension of payment, the CA contractor has neither remedied its breach nor, if the breach is not capable of remedy, made other arrangements to the reasonable satisfaction of the CA principal.	CA, clause 38.4	<p>The CA contractor should be provided with a reasonable period to show cause, following suspension of payment, before the CA principal may terminate the CA for the CA contractor's default.</p> <p>The proposed 30 day remediation period mirrors the 30 day remediation period available to the CA principal after it has received a show cause notice from the CA</p>



#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
					contractor. (see clause 38.9 of the SUFA decision form of the CA)
CA14	Compensation to CA principal (the trustee) termination of the CA arising from a defined breach by the CA contractor (Aurizon Network)	CA clause 38.12	<p>The compensation payable to the CA principal is payable 2 Months after the date on which the QCA has made a final decision on the amount of RAB inclusion in respect of a RAB inclusion submission that relates to at least 75% of the amount of the contract sum paid prior to termination (that submission being the 'First Submission').</p> <p>To the extent that the Access Regulator subsequently approves any further amounts for inclusion in the Regulatory Asset Base, the amount of compensation due will be recalculated and the CA principal will pay to the CA contractor the resulting 'true-up' amount.</p> <p>The amount payable by the CA contractor under this compensation provision shall be the CA principal's sole entitlement from the CA contractor in respect of the CA's termination.</p>	CA clauses 38.12 and 43	<p>The Access Regulator will only include assets in the Regulatory Asset Base on an annual 'in arrears' basis in accordance with Schedule E clause 1 in UT4. Consequently the calculations required under this compensation provision can only be performed after the date on which the QCA has decided the amount of RAB inclusion.</p> <p>The full cost of some project assets may not be included in the RAB by the QCA in response to the First Submission, but may be included in respect of subsequent submissions. Accordingly any subsequent RAB inclusion in respect of those subsequent submissions cannot be reflected in the initial calculation of the compensation amount. Therefore the SUFA DAAU version of the CA provides for a 'true-up' of the compensation payment to take account of the value of any subsequent RAB inclusion.</p> <p>The purpose of this compensation mechanism is to require the CA contractor to make a liquidated damages-style compensation payment to the CA principal in respect of its loss due to 'contractor-caused' termination. For clarity it should be established that the CA contractor has no other liability in respect of that termination.</p>
CA15	'Hard-wiring' of the quantum of the Advance Payment and	CA Annexure A, Items 7B and 7C	The Advance Payment is 5% of the contract sum and each Advance Deduction Amount is 5% of the applicable payment claim.	CA Annexure A, Items 7B and 7C	<p>It was unclear from the form of the CA that is part of the UT3 SUFA FD whether</p> <p>(i) a percentage of 5% was to be included into the template, or</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
	the Advance Deduction Amount				<p>(ii) a percentage was to be negotiated on a project by project basis.</p> <p>As this percentage is not a value that is likely to change to reflect project size or other transaction specific issues, Aurizon Network has specified it to be 5% in the form of the CA that is part of this UT4 SUFA DAAU. That percentage is the same as the percentage that has been included in previous SUFA submissions and decisions.</p> <p>Accordingly the square brackets and the drafting note featured in items 7B and 7C of Annexure A of the form of the CA that is part of the UT3 SUFA FD are not included in the form of the CA that is part of this UT4 SUFA DAAU.</p>
CA16	Liability Cap	CA Annexure A, Item 37	<p>The amount of the liability cap is to read:</p> <p><i>[to be inserted with a \$ amount that is not to exceed the contract sum]</i></p>	CA Annexure A, Item 37	<p>The amount of the CA liability cap is a commercial issue that will be negotiated by the Access Seekers and Aurizon Network separately for each transaction on the SUFA model. That amount is a significant pricing item in those negotiations.</p> <p>In the event the Access Seekers and Aurizon Network are unable to reach an agreement and a dispute arises under UT4, the QCA will (in accordance with UT4, as modified by the amendments set out in Schedule 2 of this UT4 SUFA DAAU) determine the amount of the liability cap by reference to the 'consistent with market practice' principle. Further information about this principle is set out in section 3.3.3 of this UT4 SUFA DAAU.</p> <p>Accordingly the form of the CA that is part of this UT4 SUFA DAAU does not 'hard-wire' the quantum of the liability cap.</p>

#	Issue	SUFA decision reference	Treatment of issue in UT4 SUFA DAAU	UT4 SUFA DAAU reference	Explanation of treatment
FIA1	Signing Clause	FIA	Aurizon Network to sign under s127 of the Corporations Act.	FIA	This position is consistent with Aurizon Network's standard corporate practice on the execution of legal documents of this nature.

### Access Undertaking issues

AU1	Aurizon Network's tax process obligation in respect of approved SUFA template	Section 13.4.4 of FD, p174-175  Final decision 7.3(2)(a) of FD, p91	<p>Aurizon Network shall seek binding guidance from the ATO in respect of the approved SUFA template. In doing so Aurizon Network shall collaborate with one representative of Customers and Access Holders without Customers (collectively the 'Relevant Parties').</p> <p>Aurizon Network shall seek binding guidance as to the key tax outcomes of a notional user funding transaction based on the Standard User Funding Agreement.</p>	UT4 Drafting Amendments (Schedule 2)	<p>Aurizon Network considers that, in the light of the ATO's advice to Aurizon that the ATO is unlikely to issue an ABA in respect of the SUFA template, that the most appropriate 'product' to be sought from the QCA is 'binding guidance'.</p> <p>Aurizon Network considers that the QCA's proposal that it should include Access Seekers, customers and coal industry groups in negotiations with the ATO to be unworkable. The involvement of numerous parties in this process would be counter-productive. A more effective, more timely and less costly application process would be for a single tax representative to work with Aurizon Network and to report back to the parties that nominated it.</p> <p>Aurizon Network considers that the matters to be addressed in the application for binding guidance should be specified in general terms, so as to provide flexibility to address all key tax issues that arise during the course of the application process.</p>
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**Figure A – List of SUFA template documents**

Template document	Purpose	Parties
Access Agreement Specific Terms Deed (AASTD)	A deed under which Aurizon Network and an Access Seeker undertake to enter into an access agreement subsequently	Trustee, Aurizon Network and an Access Seeker (Note: each Access Seeker for a SUFA project enters into a separate AASTD with the trustee and Aurizon Network)
Construction Agreement – General Conditions (CA)	A construction agreement based on AS 4902-2000 General conditions of contract for design and construct	Trustee and Aurizon Network
Extension Infrastructure Head-Lease (EIHL)	A lease that addresses ownership of the trust’s infrastructure, its leasing to the Trust and the obligations to QTH of the trust and Aurizon Network	Trustee, QTH and Aurizon Network
Extension infrastructure Sub-Lease (EISL)	A lease that addresses the sub-lease of the infrastructure by the trust to Aurizon Network	Trustee and Aurizon Network
Extension Project Agreement (EPA)	An umbrella agreement that addresses RAB inclusion and various ‘whole-of-transaction’ matters	Trustee, Aurizon Network, Access Seekers and funders
Construction Agreement – Formal Instrument of Agreement (FIA)	A formal instrument in respect of the CA, which also includes various construction-related annexures	Trustee and Aurizon Network
Financing Side Deed (FSD)	A tripartite-style deed that regulates certain matters about security that the trust grants over its assets to financiers in order to obtain secured financial accommodation	Trustee, QTH, the Queensland government (in its capacity as land lessor), Aurizon Network, the financiers and the financiers’ facility Agent
Integrated Network Deed (IND)	A deed that provides the State parties’ consent to the SUFA transaction, and establishes QTH’s payment and other obligations in favour of the Trustee in various ‘end-of-transaction’ scenarios	Trustee, QTH, the Queensland government (in its capacity as land lessor) and Aurizon Network
Rail Corridor Agreement (RCA)	An agreement under which Aurizon Network provides land access to the trustee	Trustee and Aurizon Network

Template document	Purpose	Parties
Specific Security Agreement (SSA)	An agreement that provides the trustee with a security interest in both Aurizon Network's right to receive defined amounts under defined access agreements and each 'direction to pay' undertaking given by the customer under each of these access agreements	Trustee and Aurizon Network
Trust Deed (TD)	A trust deed that establishes the SUFA trust and addresses standard trust matters	Trustee, Aurizon Network and funders
Subscription and Unit Holders Deed (UHD)	A trust deed that addresses non-standard trust matters	Trustee, Aurizon Network and funders