



Asciano Submission to the
Queensland Competition Authority
in Relation to an Aurizon Network
Discussion Paper on a Potential
Short Term Transfer Mechanism

January 2015

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1 INTRODUCTION AND BACKGROUND

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority (QCA) on the Aurizon Network Discussion Paper on a potential short term transfer mechanism. Asciano has concerns with the Aurizon Network proposal related to both the need for the transfer mechanism in the form outlined in the proposal and the details of the transfer mechanism as outlined in the proposal.

Asciano supports the flexible usage of access rights in order to facilitate the more efficient usage of these rights¹, however Asciano does not support the short term transfer mechanism proposed by Aurizon Network as Asciano believes that Schedule G of the current 2010 Access Undertaking Schedule already provides the basis for a mechanism for short term transfers if it is applied effectively and enhanced to take account of take or pay considerations.

Aurizon Network, via its Discussion Paper, is proposing a short term transfer mechanism as part of the 2014 Draft Access Undertaking (2014 DAU). Asciano has previously argued that elements of the access undertaking are inter-related such that decisions on different elements of the access undertaking should not be made in isolation but should be made in such a way that takes the whole of the 2014 DAU into account². The 2014 DAU process has been an extended process and the introduction of the current Aurizon Network short term transfer proposal into the regulatory process at a stage when it will not be incorporated into the QCA Draft Decision raises concerns that either the DAU 2014 regulatory process will be further extended to allow proper consideration of the Aurizon Network proposal or alternatively the proposal will not be fully tested and considered. Given these concerns Asciano is seeking clarity on the manner in which any proposed transfer mechanism will be incorporated into both the QCA decision making process on the 2014 DAU and the 2014 DAU itself.

¹ For a recent examples see:

- the Asciano Submission to the Queensland Competition Authority in Relation to the 2013 Aurizon Network Draft Access Undertaking pages 53 - 57
- the Asciano Submission to the Queensland Competition Authority in Relation to the Resubmitted 2014 Aurizon Network Draft Access Undertaking page 25

² For a recent example see the Asciano Submission to the Queensland Competition Authority in Relation to the Resubmitted 2014 Aurizon Network Draft Access Undertaking page 13

Asciano believes that Schedule G of the current 2010 Access Undertaking Schedule provides the basis for a mechanism which can facilitate short term transfers, and using Schedule G as the basis for a transfer process will address the concerns with the regulatory process outlined in the paragraph above.

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

2 OVERVIEW OF THE AURIZON NETWORK PROPOSED SHORT TERM TRANSFER MECHANISM

Aurizon Network intends to have two separate transfer processes:

- long term transfers, as per existing access agreements; and
- short term transfers as outlined in the Aurizon Network proposal.

The Aurizon Network short term transfer mechanism proposal is designed to allow the transfer of train service entitlements (TSEs) between holders of these entitlements in circumstances where the TSEs would otherwise not be used. Under the proposal holders of TSEs will enter into their own commercial arrangements and Aurizon Network will act to facilitate this pre-agreed commercial transfer. Under the proposal the TSE transfer will be a variation to an existing access agreement and as such any transferred path will be treated as a contracted path.

3 ASCIANO COMMENT ON THE NEED FOR THE AURIZON NETWORK PROPOSED SHORT TERM TRANSFER MECHANISM

Asciano believes that the current 2010 Access Undertaking already contains a mechanism for short term transfers, and, while varied, this mechanism is also contained in the 2014 DAU.

Schedule G of the current 2010 Access Undertaking already provides a mechanism for short term transfers. In particular Appendix 2 of Schedule G of the 2010 Access Undertaking contains the following contested train path decision-making process under clause (c) (i) and (ii):

- any requirement for giving priority to certain Train Services or certain Unloading Facilities identified within the System Rules;*

- ii) *if:*
- *an Access Holder submits Train Orders for less than its Nominated Weekly Entitlement for one Train Service Entitlement (“First Entitlement”) and the path is not allocated in accordance with paragraph (i); and*
 - *that Access Holder also submits Train Orders for a different Train Service Entitlement in excess of its Nominated Weekly Entitlement,*

then the path will be allocated to those other Train Orders in the manner requested by the Access Holder and that allocation will be documented and is deemed to be performed of the First Entitlement by QR Network for the purposes of scheduling the Access Holder’s future Train Orders;

Note that:

- “Train Service Entitlement” is defined in the 2010 Access Undertaking as an Access Holder’s entitlement under an Access Agreement to operate a specified number and type of Train Services over the Rail Infrastructure within a specified time period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified transport service; and
- “Train Service” is defined in the 2010 Access Undertaking as having the meaning of the operation of a Train on the Rail Infrastructure between a specified origin and destination.

Under the above mechanism access holders can under order on a set of TSEs and over order on another set of TSEs thus allowing an operational transfer. If the above mechanism is applied in the scheduling process it could provide an effective short term transfer mechanism without the need for amending both the 2014 DAU and existing access agreements (as proposed by Aurizon Network).

Asciano recognises that at some point amendments to access agreements will be needed to include specific train services to enable the transfer of access rights (whether transferred within the portfolio of the access holder or to another access holder). This amendment would be less complex than the amendments envisioned by the Aurizon Network proposal.

Asciano believes the 2010 Access Undertaking Schedule G transfer mechanism can be further enhanced to allow an access holder's transfer of TSEs (whether transferred within the portfolio of the access holder or to another access holder) to be taken into account for take or pay purposes. This would link the operational transfer process to a commercial transfer process. If transferred access rights reduce the transferor's take or pay liability this would encourage access holders to co-operatively use this 2010 Access Undertaking transfer mechanism.

If the Schedule G process is used this will facilitate a more efficient use of rail infrastructure as access rights not being used can be transferred and then utilised, resulting in more coal supply chain throughput.

Asciano is aware that Aurizon Network has redrafted the Schedule G provisions in the 2014 DAU³ as a pooled entitlement concept. As outlined in Asciano's October 2014 submission in response to the 2014 DAU⁴ Asciano believes that this pooled entitlement should be clarified. Asciano does not agree to the concept of requiring pooled entitlements to utilise the same 'mainline path' (which is a concept that was first introduced in the Aurizon Network 2014 DAU). The details of what a mainline path consists of are not specified in the 2014 DAU, although it seems that the intent of the mainline path concept is to restrict the use of an access holder's TSEs. Until the nature and rationale of mainline paths is clearly specified the benefit of such a concept cannot be evaluated.

Overall Asciano believes that Schedule G of the 2010 Access Undertaking provides the basis for an effective short term transfer mechanism which could be further enhanced by ensuring the TSE transfers are also taken into account for take or pay purposes. This removes the need for amending both the 2014 DAU and existing Access Agreements. Given this Asciano believes that the concepts in Schedule G of the 2010 Access Undertaking should be preserved and enhanced.

Given the current existence of a basis for an effective short term transfer mechanism Asciano opposes the introduction of the mechanism outlined in the Aurizon Network

³ See clause 10.2 (c) (iii) of Schedule G in Aurizon Network's Proposed 2014 DAU (August 2014 version).

⁴ See section 5.12, comments on Schedule G, pages 51 and 52 of Asciano's submission in response to 2014 DAU dated October 2014.

short term transfer mechanism proposal and believes that the proposal should be rejected by the QCA.

4 ASCIANO COMMENT ON THE DETAILS OF THE AURIZON NETWORK PROPOSED SHORT TERM TRANSFER MECHANISM

Section 3 above outlines the current existence of a short term transfer mechanism in the 2010 Access Undertaking, and consequently the short term transfer mechanism proposed by Aurizon Network is not needed. Asciano believes that the proposed Aurizon Network short term transfer mechanism adds a layer of complexity to the transfer process which is not warranted and restrictions within the mechanism will act to limit efficient outcomes.

However, if the QCA decides to further consider the details of the short term transfer mechanism proposed by Aurizon Network, Asciano is seeking that the comments in this section 4 be taken into account by the QCA in its consideration of the Aurizon Network proposal.

4.1 Removal of Restrictions on Transfers

Asciano believes that the proposed short term transfer mechanism will not necessarily result in efficiency benefits as the proposal contains numerous restrictions on transfers that act to restrict transfers and flexibility, and hence restrict efficiency.

Examples of such restrictions include:

- the proposal limits transfers to a maximum of 25 per cent of the TSEs contained in an access holder's access agreement for the relevant origin to destination train service in any one financial year. This restriction arbitrarily limits the ability of TSE holders to transfer TSEs. Such arbitrary constraints restrict the ability to obtain efficient outcomes.

Asciano understands that if a transferee accepts a transfer then they are subject to the full take or pay obligations of the transferor and on this basis there should not be any arbitrary TSE limit imposed as Aurizon Network are kept "financially whole".

- the proposal requires transfers to have a common destination. Transfers should be allowed within a single coal system even if there are different destinations. Thus Asciano believes that the mechanism should allow transfers between Hay Point and Dalrymple Bay, and between RG Tanna and Barney Point (and possibly Wiggins Island) if capacity is available. This restriction requiring a common destination limits the ability of TSE holders to transfer TSEs thus restricting the ability of the proposal to obtain efficient outcomes.
- the proposal requires transfers to commence in the next relevant period (i.e. the next week). Given that some transfers may be agreed between parties long before the relevant period (for example a transfer may be agreed as part of a planned maintenance program at a mine) then there should be no reason why transfers cannot be scheduled to commence at more distant future dates than the next relevant period.
- the proposal requires that short term transfers will only be allowed where the transferee's train services have access charges based on the same reference tariff as that used in respect of access charges for the transferor's train services that are the subject of the short term transfer. (Asciano understands that typically all coal train services in central Queensland have the same access charges, being reference tariffs).

To the extent that different train operators may have different access charges then this proposed restriction may act to ensure that any short term transfers only occur within the above rail portfolio of a given operator, and this in turn may act to favour the operator with the larger portfolio.

Overall this restriction on the ability of TSE holders to transfer TSEs will restrict the ability of parties to trade and so will impact on the ability of the proposed short term transfer mechanism to obtain efficient outcomes; and

- the proposal requires that short term transfers will only be allowed where there is a like for like train service description for the train services, with the exception of the change in origin. Asciano understands that some train services have slightly differing train descriptions (where some of these

differences are related to different train operators operating slightly different train consists).

To the extent that different train operators have different train service descriptions then this proposed restriction may act to ensure that any short term transfers only occur within the above rail portfolio of a given operator, and this in turn may act to favour the operator with the larger portfolio.

Overall the requirement for like for like train service descriptions will restrict the ability of TSE holders to transfer TSEs and this in turn will restrict the ability of parties to trade and so will impact on the ability of the proposed short term transfer mechanism to obtain efficient outcomes.

Overall restrictions on trading of TSEs within the short term transfer mechanism impact on the ability of the proposed short term transfer mechanism to obtain efficient outcomes. Thus these restrictions should be further considered with a view to removing any restrictions.

Asciano believes that short term trading or transfer of paths should be viewed as a market rather than as a “mechanism” controlled by Aurizon Network. If short term trading or transfer of paths is viewed as a market then it should be recognised that arbitrary and artificial restrictions and constraints on trades made within the market will act to reduce the ability of the market to achieve efficient outcomes.

4.2 Aurizon Vertical Integration

Asciano has concerns as to whether the proposed short term transfer mechanism may provide a potential means for Aurizon Network to unduly favour Aurizon’s above rail business. For example, as outlined in section 4.1 above some of the restrictions on short term transfers may favour the operator with the largest portfolio (which is Aurizon’s above rail business).

Asciano assumes that the proposed short term transfer mechanism will be subject to the same ring fencing, non-discrimination, confidentiality and cost allocation provisions and controls that will apply to Aurizon Network under the access undertaking.

Asciano is seeking:

- confirmation that the ring fencing provisions, discrimination provisions and confidentiality provisions of the access undertaking will apply to the proposed short term transfer mechanism; and
- confirmation that the proposed short term transfer mechanism will be able to be independently audited to ensure transfers are undertaken on a transparent and equitable basis. Asciano believes that if there is any uncertainty as to whether such an audit is allowed by the access undertaking then the QCA's powers should be increased to allow such an audit of the proposed short term transfer mechanism, with appropriate powers to remedy any breaches.

More generally Asciano believes that in order for the proposed short term transfer mechanism to be credible and workable the QCA must ensure that there is no potential for actual or perceived Aurizon Network discrimination in favour of its related party above rail operator.

4.3 Aurizon Network Discretion

Access Undertaking or Access Agreement

Aurizon Network's preferred approach (Discussion Paper page 11) is to have the majority of the short term transfer mechanism contained in access agreements rather than the access undertaking. Asciano believes that the short term transfer mechanism must be set out in the access undertaking as this ensures that Aurizon Network consistently undertakes short term transfers for all access holders and allows regulatory oversight of the provisions and limits Aurizon Network's discretion in being able to negotiate away from the standard access agreement

Aurizon Network (Discussion Paper page 11) notes that including the short term transfer mechanism provisions in the access undertaking limits Aurizon Network's ability for them to amend the short term transfer mechanism as it requires them to submit a draft amending access undertaking to the QCA. Asciano believes this requirement is a benefit as it ensures any amendments are validated via a regulatory process and limits Aurizon Network's discretion in being able to negotiate away from the standard access agreement.

If the short term transfer mechanism provisions were contained in individual access agreements as opposed to the access undertaking, Asciano believes that making amendments across all pre-existing access agreements would be more problematic

than amending the access undertaking. In addition if the short term transfer mechanism provisions were contained in individual access agreements then Aurizon Network would have the potential to treat different access holders differently, which may then disadvantage some access holders.

At the current time Aurizon Network has stated (Discussion Paper page 11) that they are prepared to accommodate industry's request to contain short term transfer provisions in the access undertaking. In accommodating this request Aurizon Network believes they are disadvantaged as they are without the benefit of contractual limitations on liability that applies under access agreements and as a consequence Aurizon Network have proposed to include a provision in the access undertaking to address this shortfall in protection. Asciano believes that Aurizon Network already benefiting from substantial revenue protections (such as take or pay obligations and the maximum allowable revenue framework) and as such the additional protections may not be needed.

Asciano believes that the short term transfer mechanism provisions should be contained in the access undertaking rather than individual access agreements.

Aurizon Network Discretion and Gaming

Under the proposed short term transfer mechanism Aurizon Network (Discussion Paper page 9) has indicated that they may act to refuse a transfer where Aurizon Network reasonably considers that there is no intention or ability of the transferee to use the TSEs.

Asciano is concerned that Aurizon Network discretion to refuse transfers may result in Aurizon Network acting to approve some transfers but not others. In particular if Aurizon approves transfers railed by its related operator but does not approve transfers railed by independent operators there will be a perception that Aurizon Network is acting to favour its related operator. In order to avoid this situation Asciano believes that a set of objective criteria are used such that only transfers which meet these criteria are refused.

Asciano recognises that Aurizon Network has proposed (Discussion Paper page 9) that it will take into account certain criteria in making their decision regarding gaming. Asciano believes that to the extent that such criteria are used there should not be discretion as to how they are applied.

The criteria proposed by Aurizon Network (Discussion Paper page 9) include “giving consideration to whether the short term transferee utilised at least 85% of any access rights previously transferred to it in the same year under a short term transfer provision in its access agreement”. Asciano believes that the wording of this clause (proposed clause 7.5.3 c) i) Discussion Paper page 23) should reflect the wording in the standard access agreement where the 85% is calculated over four consecutive quarters and excludes force majeure events and the failure of Aurizon network to make the access rights available.

Asciano believes that the short term transfer mechanism provisions should not provide Aurizon Network with the discretion to refuse transfers unless the transfers meet a set of objective and well-defined criteria.

4.4 Transfer Fees

Aurizon Network has indicated (Discussion Paper page 13) that there will be no transfer fees payable in relation to short term transfers. Asciano supports this position.

Aurizon Network has indicated (Discussion Paper page 13) that if they are subject to additional costs for administering the short term transfer process that is not allowed for in Aurizon Network’s regulated maximum allowable revenue then they will consider either socialising the costs across access holders via a revenue adjustment or through a direct charge to the access holder requesting the short term transfer. Asciano believes that any such cost recoveries should be substantiated before they are charged to access holders. (Asciano believes that the costs associated with administering such a process would be minimised if Aurizon Network adopted the process that exists in the 2010 Access Undertaking in Schedule G).

4.5 Implementation Issues

Asciano believes that further clarity is needed on the detail of how short term transfers will be integrated into existing scheduling and planning systems, how existing access agreements will be amended to allow for short term transfers and how short term transfers will be managed commercially. To this end Asciano would welcome ongoing consultation by Aurizon Network and the QCA on implementation issues; particularly on the issues outlined below.

Access Agreements under Different Access Undertakings

Under the Aurizon Network short term transfer proposal amendments are required to pre-existing access agreements. Asciano is concerned that with different generations of access agreements existing (i.e.; UT1, UT2 and UT3 access agreements) this may result in Aurizon Network varying the short term transfer provisions in a manner that could potentially favour one access holder over another.

In addition the differences in take or pay arrangements between a UT1 access agreements and UT2 or UT3 access agreements do not appear to be taken into account in the short term transfer mechanism. Aurizon Network should clarify how the take or pay obligations of transferred access rights from a UT1 access agreement into a UT2 or UT3 access agreement, and vice-versa, will be treated. This is needed to ensure that the allocation of take or pay liability is borne by the appropriate access holder.

More broadly Aurizon Network has indicated (Discussion Paper page 13) that transfer fees are intended to reflect the loss of revenue which arises when a longer haul path is transferred to a shorter haul. However, Asciano believes that such an approach is problematic as currently transfer fees are calculated differently under different access undertakings such that transfers between different agreements negotiated under different undertakings may also result in changes to revenues. Asciano believes that this issue will need to be addressed if transfer fees are implemented.

Overall Asciano is seeking clarity on how transfers between UT1, UT2 and UT3 TSEs will be managed.

Suite of Standard Access Agreements to be Amended

Under the Aurizon Network short term transfer proposal amendments have been proposed for the End User Access Agreement. Asciano is concerned that Aurizon Network has currently only put forward drafting of the short term transfer provisions in the proposed End User Access Agreement. Asciano is aware that the QCA is considering a consolidation of access agreements, however until such consolidation is confirmed and agreed consideration needs to be given to how the proposal could be incorporated into the current Standard Operator Access Agreement; this is needed to ensure all access holders have the ability to apply the proposed short term

transfer mechanism. This issue is mainly of concern if the final development and consolidation of the access agreements is delayed for some reason.

TSE Tranches

Under clause 7.5.2 h) of the 2014 DAU short term mechanism drafting (Discussion Paper page 19) Aurizon Network propose to group TSEs into separate tranches. For example where an access holder has TSEs under one or more access agreements with the same origin, the TSEs will be grouped on the TSE's date of grant (i.e. when agreement relevant to the TSEs was signed). The access rights for a proposed short term transfer by that access holder will be initially drawn from the TSE tranches with the earliest Date of Grant until there are no remaining applicable TSE in that TSE tranche, and then TSEs will be drawn from the TSE tranche with the next earliest Date of Grant in and so on.

Asciano believes this fundamentally reduces the flexibility available to access holders as they are not given the freedom to choose which access agreement the TSE is drawn from for a particular transfer. An access holder should be able to freely nominate which access agreement TSE are drawn from for a short term transfer. This is particularly important where an access holder with multiple access agreements for the same origin is dealing with different generations of access agreements (i.e. UT1, UT2 and UT3 access agreements).

Asciano believes that the terms of the transferor's access agreement (i.e. the agreement where the transfer access rights are drawn from) should apply to the transferee receiving those transferred access rights and obligations, including take or pay and relinquishment fee rights and obligations. This is the same approach as the current 2010 Access Undertaking for capacity transfers outlined in clause 7.3.7 (a) (ii).

It should be noted that Aurizon Network seems to contradict the approach above in the drafting of the 2014 DAU. Clauses 7.5.2 n) and o) of the 2014 DAU drafting seems to contradict 7.5.2 h) as they require a transferee to specify the relevant access agreement under which the short term access rights are proposed to be granted and where there are more than one relevant access agreement it must be the most recently executed of those access agreements.

Even Railings

Aurizon Network (Discussion Paper page 15) implies that a transfer request must be scheduled on an even railings basis. An example is given in the discussion paper (refer to tables on page 15 of the Discussion Paper) which suggests that TSEs to be transferred are represented by weekly allocations and spread evenly across the weeks of the month.

Asciano is concerned that this even railings approach would be both restrictive in relation to transfers and inconsistent with the contracted TSEs in access agreements which are based on monthly entitlements. Furthermore, on the basis that monthly entitlements are also the basis on which access holders are assessed from a take or pay obligation perspective, this misalignment between weekly scheduling and monthly contracted TSEs restricts the ability of an access holder to transfer access rights freely in a manner that will reduce any take or pay liability they may incur for the year. Asciano believes that an access holder should be allowed to nominate the amount of TSEs to be transferred for whatever period they choose (i.e. the amount should not necessarily be by evenly spread weekly periods) as long as it is within the confines of their contracted TSEs.

Communication Protocols and Procedures

Asciano is seeking further assurances regarding communication protocols and procedures related to transfers. Based on past experience Asciano has a concern that communications related to transfers and TSE adjustments may not be made in a timely manner causing scheduling issues for train operators. Given this, a clear communication process relating to short term transfers should be implemented in order to ensure there are no delays to allow trains to be given appropriate scheduling priority.

Train Plan Time Frames

The proposed short term transfer process refers to Aurizon Network (Discussion Paper page 15) issuing an Intermediate Train Plan (ITP) for a relevant seven day period. Asciano is concerned that different network systems have different planning time frames, thus Asciano is seeking that the transfer and planning time frames to be used in the different network systems be clarified.

5 CONCLUSION

Asciano does not support the short term transfer mechanism in the form proposed by Aurizon Network in its Discussion Paper as Asciano believes that Schedule G of the current 2010 Access Undertaking Schedule already provides the basis of an effective mechanism for short term transfers if it is applied effectively and enhanced to take account of take or pay considerations. This removes the need for amending both the 2014 DAU and the existing Access Agreements. Thus rather than develop a new short term transfer mechanism Aurizon Network simply needs to enhance the process in Schedule G and then practically apply this process.

However, if the QCA decides to further consider the details of the short term transfer mechanism proposed by Aurizon Network, Asciano believes that the proposal needs to be substantially modified to be both efficient and workable. In particular the proposal includes arbitrary restrictions on trading of TSEs, such restrictions impact on the ability of the proposed mechanism to obtain efficient outcomes. In addition Asciano believes that in order for the proposed short term transfer mechanism to be credible and workable the QCA must ensure that:

- there is no potential for actual or perceived Aurizon Network discrimination in favour of its related party above rail operator;
- Aurizon Network discretion is limited; and
- drafting issues, implementation issues and operational issues are resolved.

These issues include:

- addressing concerns relating to the differing treatment of transfers under different access agreements agreed under different undertakings;
- the rationale for grouping TSEs into different tranches;
- clarification as to whether transfers will use an even railings approach; and
- planning and scheduling processes and procedures and the communications that form an integral part of these procedures.