



**Asciano Response to the QR
Network Proposed Standard
Access Agreements and
Consequential Amendments to the
2010 Access Undertaking Relating
to the Alternate Form of Access for
Coal Carrying Services**

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1 EXECUTIVE SUMMARY

Asciano welcomes the opportunity to provide comments to the Queensland Competition Authority (QCA) on the QR Network Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking Relating to the Alternate Form of Access for Coal Carrying Services.

Overall Asciano supports the approach taken by QR Network, while recognising that there is the potential for further improvements to be made. Asciano believes that further improvements should focus on:

- further aligning contractual rights and liabilities;
- developing and implementing clear rules and processes that allow for efficient management of rail access rights portfolios by facilitating more effective and timely transfers (either within a single entity's portfolio or between entities);
- establishing processes to ensure that any impacts on operational efficiency as a result of the alternate form of access are minimised; and
- establishing processes to ensure that implementation of the alternate form of access is undertaken smoothly and transparently.

This submission is public.

2 INTRODUCTION

Asciano welcomes the opportunity to provide comments to the Queensland Competition Authority (QCA) on the QR Network Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking Relating to the Alternate Form of Access for Coal Carrying Services. Asciano, via its subsidiary Pacific National, transports coal by rail in Queensland where Pacific National is the main competitor to QR's above rail business.

The structure of this submission is as follows.

1. Asciano's general comments on the concept of separate access holder agreements and operator agreements, including;
 - a list of criteria which Asciano believes a contracting framework consisting of separate access holder agreements and operator agreements should meet; and

- Asciano's view of the QR Network proposed contracting framework against these criteria;
- 2. Asciano's specific comments on the proposed amendments to the Access Undertaking;
- 3. Asciano's specific comments on the proposed amendments to the Operator's Agreement; and
- 4. Asciano's specific comments on the proposed amendments to the Access Holder Agreement;

Asciano's comments on the 2010 Access Undertaking, Operator's Agreement and Access Holder's Agreement are focussed on the QR Network proposed amendments rather than other sections of the approved Access Undertaking and agreements. While Asciano has ongoing concerns about some of the content of the 2010 Access Undertaking and related agreements it believes these concerns are more properly addressed at the next review of the Access Undertaking. (Asciano strongly believes that the Access Undertaking is a single package where price elements and non-price elements, are interrelated to the extent that decisions should not be made in isolation on any elements, but rather, a single decision has to be made which takes into account all elements).

Asciano notes that some of the Access Undertaking and agreement amendments proposed by QR Network include amendments that do not seem directly related to the Alternate Form of Access for Coal Carrying Services. Asciano has a general procedural concern that QR Network is using the current process to make amendments which are not directly relevant to the requirement to develop an Alternate Form of Access for Coal Carrying Services. This has the potential to conflate amendments made to meet section 5.2 (n) of the Access Undertaking with more general "housekeeping" amendments or other amendments. Asciano believes that the amendments made to the Access Undertaking and agreements should be limited to those amendments required to give effect to section 5.2 (n) of the Access Undertaking.

Asciano does not object to the amendments which are not relevant to the requirements of section 5.2 (n) being pursued by QR Network under a separate process. By pursuing these "housekeeping" amendments via a separate process QR Network would ensure an increased level of transparency and clarity in relation to

both the “form of access” amendments and the more general “housekeeping” amendments.

3 ASCIANO’S GENERAL COMMENTS ON THE ISSUE OF ACCESS HOLDER AGREEMENTS

Asciano supports access agreement structures which provide both flexibility and certainty for both above rail operators and end users, such as coal producers. As such, Asciano supports the general concept that end users have an option of directly contracting with QR Network in relation to capacity entitlements, while allowing operational matters to be addressed by an agreement between QR Network and an above rail operator.

3.1 Contracting Framework Criteria

While supporting the concept that end users are entitled to directly contract with QR Network in relation to capacity entitlements Asciano believes that it is important to ensure that such a contracting framework meets the following general criteria¹:

- End users have a choice as to whether they;
 - contract separately and directly with both the rail access provider (QR Network) and an above rail service provider; or
 - contract with an above rail service provider who will then hold capacity rights.

This choice allows end users to select the contracting model which best meets their needs and capabilities;

- The separate contracting framework is such that contractual rights and contractual liabilities are aligned and that the party that can best manage the liability carries responsibility for the liability;
- The separate contracting framework is such that confidential information can be transferred between all parties and above rail service providers are aware of relevant obligations and arrangements between the other two parties;
- The separate contracting framework is such that it does not have a material negative impact on the efficiency of either below rail or above rail operations; and

¹ Asciano recognize that QR Network have a list of criteria on page 6 of the QR Network Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking. Asciano supports the QR Network criteria put forward. Asciano believes that the criteria it has outlined above further builds on these QR Network principles.

- The separate contracting framework is such that implementation issues are identified and addressed appropriately. In particular a clear set of transitional provisions are needed to facilitate any transition required.

These criteria are discussed in more detail below.

End User Choice

Asciano recognises that under the current QR Network proposal end users have a choice as to whether they enter into a contracting framework that either bundles access and above rail contracts or separates access and above rail contracts, and that there is no requirement for end users to move to the any particular contracting framework.

Alignment of Rights and Liabilities and Consultation in Relation to these Rights and Liabilities

The separation of access arrangements into access and above rail agreements should be done in such a manner as to ensure that contractual rights and liabilities are properly aligned and that the party that can best manage the liability carries responsibility for the liability. Asciano recognises that QR Network accepts this principle²; however Asciano believes that there are several places in the contracts that could be re-drafted to address potential misalignment. These are outlined in sections 5 and 6 below.

Asciano has a further general concern that any rights, obligations and liabilities of the above rail service provider should not be determined by an agreement between the end user access holder and QR Network when, at a minimum, the above rail service provider has not been adequately consulted as to the acceptability of these rights, obligations and liabilities. That is, there needs to be a clear obligation for access holders and QR Network to consult with above rail operators prior to placing any rights, obligations or liabilities on the above rail operators.

Information Transfer and Confidentiality

Following from the point above, there is a need for above rail operators to have a right to review access agreements and other arrangements between end user access holders and QR Network to ensure that the above rail operator can meet any obligations or exercise rights under these agreements. Asciano recognises that in

² For example it is implicit in the principles outlined by QR Network on page 6 of the QR Network Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking

obtaining such a right above rail service providers would be bound by relevant confidentiality conditions.

Asciano recognises that QR Network's proposed amendments to 12.5 (e) of the Access Undertaking facilitate the appropriate disclosure of such confidential information.

The QR Network Explanatory Note (page 9) raises concerns relating to the increasing likelihood of QR Network having to vary TSEs when negotiating train operating plans with end users without the involvement of an above rail operator. Asciano believes that by providing above rail operators with appropriate involvement in discussions and negotiations which impact on train operations issues such as this can be minimised.

Operational Efficiency

Separate access and above rail agreements may have the potential to undermine the ability of the rail network and above rail operators to operate efficiently. Asciano believes that while there may be potential for this to occur in an inflexible or poorly designed contracting system, a flexible and well designed contracting system should minimise any concerns that contracting separation will reduce operating efficiency.

Asciano believes that the current proposal by QR Network seeks to minimise inefficiencies and conflicts. However, operating efficiency issues and impacts will need to be regularly monitored and re-examined as the development of separate access holder and above rail agreements is likely to present as yet unidentified issues. To this end the contracting system needs to maintain a level of flexibility to address issues as they arise.

Particular issues that need to be considered in the contracting design process should include:

- maintaining and enhancing clear rules relating to the treatment, scheduling and prioritisation of train services operating under differing contracting models; and
- developing and implementing clear rules that allow for efficient management of rail access rights portfolios, in particular in relation to situations where a

single party holds numerous access rights³. To this end, current requirements relating to transfers may need to be streamlined to allow access rights to be more effectively transferred (either within a single entity's portfolio or between entities). In particular streamlined transfers may need to be developed to facilitate transfers for the following scenarios where two operators are permitted to operate from the same balloon loop or loadout;

- where one operator cannot meet scheduled demand for operating reasons, then the demand should be able to be rapidly transferred to the other operator if this other operator can meet the demand; and
- where one operator cannot meet ad hoc or spot demand then the demand should be able to be rapidly transferred to the other operator if this other operator can meet the demand.

The current drafting seems to imply that any transfer is to apply for three calendar months⁴. This time frame does not promote flexibility in either the management of access right portfolios or the management of train operations and should be reconsidered. Aligning transfers to align with the weekly scheduling or similar operating or system rules procedures would provide substantial additional flexibility for both end user access holders and above rail operators.

In the longer term Asciano believes that the following issues may need to be addressed in order to ensure operational efficiency is maintained and enhanced:

- the development of an independent body which oversees and co-ordinates supply chain processes should be considered. Such a body will assist in ensuring a well designed process. (Asciano would oppose having participants in the process, such as ports or below rail service providers, acting as the co-ordinating body); and
- the development of more flexible arrangements which allow the holders of access rights, either end users or above rail operators, to trade these rights in a secondary market. Asciano recognises that such a system will not be developed in the near future but as more parties hold access rights there will

³ Asciano recognises that the QR Network Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking addresses the issue of "borrow-lend" on pages 9 and 10, however issues relating to transfer and trades could be further developed in the future.

⁴ QR Network Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking page 10

be increased pressure to allow trading of these rights to ensure that market mechanisms allocate these rights to whom they are most valuable.

Implementation Issues

Asciano believes that QR Network has minimised the impact of implementation issues by making movement to the Alternate Form of Access Agreements voluntary.

However Asciano believes that there are numerous implementation issues that may arise. Implementation could be facilitated by establishing an ad hoc forum or process to address these issues. Issues which may arise include:

- uncertainty as to how the new agreements interact with established processes; and
- the mechanics of new processes such as information transfer.

3.2 Hunter Valley Experience

ARTC is currently implementing an Access Holder Agreement contracting model in the Hunter Valley coal network. Under the ARTC approach all end users are encouraged to contract for access. Asciano has been involved in this process as a major above rail operator in the Hunter Valley and many of the above criteria identified by Asciano are as direct result of Asciano's experience in the Hunter Valley.

Asciano recognises that QR Network appears to have taken into account comments made by stakeholders in the ARTC's Hunter Valley consultation process.

4 ASCIANO'S COMMENTS ON QR NETWORK'S PROPOSED CHANGES TO THE ACCESS UNDERTAKING 2010

Asciano generally supports the amendments to the Access Undertaking. In particular Asciano supports changes made which facilitate the transfer of information between relevant parties and changes made which provide for joint dispute resolution.

In addition Asciano supports the clarification to proposed clause 12.5 (e) (viii) which was provided by QR Network on page 17 of its Explanatory Note. This clarification indicated that quarterly performance reports are based on train operations rather than access holder rights. Asciano believes that all performance indicators required under the contracting framework which are linked to train operations should be

undertaken by QR Network on the basis of train operators rather than end user access holders. Asciano notes that the drafting of the train operators agreement and end users agreement appears to support this position.

Asciano has some reservations in relation to the proposed clause 12.5 (g) which essentially states that to the extent that there is any inconsistencies between the train operators rights and end users rights then the end users rights take priority. Ideally, in a well designed regulatory process, there should not be any inconsistencies; however Asciano recognises that many regulatory processes may contain the potential for unintended inconsistencies. Consequently, Asciano recognises that there is a need to address areas where the rights may be inconsistent, however there may be instances where a train operator's rights should take priority (for example in an area directly related to train operations) or where the impact on the end user is slight but the impact on the train operator is large (for example confidentiality related to a train operation clause in the end user agreement vs the right of train operator to know and agree to obligations imposed upon it). Asciano believes that this clause 12.5 (g) could be re-drafted to provide some additional flexibility while still generally providing that the end users rights take priority.

5 ASCIANO'S COMMENTS ON QR NETWORK'S PROPOSED CHANGES TO TRAIN OPERATIONS AGREEMENT (COAL)

Asciano notes that under the proposed Train Operations Agreement (Coal) the train operator continues to be responsible for the payment of access charges but does not hold the access rights. While in reality such charges are typically directly passed through to the end user, Asciano believes that it is more consistent that the rights holder should pay directly for the rights rather than have the rights payments channelled through a third party. This creates unnecessary administrative and operating costs for the third party.

Asciano accepts that, given systems and processes are currently in place to allow the train operator to pay these charges, this is a second order issue, although the issue of aligning payment should be addressed in future iterations of this contracting framework, particularly if there is widespread take up of the Alternate Form of Access Agreement.

Similarly Asciano notes that under the proposed Train Operations Agreement (Coal) depending on an assessment of its creditworthiness, the train operator may be

required to provide a security amount of either twelve weeks of access charges or an unquantified deductible. As the train operator does not hold the access rights, linking the security to access charges is a misalignment of the rights and liabilities under the agreement.

Asciano understands that the train operator agreement and end user agreement work together to initially provide the access rights and these rights are then provided to the train operator. Asciano understands that once access rights to paths are nominated to a train operator the operator becomes the access holder for certain purposes. Asciano is concerned that such a process does not result in the creation of artificial barriers to the ability of end users to transfer operations between train operators. Asciano believes that the end user should retain a reasonable level of flexibility which allows end users to transfer operations between train operators.

On a minor issue, Asciano supports using a consistent clause numbering approach which ensures that mirror clauses have an identical clause number between different types of Access Agreements.

6 ASCIANO'S COMMENTS ON QR NETWORK'S PROPOSED CHANGES TO END USER ACCESS AGREEMENT (COAL)

Asciano notes that the end user agreement includes provisions for the end user to nominate TSEs for inclusion in the train operator agreement and that the end user may periodically vary this nomination and to the extent that this occurs QR Network will notify the train operator. Asciano believes that in instances where the end user intends to vary the nomination the train operator should be involved in this decision to ensure that either adequate resources are available to meet an increased nomination or that resources can be redeployed in the event of a reduced nomination⁵. This issue is best addressed in the end user-operator agreement, but in any event there should be an obligation on the end user in the end user agreement to notify the train operator of any variation to TSEs agreed with QR Network.

On a minor issue, Asciano supports using a consistent clause numbering approach which ensures that mirror clauses have an identical clause number between different types of Access Agreements.

⁵ Asciano recognises that the discussion on the QR Network Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking page 10 aligns with this view.

7 CONCLUSION

Overall Asciano supports the approach taken by QR Network, while recognising that there is the potential for further improvements to be made.

Asciano believes that further improvements should focus on

- further aligning contractual rights and liabilities;
- developing and implementing systems that facilitate the efficient management of rail access rights portfolios, including systems which facilitate timely transfers between parties; and
- establishing processes to ensure that any implementation impacts and operational efficiency impacts of the alternate form of access are minimised.