



**Submission to the Queensland
Competition Authority**

**Response to the QR Network Draft
2010 Access Undertaking**

May 2010

Table of Contents

1	Executive Summary.....	3
2	Introduction	5
3	Key Issues	5
	3.1 Decision Context and Timeframes	5
	3.2 Effective Separation.....	6
	3.3 Non Discrimination	7
	3.4 Enforcement	8
3.4.1	Audit.....	8
3.4.2	KPIs.....	9
3.4.3	Financial Statements	11
4	Detailed Comment on QR network’s 2010 DAU Access Undertakings and Schedules.....	11
	4.1 Part 2: Intent and Scope	12
	4.2 Part 3: Ring Fencing Arrangements	12
	4.3 Part 4: Negotiation Framework	13
	4.4 Part 6: Pricing Principles.....	15
	4.5 Part 7: Capacity Management	16
	4.6 Part 8: Interface Considerations.....	16
	4.7 Dispute Resolution and Amendment Processes.....	17
	4.8 Part 11: Co-ordination and Planning	18
	4.9 Definitions and Interpretation	23
	4.10 Schedule A: Maintenance of Regulatory Asset Base	23
	4.11 Schedule B: Confidentiality Deed.....	24
	4.12 Schedule F: Reference Tariff Schedules	24
	4.13 Schedule G: Network Management Principles.....	26
	4.14 Schedule H: Issues for EIRMR	27
5	Detailed Comment on QR network’s 2010 DAU Standard Access Agreements (SAA) and Schedules	28
	5.1 Issues with SAA.....	28
	5.2 Issues with SAA Schedules	31
6	Additional issues	33

1 EXECUTIVE SUMMARY

QR has repeatedly stated publicly that they are committed to above rail competition.¹ The submission of UT 2010 was QR's opportunity to demonstrate this commitment by delivering an undertaking that would allow competition to thrive. QR has missed this opportunity and has delivered an Undertaking that has done nothing to foster competition and must lead observers to question the veracity of QR's commitment to above rail competition.

QR has ignored the majority of Asciano's recommendations on how to improve the regime. The table below summarise the major gaps. QR has also ignored a significant number of the QCA's recommendation from its recent draft decision. Asciano call on the QCA to remain vigilant and deliver an outcome that will ensure genuine above rail competition.

¹ See for example Lance Hockridge's interview with Alan Kohler on ABC's Inside business 7/3/2010. Hockridge stated "the difference here is between ownership and access, to the extent that this about competition – we favour competition." Source: www.abc.net.au/insidebusiness/content/2010/s2838676.htm



Elements of an effective regime	Changes Sought to the DAU	QR 2010 DAU Responds Effectively?	Comments
Effective Separation	<ul style="list-style-type: none"> QR Network to act in QR Networks own interests Majority of directors and chairman of QR Network independent of QR Ltd (to become QR National) 	X	
Prohibition on Preferential Treatment	<p>General non-discrimination</p> <p>Prohibition on cross subsidies, margin squeezing, anti competitive cost shifting and preferential maintenance and investment activities</p>	X	Non discrimination has been included but clause is ineffective
Enforcement - Detection	<p>Inclusion of operator specific KPIs and geographically disaggregated KPIs</p> <p>Public reporting of breaches</p> <p>Increased cost info transparency</p> <p>Effective audit</p> <p>Improved information powers</p>	X	<p>Expanded audit provision do give operator specific but not geographically disaggregated information</p> <p>Audit requirement improved but still not adequate.</p>
Enforcement Action	Directors resign for consistent pattern of non compliance or non remedied breach	X	
Infrastructure	<p>Specific infrastructure to be transferred to QR Network</p> <p>Stronger proviso relating to connection infrastructure</p>	X	Connection drafting improved but not adequate

2 INTRODUCTION

Asciano Limited (Asciano) welcomes the opportunity to provide comments on the QR Network Draft 2010 ACCC Access Undertaking (2010 DAU) which was submitted to the Queensland Competition Authority (QCA) by QR Network on 14 April 2010.

Asciano has previously provided comment to the QCA on the QR Network Draft Access Undertakings proposed in this current process. These previous comments by Asciano in relation to this current regulatory process continue to be supported by Asciano.

The structure of this submission is as follows:

- Key Issues
- Detailed comment on QR Network's 2010 DAU
- Detailed comment on Draft Access Agreements and Schedules

This submission contains no confidential information and may be considered a public document.

3 KEY ISSUES

3.1 Decision Context and Timeframes

The Queensland Government has announced that it will sell the vertically integrated QR, and Asciano understands that the time frame for this sale is tight. In particular Asciano notes that QR Network, in its correspondence, to the QCA indicates that it is seeking to have the 2010 DAU finalised by 30 June 2010.

However, under section 147A of the QCA Act the QCA has until early November 2010 to finalise the 2010 DAU.

Asciano believes that in considering the QR 2010 DAU the QCA should ensure that its decision making is robust and that it arrives at the best possible decision. Such decision making will require time to consider information and submissions provided to the QCA. To this end, Asciano does not believe the QCA should be pressured to

make a decision by June 2010 if a robust decision-making process requires additional time. Asciano strongly prefers that the QCA makes the correct decision within the QCA's legislative time frame, rather than make a hasty decision in order to meet QR's preferred time frame.

In addition to issues related to time frames Asciano also has concerns related to the appropriateness of the proposed 2010 DAU under certain corporate structures following the sale of QR. For example, Asciano understand that the Queensland Government is considering outsourcing QR Network's maintenance obligations to a service company which would perform both above and below rail maintenance. Such a structure may require both maintenance costing and ring fencing provisions of the Access Undertaking to be materially revised.

While Asciano recognises that the newly drafted clause 12.5 of the 2010 DAU addresses the application of the Access Undertaking after the sale, Asciano believes that a revised undertaking should be submitted when the new QR corporate structures and ownership are known. This revised undertaking should be fully reviewed by the QCA.

3.2 Effective Separation

To deliver a competitive above rail market, it is vital that there is effective separation between the monopoly providers above and below rail businesses.

As noted in previous submissions the terms of the undertaking are ineffective in delivering separation.² QR Network is allowed to make decisions in the interests of QR Ltd and there are no independent board directors. Asciano believes that at a minimum effective separation would require that the:

- Majority of directors on the QR Network board are independent of QR Ltd (or QR National as will be the case post IPO);
- chairperson of QR Network be independent; and
- constitution of QR Network changes such that directors of QR Network make decisions in the interests of QR Network only.

² Asciano Response to the Draft Decision February 2010, p9

In addition, the QR Network board should approve all contracts with related entities and ensure that the agreements are on arms length terms and are in the best interests of QR Network.

All these requirements could be achieved by amendments to the Access Undertaking, with consequential amendments to the constitution.

3.3 Non Discrimination

Without an effective non discrimination regime, above rail competition cannot thrive. In including the non discrimination clause in the 2010 DAU, QR Network is at least recognising the importance of non discrimination for a competitive above rail market. However, the new non discrimination clause (Clause 2.2) is qualified to the extent that it is useless.

In effect the clause states that QR Network won't discriminate unless they are allowed to do so by their access agreements and Access Undertaking. Thus QR Network could agree an access agreement with a QR related operator allowing it to favour the QR related operator and this discriminatory behaviour would not be prevented by this non discrimination clause.

Secondly, the clause qualifies discrimination with "unfairly". It is very unclear what this terminology actually means and in effect this renders the term 'discrimination' meaningless and ineffective.

The Access Undertaking should include:

- a broad, non qualified, non discrimination relevant to above rail operators.
- a commitment to deliver equivalence in: services; quality of services; access charges; access rights; train service entitlements; and train control.
- A prohibition on anti-competitive cost shifting, anti competitive cross subsidies and margin squeezing.

QR Network has introduced the option for a QCA ordered audit of the non discrimination clauses after a lengthy internal complaints procedure. This is inadequate. It is not always the case that an access seeker will know that they are being discriminated against. There should be a general annual audit of QR

Network's compliance with an effective non discrimination clause. Anything less will provide ineffective protection against discrimination.

Asciano has been consistently critical of the effectiveness of the decision making rules (clause 3.4). It is a complex piece of drafting which requires a number of hurdles to be met before it applies. These hurdles are that the decision needs to be made under the Access Undertaking, it needs to materially and adversely affect access seekers, and the non discrimination only applies to access seekers "in the same circumstances" (whatever that may mean). This clause would not deal with the "death by a thousand cuts" form of discrimination that Asciano is most concerned about (e.g. the cumulative effect of numerous train control decisions). The clause is very ineffective and Asciano's strong preference is to have a single broad non discrimination clause as described above.

Asciano has several concerns relating to the development of QR's costs in the QR corporate structure. In particular, Asciano has concerns that that the regulated infrastructure provider QR Network may have an incentive to bear a disproportionate level of QR corporate overheads. This results in QR's above rail operator not bearing a proportionate share of corporate overheads, and this consequently benefits QR's above rail operator when competing with operators which do not have a related regulated party to bear their corporate overheads. This concern may be partially addressed by the introduction of stronger separation of the QR functions and stronger accounting reporting requirements.

3.4 Enforcement

An effective enforcement regime will include strong audit provisions and information transparency.

3.4.1 Audit

Asciano believes that an audit of QR's Network's compliance with its obligations under the following parts of the Access Undertaking:

- Part 3 Ring Fencing
- Part 4 Negotiation Framework
- Clause 7.3 Capacity Allocation and
- Part 9 Reporting

must be undertaken annually.

In addition the QCA may also require an audit be conducted of QR Network's compliance with any other provision of the Access Undertaking where it has either:

- received a complaint about QR Network's behaviour,
- received a breach report; or
- where the QCA reasonably believes such an audit is necessary.

QR Network should be required to undertake any actions recommended by the auditor to ensure it remains compliant or becomes compliant with the access Undertaking.

While the 2010 DAU is an improvement on previous audit regimes put forward by QR Network it still does not go far enough. Most of the Access Undertaking provisions will not be audited without a complaint being filed or a QCA request.

3.4.2 KPIs

Asciano welcomes QR Network's adoption of operator specific KPI reports. However, QR Network rejects geographically disaggregated reports. Such reports would detect any discrimination in network quality, which is particularly relevant when there is a section of track which is served by only non QR above rail operators. Asciano is not seeking geographically disaggregated KPIs every year, but is seeking an obligation be placed on QR Network to produce them if requested by the QCA as a result of a reasonable complaint. The geographic area would relate to the area relevant to the complaint.

Generally, the range of KPIs is acceptable. However the change to clause 9.1.d.ii is unhelpful and would seem to be an attempt to undermine the performance reporting of operators. In order to improve performance we need to understand what proportion of the delays are attributable to above rail operators rather than other factors. The change should be reversed.

In discussion with QR we have suggested two additional KPIs. These are

1. *The number and percentage of Train Services scheduled in the MTP as a proportion of the total contracted Train Paths*

And

2. The number and percentage of Train Services scheduled in a weekly train plan cancelled due to a reason which can be directly attributable to an access holder (which would include cancellations attributable to a Railway Operator appointed by the Access holder).

The first is a measure of how closely QR Networks is meeting its contacted paths. The second is to detect behaviour that Asciano is concerned about. One of our current customers asked us to haul coal from a QR serviced mine because QR was unable to meet their needs. Asciano operated a number of successful services from this mine. However, QR began stating for the weekly train plan that they could meet their customer commitments and booked train paths accordingly. However, many of these QR services were cancelled prior to the 48 hour train plan being locked in as QR admitted they could not operate trains on paths booked. These late cancellations do not allow Asciano enough time to provide services for these tonnes. QR's actions prevent us from meeting the requirements of our customer.

In addition to the KPIs outlined above, Asciano also believes that other KPIs which could be usefully included in a KPI package:

1. The frequency of failures incorporated in mean time failures. Speed restrictions will result in a certain amount of time lost. While the time lost from speed restrictions needs to be reported the number of actual speed restrictions or failures should also be reported. Over time this will indicate if the infrastructure is failing at shorter intervals.

2. The sectional run times plus agreed delays percentage measured as a percentage against the actual schedule provided by QR Network to the operator

The listing above is not intended to be comprehensive.

3.4.3 Financial Statements

QR Network argues that the requirement to prepare audited general purpose financial statements is excessive and further state³:

there is no regulatory precedent to justify the imposition of such a highly detailed form of regulatory account reporting.

This is factually incorrect as there is regulatory precedent for this form of highly detailed account reporting. In particular, regulated electricity infrastructure providers (including providers owned by the Queensland Government and formerly regulated by the QCA) are required to prepare and maintain detailed regulatory and general purpose audited accounts. These obligations focus on maintaining audited general purpose financial statements, which are disaggregated and adjusted for regulatory factors in order to develop detailed regulatory accounts. These regulatory accounts are required to meet the requirements of a defined and detailed accounting template⁴.

Asciano notes that these requirements are placed on electricity infrastructure providers even though many of these providers are not vertically integrated. Asciano believes that given the vertically integrated nature of QR, requirements similar to the electricity requirements should be seen as a minimum standard.

4 DETAILED COMMENT ON QR NETWORK'S 2010 DAU ACCESS UNDERTAKINGS AND SCHEDULES

This section of the submission focuses on new or altered drafting as identified by QR Network in its 2010 DAU Volume 2, "Marked Up Access Undertaking and Schedules". Each subsection will address a different Part or Schedule.

³ 2010, QR Network, QR Network's 2010 Draft Access Undertaking Volume 1 Policy Issues page 5

⁴ Details of the electricity infrastructure accounting reporting obligations are contained in the report: Australian Energy Regulator; 2007; Electricity Transmission Network Service Providers Information Guidelines. This report and the relevant accounting templates can be found at <http://www.aer.gov.au/content/index.phtml/itemId/715238>. It should be noted that the accounting templates include 37 worksheets.

Where Asciano has made a previous comment on an issue and it has not been addressed, that is no drafting changes have been made, then lack of further comment in this submission should not be taken as agreement with current drafting.

4.1 Part 2: Intent and Scope

Timing

QR Network's response in clause 2.6 to decision 6.11 of the QCA Draft Decisions is disappointing. They have both sought to extend the timetable and fetter the QCA's discretion in approving an appropriate incentive mechanism. It is Asciano's view that the Access Undertaking should reflect the QCA's original timing and that the stakeholder consultation should be meaningful and that the clauses that fetter the QCA's ability to make good decisions should be removed, in particular clause 2.6.f should be removed.

4.2 Part 3: Ring Fencing Arrangements

Yard Review

As stated in our previous submission⁵, Asciano believes that the QCA should be able to institute a yard review without QR Network's agreement as long as it has reasonable grounds to do so. Having to get QR Network's agreement, as is required in the current drafting in clause 3.1.e, means that the review may never happen.

Transfer of Infrastructure

We have proposed a very limited number of sites to QR that should be moved from 'blue' to 'red' to allow effective competition. In our view these are reasonable requests to facilitate movements to third party owned sites such as commissioning centres. These sites are:

- Jilalan 4 road,
- Jilalan Road to access commissioning shed leased by Siemens
- 2 new Jilalan provisioning roads passing signals 49A/B and 50 A/B
- Moranbah freight siding – road to access the mainline freight centre
- Callemondah road to access to commissioning shed/ EDI shed.
- Townsville Port – blue roads coming off the long siding and mid rd heading towards Archer Street

⁵ Asciano Response to the Draft Decision February 2010, p27.

The current clause 3.7.2 is ineffective as well as being complex and transfer only occurs if, in QR's reasonable opinion, certain conditions are met. Asciano's main concern is that a subjective assessment of such a transfer request by QR Network may not treat all access seekers and access holders equally. It should be the QCA who decide what is appropriate or reasonable.

4.3 Part 4: Negotiation Framework

Timeline Changes When Access Applications Modified Before IAP Issued

The 2010 DAU has included two new clauses, 4.2.g and 4.2.h, to address the instance where, in the view of QR Network, the access applications are substantially changed before an IAP is issued. In this instance QR Network may suspend the preparation of the IAP.

Asciano's main concern with these new clauses is that the assessment of whether an access application has been substantially altered is a subjective assessment by QR Network. Asciano believes that a set of objective criteria should be outlined to guide any QR Network decision regarding the assessment of substantial alterations to access applications. For example, objective criteria could be set with reference to volumes to be transported or frequency of services.

Asciano previously raised its concern with IAP time frames in its February 2010 submission to the QCA in response to the QCA Draft Decision on the QR Network 2009 DAU.

Asciano's primary concern in relation to these time frames, and QR Network's subjective decision-making more generally, is that all access seekers be treated equally, particularly if a related party of QR network is also an access seeker.

Extension of IAP Period

QR Network, in clause 4.3.b.i, accepted QCA's amendments in regard to notifying an access seeker if additional time is required to prepare an IAP.

While Asciano acknowledges that QR Network has adopted the QCA recommendation, Asciano continues to have concerns as to why any additional time is needed to prepare an IAP, given that IAPs are indicative. In particular Asciano is concerned that the decision to extend the time required to complete an IAP is at QR

Network's sole discretion. Asciano believes that in circumstances where an extension of time is required to complete an IAP QR Network should:

- provide a statement of reasons explaining why an extension of time is required; and / or
- make the decision that an extension of time is required on the basis of a set of objective criteria.

Asciano's primary concern in relation to QR Network's subjective decision-making is that all access seekers be treated equally, particularly if a related party of QR Network is also an access seeker.

Queuing Mechanism

The QCA Draft decision released in November 2009 required QR Network to amend clause 4.3.c.iv by deleting the portion of the clauses in bracket. QR Network has rejected this drafting. Asciano supports the QCA position.

Our customers have been arguing for a number of years that the queue needs to be transparent with members of the queue having clarity regarding where they are positioned in the queue. Asciano is supportive of increased transparency.

Capacity Notification Register

QR Network has added additional wording in clauses 4.7.a and 4.7.c.ii to reflect the requirement for access seekers to have complementary arrangements before they are placed on the capacity notification register.

Asciano has three concerns with this proposed new drafting. These are:

- the drafting seems to contain an incorrect assumption. Clause 4.7.a refers to "rights required to leave the QR Network rail network in order to unload" but Asciano believes that some unloading, although not all unloading, is done on the network as QR Network owns the infrastructure through at least some of the unloading stations at the ports as per the network diagrams. As such there may be no "leaving" of the QR Network to unload; and
- the new drafting added to 4.7.a seems confused. Asciano suggests that drafting similar to the drafting below could lessen this confusion:

QR Network is not required to place an Access Seeker on the Capacity Notification Register unless the Access Seeker provides evidence satisfactory to QR Network, acting reasonably, that it has established, or will establish, satisfactory arrangements to unload at a recognised destination ("Exit Rights").

For the avoidance of doubt formal recognition of the Access Seeker's Exit Rights by the Supply Chain Group or the Supply Chain Master Plan should be taken as satisfactory evidence.

These Exit Rights may include, but are not limited to, arrangements to unload at a port or domestic unloading facility and arrangements to unload at a facility which is under construction or expansion.

- in relation to 4.7.c.ii it should be sufficient that evidence of Exit Rights is provided once. Requiring evidence be re-provided every six months is unnecessary, and as such 4.7.c.ii should be deleted.

4.4 Part 6: Pricing Principles

Sharing of Responsibility

QR Network, in clause 6.5.2.b.ii, accepted QCA's amendments and modified this clause related to the equitable sharing of responsibility between initial and later access seekers.

While Asciano acknowledges that QR Network has adopted the QCA recommendation, Asciano has concerns as to how a decision is made as to whether the sharing of responsibility is equitable.

Asciano's primary concern in relation to QR Network's subjective decision-making is that all access seekers be treated equally, particularly if a related party of QR network is also an access seeker.

4.5 Part 7: Capacity Management

Initial System Rules

In clause 7.1 QR Network introduces substantial new drafting relating to system rules. These changes do not necessarily reflect the changes sought in the QCA Draft Decision released in December 2009, and to the extent that the QR Network drafting diverges from the QCA Asciano believes the QCA position should be adopted.

Significant Investment

In Part 7, particularly clause 7.5.3, QR Network introduces substantial new drafting relating to significant investment (previously known as major projects). Asciano's understands its customers have major concerns with these clauses and will provide the QCA with detailed views in their submissions.

Asciano's main concerns are that the significant investment clauses are used to avoid complying with the undertaking capacity allocation provisions.

Transfers and Relinquishments

QCA Draft Decision released in December 2009 sought to amend the definition of relinquishment fee and explicitly differentiate between capacity transfers and relinquishments.

To the extent that the QR Network drafting diverges from the QCA, Asciano believes the QCA position should be adopted

4.6 Part 8: Interface Considerations

Connecting Infrastructure

QR Network has introduced new clauses in 8.3.d and 8.3.e that require QR Network to connect infrastructure constructed by an access seeker or holder to QR Network infrastructure, provided that this infrastructure meets technical specifications, is constructed to a reasonable standard and the access seeker or holder agrees to pay QR Network's reasonable costs of connection. Clause 8.3.e explicitly provides for a situation that where the access seeker or holder and QR Network cannot agree on technical and construction quality issues the issue may go to dispute resolution.

Asciano has several concerns with this proposed new drafting. These are:

- Clause 8.3.d.iii requires an access seeker or holder to pay QR Network's reasonable costs of connection. Asciano's concerns are:
 - QR Network's costs of connection may be neither transparent nor efficient. Ideally, both parties should pay their own costs of connection, however failing this, the QR Network connection costs should be on an "open book" basis with the access seeker or holder paying the costs and these costs should be auditable;
 - QR Network's costs of connection may be ongoing. Asciano believes that ongoing costs should be included in the broader Access Undertaking operating and maintenance costs. The costs of connection should be limited to the initial capital cost of the connection.
- Clause 8.3.e allows an access seeker or holder to seek to resolve disputes relating to specifications and construction standards by using the dispute resolution provisions. Asciano believes this clause is redundant as all access seekers and holders should be able to use the dispute resolution provisions for all disputes. The current drafting contains an implication that disputes relating to the payment of connection costs cannot be resolved using the dispute resolution provisions.

Asciano believes that this drafting should be reviewed; as if the intent of the drafting is to limit the scope of dispute resolution in relation to infrastructure connection then this may raise broader issues in relation to the regime being seen as effective. In this context it should be noted that the Competition Principles Agreement, clause 6.4.g requires that a state access regime should incorporate an independent dispute resolution process. Asciano is concerned that the 2010 DAU may not be allowing such a dispute resolution process apply to all sections of the 2010 DAU.

4.7 Dispute Resolution and Amendment Processes

Supply Chain Planning and Dispute Resolution

QR Network has introduced a new clause 10.1.4.h, which outlines the dispute resolution principles that will be applied by the QCA in the event that a dispute is raised in accordance with the new clause 11.1.3.c. Clause 11.1.3.c relates to QR Network Supply Chain Operating Assumptions, and in particular indicates that if a

participant in the Supply Chain Group does not believe these assumptions are reasonable they may be referred to the QCA for determination under clause 10.1.4. The principles outlined in clause 10.1.4.h focus on ensuring any dispute resolution will be consistent with assumptions that apply in other parts of the coal supply chain, will allow QR Network to continue to meet its obligations and operate efficiently and will be equitable.

Asciano has no major concerns with the principles outlined in clause 10.1.4.h per se, although Asciano believes that any competent mediator or arbitrator, including the QCA, would take these issues into account in any event.

However, Asciano is concerned that QR Network appears to be introducing different dispute resolution principles for different disputes.

In addition, Asciano recognises that the Supply Chain Group is a broader body than the access providers, seekers and holders covered by the Access Undertaking. As such Asciano believes that Supply Chain Group disputes are best addressed in the supply chain protocols and processes rather than the QR Network Access Undertaking. A dispute between Supply Chain Group participants is best addressed within the Supply Chain Group.

Asciano believes that clause 10.1.4.h should be removed.

4.8 Part 11: Co-ordination and Planning

Unlike many other of the amendments in the 2010 DAU which have been revisions or inclusions of individual clauses, the amendments to part 11 have been substantial and as such Asciano are providing broader comment as well as making comments on individual clauses.

QR Network argues that its participation in supply chain processes is needed for the efficient functioning of the coal system and that 2010 DAU drafting seeks to formalise QR Network's ongoing involvement in this process. This drafting provides QR Network with a central position in the supply chain process.

Asciano does not dispute the need to co-ordinate and align the coal supply chain and the need for a body to facilitate this co-ordination. However, Asciano has strong positions that:

- the coal supply chain co-ordinating body should not be an active participant in the supply chain. This allows the co-ordinating body to make decisions which are genuinely independent and in the interests of supply chain alignment rather than make decisions in its own interests; and
- the Access Undertaking should not address QR Network's input into the coal supply chain co-ordinating body's processes. The Access Undertaking should be an access document rather than a planning document. QR Network's involvement in the Supply Chain Group should be governed by separate supply chain documentation and processes. Further to this the QCA should not have a formal role in coal chain co-ordination beyond appropriately reflecting coal chain protocols and processes in its access decisions, for example the QCA and the Supply Chain Group should align access rights reduction principles and processes.

Asciano supports the establishment of an independent supply chain co-ordinator similar to the HVCCC in the Hunter Valley coal supply chain and notes that many of the participants in the HVCCC are also participants in the Queensland coal industry. Asciano notes that QR has been very reluctant to support the establishment of such independent co-ordinators in both Queensland and New South Wales.

Overall Asciano does not disagree with the broad principles underlying most of the 2010 DAU co-ordination and planning proposals, however Asciano does disagree with both the need for placing detailed co-ordination and planning proposals in the Access Undertaking and the drafting proposed.

Notwithstanding the above comments, if part or all of this drafting is accepted into the Access Undertaking then clause 11.4, which allows QR Network to effectively opt out of complying with Part 11, must be removed, or at the least substantially modified, to require QR Network to comply with the Access Undertaking.

QR Network's Participation in Supply Chain Planning

As the track owner QR Network believes it should be actively involved in discussions and modelling relating to coal chain planning and modelling. Asciano agrees that it is

appropriate for QR Network to be a core participant in the Supply Chain Group; however QR Network should not have a role co-ordinating the group.

Asciano has concerns that clause 11.1.3 is currently drafted as though the Supply Chain Group is required to justify to QR Network why this broader group's assumptions are preferable to QR Network's assumptions. Asciano believes a supply chain process where participants work co-operatively is preferable to a process where participants have to justify their assumptions via a formal submission process to another participant, particularly a participant which is a monopoly infrastructure provider.

Asciano believes that the Supply Chain Group should set out its assumptions and if these differ from QR Network's assumptions then the rationale for the difference should be explained. Participants should then make their own commercial decisions as to how to move forward.

Asciano also has concerns that in clause 11.1.3.c QR Network are proposing that if the assumptions of the Supply Chain Group and QR Network do not align then the QCA may become involved in a dispute resolution process. Asciano believes that the QCA is a competition and access body rather than an industry planning body, and consequently the QCA should not be involved in planning decisions. The resolution of disputes regarding modelling and assumptions within the Supply Chain Group should be addressed by the group's protocols and processes rather than by QCA processes.

Asciano notes that in similar processes, such as the HVCCC in the Hunter Valley, the regulator, in this case the ACCC does not directly intervene in discussions between the ARTC, the track provider, and the HVCCC.

QR Network's master plan and system master plan

Clause 11.2 outlines the process for developing a coal rail infrastructure master plan, the content of such a plan and the establishment of a coal rail infrastructure master planning forum. This forum will include all relevant coal industry participants but has no decision making authority or power over QR Network.

Asciano supports the development of a coal supply chain master plan. However, as currently proposed the QR Network master planning forum is largely irrelevant. The forum has no power and as such appears to be a mechanism whereby QR Network can demonstrate it has engaged in consultation with stakeholders, even though there is no obligation to incorporate stakeholder input into the plan.

In addition Asciano has concerns that the QR Network master planning forum may have the potential to become a de facto central planning body. Asciano strongly believes that the co-ordinating body should be independent of participants in the supply chain.

Asciano believes that rather than draft section 11.2 in the context of a master planning forum the section should be drafted as:

- requiring QR Network to prepare and distribute a rail infrastructure master plan;
- requiring certain content to be in the plan (such as the content outlined in 11.2.2.a.ii, 11.2.2.b and 11.2.2.c ; and
- allowing independent review of modelling underpinning the plan.

QR Network's Alignment of Contracted Rail Capacity with Other Infrastructure Providers

The 2010 DAU includes drafting to enable QR Network to reduce the rail capacity of access holders to the level of access they hold at the port in certain circumstances. Asciano does not oppose the general principle of alignment of rail and port capacity and contracts, but has concerns that clause 11.3.a indicates that the assessment of whether rail and port contracts are aligned is based on a subjective assessment by QR Network. Asciano believes that a set of objective criteria should be outlined to guide any QR Network decision regarding the assessment of rail and port capacity alignment, or alternatively, the decision as to whether rail and port capacity are aligned could be made by the Supply Chain Group rather than QR Network. Asciano's primary concern in relation to QR Network's subjective decision-making is that all access seekers be treated equally, particularly if a related party of QR Network is also an access seeker.

In addition, the drafting of clause 11.3.a requires the operator to "leave the network" to unload. Asciano believes that this drafting should be amended to reflect QR

Network ownership the tracks through the unloading stations at some of the ports, as per the network diagrams. This issue is identical to the issue regarding drafting and track ownership raised in section 4.3. The defined network and its relationship to this drafting should be clarified.

Clauses 11.3.b to 11.3.e enable QR Network to reduce capacity of access holders to that at the port in certain circumstances. In particular, where an access holder has their rail access capacity reduced by a project completion assessment they will receive preferential treatment in the new capacity queue for that coal system.

Asciano understands that this preferential queuing mechanism is a consequential amendment to drafting in Part 7 of QR Network's resubmitted draft 2009AU. Asciano seeks that all access seekers, including access seekers which are related parties to QR Networks, be treated equally through this process.

No Fetter Clause

Clause 11.4 states that QR Network are only obliged to comply with Part 11 (the co-ordination and planning chapter) to the extent that this compliance is consistent with QR Network's commercial objectives and does not affect QR Network's ability to exercise any discretion, power, function or right or ability to do anything in accordance with the Access Undertaking or Access Agreement.

Asciano believes such a clause is completely unacceptable as it effectively allows QR Network to only comply with Part 11 when it is in QR Network's interests to do so. Given this Asciano would query whether an Access Undertaking is genuinely effective if the access provider has the option of unilaterally deciding whether to comply with certain parts of the Access Undertaking. Asciano strongly believes that an Access Undertaking should not be drafted such that some sections or parts only have to be complied with when the access provider decides it is in their interests to comply with it. Asciano believes that clause 11.4 must be removed, or at the least substantially modified, to require QR Network to comply with the Access Undertaking.

If QR Network is seeking a flexible planning instrument then other options, rather than the Access Undertaking may be better suited to allowing QR Network the flexibility they believe is required.

4.9 Definitions and Interpretation

Consequential Loss

In the QCA Draft Decision the QCA sought to amend the definition of consequential loss to address possible confusion with regard to QR entities. QR Network has rejected this amendment.

Asciano previously raised issues with this definition in its November 2008 and February 2010 submissions. Asciano supports the QCA changes proposed in the QCA Draft Decision released in December 2009, and to the extent that the QR Network drafting diverges from the QCA, Asciano believes the QCA position should be adopted.

4.10 Schedule A: Maintenance of Regulatory Asset Base

Early Works Expenditure and the Regulatory Asset Base

In Schedule A, clause 2.5, QR Network accepts the QCA's decision to only allow expenditure on commissioned or formally discontinued projects to be included in the Regulatory Asset Base.

While Asciano acknowledges that QR Network has adopted the QCA recommendation, Asciano continues to have concerns as to why users should pay for discontinued capital projects as these projects are not used by the access seekers or holders and add no value to the operations of access seekers and holders. Asciano would prefer if the costs of these projects were borne by QR Network as it is QR Network's decision making which led to these being initiated and then discontinued.

Procurement Strategy

In schedule A, clause 3.1.3, QR Network accepts the QCA's decision to amend the clauses relating to regulatory pre-approval of procurement strategy and has inserted a new clause, 3.1.3.j to allow for costs incurred in connection with complying with clause 3.1.3.a to i to be included in the Regulatory Asset Base.

Asciano queries whether all costs incurred in connection with complying with clause 3.1.3.a to i should be in Regulatory Asset Base. Asciano believes that potentially some of these costs may be operating costs and that the inclusion of costs in the Regulatory Asset Base should be determined by accounting capitalisation policies

and other similar guidelines rather than by a blanket provision in the Access Undertaking.

4.11 Schedule B: Confidentiality Deed

Asciano believes that the Confidentiality Deed should place stronger restrictions on QR Network's ability to disclose information to others in QR under clause 2.4.

Asciano believes that to the extent that non-QR Network employees have access to the confidential information they must also be bound by the confidentiality deed.

4.12 Schedule F: Reference Tariff Schedules

Adjustment Charge

The 2010 DAU includes new drafting within Schedule F, part A clause 2.3 and Part B clause 3.2.15, which enables QR Network to recover reference tariff amounts to which it would have been entitled if reference tariffs had applied from 1 July 2009.

Interest, which is capitalised monthly, will also be charged. In addition, under clause 2.3.9, under some circumstances an adjustment charge may also apply to a new access holder who did not operate the train service to which the adjustment charge relates.

Asciano opposes QR Network's retrospective charging proposal. Access holders and operators have not been responsible for delays in the regulatory process, and as such, access holders and operators should not be required to pay for these delays, and in particular they should not be required to pay interest on these retrospective tariff variations. In addition, Asciano strongly believes that in the event that the adjustment charge is allowed, such charges should only apply to the access holders that actually operated the train services to which the adjustment charge relates. Adjustment charges should not apply to new access holders if they were not the operators of the relevant train.

Asciano believes that QCA rejection of the retrospective charging proposal would provide a strong incentive for QR Network to engage in shorter regulatory processes in the future.

Take or Pay: Capping on use of Different Operators

QR Network has rejected the QCA's proposals to allow for the transfer of take or pay obligations by producers within their own portfolio of mines, as the proposals are

difficult to administer⁶. As an alternative QR Network proposes to augment the take or pay provisions in Schedule F, Part B, by including a new clause Schedule F Part B 2.2.5 which is intended to enable the capping of take or pay liabilities for mines where they utilise different operators to haul contracted tonnages from the same origin to destination.

Asciano queries whether administrative difficulty should be a valid reason for rejecting the QCA proposal, particularly given the complexity of the overall Access Undertaking process.

New Spurs, Electrical Feeder Stations and Electricity Charges

QR Network has rejected the QCA's decision to include the actual efficient costs of maintaining new spurs in the calculation of the revenue adjustment amount once commissioned. As an alternative it has proposed in Schedule F Part B clause 3.2.2.a.i an allowance of \$15,000 per track kilometre per annum.

QR Network has also modified Schedule F Part B Clause 3.2.2.b by separating charges into electric energy and electric transmission and distribution costs.

Asciano believes that in relation to maintaining new spurs, actual costs, which may be incremental, are preferable to benchmark costs.

Treatment of Cross System Traffics

In Schedule F Part B clauses 4.1 and 4.2, QR Network proposes drafting to clarify how revenue from cross-system services will be allocated between the relevant systems.

Asciano accepts that there needs to be an allocation process for common costs beyond the incremental cost however Asciano has concerns that any allocation may not be cost reflective and result in recovery of more than the costs attributable to the service. In particular Asciano is concerned that QR Network is in some instances, for example Schedule F part B clauses 4.1.4, allowed to recover the higher of the incremental cost or the allocated cost. Asciano would prefer that one methodology be used consistently rather than allow the higher of allocated cost or incremental cost.

⁶ 2010, QR Network, QR Network's 2010 Draft Access Undertaking Volume 1 Policy Issues Appendix A Detailed Amendments to Draft2009 Undertaking p39

More broadly, on the issue of cross system traffic, the construction of the Goonyella to Abbot Point project may result in cross system issues becoming more complex. As such Asciano believes that cross system issues may need to be revisited in future Access Undertakings.

4.13 Schedule G: Network Management Principles

System Rules

In Schedule G Appendix 1 QR Network introduces new drafting relating to amending system rules. These changes do not necessarily reflect the changes sought in appendix 7 of the QCA Draft Decision released in December 2009, and to the extent that the QR Network drafting diverges from the QCA Asciano believes the QCA position should be adopted

If the QCA position is not adopted then Asciano has particular concerns in relation to Schedule G Appendix 1 clause e to h, where the QR Network proposed drafting requires an access holder to make a submission to QR Network if they are negatively impacted by QR Network amendments to system rules and which, in clause h gives QR Network broad powers to vary, reverse, remove or refuse to proceed with proposed amendments.

If the QCA position is not adopted, Asciano seeks that:

- QR Network not assess its own amendments when QR Network related parties may benefit from QR Network amendments. (Asciano is aware that under clause g any dispute may be referred to the QCA but the time and costs of a dispute may not necessarily justify reference of every contentious issue to the QCA, although the accretive impact of numerous amendments over time may act to either advantage or disadvantage any given operator); and
- QR Network not have broad discretion to vary, reverse, remove or refuse to proceed with proposed amendments, particularly when QR related parties may have proposed in consultation that such variations, reversals removals or refusals to proceed may be beneficial to the QR Network related party.

Asciano's broader concern with the network management principles is that these principles may be amended to favour one operator over another, and even in circumstances where the operating impact or revenue impact is not large, such minor advantages may still be sufficient to compromise the level playing field needed for genuine above-rail competition.

4.14 Schedule H: Issues for EIRMR

Nature Conversation

QR Network has included new drafting in Schedule H clause 4 which requires the access seeker to identify the presence of endangered, rare, vulnerable or threatened wildlife within one hundred metres of the proposed operational route.

Asciano strongly believes that the requirement to identify the presence of endangered wildlife near the relevant infrastructure is the responsibility of the infrastructure provider rather than the operator. Rather than have multiple operators identifying the presence of wildlife, the identification process should be undertaken once by the infrastructure provider. This approach will ensure the process is undertaken consistently and at the lowest cost.

In any event, if this additional drafting in Schedule H clause 4 is accepted, then Asciano believes that further drafting should be added to require that to the extent QR Network provides any assistance to related operator in regard to this clause then it should provide this assistance to all other operators.

Noise Management

QR Network has included new drafting in Schedule H clause 4 which requires the access seeker to determine whether existing noise levels in connection with the relevant infrastructure exceed defined noise levels, and whether these defined noise levels are likely to be exceeded due to the access seeker's operations.

Asciano strongly believes that the requirement to assess existing noise levels near the relevant infrastructure is the responsibility of the infrastructure provider rather than the operator. Rather than have multiple operators assessing noise levels, the assessment process should be undertaken once by the infrastructure provider. This approach will ensure the process is undertaken consistently and at the lowest cost.

Asciano believes that within the Australian rail industry it is common practice for noise measurement to be undertaken by infrastructure owners rather than operators.

In any event, if this additional drafting in Schedule H clause 4 is accepted, then Asciano believes that further drafting should be added to require that to the extent QR Network provides any assistance to related operator in regard to this clause then it should provide this assistance to all other operators

5 DETAILED COMMENT ON QR NETWORK'S 2010 DAU STANDARD ACCESS AGREEMENTS (SAA) AND SCHEDULES

5.1 Issues with SAA

Consequential Loss Provisions

QR Network has included substantial new drafting in the Operator SAA clause 3 in relation to consequential loss. The drafting provides two options:

- Clause 3.4 (AID Option) - Under this option the operator must use reasonable endeavours to procure the customer to execute the Access Interface Deed. The Access Interface Deed is a deed between the railway and customer and records their agreement that neither party will be liable to the other for consequential loss to the extent provided for in the deed; or
- Clause 3.5 (Section 55 Option) - Under this option the operator must ensure that each rail haulage agreement it enters into contains a clause which contains a set form of wording that essentially states that the railway manager is not liable for consequential loss.

Asciano believes the proposed consequential loss provision in the SAA is effectively redundant as QR Network does not agree to an access agreement until a haulage agreement is in place. Given this, QR Network could refuse an access agreement if a haulage agreement did not contain the relevant clause or the AID was not agreed and as such the amendment of the SAA to formally include the above options is redundant.

The clauses also raise some concern about the multiple indemnity interactions within the suite of haulage and access agreements. The indemnity relationships between all

parties need to be clarified to ensure that there are no unintentional gaps in the indemnities granted between the parties.

The clauses also raise concerns that QR is attempting to interpose itself in the commercial agreement between an operator and producer in an attempt to minimise risks. Asciano believes this is unnecessary.

If such a consequential loss provision is deemed necessary then it should be in the access undertaking or similar regulations, rather than the Standard Access Agreement. This reduces concerns that these clauses will only be applied to some agreements under the current model.

Security deposits

QR Network has included substantial new drafting in the Operator SAA General Conditions of Contract clause 2.4 with regard to security deposits. Under this new drafting initial security deposits are charged, and during the year QR Networks may review the amount of the security deposit and if the annual take or pay obligation under the access agreement is greater than 66% of the initial security deposit then the operator is required to provide another 12 weeks of access charges as security. However, this additional security deposit can be returned if the take or pay falls or the take or pay is paid.

Asciano believes this clause is unacceptable for several reasons:

- QR do not place this security requirement in their agreements with their related above rail operator, thus explicitly advantaging their associated above rail operator against all other competitors;
- The intention of security deposits in agreements between QR and operators, such as Asciano, should be to protect QR in the event the operator cannot meet the charges levied against them. In this event it is very likely that the financially distressed operator's end customers (most probably coal mining companies) will engage another operator and any loss to QR Network will be mitigated as the mine output will eventually be moved and QR Network will be paid for access.

The intention of this clause as currently worded seems to be to protect QR Network in the event a mining company cannot meet its payments to a rail operator. This is an issue for the mine and the operator rather than QR Network as the access provider.

Furthermore, the terms around the refunding of the additional security deposit put an operator at an explicit disadvantage when compared to QR's related above rail operator. These conditions effectively encourage either a restriction on the size of the amounts transported or encourage sub-optimal cash flow management. Both of these put independent operators at a disadvantage.

Asciano also notes other access providers do not have in place such an onerous regime.

Reduction of Access Rights

QR Network has included substantial new drafting in the Operator SAA General Conditions of Contract clause 3.2 with regard to reduction of access rights. In particular under the revised clause 3.2.b.i there appears to be a reduction in the rights afforded to the operator to put forward their case as to why access rights should not be reduced. Asciano believes the previous drafting should be restored, and if possible strengthened by providing the operator with an explicit right to retain the access rights if they can provide a reasonable explanation of why the rights were not utilised in the past and a reasonable expectation that these rights will be utilised in the future.

Liability and Negligence

The SAA General Conditions of Contract clauses 14.4 states that QR Network will not be liable to the operator and or the operator's customer except to the extent that such loss results from the failure of QR Network to perform its obligations under Clause 6.2.a.

Asciano believes that this clause is too broad in that it limits liability to breach of the agreement only. Asciano believes that QR Network should also be liable in the event of negligence, whether or not this negligence results in a breach.

Relationship with Operator's Customer

QR Network has included substantial new drafting in the Operator SAA General Conditions of Contract clause 14.10 which states that the operator is responsible for

all the conduct of their customer under the Agreement and that any act or omission of the customer is deemed to be an act or omission by the operator. Furthermore, in no event will QR Network be liable to the customer for any loss suffered by the customer and the operator shall indemnify QR Network against such a liability.

Asciano strongly opposes this new clause and believes that it should be deleted. Asciano is unsure of the actual issue or problem, if any, which this clause is attempting to address, besides that of still further limiting any risks to QR Networks.

Asciano should not be held responsible for all acts or omission by its customers, such a responsibility is too broad and, if necessary at all, should be tightly limited to the particular issue, if any, which QR Network is attempting to address by introducing this new clause.

In addition Asciano has some concerns that such a clause may not create a risk or indemnity issue for a QR Network related operator as at a corporate level the indemnity issues would effectively cancel each other out, however this clause will create issues for operators who are not related to QR Network. Asciano's primary concern is that all operators be treated equally, particularly if a related party of QR network is also an operator.

5.2 Issues with SAA Schedules

Schedule 1: Issues in Train Service Entitlements

QR Network has included substantial new drafting in the Operator SAA General Conditions of Contract clause 14.1 which amends transit times to be defined in terms of a 'Target Average Below Rail Transit Time Factor'. Asciano believes that the previous drafting should be restored such that transit run times are defined in terms of empty and loaded average transit time and maximum transit time.

Schedule 10: Issues in Interface Coordination Plan

In SAA Schedule 10 Interface Co-ordination Plan Part1 QR Network has introduced new drafting relating to capacity concepts. In particular:

- defining 'Available Capacity' as meaning

capacity excluding all Committed Capacity except Committed Capacity that will cease being Committed Capacity prior to the time in respect of which that Capacity is being assessed;

- defining 'Capacity' as meaning

the aggregate of all Existing Capacity and all Planned Capacity;

Asciano believes the previous drafting relating to capacity concepts and definitions should be restored.

SAA Schedule 10 clause 2.2.a.ii.B has also introduced new drafting stating that the master train plan details the capacity required for the provision of Train Service Entitlements and separately identifies the train paths allocated to cyclic traffic, where these paths reflect the existing capacity required for the maximum level of operation for Train Service Entitlements but may not necessarily reflect the particular train paths that those services will operate on.

Asciano believes that the previous drafting should be restored, or failing this the description of capacity required for Train Service Entitlements for cyclic traffic should be altered to require system paths allocated to cyclic traffic be designated as either contracted or non-contracted paths.

SAA Schedule 10 Appendix One c.i and c.iii state that QR Network will determine allocation of a contested train path and will prioritise the allocation based on several factors including:

- (clause c.i) any requirement for giving priority to certain services or unloading facilities identified within the System Rules. Asciano believes that any such prioritisation should not result in the breaching of any other operators train services entitlement
- (clause c.iii) the operator for whom QR Network is most behind in providing its contracted services due to a QR Network cause. Asciano believes that QR Network should not be obliged to facilitate an operator 'catching up' where the reasons for low performance are attributable to that operator rather than QR Network.

6 ADDITIONAL ISSUES

In addition to the issues outlined above Asciano believes that the following issues should be included in the Access Undertaking documentation:

- A mechanism is required to allow the removal of surplus rolling stock from the nominated network when an operator has lost or relinquished contracts. Unused or underutilised rolling stock can result in congestion on the network, particularly at unloading facilities.
- Auxiliary charges to operators should be regulated and included in the Access undertaking documentation. Charges related to activities such as storage, stowage and connection agreements should be determined to reflect efficient costs, should be charged in a non-discriminatory manner and should be transparent. In order for these criteria to be met the auxiliary charges should be regulated. Asciano's concern is that if these charges are not regulated then a QR Network related operator may benefit from differential charging.