Asciano:
Submission To QCA Re:
QR Network Access Undertaking

June 2008

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Abbreviations

2005 Undertaking	QR Access Undertaking approved by the QCA in 2006 (backdated to operate from July 2005). Note that in the QR Submission this is referred to as the 2005 Undertaking and in the QCA Position Paper as the 2006 Undertaking.
2008 OSAA	Operator Standard Access Agreement – Attachment E of the QR submission
2008 Undertaking	Draft QR Access Undertaking that is the subject of this submission.
AHSAA	Access Holder Standard Access Agreement
QCA Positions Paper	*Position Paper QR Network's 2008 Draft Access Undertaking*, Queensland Competition Authority, May 2008
QR	QR Limited
QR Network	QR Network Pty Ltd or the QR Network Access Group as the context requires.
QR Submission	*QR Network Access Undertaking (2008) Preliminary Submission to the Queensland Competition Authority*, QR Limited, 9 May 2008

1. EXECUTIVE SUMMARY

In summary, Asciano's key comments are:

General

With two major exceptions, Asciano is supportive of the approach adopted in the 2008 Undertaking and agrees that it is appropriate that the changes should be restricted to those matters that are necessary to give effect to the change in QR's corporate structure.

Asciano agrees that it is appropriate for the QCA to reserve its decision until it has assured itself that the "extra-undertaking" documents referred to in the QCA Position Paper adequately support QR Network's obligations under the 2008 Undertaking.

Asciano believes that these documents will have a crucial impact on the effectiveness of the 2008 Undertaking.

Asciano notes the stakeholders will be wholly reliant on the QCA to conduct a diligent review of these documents given that no other party will have any opportunity to comment on them.

The short timeframe available to analyse the changes has restricted Asciano's ability to fully review the documents and therefore there will be increased reliance on the QCA's review process.

Transfer Of Track Assets

A critical issue in the proposed change of undertakings is the assignment of infrastructure related assets into the new entities. The following issues arise:

- As a default position, and particularly where there is doubt or the assets are of significance to the enabling of competition, Asciano believes that QR Network should hold any infrastructure assets in the first instance.
- QR Network will be required to "obtain responsibility" for assets required for common use. Asciano would be concerned if QR Network has in contemplation some other form of control that amounted to something that did not result in QR Network obtaining appropriate rights over the asset.

  Asciano is also concerned that the issue of the potential sale of QR's above rail businesses might see infrastructure assets move totally from QR Limited's control (as the parent entity). Asciano suggests that the Final Decision should clearly set out the QCA's understanding of QR Network's intentions and the Authority's own expectations as to how QR Network would "obtain responsibility" for a relevant asset or service.
- Asciano is concerned that allocation of assets between QR Limited subsidiaries has the potential to frustrate the intention of the 2008 Undertaking to achieve its purpose in facilitating competition by allowing an above rail group to constrain competition in circumstances where the most economic connection would be via infrastructure that is initially allocated to an above rail group. Asciano is aware of a number of examples around Australia where an allocation of infrastructure in this manner has effectively foreclosed against above rail competition.
- The change to the definition of Private Infrastructure has the presumably unintended consequence that all QR above rail infrastructure (ie "blue roads") would fall into this category. This definition needs to be reconsidered. The effect would be, at the least to confuse the "blue" to "red" transfer arrangements under clause 2.8 of the 2008 Undertaking and might potentially undermine the whole intent of that clause.

Adjustment To Risk

The issues regarding the proposed changes to clauses 14 and 15 are discussed below. In summary, Asciano's concerns include:

- The proposed changes to clauses 14 and 15 of the 2008 Operator Standard Access Agreement (2008 OSAA) are contrary to the stated intention to give effect to the 2005 Undertaking under the new QR structure. The changes have not been justified on any logical grounds and represent a significant change from the current position.
- The QCA Position Paper suggests that the changes are necessary to protect QR Network against claims for consequential loss. Asciano is unable to understand how the QCA arrives at this view. The majority of the changes affect the indemnity provisions and for the most part these exclude liability for consequential loss. The end customer is not a party to the contract and therefore is not prevented from making a claim for either direct or consequential loss. As the Operator indemnity to QR Network does not cover consequential loss, the changes do not protect QR against any potential consequential loss claim. They do, however, impose on the Operator the liability for direct loss through the indemnity to QR (except for QR's own negligence).
- The position adopted appears to assume a relationship between the parties that does not exist. The end customer is not a party to the 2008 OSAA and is not a sub-contractor to the Operator, whereas in the Access Holder Standard Access Agreement (AHSAA), the Operator is clearly a sub-contractor that has the main physical interaction with QR and its property. These differences do not allow for a conclusion that there should be similar indemnity and liability arrangements between the two contracts.
- The proposal is to apply these provisions inconsistently between QR above rail entities and non QR access seekers. This places QR above rail companies in a favoured position that has not been justified in any way either by QR or in the QCA Position Paper. Unwarranted favourable treatment of QR above rail is inimical to the whole concept underpinning the undertaking.
- The proposed terms have the potential to cause an Operator to breach the access agreement. The terms require the Operator to impose obligations on a third party that it is not possible for the Operator to commit to pre-emptively. If it is not able to pass on these obligations the Operator would be in breach of the agreement unless such arrangements could be subsequently renegotiated.
- The drafting of 2008 OSAA clause 14.10 does not produce the result that it appears the QCA believes it produces. The result of the proposed drafting would be to nullify QR's liability to the Operator's Customer under any circumstances as the end customer will never be in the same position as the Operator – though QR would never be liable to the end customer in contract, as the end customer is not a party to the contract. The whole premise of the clause is flawed.
- The rationale argued by the QCA suggests a breakdown in the separation of above and below functions within QR. It is not possible for either the QCA or QR Network to argue that QR as whole is in a different position without those parties knowing the contents of its above rail contracts. QR Network is not supposed to be aware of the contents of the above rail contracts. Even with such knowledge, it is contrary to the very basis of the access undertaking for QR to rely on that position – QR Network is supposed to treat all comers, both internal and external, on the same basis, as though it had no knowledge of the relevant haulage agreement.
- If, despite all the problems associated with this proposal, the QCA is minded to accept the changes, Asciano is concerned that it is most important that they are quarantined to coal access contracts (or the coal portion of a broader access contract). The changes

place non coal rail haulage at a further disadvantage to road competitors and would be detrimental to government policy to encourage freight on rail.

Costing Manual

Asciano agrees with the QCA's proposal not to reconsider the Costing Manual at this time. Asciano suggests that consideration of that document would serve no useful purpose during the life of the 2008 Undertaking and further urges the abandonment of that document for the 2009 Undertaking in favour of the provision of information that genuinely increases stakeholder comfort that the floor and ceiling limits are being appropriately applied and that the revenue cap calculation has been carried out in accordance with the undertaking.

2. GENERAL

As a general comment, with two major exceptions, Asciano is supportive of the approach adopted in the revised undertaking and agrees that it is appropriate that the changes should be restricted to those matters that are necessary to give effect to the change in QR's corporate structure.

The QCA has identified in its Positions Paper[1] that acceptance of the new undertaking will be subject to a review of the following documents:

- converted QRNational internal access agreement
- related entity agreements dealing with confidentiality between QR entities (ring-fencing)
- agreements between relevant QR related entities for the supply of services (eg electricity), access to land and other facilities.

Asciano agrees with the QCA that these documents will play a crucial role in making the undertaking effective in its primary role of allowing third parties to access the QR rail network to compete directly against relevant QR entities. Asciano therefore supports the QCA in its stated intention to conduct the nominated reviews.

Asciano commenced its review in the belief that any issues would be minor and the QR genuinely intended to restrict the changes in the 2008 Undertaking to those matters that genuinely needed to make the new undertaking an effective reflection of the 2005 Undertaking. In that spirit, Asciano was hopeful of being able to gloss over any minor deficiencies in drafting, relying on the good will of all parties to overcome any problems. Unfortunately, Asciano believes that the 2008 Undertaking fails to be acceptable in two major areas. The problems are such that Asciano is not able to endorse acceptance of the document in its current form. These issues are discussed below in sections 3 and 4.

The short timeframe allowed to stakeholders to review the documents has necessarily constrained Asciano's ability to conduct a complete analysis of the issues. Therefore it is likely that not all of the issues have been fully considered. It is understood that there is good reason for expediting the change to the 2008 Undertaking, however this reinforces the need to constrain changes to those that are really necessary to give effect to the change in QR's structure. As discussed in section 4 of this submission, Asciano believes that QR has proposed changes that are not necessary nor are they benign. Such changes should not be adopted with full and proper consideration. Asciano places great reliance on the QCA to safeguard to interests of access seekers in this matter. Similarly the lack of crucial documents that underpin

[1] QCA Position Paper, pp 4, 6, 8

the 2008 Undertaking arrangements leaves stakeholders in a most difficult position and totally reliant on the diligence of the QCA to obtain an appropriate outcome.

3. ASSET OWNERSHIP ISSUES

3.1 Initial Transfer Of Track Assets

A critical issue in the proposed change of undertakings is the assignment of infrastructure related assets into the new entities.

Under the current arrangements, the legal ownership of all the assets lies with QR Limited. QR Limited has determined by its own policy (and with the approval of the QCA) what assets to allocate to the former QR Network Access Group and what to nominally allocate to its "above rail" business units. Thus, if in the past, a mismatch occurred between the declared facilities and the assigned ownership, this was a matter of QR policy that could be changed by QR decision. The 2005 Undertaking provides for this reallocation under paragraph 2.2(h).

Under the proposed arrangement, QR Network Pty Ltd and the above rail businesses will be separate entities from QR Limited (though QR Limited retains control through its ownership of the subsidiaries). This means that the allocation of assets becomes more permanent and requires a legal change of ownership (compared to a mere internal reallocation) any time there is a requirement for a transfer to be effected from one company to another. This increases the difficulty of effecting the change (notwithstanding that QR Limited owns both relevant entities) even if only from an administrative perspective. There is also the potential for additional costs such as transfer fees, stamp duty etc.[2] If the transfer is at all controversial, as it might well be to the existing above rail owner, then it is not difficult to imagine that delays in effecting the transfer might arise as the matter is fought out "internally" between the various entities.

The QCA Position Paper points out, with respect to access to the declared service:

"… It is also important that access to the declared service is not diminished by a lack of access to land, electricity or ancillary services essential for the use of rail transport infrastructure.

However, these matters are not definitive given the uncertainties surrounding the scope of the declaration and the allocation of management responsibilities amongst the various QR Ltd entities."[3]

Asciano agrees with the QCA's views on the importance of having access to all of the relevant assets and services for the effective operation of the undertaking. Therefore it is Asciano's view that all assets associated with the provision of below rail services should be transferred to QR Network in the first instance and that this particularly includes those assets and services where the matter is unclear as to whether the asset should be below or above rail. It is far easier for QR Limited to arrange for QR Network to provide a service to a QR above rail entity than it is for QR Network to ensure that it can obtain the service on behalf of a competing train operator from a reluctant QR above rail entity.

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[2] It is recognised that an exemption to stamp duty might be available for a change of ownership within the one group of companies and the point is raised for illustrative purposes only. Even if the exemption is available, this will require administrative effort to make the appropriate application for the exemption etc.

[3] QCA Position Paper, p 8, para 2.4

QR's submission[4] p 7 sets out the proposed transfers:

"The following Below Rail assets will transfer (at accounting book value) from QR Limited to QR Network:

- Rail Infrastructure, being associated with the 'red roads' in the Line Diagrams and including electrification infrastructure;
- QR's telecommunications backbone; and
- Assets required for management and control of all Train Services including the Mayne Control Centre."

This statement of intention is appropriate with respect to the initial transfer of assets, and Asciano does not anticipate that this would lead to any difficulties in general. However, on the basis of the above discussion, Asciano believes this needs to be extended to include any existing "blue" asset over which there is doubt regarding whether it should remain "blue" or might potentially be classed as a below rail asset, the prudent approach would be for such an asset to be assigned to QR Network.

The QR Submission[5] indicates that QR Network intends to hold the existing corridor lease for the land underlying the rail network. While the majority of the leased land would be associated with the declared network, presumably some parts of the land are used for above rail purposes by QR above rail businesses. There is no indication as to how QR intends to deal with this; eg is QR intending to carve out sub-leases where above rail assets (eg maintenance depots) sit on corridor land? Asciano believes it would be most appropriate if QR Network holds the leasehold over all of the corridor land as the default position, with specific sub-leases (or licences if these are more appropriate) being given to train operators (both QR and non-QR) for land under existing (or future) above rail assets – if this is allowable under the lease from Queensland Transport. Given the time constraints to achieving the new arrangements, presumably there is no intention to define the sub-divisions of land prior to the initial lease assignment. However, regardless of the intended method for dealing with this, it would provide useful information to access seekers for the QCA's decision to include commentary on the how QR (and subsequently QR Network once it owns the corridor lease, if that is the case) intends to deal with the lease and any requirements for the allocation of land from that lease for above rail purposes.

Asciano would also bring to the QCA's attention that the Queensland Government is in the process of reviewing the allocation of rail infrastructure at Jilalan with regard to the operation of the Goonyella coal system.[6] This review has arisen after the change in proposed allocation of new infrastructure at Jilalan where QR Limited decided to allocate to above rail (ie "blue roads"), roads to be used for the provisioning of trains that were initially designated as common use infrastructure (ie "red roads"). It would be inappropriate for these roads (which are currently proposed but not yet built) and the existing underlying land to be transferred to a QR above rail business group prior to the Queensland Government determining the appropriate status of QR's Jilalan assets. As noted above, where there is doubt, Asciano suggests that the asset should be assigned to QR Network in the first instance. In fact, it would be appropriate to consider whether more of the existing above rail assets in critical locations in the existing coal systems should be vested in QR Network, for example, in addition to Jilalan, there may be additional roads in Callemondah and Pring that would more appropriately be common user.

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4 QR Submission, p 7, para 2.4.1

5 QR Submission, p 8, para 2.4.3

6 The review is being conducted by an inter-departmental committee with Queensland Transport being the lead agency. The review is considering the role played by Jilalan as a key part of the Goonyella coal chain and the impact the current ownership/status has on competition between train operators.

A further issue for consideration is the potential for QR's above rail businesses, particularly the coal business to be sold either wholly or partially to a private sector entity. If this occurs, this would even further complicate the difficulty of effecting future transfers back to QR Network. Once an above rail business is no longer under QR Limited control, Asciano believes the effectiveness of any "in-group" agreements will be further diluted. While it might be argued that the 2008 Undertaking is a temporary measure only, two points should be noted:

- Any assignments or dealings with property under the 2008 Undertaking will be permanent, so it is not appropriate to suggest that some "unwinding" of any arrangements that occur under the 2008 Undertaking could easily take place under UT3. It is therefore very important that any disposition of assets undertaken where there may be doubt as to future requirements of the network (whether or not the above rail businesses are sold) should be to the party that allows for the easiest later reallocation – Asciano suggests that this would almost always be QR Network.
- While the intention of all parties is that UT3 commence on 1 July 2009, Asciano suggests that it would be prudent not to assume that this will necessarily be the case and that the 2008 Undertaking may be required to operate for a longer period than initial intended. Again this increases the likelihood that further changes to the ownership and structure of the QR above rail businesses may occur during the currency of the 2008 Undertaking.

3.2 Subsequent Asset Transfers

Again Asciano supports QR's intention that QR Network retain the process for the transfer of assets to QR Network from other QR related entities in the event that these are required to provide access to the declared service. This is evidenced in the QR Submission as follows:

"In addition, consistent with QR Network's objective to retain the same regulatory policy outcomes as the 2005 Undertaking, the 2008 Undertaking will substantially roll forward the provisions in clause 2.2 of the 2005 Undertaking relating to the review of Rail Infrastructure. The effect of this is that, until the expiry of the 2008 Undertaking, assets which are currently classified as 'blue roads' in the Line Diagrams (i.e. which are not managed by QR Network) may be transferred following a written request by an Access Seeker."[7]

This is given effect in the 2008 Undertaking through paragraph 2.2. This paragraph is essentially the same as the 2005 Undertaking. Sub-paragraph (h) operates (by implication) to cause QR Network to "obtain responsibility" for the relevant infrastructure if, after having conducted a review it is satisfied that the infrastructure should be covered under the undertaking:

"2.2(h) QR Network must:

…

(ii) within thirty (30) days of QR Network receiving the Access Seeker's request under Paragraph 2.2(f), give the Access Seeker written notice of **whether QR Network will obtain responsibility** for the relevant Rail Transport Infrastructure and amend the Line Diagrams; …" (emphasis added)

Under the 2005 Undertaking, this obligation was drafted as "… QR intends to **assign responsibility** … to Network Access …" (emphasis added). Where the assets at all times were owned by QR Limited, this assignment was an appropriate outcome – no alternative was readily available. However, given the assignment of assets to separate entities as proposed, Asciano is

[7] QR Submission p 8 para 2.4.1

concerned that the new obligation to "obtain responsibility" is somewhat vague and lacking in detail as to how QR Network believes it will be able to achieve this.

Asciano was able to find only a passing reference to how QR Network might seek to obtain responsibility for assets and services owned or controlled by an above rail entity:

"Service agreements between QR Network and other QR subsidiaries will be entered into for services provided. The most significant of these services will be with QR Services, who will provide maintenance and construction services to QR Network."[8]

This reference is plainly directed more towards those services that are expected to be provided on a regular basis, and while it may be contemplated by QR Network that such agreements would also set out how each entity would be required to cooperate with QR Network in a future transfer, there is nothing to suggest that this is the case.

In the following quote, the QCA Issues Paper[9] identifies the problem and suggests that it is intended that QR Network will enter into arrangements with related entities to fulfil the obligations.

"These arrangements are effective in the 2005 Undertaking as the obligations are on QR Ltd, which has the ability to transfer infrastructure from one of its business units to another.

However, in the future the undertaking will be from QR Network and it will not bind other QR parties.

…

It is also proposed that QR Network will enter into agreements with related QR Ltd entities to give effect to these obligations."

The QCA also points out the critical reliance of the proposed arrangements on these arrangements that will sit outside of the undertaking:

"However, the effectiveness of these arrangements rely not only on the terms of the preliminary 2008 DAU but also on the terms of the agreements between QR Network and other QR entities. To date, the Authority has not been provided with drafts of these agreements.

The Authority will need to see these agreements and be satisfied that they provide effective enforcement mechanisms in the event of a breach of the undertaking." [10]

Although the QCA has, in the above quote, noted that its intention to accept the 2008 Undertaking is subject to these "extra-undertaking" agreements being acceptable, Asciano is concerned that it may prove difficult to achieve an appropriate level of review given the intended timing for the undertaking's acceptance.

It is clear that these agreements will form a critical part of the arrangements even though they sit outside of the undertaking. Asciano would suggest that the emphasis in the Position Paper on "enforcement mechanisms" is important but insufficient. In addition, the emphasis should be on the agreements providing QR Network with unambiguous rights commensurate with its obligations in the undertaking and clearly articulated mechanisms directed to minimising or removing the opportunity for delay or obfuscation in the transfer of assets (if that is what is contemplated) or provision of services as may be appropriate.

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8 QR Submission p 8 para 2.4.3

9 QCA Position Paper, p 7, para 2.4

10 QCA Position Paper, p 8, para 2.4

Finally, on this point, the use of the term "obtain responsibility" does not necessarily mean that QR Network would seek a transfer of the relevant asset. Asciano would be concerned if QR Network has in contemplation some other form of control that amounted to something that did not result in QR Network obtaining appropriate rights over the asset. Again the issue of the potential sale of QR's above rail businesses is relevant as this might see the assets move totally from QR Limited's control (as the parent entity). Asciano suggests that the Final Decision should clearly set out the QCA's understanding of QR Network's intentions and the Authority's own expectations as to how QR Network would "obtain responsibility" for a relevant asset or service.

3.3 Criteria For Change Of Ownership

With respect to the criteria in paragraph 2.2(g) of the 2008 Undertaking, sub-paragraphs (iii), (iv) and (v), in Asciano's opinion, require review. For ease of reference these are quoted below:

> 2.2(g) In considering a request made in accordance with Paragraph 2.2(f), QR Network will obtain responsibility for the relevant Rail Transport Infrastructure … if, in QR Network's reasonable opinion, this is appropriate having regard to the following principles:
>
> …
>
> (iii) subject to Subparagraphs 2.2(g)(iv) and 2.2(g)(v), responsibility for Rail Transport Infrastructure should be allocated in a way that reasonably allows for Access Seekers to undertake activities of the type identified in Paragraph 2.1(b);
>
> (iv) any Private Infrastructure should connect directly to Rail Infrastructure, except where the agreement between QR Network and the Private Infrastructure manager explicitly accepts that the Private Infrastructure connects to track managed by a QR business group or a Related Party of QR other than QR Network;
>
> (v) any facility that is not owned or leased by QR Network and is accessible from track managed by QR Network (referred to as a "Private Facility") should be accessible from Rail Infrastructure, except where the agreement between QR Network and the Private Facility manager explicitly accepts that the Private Facility is accessible from track managed by a QR business group or a Related Party of QR other than QR Network; …

Again these fairly re-present the previous drafting, changing only the network owner. However, it is appropriate to consider whether the change in structure changes the underlying premise that should drive these criteria.

The purpose of paragraph 2.2 is, *inter alia*, to facilitate the transfer of infrastructure from "blue" to "red". Typically "blue" rail lines are in station yards, not main lines. As previously discussed, under the 2005 Undertaking any "transfer" occurred in an environment where the ownership was not in question, it was merely an administrative reallocation between above and below rail. In that circumstance, a decision to allow private infrastructure to connect to the network through nominally above rail infrastructure was one that QR could take as it saw fit. Whether this was appropriate or not is not a subject for this submission; the point is that the decision was one taken by QR, taking into account all of the circumstances. In that sense QR would have balanced its competing interests to arrive at an overall view as to the appropriate decision.

Under the 2008 Undertaking, the circumstances that might be deemed relevant will be different depending on the entity that makes the decision. Clearly it is not in the interests of a QR above rail business to allow such a connection without also securing agreement that this should not lead to a transfer of the above rail infrastructure to QR Network. Once such an agreement is in place, any competing train operator would be required to negotiate access to that siding with the relevant QR above rail company, effectively removing the siding from any practical possibility of competition. It is noted that the "agreement" from the Private Infrastructure owner is a "one off" election, it is not restricted by or associated with the duration of any haulage contract, so that once the election is made to quarantine the siding from competition, this is a permanent choice. However, from QR Network's perspective, the relevant principles are encapsulated sub-paragraphs (iii) and (iv) – that access seekers will be able to provide services to private sidings by obtaining access through QR Network. These are conflicting interests. Whereas currently, these can be assessed by QR as a whole, in the future these interests will be occur in different entities. As noted before the potential for the sale of the above rail businesses further distances them from any over-riding control that might otherwise be exercised by QR Limited (as parent) or QR Network (through the as yet unseen "services" contract).

Asciano is concerned that this has the potential to frustrate the intention of the 2008 Undertaking to achieve its purpose in facilitating competition by allowing an above rail group to constrain competition in circumstances where the most economic connection would be via infrastructure that is initially allocated to an above rail group. Asciano is aware of a number of examples around Australia where an allocation of infrastructure in this manner has effectively foreclosed against above rail competition for this very reason.

Private infrastructure is typically built adjacent to an end-user's facility (eg factory, warehouse, mine, quarry etc) and connection to the rail network will normally be effected most economically through the nearest point of the rail infrastructure. It is not uncommon for this to be through a station yard. In many cases the most economic connection point will be "blue" ie currently allocated to an above rail business. If that is the case, there is no incentive for the owner of the blue track to allow the transfer to occur, rather it provides an effective lever to encourage the prospective owner of the private infrastructure to give the QR above rail entity an exclusive right to provide rail services in perpetuity.

3.4 Definition Of Private Infrastructure?

Under the 2005 Undertaking, Private Infrastructure is defined as:

"… the infrastructure, including but not limited to the track, signalling and electrical overhead traction system (if applicable) for which **a party other than QR is the Railway Manager** (whether or not they are Accredited)"[11] (emphasis added)

Under the 2008 Undertaking, Private Infrastructure is defined as:

"… the infrastructure, including but not limited to the track, signalling and electrical overhead traction system (if applicable) for which **a party other than QR Network is the Railway Manager** (whether or not they are Accredited)"[12] (emphasis added)

There is no question that QR Limited was the Railway Manager for the entire QR network under the 2005 Undertaking. However, the same cannot be said for the 2008 Undertaking. The QR Submission does not address the issue of who will be the Railway Manager[13] for the various

[11] QR 2005 Access Undertaking, section 10.1

[12] QR 2008 Access Undertaking, section 10.1

[13] Railway Manager is defined in the 2008 Undertaking as having "the meaning given to that term in the TIA"

components of QR's rail infrastructure, although there is an underlying assumption that QR Network will be the accredited railway manager for the "red" network. As far as Asciano is able to determine from the documents made available, there is nothing to suggest that QR Network intends to be the accredited railway manager for the "blue" rail infrastructure. In the absence of advice to the contrary, one must assume that each QR above rail business unit will be the railway manager for the "blue" track assigned to it. This assumption is supported by the proposed definition of Rail Transport Infrastructure in the 2008 Undertaking that provides for other QR entities to be railway manager:

"***"Rail Transport Infrastructure"*** means rail transport infrastructure as defined in the TIA for which QR Network **or a Related Party of QR Network** is the Railway Manager"[14] (emphasis added)

Asciano was unable to find any comment on the change of definition to Private Infrastructure in either the QR Submission or the QCA Position Paper. Asciano's understanding of the impact of this change is that any "blue" rail infrastructure would become Private Infrastructure under the new definition as QR Network would not be the Railway Manager of "blue" tracks. This infrastructure would then fall into the definition of "Private Infrastructure" and would also be "infrastructure that is Rail Transport Infrastructure but not Rail Infrastructure" (Not RI)[15].

If this analysis is correct, then the intent of paragraph 2.2 in the 2008 Undertaking as providing a mechanism for correcting any mis-assignment of infrastructure to a QR above rail entity is at risk of being undermined. It could be argued that there will be no "blue" track available to transfer as it will all be Private Infrastructure.

Presumably this is not the intended result, and the definition of Private Infrastructure needs to be reconsidered.

4. ADJUSTMENT TO RISK

The issues regarding the proposed changes to clauses 14 and 15 are discussed below.

4.1 Contrary To The "Necessary Changes Only" Approach

In discussions with QR and in reviewing the proposed 2008 Undertaking, Asciano has taken at face value that the intention is give effect to the 2005 Undertaking under the new QR corporate structure. This intention is demonstrated in the following quote:

"Accordingly, QR Network's approach to the 2008 Undertaking is on the basis that the document should preserve, to the extent possible, the regulatory principles contained in the 2005 Undertaking for a term equivalent to the remainder of the 2005 Undertaking." [16]

The *Transport Infrastructure Act 1994* Schedule 6 (by reference from s 3) defines the term as:

railway manager means-

(a) for a railway or a proposed railway—the person who is accredited under chapter 7, part 3 as the railway manager for the railway or proposed railway; or

(b) for rail corridor land—the person who is accredited under chapter 7, part 3 as the railway manager for the railway or proposed railway on, or proposed to be on, the rail corridor land.

[14] QR 2008 Access Undertaking, paragraph 10.1

[15] See QR 2008 Access Undertaking, paragraph 2.2(f).

[16] QR Submission p 3, section 1.3

The QCA Position Paper also echoes this intention:

"The 2008 DAU seeks to preserve the regulatory principles contained in the approved 2006 access undertaking (to be withdrawn) in its proposed 2008 DAU until 30 June 2009; that is, for a term equivalent to the remainder of the 2006 undertaking." [17]

It is therefore difficult to understand both QR's intentions and the QCA's position with regard to the proposed changes to the risk positions of non-QR operators as proposed in clauses 14 and 15 of the 2008 OSAA.

The QR Submission sets out the purpose of the proposed change as follows:

"The purpose of this amendment is to ensure that, in an environment where access and rail operations will be undertaken by separate legal entities, QR Network is subject to a consistent liability exposure under either the Operator Standard Access Agreement or the Access Holder Standard Access Agreement." [18]

In Asciano's opinion, the changes substantially alter the Operator's risk position from the current agreement by requiring the Operator to indemnify QR against claims from a third party who is not in any way associated with the contract. The changes are neither required nor justified by the change of structure and have nothing to do with consistent liability exposure as consistency in this case is not appropriate. Nor is it the case that the change is minor or is otherwise generally desirable to fix some existing anomaly. Asciano believes that no anomaly exists and no case has been made to suggest that the previous arrangements were in urgent need of rectification.

4.2 Relationship Of The Parties

As far as can be understood from the QCA Position Paper, there appears to be a misapprehension that the OSAA and the Access Holder Standard Access Agreement (AHSAA) are symmetrical with regard to the parties and that it is merely a question of which of the two parties are party to the contract in each case. It flows from that view that the indemnity and limitation clauses should also be symmetrical and therefore something needs to be changed to achieve this.

Asciano suggests that the two contracts contemplate fundamentally different relationships and therefore it is not appropriate to equate the risk allocation of one with the other. The OSAA is a contract between the Operator and QR where the operator will operate the trains and be the user of the service contracted (ie access to the rail infrastructure). The coal producer is not a party to the OSAA and is in no way a sub-contractor to the Operator. In all respects, the coal producer (or any other end customer, eg a power station) lacks privity of contract. It is a stranger to the contract and can neither hold either of the parties to the contract nor prevent the parties applying the contract (as between the parties). In this context the end customer is in no different position to any other person who is not a party to the contract.

By contrast, the AHSAA contemplates one party (the coal producer) holding the contract but sub-contracting the provision of services to an Operator. As such the Operator is not a party to the contract and does not have privity of contract, but as a sub-contractor to the end customer providing the direct operating interface with QR in using the service it does have a close connection to QR. There is, therefore, some logic in specifically referencing in the contract the application of the indemnities etc to the Operator to prevent the consequences of a tort claim

[17] QCA Position Paper p 4, section 2.1

[18] QR Submission p 14, section 3.14

circumventing the operation of the limitation of liability and indemnities between the parties.[19] However, Asciano suggests that these provisions are in fact redundant as the Operator in this situation is already covered under the definition of "Access Holder's Staff" where there could be little argument that the Operator falls within the meaning of "contractor" or otherwise "any other person under the control or supervision of the Access Holder":

""**Access Holder's Staff"** means employees, contractors, volunteers and agents of the Access Holder and the Operator and any other person under the control or supervision of the Access Holder or the Operator who is involved in any activity associated with the Train Services;" [20]

The indemnity operates to protect QR against a claim from the Operator by causing the end customer to hold QR harmless in the case that a claim is made and the end customer is at fault, but excludes any consequential loss (ie QR is not indemnified against a claim by the Operator or anyone else for consequential loss).

So considering the proposed amendments to the OSAA, QR is now seeking to hold the operator liable for the acts of the end customer where the end customer has no relationship either in contract or subcontract to QR or the Operator (regarding the access contract). If one is to accept that the Operator should indemnify QR against any claim from an end customer, then there is no logic for not extending this to any claim from any third party at all. Clearly such a position is untenable and would not be contemplated in any normal commercial agreement. As the point of the undertaking and the standard agreements are to replicate, as much as possible, normal commercial practice, Asciano suggests that the position adopted by QR is not only unjustifiable but also demonstrably unreasonable.

4.3 Not About Consequential Loss

In its commentary, the QCA Submission explains the changes as being necessary to relieve QR Network for liability for consequential loss:

"The underlying premise of the existing standard access agreements is that QR Ltd is liable for direct loss, but not consequential loss, in respect of contracted parties. It is proposed to amend the operator standard access agreement to ensure that QR Network is not liable for any consequential loss suffered by the end customer where they are not a contracted party." [21]

Asciano is unable to understand this approach and further explanation is required. The two sentences are non-sequiturs. The first correctly recognises the current position that both parties to the contract are liable for direct loss that they have caused but not consequential loss. But the second sentence then makes the leap to include an entity that is not part of the contract without any explanation as to why this should happen.

It is clear that the drafting of both the current OSAA and AHSAA (clause 15.1 in each case) relieves each party to the contract from liability to the other for consequential loss except with respect to two very specific events. Both of the exceptions are events that are in the liable party's control and arise through quite specific circumstances:

clause 12.8	where an audit or inspection is carried out without reasonable justification; and
clause 19.3(b)	where QR suspends the access rights without reasonable justification.

[19] In fact Asciano is of the view that the provisions placing obligations directly on the Operator within the AHSAA are not enforceable because the Operator is not a party to the contract. But this is not an issue being argued here.

[20] AHSAA clause 1.1

[21] QCA Position Paper p 10, section 2.6

It is not unusual for a commercial contract to exclude consequential loss. Clause 15.1, again in both instances, carves out consequential loss from applying to the indemnities (except for the two exceptions).

So if consequential loss is already effectively excluded from the indemnities, relief from consequential loss cannot therefore be a justification for the change. Neither QR nor the QCA has suggested (and it would be difficult to argue) that the changes are being sought merely to provide protection against consequential loss in the case of the two exceptions. The position in both contracts is identical so it cannot be an issue of balancing a previously anomalous situation due to the change in circumstances.

In fact Asciano's analysis is that the result is the opposite of the intention of the QCA:

"… QR Network would remain liable for the customer's direct loss in circumstances where QR Network would be liable to the operator had the loss been suffered by the operator instead of the customer." [22]

Given the apparent failure of the drafting in clause 14.10 [23] plus the problems with privity of contract (see discussion, section 4.5) it is Asciano's view that QR Network would not be liable in contract to the end customer under any circumstance, but that direct loss claims would invoke the indemnity against the Operator, whereas, the Operator indemnity would not cover a consequential loss claim by a third party against QR Network.

4.4 Potential Operator Breach

The revised terms place obligations on the Operator that the Operator may not be able to fulfil. If this occurs then the Operator would be in breach of the contract, an untenable position. For example clause 14.5 now requires:

"The Parties shall render each other, and the Operator **will procure** the Operator's Customer to render, all reasonable assistance in the defence of any Claim made against a Party by a Third Party arising out of any Incident or other event giving rise to a Claim." [24] (emphasis added)

This is an absolute obligation. One can easily imagine an end customer refusing to provide such an obligation (presumably in the haulage agreement). Why should the end customer give such an undertaking – it isn't party to the access contract. If the end customer wanted to have the access contract it could arrange to do so using the AHSAA. Asciano's experience over a number of years is that coal producers have not wanted to enter into the AHSAA precisely because they do not wish to take on any direct obligations in relations to the access agreement. In that environment it would be unrealistic to suggest that a competing Operator could insist on such a term, particularly if this is not a requirement for the incumbent (see also section 4.6).

Another example is the obligation in clause 14.8:

"Where a matter is to be referred to a loss adjuster in accordance with Clause 14.7 then the following provisions of this Clause shall apply:

…

(f) Each Party **must ensure** to the best of its ability that the loss adjuster is given the opportunity to interview any employee, agent or contractor (**including employees, agents or contractors of the Operator's Customer**) involved in or with knowledge of the Incident or event giving rise to

[22] QCA Position Paper p 10, section 2.6

[23] 2008 OSAA clause 14.10

[24] 2008 OSAA clause 14.5

the Claim or with any other relevant information that may be of use to the loss adjuster." [25] (emphasis added)

While this is qualified by "to the best of its ability", that qualification is intended in the sense of people who might otherwise be difficult to locate (eg deceased, gone overseas without a forwarding address or otherwise 'not available'). It would not ordinarily be intended in the sense of gaining permission to gain access to people from a third party – this is assumed because the clause assumes privity of contract, ie that the party has made the commitment to make the people available. Again this something that an Operator is unlikely to be able to gain ready acceptance from customers for. Unless such a commitment can be obtained from the end customer, it would be akin to asking someone to commit to making the next door neighbours available in case they are needed – they would have the same level of connection to the access contract.

4.5 Clause 14.10 Doesn't Work

It appears that clause 14.10 is an attempt to limit the liability of QR with respect to the end customer. The drafting in clause 14.10(c) is clumsy and ineffective at best:

"In no event shall QR be liable to the Operator's Customer for any loss or damage suffered or incurred by the Operator's Customer and the Operator shall indemnify and shall keep indemnified QR, its directors and QR's Staff against any such liability **except to the extent that QR would have been liable to the Operator had the loss or damage suffered or incurred by the Operator's Customer instead been suffered or incurred by the Operator**, and taking into account the limitations up on liability contained in this Agreement." [26] (emphasis added)

It is most unlikely that the damage suffered by the end customer would be the same as suffered by the Operator so the damage suffered by the end customer will in all likelihood be excluded. This does not appear to be the intention, but it seems the inevitable consequence. The Operator's Customer and the Operator do different things, one mines and sells coal, the other provides land based logistics planning and rail haulage services. The result of this drafting would be to nullify QR's liability to the Operator's Customer under any circumstances – though QR would never be liable to the end customer in contract, as the end customer is not a party to the contract. Again the whole premise of the clause is flawed.

4.6 Inconsistent Application

QR makes it clear that it does not intend to apply the new "consistent liability exposure" to its own entities when the internal agreements are replaced with enforceable contracts.

"QR Network does not propose to reflect this amendment in the new Access Agreements that are replacing the existing Internal Access Agreements." [27]

Why not? No explanation is provided as to why this should be the case. If QR genuinely was concerned that each of its entities be protected as though they were independent entities, then there is no justification for seeing QR above rail entities as any different to non QR entities. There is certainly a paucity of argument justifying the change. Indeed the QCA Position Paper provides substantially more argument, though this appears to be misdirected.

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[25] 2008 OSAA clause 14.8

[26] 2008 OSAA clause 14.10

[27] QR Submission p 15, section 3.14

This approach is particularly unfortunate as it gives unwarranted advantage to QR's above rail businesses. Unjustified favourable treatment of QR above rail is inimical to the whole concept underpinning the undertaking that all access seekers both QR related and others should compete on equal terms.

4.7 Ring-fencing Failure

The QCA argues that, prior to the separation of QR Limited into a series of separate entities, QR obtained certain relief from liability due to its above rail haulage contracts. Therefore the imposition of new obligations on access seekers is justified because QR Network will not have the benefit of this relief.

"To date, QRNA has been protected from any claims for consequential loss from end customers under the operator agreement as similar limitations of liability have been included in QR National's haulage agreements with the end customer. QRNA has had the benefit of this limitation of liability in the haulage agreement as it has been part of the same legal entity as QR National, i.e. QR Ltd." [28]

The rationale argued by the QCA suggests a breakdown in the separation of above and below functions within QR. It is not possible for either the QCA or QR Network to argue that QR as whole is in a different position without those parties knowing the contents of its above rail contracts. QR Network is not supposed to be aware of the contents of the above rail contracts. Even with such knowledge, it is contrary to the very basis of the access undertaking for QR to rely on that position – QR Network is supposed to treat all comers, both internal and external, on the same basis, as though it had no knowledge of the relevant haulage agreement.

Even if QR Network has such knowledge on a legitimate basis, it is contrary to the very basis of the access undertaking for QR to rely on that position – QR Network is supposed to treat all comers, both internal and external, on the same basis, as though it had no knowledge of the haulage agreement. From an access perspective, QR Network is supposed to be blind to the above rail arrangements between access seekers and their customers. If QR Network is to make its arrangements on the basis of any existing or desired arrangements then this needs to be done on the basis of open discussion throughout the industry. As far as Asciano is aware, it has never previously been suggested that the 2008 OSAA was drafted in any particular way because of an existing above rail arrangement. If this is not the case then the QCA should provide detailed advice as to how this has come about.

4.8 Quarantined To Coal

If the QCA is minded to accept the changes, despite the significant issues discussed in this submission, Asciano is concerned that this acceptance must be clearly quarantined to application to coal related access and that it is not to be taken as endorsing the application of this broadened liability of the Operator to non coal traffics.

Asciano is very aware that QR Network has a tendency to apply the 2008 OSAA to non coal traffics as much as possible and it would be Asciano's expectation that QR Network would see no reason not to apply these arrangements more broadly without the QCA's express statement to the contrary.

The proposed changes place non coal rail haulage at a further disadvantage to road competitors and would be detrimental to government policy to encourage freight on rail. No truck owner is required to indemnify the road authority for the consequences of its actions on

[28] QCA Position Paper p 9 section 2.6

the road much less the consequences of the truck operator's customer. Thus we see yet another potential imposition on rail freight.

5. COSTING MANUAL

It is noted that the QCA intends to delay consideration of the Costing Manual until a later date.[29] Asciano has previously in submissions to the QCA, suggested that the Costing Manual currently provides no useful information.[30] Asciano remains of this view. It is also noted that, while the *Queensland Competition Authority Act 1997* Part 5, Division 9 provides for a Costing Manual to be prepared by the QCA if one is not prepared by the facility owner under direction, it is not obligatory that the QCA require a Costing Manual to be prepared.

As a result, three points are made with regard to this matter:

- Asciano agrees that the current approval of the new undertaking should not be delayed through having regard to the Costing Manual.
- Asciano believes that there is no value in requiring QR Network to submit a revised Costing Manual to the QCA during the life of the new undertaking, nor is there any value in the QCA conducting a process to review and approve a revised Costing Manual during this period.
- Asciano would prefer that for the undertaking to commence in July 2009 (UT3), QR Network replace the Costing Manual with a more useful set of accounts that provide sufficient detail for access seekers to reconcile the computed access charges, including the floor and ceiling limits (at least for the central Queensland coal systems), and the calculation of the revenue cap in accordance with the undertaking.

[29] QCA Position Paper p 9, para 2.5

[30] For example, QR Access Undertaking Reference Tariff Amendments, Pacific National Submission To QCA, Pacific National, May 2007 p 8