



**QR LIMITED's
PRELIMINARY SUBMISSION**

**QR NETWORK's
2008 ACCESS UNDERTAKING**

**COMMENTS ON STAKEHOLDER SUBMISSIONS
July 2008**

PURPOSE

The purpose of this Attachment is to provide comments to the Queensland Competition Authority (QCA) on stakeholder submissions to the QCA's consultation on QR Limited's (QR's) preliminary submission dated 9 May 2008 on QR Network's 2008 Undertaking (the 2008 Undertaking).

BACKGROUND

QR's 2005 Access Undertaking (the 2005 Undertaking) commenced on 30 June 2006 following its approval by the QCA and was to be effective for the period 1 July 2005 to 30 June 2009.

As a result of QR's announcement of its new corporate structure (including a proposed transfer date of 1 July 2008), QR has proposed to withdraw the 2005 Undertaking and for QR Network to submit a draft 2008 Undertaking to the QCA for approval by 30 June 2008.

On 9 May 2008 a preliminary submission was made by QR, on behalf of QR Network, to assist the QCA with its consultation process for the 2008 Undertaking.

However, due to a delay in obtaining the approval of QR's shareholding ministers for the implementation of the restructure, the restructure has now been deferred to 1 September 2008. The implication for this deferral is that, subject to the QCA's approval, the 2005 Undertaking will now be withdrawn with effect on and from 1 September 2008 and the 2008 Undertaking will commence on 1 September 2008.

The 2008 Undertaking will be formally submitted following QR Network's incorporation, which is now expected to be on or around 2 July 2008. QR Network's approach is for the 2008 Undertaking to preserve the regulatory principles contained in the 2005 Undertaking, subject to a number of amendments to ensure the 'workability' of the document in the short period before the 2009 Undertaking is approved by the QCA.

Defined terms used in this Attachment are per the 2008 Undertaking.

COMMENTS ON SUBMISSIONS

QR Network received directly from each stakeholder copies of two (2) submissions dated 3 June 2008 – one from the Queensland Resources Council (QRC) and the other from Asciano Limited (Asciano). The submissions were in response to the QCA's publication of QR's preliminary submission on 12 May 2008 and the QCA's Position Paper on 22 May 2008.

QR Network's comments on each of these submissions are provided below.

On 24 June 2008 QR announced a revised corporate restructure relative to that originally announced on 1 April 2008. With respect to the stakeholder submissions, the main change was that QRNational Coal will continue to operate as a business group of QR rather than as a separate subsidiary. However, the change will not affect QR's proposals to establish the new Access Agreements, with the new Access Agreements to be executed instead between QR Network and QR (on behalf of QRNational Coal).

QR is satisfied that the concerns raised by the QRC and Asciano (addressed by QR Network in this Attachment) are as relevant to QR's revised corporate restructure as for the corporate structure originally proposed.

QRC

QR Network believes that the QRC's concerns relate predominantly to the following issues:

- (i) That the replacement of the Internal Access Agreements with equivalent Access Agreements results in an inability to remedy any issues arising from these contractual arrangements;
- (ii) Whether any new Access Agreements signed under the 2008 Undertaking should be reviewed by the QCA; and
- (iii) Whether the 'transitional agreements' between QR Network and the other QR entities – specifically in relation to access to land, supply of electric traction and transfer of ownership of rail infrastructure - should be formalised in the 2008 Undertaking.

Internal Access Agreements

QR Network notes that an objective of the Internal Access Agreements was to provide transparency to Customers and Third Party Access Seekers of the arrangements for Access between QRNational Coal and QR Network for coal carrying Train Services. QR Network understands that the Internal Access Agreements are aligned with the relevant haulage agreements between QRNational Coal and Customers. Under the 2001 and 2005 Undertakings, Internal Access Agreements are Access Agreements and are treated as through they were agreements between separate entities.

As a result, the terms of the Internal Access Agreements are equivalent to the terms that would have been negotiated in Access Agreements with a separate legal entity at the time the agreements were made except for variations that were required to take account of the fact that the agreements were not being made between separate legal entities.

QR Network confirms that the changes made for the 2008 Undertaking only address issues relevant to the conversion of Internal Access Agreements into executed contracts between separate legal entities and do not impact on QRNational Coal's haulage agreements.

If any other issues exist within the Internal Access Agreements, as is suggested by the QRC, then the fact that the Internal Access Agreements are aligned with the haulage agreements means that changes to the terms and conditions in the Internal Access Agreements to address these issues may need to be matched by equivalent changes to the haulage agreements. As QR Network is not a party to these agreements, Customer and QRNational Coal support for the changes would be required.

In addition and as indicated in the preliminary submission, the new Access Agreements:

- Are a necessary consequence of the corporate restructure in which separate legal entities are created;
- Will be on the same terms and conditions as the existing Internal Access Agreements, other than consequential amendments which are required to give effect to the corporate restructure; and
- Will be provided to the QCA for review prior to commencement of the 2008 Undertaking.

In view of the above, QR Network believes that there are not – and have not been – any material issues associated with these arrangements. QR Network also notes that the QRC has not raised any further issues to those which were addressed prior to the preliminary submission. Accordingly, QR Network believes that the replacement of the Internal Access Agreements with new Access Agreements should proceed as proposed in the preliminary submission.

Review of new Access Agreements

QR Network notes that the 2005 Undertaking does not provide for the QCA to review any Access Agreement (either with a QR Operational Business Group or a Third Party) prior to its execution. QR Network believes that sufficient safeguards already exist in Part 5 of the 2008 Undertaking to ensure that the new Access Agreements are on reasonable terms and conditions and that Access Seekers are not disadvantaged relative to the Internal Access Agreements.

As stated in the preliminary submission, QR Network's approach to the 2008 Undertaking has been to preserve, to the extent possible, the regulatory principles contained in the 2005 Undertaking for a term equivalent to the remainder of the 2005 Undertaking. Accordingly, QR Network believes that:

- A general review provision is not necessary given the existing safeguards; and
- The provision is inconsistent with the principles established for the development of the 2008 Undertaking regarding the execution of Access Agreements for coal carrying Train Services.

Transitional agreements

QR Network will be entering into service agreements with other QR entities for the provision of a range of services. QR Network confirms that the proposed service agreements between QR Network and the other QR entities will include provisions reflecting QR Network's obligations in relation to Part 3 of the 2008 Undertaking.

QR Network will manage its obligations in Part 2 regarding access to land, supply of electric traction and transfer of ownership of rail infrastructure with the support and assistance of QR, where necessary. In this regard, QR Network confirms that:

- As indicated in the preliminary submission, QR Network will be held accountable for QR's compliance with Part 2; and
- QR will provide an undertaking to the QCA that it will do whatever is necessary to ensure QR Network is able to comply with Part 2 (and also with Part 3). In this regard, QR's undertaking will be contained in its letter to the QCA accompanying its request to withdraw the 2005 Undertaking.

Accordingly, QR Network believes that the transitional agreements referred to by the QRC are not required as the relevant provisions, if necessary, will be enforced by QR on behalf of QR Network.

Asciano

Asciano has raised three (3) specific issues regarding:

- (i) The proposed Review of Rail Infrastructure provisions in Part 2 of the 2008 Undertaking;
- (ii) The proposed adjustment in respect of the liability of QR Network to Customers under the 2008 Operator Standard Access Agreement (2008 OSAA); and
- (iii) The Costing Manual.

QR Network has no comments on Asciano's submission regarding the Costing Manual, which supports the QCA's Position Paper. QR Network's comments on each of the bullet points in Asciano's Executive Summary regarding the Review of Rail Infrastructure and the liability of QR Network to Customers are provided below.

Review of Rail Infrastructure

"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."

A key principle associated with the original allocation of Rail Infrastructure for QR's 2001 Access Undertaking was that where any doubt existed as to whether assets were Above Rail or Below Rail, they would be allocated to Below Rail. QR Network is not aware of any further instances where doubts exist as to the original allocation of Rail Infrastructure and notes that Asciano has not raised any specific examples where such doubts do exist.

However, Asciano does raise as an issue the allocation between QR Network and QRNational Coal of new assets associated with the Jilalan Yard expansion. In this regard, QR Network notes that:

- The scope of the Below Rail aspects of the project, including the allocation of rail assets between QR Network and QRNational Coal, was endorsed by the Goonyella Customer group via the coal master planning process and subsequently pre-approved by the QCA;
- Asciano is not prevented by Part 2 of the 2008 Undertaking from applying to have certain of the assets to be controlled by QRNational Coal (to the extent these assets are Below Rail) allocated to QR Network; and
- The allocation of certain non-rail assets to QR Limited (being the land adjacent to Jilalan Yard) is not related to the 2008 Undertaking as the assets are not Rail Transport Infrastructure and hence do not form part of the Declared Service.

In addition and as stated in the preliminary submission, the restructure will result in QR Network being the owner of 'red' roads and QR being the owner of 'blue' roads. It is not intended that 'blue roads' will be transferred to other QR entities as part of the restructure. QR will provide an undertaking to the QCA that it will do whatever is necessary to ensure QR Network is able to comply with Part 2.

In view of the above, QR Network believes that changes to the current version of the Line Diagrams are not required and that the proposed provisions in Part 2 of the 2008 Undertaking adequately address any concerns regarding Access to assets controlled by a QR entity other than QR Network.

“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.”

QR Network proposes that for the period of the 2008 Undertaking it would obtain responsibility for assets via a transfer agreement between QR Network and QR. For the transfer of assets occurring at 1 September 2008, assets would be transferred to QR Network at written down book value. For the subsequent transfer of any additional assets, QR Network would seek to have the value of these assets added to QR Network's Regulatory Asset Base.

QR Network also confirms that it is not aware of any “potential sale” of one or more of the QR Operational Business Groups during the period of the 2008 Undertaking. However, in the event that this did occur, it would be appropriate for any regulatory obligations in relation to access to the assets held by that business (if it were to be managing part of the Declared Service) would be managed by that business.

QR Network confirms that whilst it proposes for these arrangements to apply for the period of the 2008 Undertaking, it will review these arrangements as part of its development of the 2009 Undertaking.

“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.”

QR Network is unable to respond to this concern as Asciano has not nominated any example where a legitimate request for access to Rail Transport Infrastructure would be frustrated and the provisions within Part 2 of the 2008 Undertaking would not resolve the issue.

“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.”

The basis of Asciano's concern appears to be that the definition of Private Infrastructure might undermine the operation of Clause 2.2 of the 2008 Undertaking, as there will arguably be no blue track available to transfer as it will be Private Infrastructure. In response, QR Network makes the following comments:

- The only reference to Private Infrastructure in Clause 2.2 is in Subparagraph 2.2(g)(iv). Subparagraph 2.2(g)(iv) will continue to operate in favour of the direct connection of Private Infrastructure to Rail Infrastructure, unless QR Network and the Private Infrastructure manager agree "that the Private Infrastructure connects to track managed by a QR business group or a Related Party of QR other than QR Network". The implication from Subparagraph 2.2(g)(iv) is that the Private Infrastructure referred to is not Rail Transport Infrastructure (which will connect directly to Rail Infrastructure anyway).
- In any event, Subparagraph 2.2(g)(iv) is only one factor that QR Network must consider in making a decision to connect Private Infrastructure to Rail Infrastructure, and the Access Seeker can still refer the matter to the QCA as a Dispute if the Access Seeker is not satisfied with the QR Network's decision.
- The fact that Rail Transport Infrastructure can be Private Infrastructure does not operate to exclude Rail Transport Infrastructure from the operation of Clause 2.2.

Notwithstanding and to avoid any doubt around the interpretation of this clause, QR Network has amended the definition of “Private Infrastructure” to clarify that these provisions relate only to Third Party infrastructure. QR Network has also amended the reference to Private Facility in Subparagraph 2.2(g)(v) which is a related issue but is not referred to in Asciano’s submission.

QR Network notes that the first amendment does not cover a situation where Private Infrastructure is not connected to Rail Infrastructure. In this regard, QR Network confirms that:

- It is not aware of any location on QR Network’s infrastructure where this is an issue. QR Network notes that a siding in Mount Isa was connected to Rail Transport Infrastructure managed by QR Regional Freight, however the infrastructure was transferred to QR Network in 2007 following a request by the Customer.
- Even if there was such a location and access to the infrastructure could not be obtained on reasonable terms, an Access Seeker needs only to rely on the provisions in Clause 2.2 requesting that QR Network transfer ownership from the Related Party to QR Network.

Liability of QR Network to Customers

“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.”

QR Network does not accept that the changes to the 2008 OSAA depart from the principles associated with the 2005 Undertaking under QR’s new corporate structure.

The majority of QR's contracts for rail transport are directly with Customers in connection with rail haulage agreements. QR's liability vis-à-vis those Customers is limited by those agreements.

Following the restructure, QR Network will no longer have a direct contractual interface with Customers where the OSAA is used. The proposed changes are aimed at providing the same outcome in terms of QR Network's risk of liability under the 2008 Access Holder Standard Access Agreement (2008 AHSAA) relative to the 2008 OSAA.

"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 proposed changes to clauses 14 and 15 in the 2008 OSAA are intended to operate in a manner equivalent to the 2008 AHSAA. The 2008 OSAA does not prevent the Train Operator's Customer from making a claim against QR Network. However, the changes provide that the Operator is required to indemnify QR Network in respect of such claims in nominated circumstances.

"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 common feature of the OSAA and AHSAA is that the Customer and the Operator have a contractual relationship, whether that relationship was formalised before or after the execution of an Access Agreement. The main difference between these agreements is that whilst under the AHSAA the Customer will presumably seek various provisions in its haulage agreement with the Operator, under the 2008 OSAA, it will be the Operator who is motivated to seek such provisions from the Operator's Customer.

There is no reason why QR Network's liability and risk profile should differ substantially between the two contractual structures.

"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."

QR Network will apply the proposed changes in the 2008 OSAA equally to all Access Seekers.

However, as indicated in the preliminary submission, the formalisation of Internal Access Agreements will be undertaken on the basis of maintaining the current terms and conditions other than to give effect to QR's corporate restructure. This ensures the restructure does not impact on QR National Coal's haulage agreements. Accordingly, the proposed changes in

the 2008 OSAA will not apply to those existing Access Agreements with QR Operational Business Groups.

New Access Agreements with QR Operational Business Groups will include the proposed changes. As such, the changes do not represent favourable treatment of a QR Operational Business Group over Third Parties.

“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.”

As indicated above, QR Network does not propose to amend the terms and conditions of Access Agreements where back-to-back haulage agreements are already in place. Accordingly, it is difficult to understand how an Operator could breach an Access Agreement that is not already executed.

During contract negotiations the Operator (in terms of the 2008 OSAA) faces a similar issue to that of a Customer (in terms of the 2008 AHSAA) in convincing a 3rd party to an Access Agreement to accept obligations that it might otherwise not wish to accept. If the Operator or the Customer have difficulties in achieving a satisfactory allocation of risk then that is a commercial matter for the Operator or Customer. It is always open to the Operator or Customer not to contract with a 3rd party if the risk allocation is not satisfactory.

If the proposed changes to the 2008 OSAA shift the allocation of risk it is for the Operator and the Operator's Customer to establish how that risk will be dealt with between them, just as it is under the AHSAA. In this regard, the negotiating positions of both the QR Operational Business Group and the Third Party Operator are the same.

In addition, Asciano makes specific reference in the detailed discussion to clauses 14.5 and 14.8 of the OSAA.

- In respect of clause 14.5, the obligation is on the Operator to procure the Operator's Customer to render “all reasonable assistance” in respect of the particular matters set out in that clause.

QR Network believes that this clause is not an overly onerous commitment to procure from an Operator's Customer. However, a Customer may or may not agree to make this commitment. If the Operator (including a QR Operational Business Group) is not satisfied it can procure such a commitment, then this will be a commercial matter which the Operator needs to take into account during its negotiations. QR Network disagrees with Asciano's assertion that Customers will refuse to agree to provide such assistance and rejects Asciano's implication that the obligations under clause 14.5 would only be applied to persons other than QR Operational Business Groups.

- In respect of clause 14.8, this provision is already qualified by the words “to the best of its ability”.

Asciano asserts that clause 14.8 assumes privity of contract. This assertion cannot be correct as the Operator's Customer (as is the Operator under the AHSAA) is not a party to the Access Agreement. The drafting of the clause is also inconsistent with Asciano's assertion that the Operator must ‘procure’ these obligations from the Operator's Customer. If the Operator, despite using the best of its abilities, cannot give any loss adjuster the opportunity to interview an employee, agent or contractor of

the Operator's Customer, then the Operator cannot be said to be in breach of clause 14.8.

"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."

As previously indicated, Clause 14.10 is now consistent with the equivalent provision in the 2008 AHSAA. The question is not whether the Operator's Customer will be in the same position as the Operator but whether, if the Operator had suffered or incurred the loss suffered or incurred by the Operator's Customer, QR Network would be liable to the Operator for that loss. If QR Network would be liable, then the Operator will not be obliged to indemnify QR Network in respect of QR Network's liability to the Operator's Customer.

"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."

There is no breakdown in the separation of Above and Below Rail functions within QR. To the extent that the restructure of QR has implications for the liabilities and risks of QR's subsidiaries formed as part of that restructure (particularly, if the restructure leads to a distortion of those risks and liabilities), those matters should rightly be taken into account and addressed by QR in connection with the restructure. QR Network does not have access to rail haulage agreements.

The proposed amendments to the 2008 OSAA will be consistently applied to both QR Operational Business Groups and Third Parties in respect of Access Agreements (subject to the above discussion regarding the conversion of existing Internal Access Agreements).

"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."

QR Network confirms that the 2008 OSAA relates only to coal carrying Train Services. Negotiations for Access Agreements for other services will be in accordance with the provisions of Part 5 of the 2008 Undertaking.