



QRC SUBMISSION
DRAFT SUBMISSION - SUFA
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**SUFA – QRC draft submission on QCA Draft Decision on Aurizon Network’s 2013 SUFA
DAAU of October 2014**

The Queensland Resources Council (**QRC**) provides this draft submission on behalf of its members in response to the QCA Draft Decision on Aurizon Network’s 2013 SUFA DAAU of October 2014 and associated draft agreements (**QCA Draft Decision**).

The QRC is the peak industry association representing the commercial developers of Queensland’s mineral and energy resources. The QRC works collaboratively with stakeholders to achieve positive outcomes for QRC members.

Please find attached the QRC’s draft submission on the QCA Draft Decision. The QRC notes that it intends to provide a supplementary submission to this draft submission and confirms that this draft submission may be made public. The QRC notes that the comments in this draft submission are in addition to comments and submissions previously made by the QRC in respect of the SUFA documents.

Capitalised terms used in this submission have the meaning given to them in the SUFA documents. Thank-you for your consideration of our draft submission.

Yours sincerely

Michael Roche
Chief Executive

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1 Overview

The tables below set out the QRC's comments on the following draft documents, each published by the QCA on 31 October 2014:

- User Funding – Access Agreement Specific Terms Deed (**ASD**);
- Extension Project Agreement (**EPA**);
- User Funding – Trust Deed (**Trust Deed**);
- User Funding – Subscription and Unit Holders Deed (**Deed**);
- User Funding – Design and Construct Contract (**D&C Contract**);
- Extension Infrastructure Head-Lease (**EIHL**);
- Extension Infrastructure Sub-Lease (**EISL**);
- Integrated Network Deed (**IND**); and
- Rail Corridor Agreement (**RCA**).

The QCA intends to address the following documents in a supplementary submission:

- Financing Side Deed; and
- Specific Security Agreement.

We have used the key below to grade our comments on these documents as 'high concern', 'medium concern' or 'low concern'.

- = High concern
- ☹ = Medium concern
- ⊂ = Low concern

2 User Funding – Access Agreement Specific Terms Deed

Item	Clause	Description	Comments	Rating
1	N/A	General	<p>The QRC notes that the ASD requires the Access Seeker to enter into an Access Agreement with AN within a specified timeframe. Presumably some Access Seekers will, at the time they are required to enter into an Access Agreement with AN under the ASD, be a party to access agreements with AN for other parts of AN's railway network (excluding the Extension) which may ultimately interface, via connecting infrastructure, with the Extension.</p> <p>The QRC queries how the Access Agreement entered into pursuant to the ASD will interact with the Access Seeker's existing access agreements to ensure complete alignment of access rights for the operation of train services that traverse the Extension Infrastructure and existing railway network.</p>	●
2	2	Term	<p>Clause 2(a) provides that the ASD commences on the Conditions Precedent Satisfaction Date (which is the date of the satisfaction or waiver of the last Condition Precedent outstanding under the Extension Project Agreement (EPA)).</p> <p>Clause 2(b) provides that the ASD will terminate if the EPA has not been signed by all the parties by the End Date or due to a failure to satisfy the Conditions Precedent under the EPA.</p> <p>The QRC queries how the termination events in clause 2(b) might arise if the ASD does not actually commence until the Conditions Precedent Satisfaction Date under the EPA. The QRC queries what this clause is intended to achieve.</p>	●
3	2	Term	<p>Paragraph (b) of the definition of "Pro Forma Access Agreement" implies, by referring to Nominated Access Rights that are not otherwise the subject of an Access Holder Access Agreement or an Operator Access Agreement referred to in clause 3.1, that the Access Agreements for part of the Nominated Access Rights could be entered into under clause 3.1.</p> <p>If this is the case, then it creates a termination risk. Clause 2(a)(i) provides that the ASD will terminate when</p>	●

Item	Clause	Description	Comments	Rating
			<p>an Access Agreement or Access Agreements which meet the criteria in clause 3.1 have been entered into. If an Access Agreement for part of the Nominated Access Rights is taken to meet the criteria in clause 3.1 then the ASD will terminate, which is not an appropriate outcome.</p> <p>The QRC considers that the interaction between clause 3.1 and clause 2(a) needs to be clarified.</p>	
4	3.1	Entry into Access Agreement	<p>The timeframe for entering into an Access Agreement is the six month period ending on the Due Date (which is the latest Date for Practical Completion for all Separable Portions to be carried out on the Access Seeker Segments).</p> <p>Under the Construction Agreement, the Date for Practicable Completion will move if EOTs are directed, granted or allowed in accordance with the Construction Agreement. Accordingly, the 6 month period for entering into an Access Agreement will also move as the Date for Practical Completion moves.</p> <p>The movement of the 6 month period creates a risk that an Access Agreement that is entered into in compliance with the original 6 month period might fall outside the revised 6 month period, depending on when the Access Agreement was executed and how far the Date for Practical Completion moves.</p> <p>If this happens, the QRC queries whether it is proposed that a further Access Agreement will be entered into and the original Access Agreement terminated.</p>	●
5	3.1	Entry into Access Agreement	<p>In order to comply with clause 3.1, the Access Seeker is dependent on AN executing the relevant Access Agreement.</p> <p>If AN declines to sign the relevant Access Agreement or is slow to sign the Access Agreement and does not sign within the required period, then the Access Seeker will be taken to have failed to comply with clause 3.1 and the default Access Agreement regime in clause 3.3 will apply.</p> <p>The detriment for the Access Seeker is that it loses the right to nominate a Railway Operator (under clause 3.2(a)(ii)) and will be a party to a potentially incomplete Access Agreement.</p> <p>The QRC considers that AN should at least be obliged to use reasonable endeavours to assist the Access Seeker to comply with this clause.</p>	●

Item	Clause	Description	Comments	Rating
6	3.1	Entry into Access Agreement	<p>The Access Agreements referred to in clause 3.1 are for the whole of the Nominated Access Rights.</p> <p>However, paragraph (b) of the definition of “Pro Forma Access Agreement” implies, by referring to Nominated Access Rights that are not otherwise the subject of an Access Holder Access Agreement or an Operator Access Agreement referred to in clause 3.1, that the Access Agreements for part of the Nominated Access Rights could be entered into under clause 3.1.</p> <p>The QRC queries whether it is the case that the Access Seeker may enter into Access Agreements under clause 3.1 for part of the Nominated Access Rights. If so, the QRC considers that this should be clarified in clause 3.1 and that clause 2(a)(i) will need to be amended (see item 3).</p>	●
7	3.2	Completion and modification of Access Agreement Schedule 1, Part 2, item 6	<p>Under this provision, the Access Seeker authorises AN to complete the schedules and attachments to the Access Agreement to be entered into between AN and the Access Seeker. AN is required to act reasonably and in good faith in carrying out this obligation.</p> <p>However there seems to be no ability for the AN and the Access Seeker to agree the content of the schedules or for the Access Seeker to give AN any directions as to the content of the schedules. The schedules are likely to include key commercial matters such as access charges, rollingstock configurations and performance levels.</p> <p>The QRC considers that the Access Seeker should have input into the content of the Access Agreement, particularly with respect to key commercial matters.</p>	●
8	3.2 Schedule 1, Part 1	Completion and modification of Access Agreement	<p>The ASD does not seem to provide the Access Seeker with any guarantee that it will have first priority to the “Nominated Access Rights” and that the “Nominated Access Rights” will be available for AN to grant to the Access Seeker during the 6 month period during which the Access Seeker must sign an Access Agreement. There is no restriction on AN dealing with the Nominated Access Rights.</p> <p>If the Nominated Access Rights are not available, whether because insufficient capacity has been created by the Extension or because the rights have been granted to a third party, then the Access Seeker (through no fault of its own) cannot comply with its obligations under the ASD.</p> <p>The QRC queries what process should be followed if the whole or any part of the Nominated Access Rights</p>	●

Item	Clause	Description	Comments	Rating
			are not available to the Access Seeker.	
9	3.3(b)(iii)	Default Access Agreement	<p>The QRC considers that it is unclear whether the Default Access Agreement will be modified and completed in accordance with clause 3.2. The definition of “Pro Forma Access Agreement” indicates that this will be the case, however clause 3.3(b)(iii) indicates that this might not be the case because of the reference to “whether or not the details referred to in clause 3.2...have been completed”.</p> <p>If the details in the Default Access Agreement have not been completed at the date of execution by the Access Seeker, the QRC queries how the Access Seeker ensures that the details are completed in accordance with its requirements.</p>	●
10	3.3	Default Access Agreement	The QRC notes that whether there is any risk that, despite clause 3.3(b)(i), the Default Access Agreement could be considered void for uncertainty requires further consideration.	●
11	3.3(c)	Default Access Agreement	The QRC considers that AN should be required to provide the Default Access Agreement to the Access Seeker with a specified timeframe and if AN fails to provide the Access Agreement within the specified timeframe then the Access Seeker should have the right to execute Default Access Agreement for and on behalf of both itself and AN (pursuant to a power of attorney granted by AN under the ASD).	●
12	3.3(c)	Default Access Agreement	The QRC considers that AN should also be required to execute the document within a specified period after the Access Seeker executes the document.	●
13	3.4(d)	Dispute	The term “CEO Process” is not defined in the ASD or the EPA. The QRC queries whether this clause should refer to the process under clause 5.2 (Chief executive officer resolution) of the EPA.	●




Item	Clause	Description	Comments	Rating
			The QRC also queries what is meant by “the requirements imposed on Aurizon Network under this clause...”.	
14	4	Termination	<p>The QRC notes that the Access Seeker effectively has no right to terminate the ASD given that the termination right in clause 2(b) seems to be ineffective and the termination right in clause 4.1 is only for the benefit of AN.</p> <p>The Access Seeker may wish to have the right to terminate the ASD if:</p> <ul style="list-style-type: none"> • an Insolvency Event occurs in respect of AN or the Trustee; or • subject to the outcome of negotiations with respect to the assignment clause, AN or the Trustee breaches their respective assignment obligations. <p>The QRC notes that the consequences of the termination of the ASD by the Access Seeker requires further consideration.</p>	●
15	5.1(a)	Trustee's limitation of liability	<p>The QRC notes that the cross reference to clause 12.2 of the EPA is incorrect as this clause prescribes how notices are to be given under the EPA rather than Trustee warranties.</p> <p>The QRC requests clarification regarding the warranties that are to be given in relation to the Trustee's capacity.</p>	●
16	5.1(c)	Trustee's limitation of liability	<p>Clause 5.1(c) refers to “Wilful Default, breach of trust or breach of the Trust Deed or the Unit Holders Deed”.</p> <p>The term “Wilful Default” extends to all Transaction Documents (although the ASD ceases to be a Transaction Document on termination or expiry of the ASD). The QRC considers that this clause should be amended to clarify that the term “Wilful Default” in this clause is not limited in its application to the Trust Deed and the Unit Holders Deed.</p>	●




Item	Clause	Description	Comments	Rating
17	5.1(c)	Trustee's limitation of liability	<p>Clause 5.1(c) refers to "Gross Negligence" and "Wilful Default" which in turn refer to Transaction Documents.</p> <p>The ASD ceases to be a Transaction Document on termination or expiry of the ASD.</p> <p>The QRC considers that the exclusion from the Trustee's limitation of liability under clause 5.1(c) should continue to apply in respect of the ASD despite the termination or expiry of the ASD.</p>	●
18	5.2	Aurizon Network's limitation of liability	<p>The QRC considers that this clause should be amended to expressly clarify that the limitations of AN's liability in the ASD in no way limit AN's liability under any Access Agreement / s entered into pursuant to, or in connection with, the ASD.</p>	●
19	5.3	Application of Extension Project Agreement	<p>The QRC considers that clause 7.3 of the EPA should not apply to the ASD on the basis that this limitation is already covered by clause 5.1(c).</p>	●
20	5.2 and 5.3	Application of Extension Project Agreement	<p>The QRC notes that the breadth of the limitation of liability in clause 7.1 of the EPA means that AN effectively has no liability to the Access Seeker under the ASD.</p> <p>The QRC considers that AN and the Trustee should at least be liable to the Access Seeker for loss suffered or incurred by the Access Seeker that arises in connection with any breach of the ASD, Wilful Default, Gross Negligence or fraud.</p>	●
21	5.2	Aurizon Network's limitation of liability	<p>The QRC queries why AN's liability in respect of Claims arising out of Transaction Documents other than the ASD is specified here.</p>	●

Item	Clause	Description	Comments	Rating
22	6.4	Assignment	The ASD does not impose any restrictions on the assignment of the ASD by AN or the Trustee. The QRC considers that restrictions on AN and the Trustee, similar to those specified in the Integrated Network Deed, should be included in the ASD.	●
23	6.4(b)(i) and 6.4(b)(ii)(B)	Assignment	If the Access Seeker and its assignee intend to (and agree in favour of AN that they intend to) enter into an Operator Access Agreement, the QRC queries why should it be assumed that the Access Seeker will enter into an Access Holder Access Agreement.	●
24	6.4(d)	Assignment	The QRC queries why the listing is limited to the Australian Stock Exchange Limited. the QRC considers that this provision should be expanded to include foreign exchanges recognised under the Corporations Act.	●
25	6.4(e)	Assignment	The QRC notes that there appear to be formatting errors in this clause which change the intended operation of the clause. This clause appears to be based on clause 21.2(e) of AN's 2010 "Operator Access Agreement Coal" and should be reformatted in the same way in order to achieve the intended operation of the clause.	●
26	6.6(c)	Stamp Duty	The QRC notes that there seems to be some overlap and inconsistency between clauses 6.6(b) and 6.6(c).	●
27	6.7	Survival	The QRC considers that clauses 3.4, 4.3, 6.2, 6.3, 6.5 and 6.9 should survive termination of the ASD.	●
28	Schedule 1, Part 2	Modification to terms of Access Agreement	Part 2 does not refer to the modification to the terms of a Train Operation Agreement where AN and the Access Seeker enter into an Access Holder Access Agreement. The QRC queries whether the reason for this omission is because it is assumed that the Train Operations Agreement will be an annexure to the Access Holder Access Agreement and will thereby be amended via amendments to the Access Holder Access Agreement.	●





Item	Clause	Description	Comments	Rating
29	Schedule 1, Part 2, Item 2 1.1 "Access Agreement Term"	Term	The QRC notes that whether the default term of 10 years for an Access Agreement is commercially acceptable requires further consideration.	●
30	Schedule 1, Part 2, Item 4(b)	Commitment Date	The QRC notes that the definition of "Required Mine Specific Infrastructure" is critical to the definition of Commitment Date. Given the importance of this definition, the QRC considers that the template document should allow the definition of "Required Mine Specific Infrastructure" to identify the actual infrastructure more clearly.	●
31	Schedule 1, Part 2, Item 4(a)(iii)	Commitment Date	The QRC considers that in paragraph (a)(iii) the reference to "any other enhancements (other than the Extension) required to Aurizon Network's Railway Network" is very broad and should be limited to specified enhancements relevant to the Nominated Access Rights.	●
32	Schedule 1, Part 2, Item 4(a)(iii)	Commitment Date	This item provides that the Commitment Date for Derivative Access Agreement will be the day following the date of the expiration or termination of the Access Agreement which the subsequent Derivative Access Agreement is replacing. With respect to Derivative Access Agreements that are entered into as a consequence of the transfer of the access rights under an Access Agreement, the QRC considers that the reference to the termination of an Access Agreement which the subsequent Derivative Access Agreement is replacing does not seem to work.	●
33	Schedule 1, Part 2, Item 5	Completion of matters prior to	The QRC notes that whether, on the basis of the usual matters that the Access Holder is required to do before the commencement of train services, a three month period is too far out from the Commitment Date requires further consideration.	●

Item	Clause	Description	Comments	Rating
		Commencement of train services	The QRC notes that matters that are not likely to be done until much closer to the Commitment Date that would potentially put the Access Agreement at risk of termination if the reference to “three months” is retained require further consideration.	
34	Schedule 1, Part 2, Item 8	Right of renewal	The QRC notes that whether a period of not more than 36 months and not less than 12 months before expiration would be more appropriate (as per clause 7.3(f) of the 2014 DAU) requires further consideration.	●
35	Schedule 1, Part 2, Item 8	Right of renewal	The QRC notes that whether Item 8(a)(i) should be the lesser of 10 years and the remaining life of the relevant mine (as per clause 7.3(f) of the 2014 DAU) requires further consideration.	●
36	Schedule 1, Part 2, Item 8(f)	Right of renewal	<p>The QRC notes that a Renewal Application must be for the existing mine which receives the benefit of the Access Rights or a Replacement Mine.</p> <p>This requirement deviates from the criteria specified in clause 7.3(b) of the 2014 DAU which allow the origin to be different, provided that the Mainline Paths are the same and the origin for the renewal application is located in the same Track Segment.as the existing origin</p> <p>The QRC queries why the requirements with respect to the origin are more onerous in the ASD.</p>	●
37	Schedule 1, Part 2, Item 8(f)	Right of renewal	The QRC considers that the restrictions on AN entering into an Access Agreement for capacity that will become available as a result of the Access Agreement expiring (specified in clause 7.3 of the 2014 DAU) should be included in the ASD.	●
38	Schedule 1, Part 2,	Right of renewal	The QRC considers that where a capitalised term used in item 8 (such as “Access Agreement”) is defined in the 2010 Access Undertaking but also defined in the ASD, the capitalised term should have the meaning	●




Item	Clause	Description	Comments	Rating
	Item 8(g)		given in the ASD rather than the current Access Undertaking. The QRC requests clarification of this rule of interpretation.	
39	Schedule 1, Part 2, Item 8(g)	Right of renewal	The QRC considers that where a capitalised term used in item 8 (such as “Central Queensland Coal Region”) is defined in the 2010 Access Undertaking but is not defined in the current Access Undertaking (see 2014 DAU for example), the capitalised term should have the meaning given in the 2010AU. The QRC requests clarification of this rule of interpretation.	
40	Schedule 1, Part 2, Item 9	Obligation to pay “Take or Pay” charges	<p>The Access Seeker’s obligation to pay Take or Pay charges may commence if AN is not satisfied that the Connecting Infrastructure and other enhancements have been completed by a certain date.</p> <p>The QRC considers that the Access Seeker should not be liable to pay Take or Pay charges if the reason that the Connecting Infrastructure and other enhancements have not been completed is not due to the acts or omissions of the Access Seeker.</p> <p>In addition, given the potentially significant liability for the Access Seeker, the QRC considers that the definition of “Required Mine Specific Infrastructure” should be clarified (see item 30) and the reference to “any other enhancements” should also be clarified (see item 31).</p> <p>As QRC noted in item 7, the Access Seeker has no visibility on the amount of the charges, including the Take or Pay charges. The QRC considers that information in relation to the charges should be specified in the ASD or another Transaction Document and referred to in the ASD.</p>	
41	Schedule 1, Part 2, Item 9(a)(iii)	Obligation to pay “Take or Pay” charges	The QRC considers that in item 9(a)(iii) the reference to “any other enhancements (other than the Extension) required to Aurizon Network’s Railway Network” is very broad and should be limited to specified enhancements relevant to the Nominated Access Rights.	





Item	Clause	Description	Comments	Rating
42	Schedule 1, Part 2, Item 9(a)(ii)(B)	Obligation to pay "Take or Pay" charges	<p>The QRC notes that the Access Seeker should not be liable to pay Take or Pay charges before the earliest date that the Commitment Date can occur.</p> <p>Therefore, the date specified in item 9(a)(ii)(B) should not be earlier than the date specified in item 4(a)(ii) and this requirement should be specified in item 9(a)(ii)(B).</p>	
43	Schedule 1, Part 2	Modification to terms of Access Agreement	<p>The QRC queries whether there will be any modifications to the following standard Access Agreement terms:</p> <ul style="list-style-type: none"> • security; • resumption of access rights; • reduction of conditional access rights due to capacity shortfall; • reduction of nominated monthly train services if maximum payload exceeded; • Access Holder initiated increases to maximum payload; • reduction of nominated monthly train services if nominal payload increased; • relinquishment of access rights; and • transfer of access rights. 	
44	Schedule 1, Part 2	Modification to terms of Access Agreement	<p>The QRC notes that whether there are any other terms of the standard Access Agreement that the Access Seeker wishes to modify requires further consideration.</p>	






3 User Funding – Design and Construct Contract






Item	Clause	Description	Comments	Rating
1	2.1	Nature of Contract Price	<p>The Contract is silent on whether the lump sum contract price is subject to adjustment for rise and fall or escalation. Considering the nature of the project and in the interests of ensuring certainty of costs, QRC considers rise and fall should specifically be excluded from recovery by the Contractor.</p> <p>QRC considers paragraph 2, the operative provision for payment of the contract sum by the Principal, should be clarified to ensure that payment is only made by the Principal in consideration of the Contractor's due and proper performance and completion of the Works rather than for "work".</p>	 
2	2.2	Contractor's warranties	<p>Considering the nature of the work being performed by the Contractor, QRC considers that the warranties provided are extremely limited and do not adequately address the risk of non-performance of the Contractor's obligations under the Contract. QRC recommends the following additional warranties:</p> <ul style="list-style-type: none"> • warranty that the Contractor has performed its due diligence in relation to availability of skilled labour, equipment and materials required for the Works (including any items to be procured); • warranty as to the sufficiency of the contract sum for the WUC, including taking into account conditions identified in the baseline site conditions; • extension of the warranty in subclause 2.2(a)(i) to apply to the personnel, suppliers and subcontractors which the Contractor engages for the performance of the WUC; • warranty that the Works will be free from defects; and • warranty that it will obtain and maintain all required regulatory approvals for the WUC. 	
3	3	Provisional sums	<p>QRC considers that provisional sums should only be payable to the Contractor arising from a direction from the Principal.</p>	





Item	Clause	Description	Comments	Rating
4	5.5	Principal's Security – trusts and interest	The Contract currently provides that the Contractor shall not hold the security or the proceeds of security on trust. To the extent that the Contractor converts the security to cash in circumstances where it is not entitled to the whole of the security, the Contractor should hold the balance of the security on trust for the Principal until such time as either the Contractor has a valid claim on the balance or the balance is returned to the Principal.	●
5	N/A	Contractor's security	Considering the nature of the Works, the project and the requirement for security to be provided by the Principal in respect of its obligations under the Contract, QRC considers that the Contractor should provide security to the Principal for the due and proper performance of its obligations under the Contract.	●
6	8.3	Purpose for which Principal may use Contractor supplied documents	QRC considers that the purpose for which the Principal may use document supplied by the Contractor under the Contract should be extended to include any purpose in connection with the performance of the Principal's obligations under the Contract or the WUC.	●
7	8.7	Variation Pricing information	<p>QRC's agreement to the proposed restrictions on the disclosures of pricing information regarding the lump sum contract price is conditional upon user funders contributing to the negotiation of scope, price and schedule for the construction contract prior to execution of the construction contract and the process including a binding dispute resolution mechanism where Aurizon and the user Funders cannot agree on any of these matters. Assuming this process is documented into the expansion process, QRC can accept the restrictions on visibility into the makeup of the lump sum contract price at the construction contract stage.</p> <p>Notwithstanding the foregoing, QRC considers that the restriction on disclosures of pricing information should be limited to the composition of the lump sum components of the contract sum only and should not extend to any provisional sums included in Schedule 2, to ensure transparency of costs in relation to the project and the contract price. As drafted, the Principal is only entitled to review pricing information if</p>	●

Item	Clause	Description	Comments	Rating
			disclosure is necessary for the Principal to assess or agree any adjustment to the contract sum (which is defined as including the provisional sums) or variation. Where the Principal is to pay a price for work to which a provisional sum relates under clause 3, the Principal should have complete transparency as to how the price of the work differs from the provisional sum included.	
8	9.5	Subcontracting	QRC requests the deletion of the words “Except were the Contract otherwise provides” from the opening line of this clause.	
9	10	Intellectual property	<p>QRC requires the following amendments:</p> <ul style="list-style-type: none"> • The warranty given by the Principal under clause 10.1(a) should apply to the intellectual property rights of third parties only (and not to intellectual property rights of the Contractor and its subcontractors). • In respect of clause 10.1 (b), an express reference to ‘design documents’ should be included. • The indemnity in paragraph (c) should be limited to third party claims made against a party • The Contractor should be obliged to ensure it obtains any intellectual property rights from its subcontractors and suppliers as necessary for the use, repair, maintenance, alteration, upgrade of the Works by the Contractor and user funders. 	
10	11	Legislative Requirements	Under the SUFA model where Aurizon performs that role of landholder. constructor of the infrastructure, and then sub-lessee the infrastructure once built, the QRC cannot see that the Principal should be responsible for satisfying any legislative requirements under the construction contract.	





Item	Clause	Description	Comments	Rating
11	11.2	Changes	<p>QRC considers changes in law should only give rise to an EOT or adjustment to the contract price to the extent caused by a change in existing legislation or new legislation, or where there is a change in an Approval required for the works. The definition of 'legislative requirement' is too broad to be linked to the EOT and adjustment entitlement.</p> <p>Further, it is generally standard practice to limit the Contractor's ability to claim these entitlements to changes in law occurring prior to the Date of Practical Completion. Any change arising after this date should not apply to the Works and as such the Contractor should bear this risk.</p> <p>QRC does not consider that the Contractor should be entitled to claim an adjustment event for changes to fees and charges where the scope and performance methodology of the Works remains unchanged, changes to income tax legislation or any changes which the Contractor should have reasonably foreseen at the date of the Contract. Inclusion of these items takes away price certainty for the user funders.</p>	
12	11.3	Approvals	<p>Under the SUFA model where Aurizon performs that role of landholder. constructor of the infrastructure, and then sub-lessee the infrastructure once built, the QRC cannot see that the Principal should be responsible for obtaining any approvals under the construction contract. Propose that subclause (a) is deleted and subclause (b) is amended to oblige the Contractor to obtain all approvals necessary for the lawful design and construction of the Works etc.</p>	
13	11.4	Health and safety	<p>Given the hands off role of the Principal under the SUFA structure, QRC requires an additional clause to be included requiring the Contractor to do everything necessary to assist the Principal to discharge any obligations it retains under the WHS Act as the "person who commissions the Works" including making all relevant investigations, inspections and enquiries relevant to the design and hazards and risks in relation to the workplaces where the WUC is carried out.</p>	
14	12	Protection of people and property	<p>QRC considers that this clause requires amendment to require the Contractor the rectify any damage to property caused by its subcontractors.</p>	






Item	Clause	Description	Comments	Rating
15	N/A	Environment	This contract is silent on protection of the environment. The Contractor should be responsible for performing the work, and ensuring that its subcontractors perform the work, so as to avoid any detrimental environmental impact and to manage compliance with environmental requirements. QRC recommends including a requirement to develop an environmental management plan and an obligation for the Contractor and its subcontractor to comply with such a plan.	
16	14.3	Excepted risks	Paragraph (f) should be deleted as the Contractor is warranting the preliminary design under clause 2. QRC considers paragraph (g), loss due to disappearance of items, is outside the Principal's control as the Contractor has possession of the Site. Further, paragraph (h), loss due to corruption of electronic data is not a typical excepted risk and is also not within the Principal's control.	
17	14.4	Passing of title	QRC considers title in materials, parts, components and goods should pass on the earlier of payment or incorporation into the Works. QRC suggests it is unreasonable for these items to have been paid for and title to remain with the Contractor until incorporation into the Works. Please also note comments on clause 36.1 regarding the way in which progress payments and manner in which the progress of WUC is determined.	
18	15.1(d) and 15.2	Damage to people and property	As noted in item 11 above, the Principal is not likely to obtain any approvals necessary for the performance of the Works and therefore clause 15.1(d) should be deleted. Further, the indemnity relating to this clause in clause 15.2 should also be deleted.	
19	N/A	Insurances	QRC recommends the Contractor should be required to take out motor vehicle insurance. The Contractor should also be obliged to ensure its subcontractors maintain similar insurances.	




Item	Clause	Description	Comments	Rating
20	23.2	Access for Principal and others	QRC considers the third paragraph should be deleted or restricted to where the Contractor is impeded resulting from inspections by the Principal in respect of a Landholder Requirement under the Rail Corridor Agreement only (as this is within the Principal's control). The Principal should not be responsible for the actions of the Independent Certifier, who is appointed jointly by the QCA, Aurizon the Principal.	
21	24.1	Latent conditions	QRC's acceptance of measuring Latent Conditions against a baseline site conditions report is subject to user funders agreement on the scope and detail of the report to be included in the construction contract. As Latent Conditions give rise to an extension of time and adjustment costs, QRC considers the definition of latent conditions should be restricted to conditions which could not have been anticipated by a competent contractor exercising good industry practice. The Contractor should be applying these principles when considering site conditions.	
22	24.4	Site Conditions	The confirmation should be extended to include confirmation that all work necessary to overcome all baseline site conditions has been allowed for in the program as well as the contract sum.	
23	25A	Contamination	QRC's acceptance of measuring unexpected contamination against a baseline site conditions report is subject to user funders agreement on the scope and detail of the report to be included in the construction contract. The confirmation in clause 25A(c) should be extended to confirm that all work necessary to overcome all baseline contamination has been allowed for in the program as well as the contract sum.	
24	27	Materials, labour and construction plant	QRC recommends further detail be provided in respect of Contractor's obligations in respect of construction plant to include responsibility for maintenance and spare parts and compliance with law and licensing requirements. The Contractor should be obliged to ensure that its subcontractors comply with these requirements.	

Item	Clause	Description	Comments	Rating
25	N/a	Personnel	<p>The Contract is silent on the Contractor's responsibilities for its personnel. QRC recommends inserting a clause requiring the Contractor to:</p> <ul style="list-style-type: none"> • employ people with sufficient qualifications and experience to perform the WUC. • promptly replace personnel if necessary. • allow the Principal or the Independent Certifier to direct removal of unsuitable personnel where required. • take responsibility for employee relations management and industrial disputes at Site. 	
26	28.2	Quality	<p>QRC recommends requiring the Contractor to comply with a quality assurance system which complies with a nominated standard, for clarity. The quality clause merely provides that the Contractor must maintain a 'conforming' quality system, without specifying any further details.</p>	
27	31	Program	<p>QRC's agreement to a baseline program prepared by the Contractor being included in the contract is conditional upon user funders contributing to the negotiation of schedule for the construction contract prior to execution of the construction contract and the process including a binding dispute resolution mechanism where Aurizon and the user funders cannot reach agreement.</p> <p>QRC considers that this clause should be amended to include a positive obligation on the Contractor to submit revised programs to the Independent Certifier for approval when an extension of time is granted.</p> <p>QRC considers it critical to include a provision allowing the Independent Certifier (if it is of the opinion that the works will not achieve Practical Completion in accordance with the program), to direct the Contractor to work overtime, use more equipment etc. to maintain the program at the Contractor's cost. QRC also recommends inserting a clause allowing the Principal to direct the Contractor to accelerate the Works on the basis that an acceleration would be an adjustment event.</p>	
28	33, 40.2	Time and	<p>Considering the nature of the project, time is of the essence in relation to this Contract. The Contract</p>	

Item	Clause	Description	Comments	Rating
		progress	<p>should reflect this.</p> <p>QRC considers this clause requires substantial amendment, in line with market standards and reflecting the critical requirement for on-time completion:</p> <ul style="list-style-type: none"> • Time bars should apply for the initial delay notice submitted by the Contractor as well as the EOT claim. • The Contractor should only be entitled to an extension of time where the delay is on the critical path and affects the Contractor’s ability to reach practical Completion by the Date for Practical Completion. • To the extent that a qualifying cause of delay and non-qualifying cause overlap, the Contractor should not be entitled to any EOT. • QRC requests deletion of clause 33.9 (Delay damages). As the contract already provides for payment for adjustment events, having a separate head for delay damages for “compensable causes” is over-recovery by the Contractor. In the event that the concept of “compensable causes” is retained, these should be exhaustively defined in the template and provision should be made in the clause to ensure that there is no overlap between “delay damages” and payment for “adjustment events”. Finally, if the concept of “delay damages” is retained, the clause needs to specify the basis of calculation of such damages (e.g. direct costs only, without mark-up for profit). <p>QRC considers qualifying causes of delays should not include:</p> <ul style="list-style-type: none"> • inclement weather; or • industrial action. <p>An appropriate allowance for such events can be included in the program and contract sum for the works. Including these as events which entitle the Contractor to claim and extension of time and additional costs undermines the certainty of schedule and price provided by a lump sum arrangement.</p> <p>QRC also queries the inclusion of “any delay by the Principal in providing access to the site for the Contractor to commence or carry out the WUC” as Aurizon will be the landholder of the Rail Corridor which forms the site under the SUFA arrangements.</p>	

Item	Clause	Description	Comments	Rating
29	34.5B, 36A	Adjustment events	<p>QRC is of the opinion that the definition of “adjustment event” is too broad and this detracts from the certainty of the lump sum contract price.</p> <p>QRC strongly recommends that for certainty of cost and appropriate risk allocation, Adjustment Events in clause 36A.1 exclude the following:</p> <ul style="list-style-type: none"> • Industrial action; • Inclement weather; • Force Majeure (i.e the Contractor remains entitled to an EOT but bears its own costs associated with any delay). <p>Time bars should apply in respect of notice for adjustment events.</p>	
30	34	Defects liability	<p>Considering the nature of the Works, QRC recommends that a separate defects rectification period apply to defects which have been rectified by the Contractor, provided that this period should not exceed 24 month from the defects rectification period in total.</p>	
31	35	Discretionary Variations	<p>The mechanism contemplated by this clause requires the Contractor’s agreement before Variations must be carried out. The agreement should specify the ground on which the Contractor may refuse to undertake a variation required by the Principal.</p> <p>The QRC proposes that where the parties do not reach agreement, the matter should be referred to some form of binding dispute resolution.</p>	
32	36.1	Progress Claims	<p>QRC consider that the further parameters around the determination of the “progress payment payable on account of the WUC carried out” should be included in this clause. For example, WUC carried out should not include materials ordered but not yet incorporated into the Works.</p> <p>In respect of subclause (h), QRC wishes to confirm that the time frame for payments to the Contractor align with the timing for funding the trust when finalised.</p>	




Item	Clause	Description	Comments	Rating
33	36.4(c)	Final payment claim	QRC suggests “any accidental” be deleted and “any erroneous inclusion” instead refer to “any significantly erroneous” inclusion. This should avoid any re-opening of amounts paid unless a significant error was made.	
34	38	Contractor's Default	QRC considers the current list of Contractor default events to be very limited. QRC proposes that the list is amended to include failure to: <ul style="list-style-type: none"> (i) perform properly the Contractor's design obligations; (ii) failing to proceed with due expedition and without delay; (iii) failing to bring the Works to completion by the date for Practical Completion; (iv) failing to use appropriately skilled and qualified subcontractors to perform the work; and (v) breach of any material obligation that is not remedied within a specified cure period. 	
35	38.10	Termination	QRC does not agree to the parties rights and remedies on termination for the Principal's default being the same as at law in circumstances where the Principal's rights on termination for the Contractor's default are codified. QRC proposes that the Contractor's rights on termination for the Principal's default should be as set out in clause 39.2.	
36	38.12	Compensation to Principal	The QRC would like to consider the proposed compensation regime in light of the provisions to be included in the Access Undertaking regarding inclusion of the capital costs of the expansion in Regulatory Asset Base, including any preapproval process.	
37	39.2(b)	Termination compensation to Contractor	To the extent that the Principal pays for materials reasonably ordered which the Contractor is liable to accept, QRC suggest s inserting a clarification stating that ownership in such material passes to the Principal on payment.	

Item	Clause	Description	Comments	Rating
38	40A	Force majeure	<p>QRC does not agree with the position under the Contract that the Principal is responsible for the Contractor's costs relating to Force Majeure events. This is not a standard position. The Contractor must be responsible for these costs.</p> <p>QRC queries the use of "storm" in the definition of Force majeure. This should be further defined as storm may only include a rain event which should be the responsibility of the Contractor to manage.</p>	
39	40	Notification of claims	QRC considers that a time limit for notification of claims should be added to this clause. Claims not notified within the agreed limit should be time barred.	
40	43	Limit of Liability and consequential loss	<p>QRC requests that the Contractor's limit of liability should be limited to the Contract Price and not in respect of tort, statute or law.</p> <p>The carve outs to the Contractor's limitation of liability 43.1(b) are quite restricted. QRC considers the following carve outs should be included:</p> <ul style="list-style-type: none"> • Gross Negligence and Wilful Default; • in respect of death or personal of any person; • destruction of any property; • any claim for payment made by the Contractor's employees; • Intellectual property indemnity provided by the Contractor; and • obligations to pay LDs. 	
41	Definition of 'works'		QRC recommends this definition either be deleted or expanded as it currently it is vague and may lead to confusion or dispute in administering the contract.	





Item	Clause	Description	Comments	Rating
42	N/A	Survival	QRC considers that a survival clause should be inserted for clarity.	●
43	N/A	Records	QRC recommends inserting a clause which requires the Contractor to keep accurate records of the WUC for a set period which may be inspected by the Independent Certifier on reasonable notice.	●
44	N/a	Obligations placed on Contractor should extend to subcontractors	Throughout the document, most references to the Contractor being required to do something should be amended to require the Contractor to ensure that its subcontractors also comply. For example; clauses 12, 25, 26, 27 and 28.	●
45	FIA, clause 7	Conditions Precedent	For clarity, QRC recommends including references to clause 7 (Notices) in this clause. There are incorrect clauses references in paragraphs (v) and (vi).	●


4 User Funding – Extension Infrastructure Head Lease

Item	Clause	Description	Comments	Rating
1	1.1	Definitions –	The QRC maintains the definition of Insolvency Event should be amended as recommended in previous	●


Item	Clause	Description	Comments	Rating
		Insolvency Event	<p>SUFA submissions to narrow the scope of what constitutes an insolvency event to prevent otherwise insignificant events from triggering termination of the EIHL and EISL.</p> <p>The QRC notes the comments of the QCA in respect of termination and the QTC, however considers that the definition should be amended nonetheless.</p>	
2	1.1	Definitions – Loss	<p>The QRC considers this definition very broad and particularly notes that it is very unusual to include legal costs on a full indemnity basis in a definition of this nature. In the QRC's view it would be appropriate for a narrower, more standard definition to be adopted.</p>	
3	3	Lease and Sublease – restoring functionality as distinct from 'new' functionality	<p>The QRC is concerned that the distinction between 'restoring' functionality and 'new' functionality to determine what is brought into the Extension Infrastructure reflected in clause 3 does not seem to be reflected in the similar provisions of the EISL as regards the infrastructure leased from the Trustee to Aurizon. In the EISL, the distinction depends on whether it is 'Aurizon Additional Infrastructure' (which stays with Aurizon) or 'Trustee Additional Infrastructure' (which is transferred to the Trustee and leased to Aurizon). These definitions do not appear to necessarily be linked to restoring or new functionality. The QRC suggests that these provisions should be more consistent.</p> <p>In addition, clause 3.5(b) appears to apply a different test to the 'functionality' test in clause 3.1(d). Clause 3.5(b) is not made subject to clause 3.1 and appears to cut across clause 3.1(d) in particular. The QRC's view is that there ought to be consistency in the approach and use of restoration of functionality, or new or additional functionality.</p>	
4	3.3	Authorisations, compliance with Laws and assistance provided by Lessor	<p>The QRC considers the Lessor's obligations in relation to required Authorisations and compliance with Laws to be unacceptably low. In the QRC's view, it is necessary and reasonable for the Lessor to agree to provide all reasonable assistance requested by the Lessee or Sublessee in relation to the Lessee or Sublessee obtaining Authorisations or complying with Laws.</p>	




Item	Clause	Description	Comments	Rating
5	6	Operation, repair, maintenance and removal	<p>The QRC considers it is necessary and reasonable to include in this clause obligations on the Sublessee to exercise its rights and perform its obligations in respect of operation, repair, maintenance and removal under this clause in the same manner and to the same standard as it does for the balance of the rail network.</p> <p>As well as the ability to refer alleged discrimination to the QCA, Aurizon must have obligations under the EIHL and EISL not to discriminate. The QRC considers that the EIHL and EISL must be amended such that where the QCA makes a finding of discrimination, such a finding will constitute a wilful default for which Aurizon's limitation of liability under the EISL does not apply.</p>	●
6	7.2	Records, information and inspection	<p>The QRC considers that the Sublessor's obligation to provide the Lessor and authorised representatives with the information in clause 7.2 should also extend to provision to the Lessee. It is appropriate and necessary for the Lessee to have the ability to request the information the Lessee reasonably requires to determine the Lessee's and Sublessee's compliance with the EIHL.</p>	●
7	7.6	Asset register	<p>As the EISL has been amended for the Sublessee to consult with the Lessee about the asset register after it has been provided to the Lessor, the Lessee's acknowledgment and agreement in clauses 7.6(c) and (d) should not apply to the Lessee until the consultation has been completed and any resulting amendments have been provided to the Lessor by the Sublessee.</p> <p>The QRC makes a similar note in respect of clause 7.7 (Defects Register).</p>	●
8	9	Insurance – notice of claims and workers compensation	<p>The QRC considers it appropriate that the Sublessee be under an obligation to notify both the Lessee and Lessor as soon as possible of a cancellation of, change in or reduction in the coverage of a policy, if a policy becomes void or voidable or any other material circumstance or correspondence relation to a policy of insurance required under the EIHL. The Decision Draft provides that the Lessee is only under</p>	●



Item	Clause	Description	Comments	Rating
			<p>an obligation to notify the Lessor of these matters.</p> <p>The QRC also considers that the Sublessee ought to be required to effect and maintain appropriate workers' compensation insurance.</p>	
9	10	Risk and indemnities	The QRC was of the understanding that the Trustee was to be entitled to claim uncapped damages where the EIHL is terminated due to the fault of the Sublessee. The QRC considers this is not evident in the EIHL.	
10	11 (particularly 11.4(b) and 11.7)	Termination	<p>In addition to the termination points raised in items 1 (definition of Insolvency Event) and 13 (references to Infrastructure Lease), the QRC makes the following comments in respect of the termination provisions of the Draft Decision EIHL:</p> <p>there should be a mechanism for the parties to agree to extend the permitted time period with respect to the suspension or cancellation of a Major Authorisation where appropriate to avoid termination of the EIHL;</p> <p>it is neither appropriate nor practical to provide that the Parties may not terminate or rescind the EIHL (as applicable in respect of particular provisions); and</p> <p>it is neither appropriate nor practical to provide that the EIHL will not terminate, be frustrated, be repudiated or taken to have been repudiated (as applicable in respect of particular provisions).</p>	
11	14	Force Majeure	The QRC maintains the view that the Force Majeure operative provisions and definitions should match across the EIHL and EISL – this is not currently the case. The QRC considers that a consistent and industry standard force majeure framework goes towards the credibility of SUFA.	
12	17	Dispute Resolution	The QRC maintains the view that the Lessor ought to be required to provide reasonable details of a dispute to improve the workability, bankability and credibility of the EIHL.	





Item	Clause	Description	Comments	Rating
13	Throughout	References to Infrastructure Lease	<p>The QRC notes there are a number of provisions of the EIHL which refer to, or incorporate, terms of the Infrastructure Lease. The QRC notes previous confidentiality concerns of Aurizon and QTH relating to the release of the Infrastructure Lease and the QCA Draft Decision suggestion that a redacted version of this document be made available to relevant parties during negotiation of a SUFA.</p> <p>The QRC is of the view that only requiring the provision of a redacted version during negotiation of a SUFA provides insufficient commercial certainty for QRC members in considering the Draft Decision Agreements. Further, the QRC suggests that provision of the Infrastructure Lease at the point in time proposed by the QCA undermines the principle of workability emphasised by the QCA. The Draft Decision indicates the QCA considers 'workable' means "<i>the documents must...be able to be executed by all parties without negotiation if necessary</i>". The QRC members will not be in a position to execute the EIHL without further negotiation unless members have access to all essential documents in order to satisfy themselves of the suitability of the SUFA documents, including the Infrastructure Lease (which the QRC considers may be appropriately redacted).</p> <p>The QRC confirms that due to the ongoing lack of visibility concerning the Infrastructure Lease, it has not been possible for the QRC to meaningfully review those provisions of the EIHL relating to the Infrastructure Lease, particularly with respect to termination.</p>	





5 User Funding – Extension Infrastructure Sub-Lease

Item	Clause	Description	Comments	Rating
1	1.1 Definitions	State Infrastructure Lease	The QRC previously raised concerns that the inclusion of separate definitions of State Infrastructure Lease and Infrastructure Lease may give rise to confusion. The QRC notes that while State Infrastructure Lease has been deleted from the definitions provision, the term continues to be used in the	






Item	Clause	Description	Comments	Rating
			operative provisions of the EISL. Accordingly, the QRC considers that this issue has not been substantively resolved.	
2	3.5(h)	Indemnity – compensation arrangement Aurizon Network cause	<p>Clause 3.5(h) of the EISL provides that despite any other Transaction Document and except as provided in clause 3.5 more broadly, Aurizon Network has no liability to the Trustee in connection with a termination of the EIHL in certain circumstances.</p> <p>The QRC considers clause 3.5(h) of the EISL should be deleted and Aurizon Network ought to be liable to the Trustee in connection with a relevant termination of the EIHL where any relevant event or circumstance, act or omission of Aurizon Network gives rise to the termination. It is appropriate for Aurizon Network to bear this liability where the termination is the result of an event or circumstance caused by Aurizon Network, or where the termination is due to an act or omission of Aurizon Network.</p>	
3	4 and 5	Discrimination	<p>The QRC previously raised concerns that Aurizon Network may have the ability to treat SUFA assets differently from Aurizon Network funded assets or in relation to the performance by Aurizon Network of its obligations under the SUFA documents as opposed to the balance of the Aurizon Network rail network. The QRC notes the Draft Decision interim position of the QCA in respect of this issue and will consider the QCA's further comments outlined by the QCA as expected in respect of the following as part of the 2014 DAU process:</p> <ul style="list-style-type: none"> – discrimination in respect of asset maintenance; and – potential issues of cost-shifting and other discriminatory behaviour. <p>As noted previously, the QRC considers that the EIHL and EISL must be amended such that where the QCA makes a finding of discrimination, such a finding will constitute a wilful default for which Aurizon Network's limitation of liability under the EISL does not apply.</p>	
4	5.8	Rail Corridor Agreement and	The QRC considers the limitation of the Trustee's rights under clause 8 of the RCA as provided for in clause 5.8 of the EISL to be inappropriate. In the QRC's view, the Trustee should not be obliged to	

Item	Clause	Description	Comments	Rating
		removal of Extension Infrastructure	obtain the prior written consent of Aurizon Network before removing any part of the Extension Infrastructure.	
5	6.1	Rectification of Defects by Trustee	The new clause 6.1 provides that the Trustee must at its cost, procure the rectification of any Defects promptly after they are recorded in the Defects Register (as defined in the Construction Agreement). As noted in the QRC submission comments on the Construction Agreement, it is not appropriate that the Trustee bear liability for Defects resulting from obligations of Aurizon Network as Contractor under the Construction Agreement to deliver the agreed fit-for-purpose scope.	
6	7, 8 and 9	Rent and other payments – calculation of rent	<p>As both the QRC and QCA have previously noted, the right to receive a rental stream is the key asset of a SUFA Trust. The QRC acknowledges the QCA's agreement with the QRC's suggestion that example spreadsheets be provided to assist with the rental calculation methodology. The QRC notes the QCA's commitment to work with Aurizon Network to develop:</p> <ul style="list-style-type: none"> – example spreadsheets; and – a review of the schedules underpinning the rental calculation. <p>The QRC looks forward to reviewing this additional material when it is made available by the QCA.</p> <p>The QRC previously commented that if the CQCN ceased to be regulated, certainty of continuity of rent would be essential. The QRC notes the QCA's Draft Decision comment that uncertainty around continuity of rent detracts from the bankability of SUFA.</p> <p>The QRC agrees with the following suggestions made on this point by the QCA:</p> <ul style="list-style-type: none"> – the SUFA to allow for both parties to remain under the regulated contract; and – the SUFA to allow for linked access agreements for SUFA assets to include a schedule setting out access charges in the event an asset is no longer declared. 	

Item	Clause	Description	Comments	Rating
7	7.6	Set-off	<p>The QRC makes the following comments in respect of set-off, in light of the QCA's Draft Decision comments on this issue:</p> <ul style="list-style-type: none"> – set-off for over / under payment of rent is not acceptable due to the fact that as the QCA has acknowledged, at the extreme, it is technically possible that for a given month a SUFA trust may receive no rent if no access charges were received – in making this comment the QCA notes that the right to a rental stream is the primary asset associated with a SUFA for a SUFA Trust; and – the QRC again emphasises its previous position in relation to set-off and confirms its members support set-off for immaterial amounts, provided an appropriately low materiality threshold is in place and single and cumulative set-off amounts are recognised. 	
8	9	Insurance	As with the EIHL, the QRC also considers that Aurizon ought to be required to effect and maintain appropriate workers' compensation insurance.	
9	11	Force Majeure	As noted in item 11 above, the QRC maintains the view that the Force Majeure operative provisions and definitions should match across the EIHL and EISL – this is not currently the case. The QRC considers that a consistent and industry standard force majeure framework goes towards the credibility of SUFA.	
10	12	Termination	<p>Similarly to item 10 above, the QRC makes the following comments in respect of the termination provisions of the Draft Decision EISL:</p> <ul style="list-style-type: none"> – it is neither appropriate nor practical to provide that the Parties may not terminate or rescind the EISL (as applicable in respect of particular provisions); and – it is neither appropriate nor practical to provide that the EISL will not terminate, be frustrated, be repudiated or taken to have been repudiated (as applicable in respect of particular provisions). 	

Item	Clause	Description	Comments	Rating
11	13	Limitation of liability	The QRC notes that as clause 13.2 of the Draft Decision EISL provides that the limitations and provisions contained in clause 7 of the Extension Project Agreement apply to the EISL mutatis mutandis, the QRC comments in respect of clause 7 of the Extension Project Agreement also apply to the EISL to the extent they are relevant.	
12	16.4	Assignment	The QRC's view is that the assignment provisions across both the EIHL and EISL ought to be consistent. As outlined in the Draft Decision documents, the EIHL largely deals with assignment by reference to the Integrated Network Deed, while the EISL largely deals with assignment in accordance with the Extension Project Agreement.	
13	16.6	Survival	The QRC notes that the survival clause of the Draft Decision EISL has a number of placeholders. The QRC considers that the standard survival clauses should be included instead of these placeholders, for example limitation of liability (clause 13).	
14	Throughout	References to Infrastructure Lease	As with item 13 above, the QRC notes there are a number of provisions of the EISL which refer to, or incorporate, terms of the Infrastructure Lease. The QRC confirms that due to the ongoing lack of visibility concerning the Infrastructure Lease, it has not been possible for the QRC to meaningfully review those provisions of the EISL relating to the Infrastructure Lease.	

6 Integrated Network Deed


Item	Clause	Description	Comments	Rating
1	1.1	Definitions - Interest Rate	<p>There are inconsistencies between the SUFA documents with respect to the interest rate to be applied when interest is due under the SUFA documents. For example, Interest Rate under IND refers to a rate published by the Commonwealth Bank of Australia, whereas Default Interest Rate under the EIHL refers to a rate published by the National Australia Bank.</p> <p>The QRC considers the definitions should refer to a single published rate consistently.</p>	
2	5	Restrictions on Trustee	<p>The QRC considers the restrictions on the Trustee in clause 5 inappropriate and impractical. Specifically, the QRC is of the view that the restriction on the Trustee terminating, rescinding or repudiating without first securing the prior written approval of the Infrastructure Lessor ought to be deleted.</p>	
3	12	No rights of termination	<p>Similarly to item 29 above, the QRC considers that it is neither appropriate nor practical to provide that neither party may terminate or rescind the IND or treat it as repudiated or obtain any order to this effect other than as expressly provided for in the IND.</p>	
4	Throughout	References to Infrastructure Lease	<p>The QRC notes there are a number of very significant provisions of the IND which refer to the Infrastructure Lease.</p> <p>As noted above, the QRC confirms that due to the ongoing lack of visibility concerning the Infrastructure Lease, it has not been possible for the QRC to meaningfully review those provisions of the IND relating to the Infrastructure Lease and that visibility over the Infrastructure Lease is essential to a complete review of the IND.</p>	
5		References to Land Lease	<p>The QRC notes there are a number of provisions in the IND which refer to the Land Lease. Similarly to item 31 above, the QRC notes that it has not been possible for the QRC to meaningfully review those</p>	


Item	Clause	Description	Comments	Rating
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provisions of the IND relating to the Land Lease due to a lack of visibility regarding the Land Lease.


7 Rail Corridor Agreement



Item	Clause	Description	Comments	Rating
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1	2.1	Term	The QRC considers that a minor correction is required for clarity to clause 2.1(b). Specifically, the QRC considers that (i) should read as "the Extension Project Agreement has not been executed..." rather than "no Extension Project has not been executed...".	
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2	8	Removal of Extension Infrastructure	As noted in item 17 above, the QRC considers that the Trustee's rights in respect of removal of any part of the Extension Infrastructure without the prior consent of the Landholder should not be limited by clause 5.8 of the EISL.	
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3	9.2	Limitation of liability - Extension Project Agreement	The QRC suggests the inclusion of clause 9.2 gives rise to an unacceptable level of uncertainty in the RCA. Specifically, clause 9.2 provides that the limitations and provisions contained in clause 7 of the Extension Project Agreement apply to the RCA mutatis mutandis. Incorporating provisions in this manner may create uncertainty with regards to interpretation.	
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4	11.1	Termination	The QRC considers that it is neither appropriate nor practical to provide that neither party may rescind	
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Item	Clause	Description	Comments	Rating
			the RCA or treat it as repudiated or obtain any order to this effect other than as expressly provided for in the RCA.	
5	13.4	Assignment	As noted in item 25, there is some inconsistency regarding assignment across the SUFA Draft Decision documents. The QRC considers these inconsistencies ought to be resolved. For example, assignment in the RCA is dealt with by reference to the Extension Project Agreement, whereas the EIHL largely deals with assignment by reference to the Integrated Network Deed and the EISL largely deals with assignment in accordance with the Extension Project Agreement.	
6	13.6	Survival	The QRC notes that the survival clause of the Draft Decision RCA has a number of placeholders. The QRC considers that the standard survival clauses should be included instead of these placeholders, for example limitation of liability (clause 13).	

8 User Funding – Trust Deed

Item	Clause	Description	Comments	Rating
1	1.1	Definition of 'Aurizon Unit Holder' and 'Ordinary Unit Holder'	<p>The definition of Aurizon Preference Unit Holder is defined as '<i>a Preference Unit Holder who is Aurizon Network or a Related Body Corporate of Aurizon Network</i>' in the User Funding – Subscription and Unit Holders Deed (QCA Draft Decision) (Subscription Deed).</p> <p>The QRC considers that the Trust Deed definition of Aurizon Preference Unit Holder is technically</p>	

Item	Clause	Description	Comments	Rating
			<p>broader as it refers to 'a Preference Unit Holder that is also the Ordinary Unit Holder or a Related Body Corporate of the Ordinary Unit Holder'.</p> <p>Whilst this definition has the same effect in both documents (provided that Aurizon Network is the Ordinary Unit Holder as provided for in the Subscription Deed) the QRC considers that the definition of 'Aurizon Unit Holder' in the Trust Deed should be amended to align with the Subscription Deed definition.</p>	
2	8.2	Lien over Partly Paid Units	<p>The QRC considers that it is not necessary for the Trustee to also have a lien over Partly Paid Units as the Subscription Deed requires the Preference Unit Holders to provide the Trustee with a separate security over the Preference Units and Loan Balances and (in some cases) a Bank Guarantee.</p> <p>In the QRC's view, the additional lien may create unnecessary complications with respect to external financing arrangements and duplicates the security provisions of the Subscription Deed.</p>	
3	8.5	Discretion to extinguish liability on Calls	<p>Whilst the QRC acknowledges that the Trustee will be a party to the Subscription Deed (and so will be bound by the terms of that deed), the QRC considers that the only situation in which the Trustee should be permitted to exercise its discretion under the Trust Deed to extinguish liability on calls (whilst the Subscription Deed is in effect) should be the circumstances contemplated by clause 5.9 of the Subscription Deed.</p>	

9 User Funding – Subscription and Unit Holders Deed

Item	Clause	Description	Comments	Rating
1	1.1	“Liquidity Target” – paragraph (c)	The QRC considers that this paragraph should include a reference to the “Month” in relation to which the Liquidity Target is determined.	●
2	1.1	“Material Adverse Change”	The QRC maintains the view that paragraphs (d)-(f) of this definition are too broad and also capture matters or consequences which may not be “material”. Each of these paragraphs should be amended to require a materiality threshold is reached before the paragraph is triggered.	●
3	1.1	Preference Unit Holder	The QRC considers that this definition should be amended to state that a person ceases to be a “Preference Unit Holder” once it transfers all of its Preference Units or all of its Preference Units are redeemed (except where the Deed expressly states otherwise).	●
4	Prior 2.6 (now deleted)	Rights and liabilities after redemption	The QRC considers that this provision should be reinstated otherwise it is unclear which rights and liabilities continue to apply to an entity after redemption of all of its Preference Units. This lack of clarity is increased due to the issue with the definition of “Preference Unit Holder” (see above).	●
5	4.2	Delivery of Security Documentation	<p>The QRC maintains the view that clause 4.2 should be removed.</p> <p>The QRC does not see the requirement for every Preference Unit Holder to provide security over its units and loan proceeds as being necessary. There are already bank guarantee mechanisms to deal with any Preference Unit Holders which are considered a credit risk (clauses 4.3 and 9).</p> <p>The QRC reiterates its concerns that the security documentation required by clause 4.2 may limit the ability of Preference Unit Holders to obtain third party funding required to fund loan contributions under the SUHD. Even if the third party funding is available, the security documentation requirements may adversely</p>	●



Item	Clause	Description	Comments	Rating
			<p>affect the terms on which such third party funding is advanced to a Preference Unit Holder.</p> <p>Given that there are the bank guarantee mechanisms to effectively manage credit risk of Preference Unit Holders, the QRC considers that the potential adverse effects for Preference Unit Holders from clause 4.2 make it an unreasonable provision.</p>	
6	5.9(c)(ii)(B)	Maximum call amounts: Removal of requirement to release of Security Documentation	The QRC notes that there is now no requirement in the Deed or elsewhere for the Trustee to release the Security Documentation, except in very limited circumstances (clause 4.10(a)(ii)(C) and 7.6(j)). The QRC considers that the requirement to release Security Documentation, as well as any bank guarantees once the Preference Units are fully paid, should be reinstated.	●
7	8.3(a) and (b)	Mandatory Reallocation Process	The QRC queries whether these 2 clauses are the wrong way around. For example, the QRC queries whether paragraph (a) should state that the mandatory reallocation process does not apply and paragraph (b) state that it does.	●
8	11.1(b)(ii)	Transfers by Preference Unit Holders	The QRC considers that the new clause 11.1(b)(i)(B) should also apply to clause 11.1(b)(ii).	●
9	11.1(c)	Transfers by Preference Unit Holders – Ordinary Unit Holder opportunity to	<p>The QRC supports the QCA position that AN not have a right of first refusal in respect of a transfer of Preference Units. The QRC considers that express confirmation of this should be included in clause 11.1(c) and that this provision should be amended to include an express statement that the Preference Unit Holder may, but is not obliged to, accept an offer made by the Ordinary Unit Holder.</p> <p>The QRC also considers that it is not clear how the clause will operate where there is more than 1 entity</p>	●

Item	Clause	Description	Comments	Rating
		offer to acquire	holding the Ordinary Unit as tenants in common (as contemplated in clause 11.2(b)). Additional wording should be included to determine whether or not multiple holders of the Ordinary Unit can submit separate offers and, if so, how the competing offers may be dealt with by the Preference Unit Holder.	
10	18(a)(vii)	Stamp Duty	The QRC considers that the exception to the liability to pay Stamp Duty should also extend to any Stamp Duty payable by a transferee in respect of a transfer of any Loan Balance.	●
11	21.9	AN's limitation of liability	<p>The QRC is of the view that AN's liability to a Preference Unit Holder should not be limited. In particular, it should not be limited as proposed in clause – to \$1 in respect of any Transaction Document (other than SUHD and the Trust Deed) and irrespective of the cause of the liability.</p> <p>The QRC considers that clause 21.9 does not appear to be consistent with QCA's comments in its Draft Decision at 13.4.2.</p> <p>The QRC considers that clause 21.9 should be removed in its entirety.</p>	●

10 User Funding - Extension Project Agreement

Item	Clause	Description	Comments	Rating
1	3.1	Inclusion into Regulatory Asset Base	<p>QRC to consider whether:</p> <ul style="list-style-type: none"> AN should be required to comply with reasonable directions given by the Trustee to AN in connection 	●

Item	Clause	Description	Comments	Rating
			<p>with the inclusion of the Capital Costs and Construction Interest [on the Capital Costs] in the Regulatory Asset Base; and/or</p> <ul style="list-style-type: none"> AN should grant a power of attorney to the Trustee which the Trustee could exercise in the event that the Trustee, acting reasonably, considers that AN is not acting in accordance with its obligations under clause 3.1(b). <p>The QRC considers that AN should be required to provide copies of proposed correspondence and submissions to the Trustee for review at least [10] Business Days before the submission is proposed to be lodged with the Access Regulator.</p> <p>The QRC further considers that AN should also be required to provide copies of all correspondence between AN and the Access Regulator in connection with the inclusion of the Capital Costs and the Construction Interest on the Capital Costs into the Regulatory Asset Base to the Trustee.</p>	
2	3.1	Inclusion into Regulatory Asset Base	<p>The QRC considers that at the end of clause 3.1(b)(i), “as determined by the Trustee” should be inserted.</p> <p>The QRC considers that in clauses 3.1(b)(ii), (iv), (vi) and (vii), “on the Capital Costs” should be inserted after “Construction Interest”.</p> <p>The QRC considers that in clause 3.1(b)(iv), “or omit to do anything” should be inserted after “do anything”.</p> <p>The QRC considers that in clause 3.1(b)(vi), “reasonably necessary” should be replaced with “reasonable”.</p>	●
3	3.2	Calculation of Construction Interest on the Capital Costs	<p>The QRC queries whether, for clarity, the indexation of $(1 + R)_{\text{mth}}$ should be $(t - x) + 1$. If the indexation is interpreted as “$t - (x + 1)$” then a different, and presumably unintended, outcome will be reached. By way of a simple example, consider the outcome where both t and x equal 1.</p> <p>With respect to “R”, the QRC queries whether it is possible that the Regulator might apply different interest rates at different periods of time (particularly if it takes a prolonged period of time for the costs to be included in the Regulatory Asset Base). If so, the QRC considers that the definition of “R” should be</p>	●

Item	Clause	Description	Comments	Rating
			amended to reflect this.	
4	3.2	Calculation of Construction Interest on the Capital Cost	<p>Given that the definition of CC_x refers to Capital Costs incurred in calendar month x, The QRC queries whether the definitions of “t” and “x” should refer to calendar months (being “Months”), rather than “months”.</p> <p>If so, then the QRC considers that the definition of “x” should be revised as follows:</p> <p>“Each Month after the first CC_x amount is incurred by the Trustee or Aurizon Network (expressed as a number, where x =1 in the Month during which the first CC_x amount is incurred by the Trustee or Aurizon Network and x = 2 in the Month immediately following the Month in which the first CC_x amount is incurred by the Trustee or Aurizon Network, and so on).”</p> <p>The QRC queries whether if the definition of “x” is based on whole “Months” then the definition of “t” should also be based on whole “Months”? If so, then the QRC considers that the definition of “t” should be revised as follows:</p> <p>“The number of Months from the date that the first CC_x amount is incurred by the Trustee or Aurizon Network to the date that the Capital Costs are included in the Regulatory Asset Base, provided that:</p> <ul style="list-style-type: none"> (a) the Month in which the first CC_x amount is incurred by the Trustee or Aurizon Network is counted as one Month (even if the date the first CC_x amount is incurred is not the first day of the Month); and (b) the Month in which the Capital Costs are included in the Regulatory Asset Base is counted as one Month (even if the date that the Capital Costs are included in the Regulatory Asset Base is not the last day of the relevant Month).” 	
5	5.2(b)	Chief executive officer resolution	The QRC notes that the operation of clause 5.2(b) depends on the Parties complying with clause 5.2(a) and making the necessary referral. If any of the Parties fail to make the required referral then clause 5.2(b) cannot be triggered and the dispute resolution process will be at a standstill. The QRC considers that clause 5.2(b) should be amended so that the timeframe is counted from the date that the Dispute Notice is given.	

Item	Clause	Description	Comments	Rating
6	5.3(g)	Expert Determination	The QRC considers that this provision should be reciprocal.	●
7	5.3(g)	Expert Determination	The QRC considers that where Price Sensitive Information will inform an Expert's resolution of a Dispute, then the Access Seeker should have the right to appoint its own expert (who is subject to a confidentiality agreement in favour of Aurizon Network) who can review the Price Sensitive Information in the context of the Dispute (without disclosing such information to the Access Seeker) and make submissions to the Expert on behalf of the Access Seeker (in accordance with the Access Seeker's instructions).	●
8	5.6(a)	Costs	The QRC considers that the Expert should be given a right to make an alternative determination in relation to how the parties will bear the costs of the Expert and any advisers engaged by the Expert in respect of the Dispute, where, for example, the Dispute has been pursued vexatiously or otherwise without any reasonable foundation.	●
9	5.7	Determination by court	The QRC queries whether it is intended that the Expert determination process, where it is required under a Transaction Document, is a condition precedent to litigation? If so, then this needs to be clarified in the drafting particularly given the issues referred to above.	●
10	5.9	Time bar	<p>The QRC considers that the period of time for the time bar should commence on the date that a party becomes aware of the liability. This is relevant where the full extent of the liability arising from an event or circumstance is not known until more than 12 Months after the party becomes aware of that the event or circumstance has occurred, for example an environmental incident. In addition, audits are only allowed to be carried out not more than once a year so the time bar of 12 Months creates a risk that Claims will be extinguished before the audit determines the full extent of the relevant issue.</p> <p>The QRC notes that whether the period of 12 Months is acceptable requires further consideration.</p> <p>The QRC considers that there should also be an acknowledgement that the time bar does not in any way</p>	●

Item	Clause	Description	Comments	Rating
			limit AN's liability under the Access Undertaking or under an Access Agreement.	
11	6(a)	Environmental Issues	<p>The QRC notes that the term "Activity" is not defined. The term "Activity" is also used in the definition of "Environmental Authorisation".</p> <p>The QRC queries what is meant by "any of the properties" in the definition of "Environmental Authorisation".</p> <p>The QRC considers that in the definition of "Environmental Law" the words from "components of the earth..." to the end of the definition should be replaced with with "the Environment".</p>	●
12	6(a)	Environmental Issues	The QRC considers that "touching and concerning" should be replaced with "in connection with".	●
13	6(c) and (d)	Environmental Issues	The QRC queries how the Access Seekers are kept whole for liability arising under clauses 6(c) and 6(d).	●
14	7	Limitation of liability	The QRC considers that there should be an acknowledgement that the limitations of liability in clause 7 do not limit AN's liability under the Access Undertaking or under an Access Agreement.	●
15	7.1	No liability in relation to capacity	The QRC considers that clause 7.1 should be expressed as not limiting Aurizon Network's liability under clause 6.	●
16	7.1	No liability in	The QRC considers that AN should at least be liable to the Access Seeker for loss suffered or incurred by	●

Item	Clause	Description	Comments	Rating
		relation to capacity	the Access Seeker that arises in connection with any breach of the EPA, Wilful Default, Gross Negligence or fraud.	
17	7.2(c)	Exclusion of Consequential Loss under the Transaction Documents	The QRC considers that “under any of the Transaction Documents” should be inserted at the end of clause 7.2(c) .	●
18	7.2(d)	Exclusion of Consequential Loss under the Transaction Documents	The QRC notes that whether or not the exclusion of liability for Consequential Loss should apply where the Claim for Consequential Loss is one which a Party would have recovered insurance proceeds had that Party complied with its obligation under a Transaction Document to effect the necessary insurance requires further consideration.	●
19	7.2(e)	Exclusion of Consequential Loss under the Transaction Documents	The QRC notes that clause 7.2(e) seems to be incomplete.	●
20	7.3(d)	Trustee's limitation of liability	The QRC queries how the Access Seeker will be compensated if the Date of Practical Completion is later than the Due Date due to acts or omissions of the Principal under the Construction Agreement?.	●

Item	Clause	Description	Comments	Rating
21	8(b)	Trustee and Preference Unit Holder Risk Acknowledgement	The QRC queries why AN is not liable to the extent that the reduction in Rent is due to circumstances within AN's control.	●
22	9.2(c) and 9.2(f)	Disclosure of Confidential Information	The QRC considers that the people referred to in clauses 9.2(c) and 9.2(f) should be under a duty of confidentiality to the Recipient.	●
23	9.2(m)(ii)	Disclosure of Confidential Information	The QRC queries whether, prior to disclosure of Confidential Information which the Recipient determines is "reasonably required for the purposes of a Transaction Document", the Recipient should be required to notify the Disclosing Party of the proposed disclosure.	●
24	17	Survival	The QRC queries whether clauses 7 (Limitation of liability), 9 (Confidentiality), 10 (GST), 12 (Notices) and 19 (Applicable Law) should survive termination.	●

11 QRC comments on key tax aspects of QCA Draft Decision

11.1 Background

The QRC considers that the QCA Draft Decision provides valuable comment and is a positive step towards reaching an agreement on a workable SUFA framework that does not expose participants to an unacceptable level of tax risk, notwithstanding the interim position is to refuse the 2013 SUFA DAAU in its current form.¹

11.2 QRC's view

As recognised by the QCA, taxation has been a key issue throughout the development lifespan of the SUFA framework.²

The QRC welcomes the QCA's consideration of the key remaining tax issues, being:

- (a) the Trust's entitlement to claim depreciation deductions in respect of the Extension Infrastructure, given the various technical tax requirements which must be established in order for this to occur;
- (b) the scope of the tax indemnity provided to Aurizon Network Pty Ltd (**Aurizon Network**) and Queensland Treasury Holdings Pty Ltd (**QTH**);
- (c) the possibility of debt funding being provided to a SUFA trust and the ability of the Trust to carry forward these tax losses to offset future income; and
- (d) the processes and roles and responsibilities of the parties in obtaining administratively binding advices (**ABAs**) and private binding rulings (**PBRs**) from the Australian Taxation Office (**ATO**) in respect of the SUFA documents.

The QRC sets out its response to the QCA's proposals in respect of each of these issues in this section 6.

For the avoidance of doubt, the QRC has not undertaken a comprehensive review of the documents in order to comment on all remaining tax issues. Rather, as stated above, the QRC provides comment only on the four key issues outlined above. Further, the QRC has not provided detailed drafting comments on those four key issues in line with the QCA's request that submissions focus on principles rather than exact

¹ QCA Draft Decision, ix.

² QCA Draft Decision, 76.

drafting.³ The QRC reserves its position on tax matters not addressed in this paper and in relation to specific drafting of tax matters in the SUFA transaction documents.

11.3 Tax depreciation

As previously highlighted, the ability of the Trust to claim tax depreciation deductions in respect of the Extension Infrastructure is fundamental to the economics of the SUFA structure as a whole, as it is depreciation deductions which allow distributions to Preference Unit Holders to be made in a tax effective manner.

Given the significance of tax depreciation to the economics of the SUFA structure, the QRC reiterates that it is in the interests of all parties that the Trust's entitlement to claim depreciation is clearly established.

Tax technical basis for depreciation

Our understanding continues to be that the Trust is to establish that it is the "holder" of the Extension Infrastructure under Item 2 of the table in section 40-40 of the *Income Tax Assessment Act 1997* (Cth).

To summarise, broadly, this involves establishing that:

- (a) the assets comprising the Extension Infrastructure are "fixed to land";
- (b) the Trust has a "quasi-ownership right" in respect of that land; and
- (c) the Trust has a right to remove the Extension Infrastructure.

The QRC welcomes the amendments to the Rail Corridor Agreement (**RCA**), which are understood to be intended to confirm that the Trust will establish itself as the "holder" of the Extension Infrastructure under Item 2 of the table in section 40-40 of the *Income Tax Assessment Act 1997* (Cth) and therefore will be eligible to claim depreciation deductions.⁴ In particular, the QRC welcomes the strengthening of the Trustee's right to remove any part of the Extension Infrastructure without the prior consent of the Landholder in the RCA.⁵ However, the QRC queries whether in substance the right to remove and the restriction placed upon it are the same as previously drafted, due to the limitation under the Extension Infrastructure Sub-Lease (**EISL**) on this right to remove whereby the Trustee agrees that it will not exercise its right to remove without the consent

³ QCA Draft Decision, 13.

⁴ QCA Draft Decision, 79-80.

⁵ QCA Draft Decision, 80; clause 8 of the RCA.

of Aurizon Network.⁶ The QRC seeks to understand this amendment and the way, if any, in which it strengthens the Trust's ability to establish itself as the "holder" of the Extension Infrastructure.

Further, the QRC note that the current drafting does not eliminate the need to displace the application of Item 6 of the table in section 40-40 of the *Income Tax Assessment Act 1997* (Cth) which, if applicable, would prevent the Trust from being entitled to depreciation.

Whilst the QRC is not necessarily suggesting that Item 6 does apply, the QRC considers that clarity on the ATO's views on tax depreciation must be sought in relation to the standard form documents.

11.4 Tax indemnity provided to Aurizon Network and QTH

Appropriateness of indemnity to QTH

As stated in its 30 August 2013 and 7 July 2014 submissions, the QRC considers that:

- indemnification of QTH in respect of duty paid to the Queensland State Treasurer is **not** appropriate as it does not represent a 'real' loss to QTH, being a State-owned body; and
- indemnification of QTH in respect of National Tax Equivalents Regime (**NTER**) paid to the Queensland State Treasurer is **not** appropriate as it again does not represent a 'real' loss to QTH.

In respect of the first point, the QRC maintains the view that the indemnity to QTH is inappropriate and likely to be unattractive and therefore rejected as a matter of principle by third party investors.⁷ Whilst the QRC acknowledges that, provided statutory severance is achieved, it may be unlikely for the indemnity to be called upon, the QRC maintains the position that such an indemnity should not be included in the first place.

If the indemnity provided to QTH is to be maintained, the QRC again reiterates that in order to provide an additional level of protection, and in addition to obtaining appropriate statutory severance, it considers that further work should be undertaken to determine whether *ex gratia* or other relief may be available in respect of any duty payable on the transfer and lease back.

In respect of the second point, the QRC welcomes the carve out proposed by the QCA with regard to liability for income tax or income tax equivalent provided in clause 10.2(c) of the Extension Infrastructure Head Lease (**EIHL**).⁸ However, the QRC requests further clarification as to the policy justification for retaining any liability for income tax or income tax equivalent where such liability arises as a result of a failure by the Trustee or Aurizon Network to comply with their obligations under the EIHL or the Integrated Network Deed. The QRC acknowledges that the Lessee and Sublessee may incur commercial penalties where they fail to comply with their obligations. However, the QRC does not consider it

⁶ Refer clause 5.8 of the EISL.

⁷ QCA Position Paper, May 2014, 55; QRC Submission, July 2014.

⁸ Refer clause 10.2(c) of the EIHL.

appropriate for QTH to be compensated for any income tax (or income tax equivalent) paid on receipt of those commercial penalties. Accordingly, the QRC considers that a blanket carve-out should apply for all liability for income tax or income tax equivalent. For simplicity and to remove any possible confusion as to coverage, it is suggested that the carve-out specifically refer to income tax and income tax equivalent payable under the NTER or similar or subsequent regimes.

Tax indemnity provided to Aurizon Network

The QRC welcomes consideration of the appropriateness of the tax indemnity provided to Aurizon Network.⁹ The QRC considers that the tax indemnity provided to Aurizon Network is not necessary. In particular:

- each SUFA arrangement is not intended to be entered without favourable PBRs to support it.¹⁰ Accordingly, the tax risk intended to be covered by the tax indemnity should be removed; and
- provided the stamp duty indemnity in favour of QTH under the EIHL is removed or, failing that, statutory severance is achieved and there is also a blanket carve-out for any income tax or income tax equivalent from the indemnity provided by Aurizon Network to QTH under the EIHL,¹¹ Aurizon Network should not be liable for any amount under the EIHL that is intended to be covered by the tax indemnity.

If the tax indemnity is to remain in its current form, the QRC welcomes the QCA's proposed amendments to the tax indemnity provided by Preference Unit Holders to Aurizon Network and the Trustee under the Subscription and Unit Holders Deed (**SUHD**).¹² The QRC considers that these amendments assist in making the indemnity more reasonable in its scope and approach.

Whilst acknowledging the improvement in the appropriateness of the tax indemnity, the QRC considers that further carve-outs from the tax indemnity should be included to ensure appropriate coverage. In particular, the following carve-outs are considered appropriate to align the tax indemnity with the indemnities provided under the EIHL and EISL:

- to the extent a claim arises due to the breach of a Transaction Document. This principle is consistent with the indemnity provided by Aurizon Network to QTH under the EIHL, which provides a carve-out for the QTH's breach of the EIHL or Integrated Network Deed;¹³ and

⁹ QCA Draft Decision, 82.

¹⁰ QCA Draft Decision, 82.

¹¹ Refer clause 10.2(c) of the EIHL.

¹² Clause 17 of the SUHD.

¹³ Clause 10.2(b)(i) of the EIHL.

- to the extent the acts, omissions or negligence of an associate of an Indemnified Entity contribute to the loss. This principle is consistent with the indemnity provided by Aurizon Network to QTH under the EIHL and by the Trustee to Aurizon Network under the EISL.¹⁴

The QRC notes that the scope of the tax indemnity is limited to certain amounts 'in respect of the implementation of, participation in or exit from the Extension Structure'. The QRC seeks confirmation that 'Extension Structure' refers to the specific SUFA transaction, as this term does not appear to be defined.

Statutory severance and duty liability

In respect of the 'back-to-back' tax indemnity provided by Preference Unit Holders to QTH, the QRC again welcomes the QCA's proposal that appropriate legislative amendments continue to be sought to provide for the effective severance of the Extension Infrastructure so that the transfer and lease-back of the Extension Infrastructure does not attract duty. The QRC agrees with the QCA that without appropriate statutory severance the SUFA project is unlikely to proceed.¹⁵

If project specific applications are required with regard to statutory severance,¹⁶ the QRC submits that the Preference Unit Holders are the most appropriate party to co-ordinate project specific applications, and should maintain any ability to waive any relevant condition precedent, as it is the Preference Unit Holders who are ultimately exposed to the tax risk under the back-to-back indemnity should statutory severance not be obtained.

11.5 Circumstances in which a SUFA trust may generate tax losses

As stated in the QRC's July 2014 submission, the parties had previously proceeded on the basis that a SUFA trust would not generate tax losses. This is because it was understood that a SUFA trust would not raise debt (either directly or indirectly) and that depreciation deductions claimed by the Trust would be absorbed by rent received by the Trust from Aurizon Network such that no tax losses would arise at any stage.

The consideration of the option of debt financing created the possibility of tax losses being generated by the Trust. In the QRC's July 2014 submission, the QRC set out its preliminary views on the ability of the Trust to carry forward tax losses. Due to the tax complexities surrounding this issue, the QRC agrees with the QCA that the potential issues arising from the use of debt financing are best considered on a case-by-case basis should the SUFA parties choose to pursue debt financing through the Trust.¹⁷ On this basis, the QRC has not reviewed the documents on this issue.

¹⁴ Clause 10.2(b)(iii) of the EIHL and clause 3.3(a) of the EISL.

¹⁵ QCA Draft Decision, 81.

¹⁶ QCA Draft Decision, 81.

¹⁷ QCA Draft Decision, 80-81.

The QRC considers that a PBR should be obtained confirming the position of the Trust should debt funding be pursued. As was stated in the QRC's July 2014 submission, it is noted that these types of issues are regularly encountered and addressed by parties to infrastructure projects.

11.6 Process for seeking ABAs and PBRs

The QRC welcomes the QCA's proposal that Aurizon Network, the QCA and interested parties such as the QRC work on a joint submission for an ABA. The QRC also agrees that there is merit in the parties consulting with each other and coordinating PBR submissions to the ATO. The QRC remains of the view that an ABA on the pro-forma documents and PBRs on a transaction by transaction basis are essential to ensuring that the tax risk of SUFA is effectively managed and that the SUFA framework can become workable, bankable and creditable.

Administrative binding advice

Whilst the QRC supports working co-operatively in joint submissions for ABAs and is very committed to attending meetings to facilitate the process, the QRC considers that it is not clear how the drafting and submission of an ABA would work in practice.

The QRC welcomes the idea of a joint submission but considers that further clarification of the roles and responsibilities for seeking ABAs is required in preparing joint submissions. In particular, the QRC considers that one party should be primarily responsible for the preparation of the ABA application (following consultation with the other relevant parties and reflecting the agreed approach arising from those negotiations) and negotiation with the ATO, as well as deciding whether the ABA is favourable. The QRC considers that nominating a party to co-ordinate the process would provide the most efficient and effective way for the parties to obtain ABAs in respect of the standard form SUFA documents, whilst still allowing the co-operation suggested by the QCA.

In particular, QRC maintains the view that:

- to the extent an ABA relates to the tax treatment of the Trust and tax consequences for Preference Unit Holders, the QRC (acting as a representative of and in conjunction with Access Seekers) should be responsible for the preparation of the ABA application (following consultation with the other relevant parties and reflecting the agreed approach arising from those negotiations) and negotiation with the ATO, as well as deciding whether that ABA is favourable; and
- to the extent the ABA relates to the tax treatment or consequences of SUFA for Aurizon Network (for example, the deductibility of the Rent), Aurizon Network should be responsible for the preparation of the ABA application and negotiation with the ATO, as well as deciding whether that ABA is favourable.

As acknowledged by the QCA,¹⁸ it is the Preference Unit Holders who are ultimately exposed to the tax risk of SUFA, either directly or indirectly through the tax indemnity provided to Aurizon Network. Accordingly, the QRC maintains that this allocation of responsibility is appropriate given it is Preference Unit Holders who are ultimately exposed to the tax risk of SUFA.

¹⁸ QCA Draft Decision, 76.

Roles and responsibilities for PBRs

The QRC welcomes the proposal for parties to consult with each other and co-ordinate submissions to the ATO.¹⁹ However, the QRC maintains that as it is the Preference Unit Holders who are ultimately exposed to the tax risk of SUFA, either directly or indirectly through the tax indemnity provided to Aurizon Network, the Preference Unit Holders should have carriage of the PBR process (in a similar manner as set out above with regard to ABAs) to the extent a PBR relates to the tax treatment of the Trust and tax consequences for Preference Unit Holders.

Likewise, the right to waive a condition precedent to obtain a PBR should ultimately reside with the Preference Unit Holders to the extent a PBR relates to the tax treatment of the Trust and tax consequences for Preference Unit Holders.

For completeness, we do not comment on the ABAs or PBRs relating to QTH on the assumption that a full income tax or income tax equivalent carve-out will be accepted.

¹⁹ QCA Draft Decision, 82.

