



**Asciano Submission to the  
Queensland Competition Authority  
in relation to the QR Network  
Proposed Standard Connection  
Agreement**

September 2011

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## **1 INTRODUCTION AND BACKGROUND**

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority on the QR Network proposed Standard Connection Agreement for customer specific branch lines in accordance with clause 8.4 of the 2010 Access Undertaking. This submission is public.

Asciano recognises that a fair and reasonable standard connection agreement governing the connection of QR Network rail systems to third party rail infrastructure contributes to the efficient development and operation of the rail system.

In the past QR Network has been able to offer connection agreements to customers with limited regulatory scrutiny.

In the 30 June 2011 covering letter to the document package QR Network note they have previously offered connection agreements to customers that contain terms and conditions similar to those included in the proposed QR Network Standard Connection Agreement. Asciano does not believe that connection agreements which customers have signed in the past are a useful indicator as to the nature and content of an ideal connection agreement. Connection agreements previously agreed with QR Network have been agreed with a monopoly service provider, and as such the difference in negotiating power between the two parties is such that terms and conditions agreed to by the party seeking the connection should not be considered as being a useful indicator as to the content of a more equitable connection agreement.

The 30 June 2011 covering letter to the document package also notes that the Standard Connection agreement should be considered in conjunction with the proposed amendments put forward by QR Network in Draft Amending Access Undertaking provided by QR Network to the QCA in December 2010. This Draft Amending Access Undertaking was required by the Access Undertaking to address investment framework issues.

Asciano had a general procedural concern with the connection agreement amendments put forward in the Draft Amending Access Undertaking as QR Network

were using a process relating to the investment framework to make amendments which were not relevant to investment framework issues. Asciano believes that issues relating the connection agreement should be addressed in the current process rather than in a process relating to the investment framework.

In relation to the proposed amendments relating to connection put forward by QR Network in Draft Amending Access Undertaking Asciano's position is unchanged from the position it put forward in March 2011, namely that it is more equitable and more conducive to facilitating access if QR Network and the connecting party both pay their own costs, rather than the connecting party also pay QR Network costs.

## **2 ASCIANO'S POSITION ON QR NETWORK'S PROPOSED STANDARD CONNECTION AGREEMENT**

Asciano believes that QR Network should further clarify the intended scope and use of the standard connection agreement. Asciano understands that the standard connection agreement only deals with an actual continuing connection to the network and the maintenance costs etc associated with this connection. As such the standard connection agreement does not deal with the construction of the connecting infrastructure (as there are other agreements that QR Network uses to facilitate the construction of connecting infrastructure). In the standard connection agreement document package QR Network does not appear to acknowledge its requirements in respect of those other agreements. Asciano believes that there should be more transparency surrounding these agreements, as otherwise there may be an assumption by users that the standard connection agreement is intended to deal with all of these matters.

Asciano notes that the standard connection agreement is to be used for the connection of customer branch lines for the purpose of coal services but not the connection of major expansions or non-coal services<sup>1</sup>. While Asciano recognises that major expansions may possibly require varied terms and conditions, the variation of these terms and conditions is most likely in construction, rather than the continuing connection, and as such these variations will be dealt with in the construction connection agreements.

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<sup>1</sup> QR National Network Services Proposed Standard Rail Connection Agreement Explanatory Notes p3

Asciano is concerned that QR Network has unilaterally reserved for itself the ability to substantially redraft the standard connection agreement as required. Asciano believes that the terms and conditions of the standard connection agreement should act as a template for major connections and for non-coal service connections and should only be varied to address the specific issues arising from the major connections or non-coal service connections following consultation

## **2.1 Coal Loss Provisions and Loadout Performance**

QR Network is requiring owners of customer specific branch lines to mitigate coal loss via load profiling and load veneering at the point of loading. These coal loss provisions within the proposed connection agreement provide QR Network with the ability to suspend the right to use the connection where owners of customer specific branch lines do not act to comply with coal loss standards, including the operation of over-weight and over-height wagons.

Asciano believes that these coal loss provisions should only apply in circumstances where they are required by the nature of the private infrastructure.

## **2.2 Provision of a Safe Connection**

Asciano supports the general principle of ensuring that all below rail infrastructure and above rail operations are safe however, the requirement for safe operations should not be conflated with other non-safety related requirements in respect of the rail infrastructure. In this regard, Asciano notes that certain sections of the standard connection agreement seem to do this so that upgrades, modifications or replacements of the connecting infrastructure required for the purposes of safety are treated in the same way as upgrades, modifications or replacements for efficiency purposes or other non safety related requirements of QR Network (see for example, clauses 6.5 and 6.6 of the standard connection agreement).

## **2.3 Reimbursement of QR Network Costs**

An underlying principle of the proposed connection agreement is that the user pays for the connection to the system that would not have occurred but for their requirements. This payment includes the payment of QR network costs, although the connecting infrastructure remains QR Network infrastructure. Asciano believes that ideally both parties should pay their own costs. If this is not achievable then Asciano believes that if the user is to pay QR Network costs then the agreement should be more prescriptive as to what these costs should cover. For example, it would be

unreasonable for QR Network to seek the payment of costs linked to an upgrade to a unilaterally determined standard or to seek payment of a cost which would benefit other users or operators.

#### **2.4 Train Service Plan**

The connection agreement requires the inclusion of a train service plan to allow QR Network to assess the level of activity over the connecting infrastructure. While Asciano accepts that such a plan is useful to QR Network Asciano has concerns that such a plan may be commercially sensitive in terms of above rail operations and as such any train service plan put forward in connection agreement discussions should be viewed as confidential and be protected via ring fencing provisions.

### **3 ASCIANO'S DETAILED COMMENTS QR NETWORK'S PROPOSED STANDARD CONNECTION AGREEMENT**

#### **3.1 Annual Service Charge**

As drafted, there is no indication given as to how this Annual Service Charge will be determined. Other than the general statement in the Explanatory Notes provided with the standard connection agreement that underlying principle of the proposed connection agreement is that the user pays for the connection to the system that would not have occurred but for their requirements and an acknowledgement in the agreement that the charge has been developed by QR Network on the basis of the Train Services Plan, the standard agreement itself provides prospective users with no details around how this amount will be calculated and what it will take into account. Asciano considers that some provision should be made in Schedule 5 for a formula to set out the factors that will be taken into account in setting this Annual Service Charge.

#### **3.2 Indemnities**

Asciano note that the QR Network position on indemnities and liabilities in the proposed standard connection agreement is similar to QR Network position on indemnities and liabilities in the standard Access Agreement. Arguments put forward by Asciano in relation to the Access Undertaking and Access Agreement in relation to indemnities and liabilities continue to apply.

Asciano note that the standard connection agreement includes a liability cap at clause 21.3. The value of this cap should be made explicit in either the agreement or

the explanatory note. Asciano does not believe that a token value for the liability cap is appropriate.

Asciano notes that the indemnity provided by the owner relates to the private infrastructure and the connecting infrastructure, but the indemnity provided by QR Network only relates to the network i.e. it does not give any indemnity in respect of the connecting infrastructure. Given that QR Network is the owner of that infrastructure and is responsible for the maintenance and repair of that infrastructure it should provide an indemnity in respect of any loss or damage it causes as a result of its acts or omissions in respect of that connecting infrastructure.

### **3.3 Connecting Infrastructure**

Clause 6 of the standard connection agreement provides for a broad range of matters in relation to the inspection, maintenance and upgrading, modification or replacement of the connecting infrastructure. However, there are no safeguards in the clause to provide that the standard to which QR Network is required to maintain the infrastructure is to a particular standard, for example, that required by the requirements of the daily train plan. The clause merely provides that the connection will be maintained. Similarly, there are no safeguards to ensure that any upgrades, modifications or replacements of the infrastructure required under clause 6.5 are not the result of a failure of QR Network to properly maintain and repair the connection.

In addition, as noted above, clauses 6.5 and 6.6 include requirements in relation to upgrading, modification or replacement of the connecting infrastructure required by safety and operational efficiency reasons but also for other reasons including comparable standards on other parts of the network. The standard connection agreement requires that the owner pay for the costs of all such upgrades, modifications or replacements but does not have the ability to dispute the need for such upgrades, modifications or replacements, the scope of such nor the party that is undertaking the works. Asciano submits that if it is required to pay for such costs, it should have the ability to dispute and discuss such matters with QR Network. Asciano also holds this view in respect of similar requirements imposed by the standard connection agreement in relation to upgrades, modification or replacement to the user's private infrastructure (clause 7 of the standard connection agreement).

### 3.4 Incidents on the Private Infrastructure

Asciano is concerned to ensure that the requirements of clause 10 of the standard connection agreement in respect of coordination and response to incidents on the private infrastructure that have an impact on the connecting infrastructure do not impinge upon an owner's obligations and rights in respect of its own investigations and responses to incidents.

In particular Asciano is strongly concerned that clause 10.9 gives QR Network extensive rights in relation to investigating incidents on non-QR Network infrastructure, even if QR Network have no cause to believe the incident will impact QR network in any way. Furthermore Asciano is concerned that these rights are not reciprocal despite the fact that incidents on QR Network infrastructure may impact on private infrastructure.

Asciano believes that investigations under clause 10.9 should only be required when QR Network have reasonable cause to believe the incident will impact on QR Network infrastructure. These investigations should include representatives of the infrastructure owner and should be carried out in a manner generally consistent with Schedule 8 of the QR Network Standard Access Agreement.

### 3.5 Termination Rights

Asciano queries the requirement to include a termination rights in respect of the termination of any other agreement that is incidental to the standard connection agreement (see clause 18.1(k)). Given that there are significant other termination rights under clause 18.1 and security is also required under this Agreement, termination rights consequent upon the termination of other unspecified agreements seems unnecessary.

Asciano considers that the remedy period in respect of QR Networks failure to comply with a material term of the standard connection agreement under clause 18.2 should be 14 days rather than 30 days. There does not appear to be any justifiable reason as to why QR Network should be entitled to extra time to remedy a failure to perform a material term, especially when such failure could have the effect of stopping the owner being able to use the connecting infrastructure for which it is paying.

### 3.6 Charges

Asciano notes that that the schedules to the agreement include no information on the actual numerical value of charges. This would be material in any actual agreement.

Asciano believes that further information on the charges should be provided. If indicative figures cannot be provided then a description of how such charges would be calculated or otherwise derived would be useful.