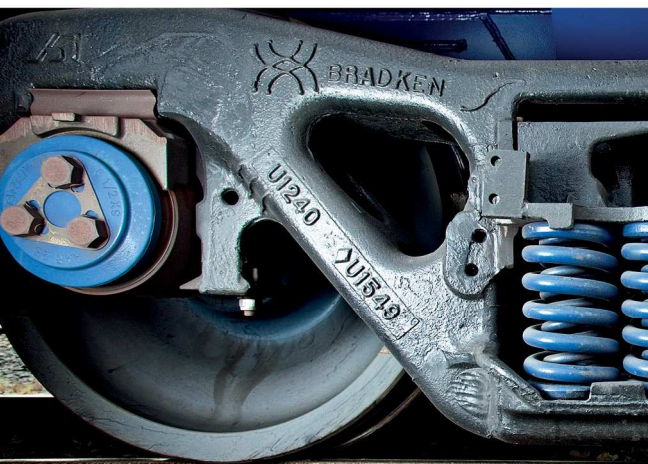


# asciano

Submission to the Queensland Competition Authority in  
Relation to the 2013 Aurizon Network Draft Access  
Undertaking

October 2013



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# 1. Executive Summary

Asciano welcomes the opportunity to make this submission to the Queensland Competition Authority (QCA) in response to the 2013 Aurizon Network Draft Access Undertaking (2013 DAU). Asciano has numerous concerns with both the general direction and the detailed proposed drafting of the 2013 DAU. The 2013 DAU does not meet the requirements of the QCA Act and the QCA should not approve the 2013 DAU.

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

## Scope and Timing of QCA Decision

The QCA should seek to make the best decision possible taking into account all the information available, consequently Asciano has no fundamental concern with further time extensions past July 2014 if this time is required for the QCA and stakeholders to take into account the information available and for the QCA to make a single decision on the whole 2013 DAU.

In this regard, Asciano has strong concerns with the approach used for the 2010 AU, whereby various elements of the 2010 Aurizon Network Access Undertaking (2010 AU) which were not resolved in the 2010 AU Final Decision were to be addressed in the period 2010 to 2013, however many of these elements have only been partly addressed in this period. Asciano strongly believes that the 2013 DAU is a single proposal where the elements of the proposal are interrelated such that decisions on these elements cannot be made in isolation, but rather, a single decision has to be made by the QCA which takes into account the whole of the 2013 DAU proposal.

## The 2013 DAU

Since the 2010 AU was approved Aurizon has changed their strategy and their organisational structure. Aurizon's strategy is to reduce the impact of regulation on their business and to exploit the advantages inherent in being a vertically integrated monopolist<sup>1</sup>. This approach by Aurizon makes the need for strong regulation and in particular a strong non-discrimination regime significantly more important in 2013 DAU than it was in 2010 AU. The regulatory regime and the QCA need to respond to Aurizon's strategy in order to ensure effective ongoing above rail competition and avoid the loss of economic benefits that competition has produced. However, consistent with their strategy, the 2013 DAU submitted by Aurizon represents a significant reduction in regulatory oversight of Aurizon.

Asciano believes that the 2013 DAU should place more emphases on Aurizon Network as a service provider. In a commercial environment a service provider should be seeking to understand the requirements of its customers and provide an acceptable service offering to these customers in a cost-effective manner. However, under the 2013 DAU Aurizon Network is not seeking to meet its customer requirements, but rather is seeking to take on a role where it further plans and controls the train operations of third parties while minimising its own risks.

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<sup>1</sup> Aurizon Investor Briefing 18 July 2013: this briefing can be found at <http://www.aurizon.com.au/investor/FinancialReports/Shared%20Documents/Aurizon%20Investor%20Briefing%20July%2018.pdf>

Asciano has specific concerns regarding eight key issues in the 2013 DAU, as outlined below. In addition Asciano has numerous concerns with the drafting and detail of the 2013 DAU and its related documents.

### **Preventing Discrimination: Ring Fencing, Audits & Breach**

A strong ring fencing and compliance regime is fundamental to facilitating third party access, particularly where the access provider is a vertically integrated natural monopoly. Asciano is very concerned that the 2013 DAU contains numerous provisions that seek to weaken the existing sub-standard ring fencing and compliance regime. If the full benefits of above rail competition are to be realised then the ring fencing and compliance regime must be substantially strengthened rather than weakened. In order to be approved the 2013 DAU must be consistent with the QCA Act 137(1A) and include provisions for identifying, preventing and remedying discrimination. The 2013 DAU does not contain provisions that would achieve this and needs to be amended.

#### *Recommendations for Improving the 2013 DAU In Order to Identify Discrimination*

The 2013 DAU should be amended to introduce:

- a regular internal audit;
- a confidential reporting line;
- a requirement for an internal compliance declaration from the CEO and all key senior managers across Aurizon; and
- an issues register that can be viewed by the auditors and the QCA.

The 2013 DAU should be amended to allow improved QCA information gathering powers and an improved audit procedure in order to improve compliance with the QCA Act, increase the QCA's influence and provide transparency and accountability in the audit process namely:

- the auditor should be approved by the QCA without constraint;
- each year an external compliance audit should be conducted;
- the auditor should be required to consult with all above rail operators;
- the auditor should provide both a confidential report (to the QCA) and a public report;
- each audit should assess whether the previous year's recommendations have been effectively implemented and require Aurizon Network to address any non-compliances identified; and
- the QCA should be able to require the audit to be redone if it is not satisfied with the rigour of the audit.

The restrictions on the QCA's information gathering powers in the 2013 DAU 10.3.1 and 10.3.2 (b) should be removed.

#### *Summary of Recommendations for Preventing Discrimination*

In order to prevent discrimination the 2013 DAU should at a minimum include:

- an Infringement Penalty regime operated by the QCA similar to that enforced by the ACCC;
- the requirement that the Chairman and majority of the Aurizon Network board are truly independent;

- the reinstatement of the clause in 2010 AU which requires the independent management of Aurizon Network;
- a requirement that Aurizon's core network functions should be undertaken by Aurizon Network; and
- Aurizon Network staff should be prevented from undertaking non core access activities.

### *Summary of Recommendations for Remedying Discrimination*

The 2013 DAU should include requirements:

- to implement the recommendations of the auditor including amending the undertaking where required; and
- to comply with a QCA order where the QCA requires a change to be made to ensure future compliance, including changes to the undertaking and/or changes to Aurizon's compliance program.

### **KPI Reporting**

A robust and consistently applied KPI reporting regime is needed to allow stakeholders to monitor Aurizon Network's compliance with their access undertaking and access agreements and their performance against access agreements.

The 2013 DAU should be amended to introduce monthly operational KPI reporting to the QCA and access holders by system on an origin-destination pairing basis, access agreement basis, an access holder basis and a total basis. KPIs to be reported should include at a minimum:

- sectional run time performance;
- below rail transit time performance;
- contracted vs actual Train Service Entitlements consumption;
- availability days; and
- actual vs forecast system GTKs.

Similar KPI reporting obligations should also apply in individual Access Agreements

### **Incentive Mechanism**

Under the 2013 DAU, Aurizon Network does not have sufficient incentive to seek improvements in operating efficiency. An incentive mechanism is required to drive efficiency improvements in Aurizon Network's operations. Such an incentive mechanism must be designed to ensure that it provides strong incentives to treat all access holders in a non-discriminatory manner, in particular operational efficiencies driven by the incentive mechanism must not unduly favour Aurizon Network's related party train operator.

The 2013 DAU should be amended to provide for the development and implementation of an incentive mechanism. The mechanism must include:

- relevant performance metrics and KPIs which are linked to performance, contracted access entitlements and regulatory framework outcomes (such as System Allowable Revenue and Reference Tariffs);

- linkages to individual operators rather than whole of system performance – this is required to ensure that differential treatment of operators is not hidden by aggregated performance metrics; and
- a degree of symmetry between the incentives linked to over performance and under performance.

The incentive mechanism requires a transparent and agreed information base, methodology and target values. The mechanism also requires the development of an independent audit process to audit the operation of the incentive mechanism

### Reference Tariff Structure

Contrary to the requirements of the QCA Act, particularly the pricing principles under section 168A of the QCA Act, the 2013 DAU proposes various changes in tariff structures and tariff levels which shift the tariffs from being efficient, cost-reflective tariffs.

The 2013 DAU proposes a significant increase to the AT<sub>2</sub> tariff component for each Coal System and a rebalancing of tariffs such that a greater proportion of revenue is now recovered via the AT<sub>2</sub> tariff component.

The AT<sub>2</sub> tariff component increase is of particular concern as it increases the take or pay component of the tariff structure.

Asciano does not believe that this tariff increase and rebalancing is warranted. In particular, Asciano believes that the Aurizon Network tariff structure no longer reflects the cost structure. Asciano strongly supports having a prescribed and transparent methodology to determine how System Allowable Revenue is apportioned between each tariff component.

Asciano continues to strongly oppose the Aurizon Network AT<sub>5</sub> tariff proposals as put forward in the 2013 DAU and in previous Aurizon Network proposals. Any final position on the AT<sub>5</sub> tariff approved in the 2013 DAU must ensure that:

- market based decisions on traction choice are allowed in above rail markets;
- pricing methodologies and outcomes are efficient for electric and diesel traction operators, and in particular:
  - diesel traction operators and users should not pay for electric infrastructure which they do not use; and
  - Goonyella system operators and users should not pay for Blackwater electric infrastructure which they do not use;
- outcomes are non-discriminatory for above rail operators and traction types, that is it must not favour one rail operator or traction type over another, distort competition in the above rail market or have an anti-competitive impact in the above rail market; and
- future pricing is determined via transparent pricing methodologies.

Asciano strongly opposes the capacity multiplier proposal as put forward by Aurizon Network. The current Aurizon Network proposal is based on flawed assumptions as to which trains are or are not efficient.



## Allocation of Corporate Costs to Aurizon Network

The costs underpinning the 2013 DAU tariffs include a substantial increase in Aurizon Network's allocation of corporate costs based on a rationale that these would be Aurizon Network's stand alone corporate costs. This approach shifts tariffs from being efficient, cost-reflective tariffs and provides a cost advantage to Aurizon Network's related party above rail operator when competing with other above rail operators.

The immediate impact of the 2013 DAU cost allocation is that Aurizon above rail is no longer carrying a reasonable allocation of corporate costs which then provides Aurizon above rail with an advantage in competing with other above rail providers. Thus the cost allocation is not economically efficient and acts to discourage competition in the market for train operations.

This concern with cost allocation reinforces the need for an updated the Aurizon costing manual. A requirement for Aurizon Network to update their costing manual should be included in the DAU 2013. Ongoing concerns regarding Aurizon Network's potential to favour their related above rail operator would be minimised if thorough regulatory consultation process resulted in a revised QCA approved cost allocation manual.

## Shifting Key Clauses & Principles from the Access Undertaking to the Access Agreement

The 2013 DAU removes numerous key operational clauses and principles entirely from the access undertaking documents package, and also shifts numerous principles from the 2010 AU to the 2013 DAU proposed access agreements. This removal and shifting of clauses reduces transparency, certainty and regulatory scrutiny, and increases the potential for Aurizon Network to negotiate discriminatory terms with its related above rail operator.

Principles and concepts which have been removed from the 2013 DAU or shifted to the 2013 DAU proposed access agreements should be reinstated to the 2013 DAU.

## Flexibility

The 2010 AU did not encourage flexibility in the usage of access rights. The 2013 DAU further restricts the flexible usage of access rights. Asciano believes that the 2013 DAU should allow a more flexible usage of access rights by access holders. The object of Part 5 of the QCA Act is to promote the economically efficient use of rail infrastructure; increased flexibility in the usage of access rights will result in a more efficient use of these access rights.

The 2013 DAU and the 2013 DAU Network Management Principles should be amended to;

- remove the concept of "Train Service Type";
- introduce increased flexibility in the contested train paths process;
- introduce increased flexibility in the design and use of "origin – destination" pairs, including consideration of the use of a broader portfolio approach; and
- introduce increased flexibility in the application of access rights in the take or pay process.

The 2013 DAU should allow flexible utilisation of access rights by an access holder and in particular should allow an access holder to allocate their access rights to another access agreement, train service or rail operator.

## Forecasting

The access regime provides incentives for Aurizon Network to under forecast volumes. The 2013 DAU should address this issue by more closely involving stakeholders in forecasting. The 2013 DAU should be amended to provide for improved forecasting.

2013 DAU forecasting should involve a process where supply chain stakeholders are further involved with the annual determination of forecasts and the annual forecasts are independently assessed by an expert.

## 2013 DAU Drafting and Other issues

In addition to the concerns relating to eight key issues as outlined above Asciano has numerous concerns with the proposed drafting of the 2013 DAU. These concerns are outlined in this submission in Section 7, Section 8, Attachment 2, Attachment 3 and Attachment 4. These concerns include (but are not limited to):

- the intent and scope of the 2013 DAU, and in particular the shift away from clear statements on non-discriminatory treatment and a dilution of obligations under the ultimate holding company deed;
- the dilution of ring fencing obligations and the lack of robust processes to identify, remedy and prevent ring fencing breaches. In particular Asciano is concerned with dilution of auditing powers and processes;
- the nature of commercial negotiations in the 2013 DAU regulatory framework, and in particular concerns with changes to access application procedures and how these may be misused by Aurizon Network;
- access agreement issues, including the new focus on train service types in the standard operator's access agreement and the train operations agreement;
- capacity allocation, and in particular the move from an objective capacity allocation regime to a more subjective capacity allocation regime;
- the status of recently approved regulatory processes relating to alternative standard access agreements and standard rail connection agreements, where Asciano supports their incorporation into the 2013 DAU;
- the lack of obligations on Aurizon Network to provide detailed and frequent operational reporting;
- dispute resolution procedures in the undertaking, where Asciano supports a position that these procedures should take precedence over the procedures in the access agreement and that these dispute resolution procedures should be broadened in scope.

Overall Asciano strongly opposes approval of the 2013 DAU in its current form for the reasons set out in this submission.

## 2. Introduction

Asciano welcomes the opportunity to make this submission to the Queensland Competition Authority (QCA) in response to the 2013 Aurizon Network Draft Access Undertaking (2013 DAU) which was submitted to the QCA in April 2013.

The 2010 Aurizon Network Access Undertaking (2010 AU) was originally due to expire on 30 June 2013, however Aurizon Network submitted a draft amending access undertaking proposing to extend the termination date of the 2010 AU to 30 June 2014 and to adjust reference tariffs for 2013-2014. This proposal was approved by the QCA.

Since this time, Aurizon Network has submitted a draft access undertaking (the 2013 DAU) to the QCA for its approval.

Asciano believes that while there is a balance to be achieved between making a decision within the stipulated time frame of 1 July 2014 and making the best decision possible by taking into account all the information available, Asciano believes that QCA should seek to make the best decision possible taking into account all the information available. Consequently Asciano has no fundamental concern with any further time extensions if the time is required for the QCA and stakeholders to take into account the information available. In taking this position Asciano recognises that all parties should aim to finalise the 2013 DAU process by 1 July 2014 but that this time frame should not be used to force the approval of the 2013 DAU prior to all of the issues raised in the regulatory consultation process being addressed.

Asciano has strong concerns with the approach used in the 2010 AU, whereby various elements of the 2010 AU were not resolved and have been either addressed or partly addressed in the period 2010 to 2013. Asciano strongly believes that the 2013 DAU is a single package where all elements of the proposal are interrelated to the extent that decisions on these elements cannot be made in isolation, but rather, a single decision has to be made by the QCA which takes into the whole of the 2013 DAU proposal.

Asciano believes that the 2010 AU had substantial defects. The 2013 DAU has not sought to address these defects and in many instances (for example ring fencing provisions) the 2013 DAU is less acceptable than the 2010 AU.

Asciano believes that the 2013 DAU should place more emphases on Aurizon Network as a service provider. As a service provider would strive to provide the best possible service offering that they can to customers. That is, a service provider Aurizon Network should be seeking to understand the requirements of its customers and then meeting these requirements in a cost-effective manner.

Asciano opposes approval of the 2013 DAU in its current form for the reasons set out in the submission.

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

### 3. Framework of this Asciano Submission

The regulatory framework for the provision of below rail access is a critical element in the effectiveness of the overall supply chain. In its current form, the 2013 DAU continues to confine stakeholders to a regulatory regime that does not support supply chain effectiveness. Asciano is of the view that the regulatory framework adopted should not dictate the effectiveness of the supply chain but rather set a supportive foundation for it.

Asciano believes that this supportive foundation is achievable for the 2013 DAU if eight key priorities as identified in section 6 of this submission are addressed by the QCA and numerous other issues of detail are also resolved. If these key issues are appropriately addressed in the 2013 DAU, it can set a foundation for a supply chain that is transparent, equitable and where capacity is optimised for all stakeholders.

This Asciano submission is set out as follows:

- introductory sections (Chapters 1-5) framing the background to Asciano, the 2013 DAU and this submission;
- a section (Chapter 6) which outlines eight key issues that should be addressed in the 2013 DAU regulatory process;
- a section (Chapter 7) which outlines further specific issues in the drafting of the 2013 DAU;
- a section (Chapter 8) which outlines further specific issues in the drafting of the 2013 DAU attached agreements; and
- four attachments which provide:
  - information on recent Asciano submissions on 2010 AU QCA consultation processes;
  - detailed comment on the changes between the 2010 AU and the 2013 DAU;
  - detailed comment on the changes between the Train Operations Agreement approved by the QCA in 2013 and the Train Operations Agreement attached to the 2013 DAU; and
  - responses to the questions raised by the QCA consultation paper on the 2013 DAU.

In preparing this submission, Asciano has been mindful of the factors set out in the QCA Act to which the QCA must have regard in determining whether or not to approve the 2013 DAU. The QCA may only approve the DAU if the QCA considers it appropriate to do so having regard to the matters outlined in section 138 of the QCA Act. In addition Asciano believes that it is appropriate that the QCA consider the 2013 DAU proposed pricing by having regard to section 168A of the QCA Act.

Asciano believes that in broad terms the requirements of the QCA Act can be met by focussing on the objective of Part 5 of the QCA Act (Part 5 relates to Access to Services) that access to services promote the:

*economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

In considering both the broader requirements of the QCA Act and the objective of Part 5 of the QCA Act, Asciano believes that the efficient operation and investment in infrastructure is best met by focusing on allocative efficiency, productive efficiency and dynamic efficiency and the promotion of competition is best met by requiring non-discriminatory behaviour, vertical equity, horizontal equity and transparency.

In its current form the 2013 DAU does not meet these criteria.

## 4. Background to Asciano

Asciano is a combined rail freight and port operator; Pacific National Coal is a coal train operator which is a subsidiary of Asciano. Pacific National Coal has substantial coal train operations in Queensland which utilise the Aurizon Network via third party access agreements agreed under the third party access regulatory regime. Pacific National Coal is currently the only third party coal rail operator using the Aurizon Network coal rail systems. The other user of the Aurizon Network rail systems is Aurizon's above rail operations, which is a related party to Aurizon Network. Thus Aurizon is both the major competitor to Pacific National Coal in Queensland and the monopoly supplier of below rail services to Pacific National Coal in Queensland.

Given the structure of the Queensland coal rail market the outcome of the 2013 DAU regulatory process is of critical importance to Pacific National Coal. In particular, the 2013 DAU needs to strengthen the separation between Aurizon Network and Aurizon's above rail operations.

Pacific National Coal entered the Queensland coal haulage market in 2009. At the time of Pacific National Coal's entry into this market Aurizon was a de facto vertically integrated monopoly, as it operated both the coal rail infrastructure and all of the coal trains which used this infrastructure.

In the past five years Pacific National Coal has invested well in excess of \$1billion in its Queensland operations and currently holds approximately 20 per cent of the Queensland coal haulage market. The dimensions of the Pacific National Coal business in Queensland are below:

- 38 million tonnes of coal transported per annum;
- 2200 coal wagons;
- 74 locomotives; and
- 400 employees.

Asciano believes that the entry of Pacific National Coal into the Queensland coal haulage market has provided competition benefits to the coal supply chain by driving efficiencies in above rail operations, driving transparency and accountability in Aurizon processes and decision making and providing choice of above rail service provider to users. In order for these benefits to be maintained and further benefits realised, the regulatory framework must provide an even playing field for stand alone above rail operators, such as Pacific National Coal, and the vertically integrated above and below rail operator.

In addition to the Pacific National Coal business outlined above, Pacific National Rail has intermodal freight operations in Queensland which utilises sections of the Aurizon Network (primarily the section between Rocklands and Parana).

## 5. Background to the Aurizon Network Undertaking Process

### 2010 Access Undertaking – Substantial Concerns with Approved 2010 AU

Asciano has had substantial concerns with the 2010 AU. These concerns have centred on ring fencing and non-discrimination compliance, and on the ability of the QCA to both identify and remedy instances of ring fencing non-compliance and discrimination.

The 2013 DAU is planned to replace the current 2010 AU in June 2014. Asciano remains concerned about ringfencing and non discrimination compliance and is disappointed that the 2013 DAU has not sought to address these issues. Indeed the ring fencing and non-discrimination provisions in the 2013 DAU are now less acceptable than the ring fencing and non-discrimination provisions in the 2010 AU.

### 2010 Access Undertaking – Issues Remain to be Resolved

Asciano has had substantial concerns with the piecemeal approach to the provision of the 2010 AU and the “long regulatory tail” of the 2010 AU which has meant that there has not been, and there is still not, a complete 2010 AU which includes all of the elements required to be included in the undertaking and which have all been considered as a whole taking into account how each of those elements impacts on other elements within the undertaking.

The 2010 AU contained numerous requirements for further regulatory consultations and approvals to be undertaken on various issues during the duration of the 2010 AU. The further work included requirements that Aurizon Network submit proposals on the following issues which were not finalised at the time of the 2010 AU approval:

- an incentive mechanism regime (clause 2.6 of the 2010 AU);
- a set of Goonyella system rules (clause 7.1 of the 2010 AU);
- a standard user funding agreement which allows users to fund infrastructure (clause 7.6 of the 2010 AU);
- a standard rail connection agreement (clause 8.4 of the 2010 AU);
- a form of access agreement which allows for coal producers to directly contract for access rights (clause 5.2 of the 2010 AU);
- a network condition assessment (part 13 and Schedule A clause 5 of the 2010 AU); and
- a set of supply chain operating assumptions (clause 11.13 of the 2010 AU).

Of these requirements only the standard rail connection agreement and the form of access agreement which allows for coal producers to directly contract for access rights have been finalised. Asciano recognises that many of the other requirements outlined above have been progressed, but they are not yet approved by the QCA.

In addition to the required regulatory submissions outlined above Aurizon Network has also initiated several other 2010 AU amendment processes, notably amendments to address pricing for the Goonyella to Abbott Point expansion and amendments to address perceived concerns

regarding the level and sustainability of Aurizon Network electric infrastructure pricing. Neither of these regulatory processes has been finalised.

Asciano remains concerned as to how these current and ongoing regulatory processes will be incorporated into the QCA's assessment of the 2013 DAU.

Asciano has previously made submissions to many of the regulatory consultation processes outlined above. As well as addressing specific issues relating to the regulatory consultation these Asciano responses have focused on several broad issues including:

- ensuring equal treatment of all above rail operators by Aurizon Network, and in particular ensuring that Aurizon above rail activities are separated from Aurizon Network activities;
- ensuring end user choice of above rail operators and above rail operational modes;
- ensuring Aurizon Network's pricing and costing is both allocatively efficient (i.e. prices reflect costs) and productively efficient (i.e. costs are the lowest possible costs);
- ensuring Aurizon Network meets its contractual obligations in regard to pathing; and
- seeking that ongoing improvements occur in the effectiveness of coal supply chains.

Asciano believes that these broad issues remain important in considering the 2013 DAU.

To the extent that issues previously considered by QCA consultation processes identified above are to be re-considered in the 2013 DAU, Asciano is seeking that its previous submissions on these issues be taken into account by the QCA if they are relevant to the issue under consideration. Previous submissions made by Asciano to these QCA consultation processes are listed in Attachment 1.

As outlined above, the fact that numerous issues from the 2010 AU remain unresolved is of concern to Asciano. Asciano believes that in order to avoid having ongoing unresolved elements of an access undertaking being subject to ongoing consultation throughout the term of the undertaking a single decision has to be made by the QCA on the 2013 DAU which takes into account the whole of the 2013 DAU proposal.

### 2013 DAU – Substantial Concerns with 2013 DAU

Asciano has substantial concerns with the 2013 DAU. The submission of the 2013 DAU was an opportunity for Aurizon Network to demonstrate a level of commitment to delivering a regulatory framework that would allow above rail competition on the Aurizon Network to further develop. Aurizon Network has missed this opportunity and has delivered an access undertaking document package that would undermine above rail competition.

Issues which have not been addressed but which are critical to facilitating above rail competition include:

- the effective operational separation, commercial separation and governance separation of above rail and below rail functions;
- the development of more effective programs to identify and remedy compliance breaches;
- a commitment to non-discriminatory provision of services and access rights, including an equivalent quality of service for all users; and



- efficient and non-discriminatory cost allocations and efficient and non-discriminatory access charges.

These issues need to be addressed in the approved 2013 DAU.

### 2013 DAU – Stakeholder Consultation

The 2013 DAU has been characterised by a relatively lengthy initial consultation period, which was based on a view that Aurizon Network and the Queensland Resources Council (QRC) (representing end users) would be able to use this time to consult with each other in order to identify common areas of agreement in relation to the 2013 DAU. Asciano has not been involved in these consultations to any great extent, despite indicating a desire to be involved.

Asciano is concerned that the outcome of the 2013 DAU has the potential to become a negotiated outcome between Aurizon Network and QRC rather than the outcome of a regulatory process undertaken under the QCA Act. In relation to this concern Asciano is heartened by QCA statements<sup>2</sup> that while the QCA may have regard to the Aurizon Network and QRC negotiations the QCA decision making on the 2013 DAU will be driven by the requirements of the QCA Act.

While Asciano has no fundamental concerns with Aurizon Network and QRC consulting, Asciano believes that the 2013 DAU process is fundamentally a process undertaken under the QCA Act and the outcome of the process must be consistent with the QCA Act.

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<sup>2</sup> QCA Consultation Paper Aurizon Network 2013 Draft Access Undertaking August 2013 p7

## 6. Key Issues

This section outlines the key issues Asciano believes need to be addressed by this 2013 DAU regulatory consultation process.

### 6.1 Key issue: Strengthened Ring Fencing, QCA Audits and Penalties for Breach

#### Overview of Ring Fencing

Asciano believes that a strong ring fencing and compliance regime is fundamental to facilitating third party access; without such a regime a vertically integrated natural monopoly will effectively act to disadvantage any existing third party access holder. Any actual or perceived dilution of the ring fencing and compliance regime will act to reduce both the confidence of any third party access holder that it is competing on a level playing field and the competitiveness of the third party access holder. Thus the existence of a strong ring fencing and compliance regime is a necessary prerequisite for third party access and above rail competition.

The Queensland coal rail network consists of a natural monopoly market and a contestable component. Productive efficiency in the contestable market can be increased by facilitating competition in this market. Facilitating competition in the contestable market is problematic when the incumbent operator in the market is a related party of the natural monopoly service provider. This is because the natural monopoly service provider will have a strong commercial incentive to favour its related party through both commercial and operational processes in order to return the related party to a monopoly position in the contestable market. In order to facilitate competition in this instance a strong ring fencing and compliance regime is needed between the natural monopoly service provider and its related party so that any third party access holder has the confidence to remain in the contestable market and remain competitive.

Asciano is seriously concerned that the 2013 DAU contains numerous provisions that seek to weaken the ring fencing and compliance regime. These changes must be reversed. If the full benefits of above rail competition are to be realised then the ring fencing and compliance regime must be strengthened rather than weakened and the powers of the QCA to investigate potential breaches of the ring fencing regime must be strengthened.

Ultimately ring fencing is driven by a corporate culture that accepts that ring fencing results in the most efficient outcomes for the supply chain. Asciano does not believe that the Aurizon corporate culture has embraced ring fencing as a positive outcome for the supply chain.

#### Identifying Preventing and Remedying Discrimination

Aurizon's structure and market positioning has changed since the 2010 AU was approved by the QCA. In particular, Aurizon has moved to a more functional business model whereby Aurizon Network is less of a stand alone business. Significant services, notably strategy development, are now undertaken at the corporate centre for all of Aurizon including for both above rail and below rail activities. This business model presents specific challenges and concerns relating to the ring fencing of Aurizon Network.

Aurizon are modelling themselves on US Class 1 Railroads, which are vertically integrated operations<sup>3</sup>. The influence of US Class 1 Railroads is evident in their strategy, functional structure and the employment of key ex US Class 1 Railroads executives, most notably to lead Aurizon's regulated business, Aurizon Network.

Whilst often communicating in euphemisms, Aurizon are clearly positioning themselves to reduce the impact of regulation and ring fencing on their business and to exploit the advantages inherent in being a vertically integrated monopolist. Some examples of this approach, as outlined in a recent Aurizon analyst briefing include:<sup>4</sup>

- one of the six building blocks to drive world class transformation is "coordination of a connected network" with the objective to "improve regulatory affairs" (page19);
- one of Aurizon's objective is to become an "expert manager of regulators" (page18);
- one of their business priorities is to leverage their functional model including "extract above and below rail integration benefits" (page 31);
- strategic themes include "leveraging an integrated approach to business" (page 44); and
- a key part of their transformation program is an "Integrated Operating Plan" (page 47).

Thus the market positioning and approach of Aurizon is seeking to reduce regulatory impact and exploit its vertically integrated monopoly position, making the need for a strong non-discrimination regime significantly more important in 2013 DAU than it was in 2010 AU. Asciano is not suggesting that this approach is an inappropriate strategy for Aurizon to pursue, but that the regulatory regime and the QCA needs to respond to this Aurizon strategy in order to ensure ongoing above rail competition and avoid the loss of economic benefits that this competition has produced (and will produce in the future). An additional reason why the 2013 DAU non-discrimination regime should be significantly more robust than the regime contained within the 2010 AU is because of the capital investments which may be undertaken both in the existing network and in the construction of new track. In this area, the potential for discrimination is particularly acute as detailed later in this submission. However, Aurizon is proposing a weakening of the non-discrimination provisions in a number of key areas. A key example of this is the inclusion of section 3.23 in the 2013 DAU which allows Aurizon to apply for a waiver of any of its obligations under Part 3 of the 2013 DAU. As such, the 2013 DAU as currently drafted creates uncertainty and gives Aurizon and Aurizon Network an opportunity to avoid its obligations. Section 3.23 should be removed from the 2013 DAU.

In assessing Aurizon's approach to discrimination in the 2013 DAU and whether it meets the requirements of an appropriate non discrimination regime, it is important to refer to the QCA Act. Clause 137(1A) of the QCA Act states:

*An access undertaking for a service owned or operated by a related access provider must include provisions for –*

*(a) Identifying, preventing and remedying conduct of the related access provider that unfairly differentiates in a material way between –*

<sup>3</sup> For example, see the Aurizon Investor Briefing 18 July 2013 p21

<sup>4</sup> Page references in these dot points reference the Aurizon Investor Briefing 18 July 2013

- (i) *In negotiating access agreements, or amendments to access agreements, relating to the service – access seekers; or*
- (ii) *In providing access to the service –users; and*
- (b) *Preventing the related access provider recovering, through the price of access to the service, costs that are not reasonably attributable to the provision of the service “*

In this context related access provider is defined as:

*... in relation to a service, means an access provider that –*

- (a) *Owns and operates the service; and*
- (b) *Provides, or proposes to provide, access to the service to itself or a related body corporate of the access provider.*

There are three key concepts in clause 137(1A) of the QCA Act, namely identifying, preventing and remedying discrimination. This section of the Asciano submission assesses how the 2013 DAU addresses these three key requirements of the QCA Act.

The remainder of this section of the Asciano submission is set out as follows. The section “Types of Discrimination” looks at the types of discrimination that can occur as it is important to keep these in mind when assessing the effectiveness of the 2013 DAU in identifying, preventing and remedying discrimination. The section “Asciano Undertakings” describes Asciano’s experience in complying with an ACCC Undertaking, which will provide useful context for assessing the validity of the approach that Aurizon are proposing. The sections “Identifying”, “Preventing” and “Remedying” each consider in turn the three key concepts of identifying, preventing and remedying discrimination, and assessing the effectiveness of the proposed approach in 2013 DAU against regulatory best practice and making recommendations for improvement.

### Types of Discrimination

As well as obvious examples of discrimination, such as the breaches of 2010 AU that have been revealed to Asciano over the last three years (including for example the differential ancillary charges applying to the Aurizon above rail and the Pacific National Coal above rail business), there are more subtle forms of discrimination open to Aurizon. It is useful to understand these more subtle forms of discrimination when assessing the effectiveness of the proposed 2013 DAU in identifying, preventing and remedying discrimination. This submission outlines four examples of such discrimination below.

Example 1: Timing of Investment: There is the potential for network capacity investment to be used to favour one rail haulage provider's service offering. For example, consider the situation where a coal company is developing a new mine and requires a capacity expansion on the main line in order for it to move its forecast tonnes. In responding, Aurizon Network indicates that given its current commitments it would be in a position to increase capacity within 18 months, but if the coal company's above rail operator was to be Aurizon’s coal haulage operator it could increase capacity within 9 months. This conduct in effect undermines competition in the above rail market. The type of discrimination will be facilitated where there is not strong independent and separate

management of Aurizon Network and reinforces the need for strong audit and information gathering powers for the QCA.

Example 2: Timing of Maintenance: There is the potential for performance of the network to be used in subtle ways so that one rail haulage provider's service quality to its customers is degraded. For example, if a particular part of the network such as a spur line was used either exclusively or much more significantly by a third party operator (rather than Aurizon), then less frequent or inferior maintenance of that spur would have a differential impact on the service being offered by the third party operator.

Over time, the resulting lower performance of that part of the network could lead customers to regard the third party operator's service quality as inferior compared to Aurizon's. This would be through no fault of the third party operator but due to the way in which Aurizon Network prioritised maintenance of different parts of the network. This type of discrimination would not necessarily be immediately obvious to the third party operator.

The potential for this type of non-transparent discrimination is why it is essential that the power which is given to the QCA to monitor compliance with the access undertaking is implemented in a robust way to ensure that the potential discrimination can be detected. It also highlights the importance of the need for compliance focused KPIs which are transparently monitored and the need for a system whereby investigations are undertaken when KPIs indicate a potential issue.

Example 3: Management of Constraints: The management of incidents on the network is another area where there is the potential for Aurizon Network to unfairly discriminate between rail operators. For example, if a portion of the track is damaged Aurizon Network would have to decide how it should allocate the available constrained capacity. Aurizon Network could favour its related operator in any such allocation.<sup>5</sup>

Example 4: Aurizon Network Reducing Access Pricing: Aurizon Network could set access prices at a lower level should the coal company sign up with Aurizon above rail. In such a scenario Aurizon Network would avoid being in breach of the access undertaking by also offering other above rail operators the same access price, but such an offer would be irrelevant as the above rail contract has already been committed to Aurizon above rail. This form of discrimination has an added attraction to Aurizon as the regulatory regime allows Aurizon Network to increase prices elsewhere to ensure their revenue cap is maintained – thus other users and operators may effectively be funding the discount offered to secure the above rail.

### Asciano Undertakings

On 18th April 2006 the Australian Competition and Consumer Commission (ACCC) accepted Asciano Undertakings under Section 87B of the Trade Practices Act. These undertakings were in force until 31 March 2011. The main thrust of these undertakings was that Asciano could not discriminate in favour of Toll compared to its other customers. Asciano was substantially formed from assets and businesses which were at least partially owned by Toll.

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<sup>5</sup> For example in the 2013 DAU Schedule H 7.4 (c) Aurizon Network can depart from its traffic management matrix after an incident or a Force Majeure event.

The ACCC used its powers through the undertakings to ensure that Asciano complied with the undertakings. The keys to ensuring this compliance were the following factors:

- there were significant consequences in the event of non compliance, namely that Asciano would have to divest 50 per cent of its Pacific National business;
- there was a requirement to have compliance with the undertakings audited;
- the ACCC had a right to approve an auditor of the undertakings. The ACCC used this power to ensure that RSM Bird Cameron was appointed as the auditor. The auditor was very active in dictating the compliance framework. It was made plain to Asciano that the more robust the internal compliance framework was the less invasive the external audit would need to be. Asciano and RSM Bird Cameron worked together to develop the Asciano internal compliance regime.
- there was a compliance risk assessment undertaken by Asciano at the start of the undertakings which identified the key areas where compliance focus was required – both in terms of individuals and in terms of business units.

Key features of the ACCC undertakings compliance regime were:

- audits - Regular six monthly external audits conducted by independent auditor approved by the regulator;
- customer surveys - Regular six monthly customer surveys of Asciano's biggest customers to assess compliance and inform the focus of the external audit;
- issues register - The maintenance of an issues register. Any issues raised by internal or external parties, via the whistleblower line or any other source were recorded in the issues register along with the actions taken for resolution. The issues register was used by the auditor to focus their audits.
- information gathering - The unconstrained information gathering power of the regulator. The undertakings gave the ACCC almost unlimited information gathering power.
- compliance KPI reporting - The detailed and regular compliance KPI reporting to both the ACCC and the auditor. The KPIs monitored and reported were directly related to compliance. Any variance to the expected KPIs was investigated and the result of the investigation shared with the auditor and the ACCC.
- internal compliance manager - The appointment of dedicated internal compliance manager. The compliance manager had the following specific responsibilities:
  - Ensuring that the compliance regime remained relevant and effective;
  - Implementing recommendations following the six monthly audits of the regime;
  - Ensuring that relevant staff were appropriately trained and familiar with the obligations under the non-discrimination regime;
  - Investigating internal and external complaints of discriminatory conduct; and
  - Answering staff queries about the non-discrimination regime.
- CEO statement of compliance - A statement of compliance signed by the CEO was provided to the ACCC at six monthly intervals. This was only signed once all the key individuals identified in the risk assessment had also signed a declaration confirming compliance and that any

issues they were aware of had been raised with the compliance manager. This was a very effective tool ensuring that all potential issues were raised with the compliance manager.

- employee compliance guides - Employee compliance guides were developed in plain English and provided throughout Asciano.
- compliance training - Annual compliance training was provided to all senior managers. In addition a six monthly update was given to senior managers on the outcomes of the audit reports and the required actions which were identified. For the areas of higher risk identified in the initial risk assessment additional operational training was provided. A training register was maintained and was audited by the external auditor.
- internal audit - A rolling internal audit program was implemented to review and test that the controls which had been developed were being complied with within the organisation.
- intranet information dissemination - Information on the undertakings was distributed via Asciano's intranet sites. The information included details of the undertakings, the compliance manuals, contact details for the compliance manager and details on the "whistleblower" process.
- whistleblower reporting line - An externally provided confidential and anonymous whistleblower reporting line was instituted. A detailed policy was put in place for dealing with whistleblower complainants. Asciano policy was that no action would be taken against a whistleblower but disciplinary action will be taken against those who carelessly or deliberately breached the undertakings obligations. The whistleblower line was widely advertised.
- compliance process - A clear process and policy was created for managing undertaking compliance complaints. Key customers and staff were advised of the process under which all complaints were passed to and followed up by the compliance manager. A register of all complaints and the actions undertaken was maintained.

A number of the features of Asciano's compliance regime were not specified in the ACCC undertakings and Asciano put these in place in consultation with the auditor.

In Aurizon Network's case Asciano strongly believes that similar features to those above should be specified in the 2013 DAU. The need for these features is due to:

- Aurizon's documented failures to comply with the provisions of the 2010 AU;
- Aurizon's strategy of minimising the ongoing regulatory constraints on its business;
- the lack of pro-activity of the external ring fencing compliance auditor; and
- the Aurizon legalistic approach and black letter interpretation of the 2010 AU (for example Aurizon's reliance on lawyers to limit the effectiveness of the audit process in the 2010 AU).

### Identifying

Based on Asciano's experience of an undertaking designed to prevent discrimination (as outlined above), an effective regime for identifying discrimination must have at a minimum:

- a robust external audit process including discussion with, and input from, customers;
- a robust and effective internal audit process;
- a confidential reporting line (such as a whistleblower line);

- a robust and effective complaint handling procedure;
- a breach disclosure process;
- an internal process for declaration of compliance for all key individuals;
- an issues register;
- a requirement to produce meaningful and timely compliance focused KPIs; and
- strong regulatory information gathering powers.

The 2013 DAU does not include an internal audit procedure, a confidential reporting line, requirement for compliance declaration, or an issues register. At a minimum a requirement for implementing these controls should be included in 2013 DAU. In addition processes that do exist (such as external audit processes) must be strengthened.

The 2013 DAU contains a breach reporting process at section 10.2 of the DAU which provides for any breaches to be reported to the QCA. Asciano believes that this process is adequate in regard to reporting to the QCA but it should be extended so Aurizon Network report any breach to an access seeker, access holder or train operator if such a breach adversely affects their interests

The complaint handling process contained in section 3.22 of the DAU is adequate.

QCA Information Gathering Powers: As noted above the information gathering power of the QCA is one of the keys to identifying discrimination by Aurizon Network, particularly given the potential subtle forms of discrimination that were described above in section "Types of Discrimination".

There are two key areas in the 2013 DAU where Aurizon Network is seeking to constrain the information gathering powers of the QCA. These are both of concern to Asciano.

In Clause 10.3.1 of the 2013 DAU, which deals with access agreement disclosure, it is unclear to Asciano why:

- a new category of "Below Rail aspects" has been created for this clause and what those aspects are, noting that "Below Rail" is not itself a defined term; and
- Aurizon Network is seeking to withhold information from the access agreement before presenting it to the QCA (particularly given that the access agreements are not being published).

Asciano notes with concern that some of the terms Aurizon Network is proposing to withhold (for example insurance provisions, rolling stock configurations) and which are not "Below Rail aspects" are precisely the areas in which discrimination is likely to occur.

In clause 10.3.2(b) of the 2013 DAU Aurizon Network is also seeking to limit the QCA's information gathering powers which it requires in order to perform its obligations under the access undertaking. Aurizon Network may refuse to provide information requested by the QCA if it has "reasonable excuse for non compliance". The term "reasonable excuse" is very broad and substantially diminishes the effectiveness of the QCA information gathering powers. This has not changed from the 2010 AU, but the need for strong information gathering powers have increased due to Aurizon's clear strategy of seeking to minimise regulation's impact on its business and attempting to take advantage of its vertically integrated monopoly position and its changed structure. Aurizon



should be obliged to always comply with an information request from the QCA. The attitude inherent in this current Aurizon Network approach is that Aurizon Network compliance with the access undertaking is not seen as a core value or principle of the organisation but compliance may be undertaken at its discretion if it does not inconvenience the activities of the organisation.

External Audit: An effective external audit is another key to identifying discrimination by Aurizon Network, particularly given the multiple and detailed forms that discrimination can take. Stakeholders have been frustrated with the lack of effectiveness and transparency in the 2010 AU audit regime and believe it should be strengthened. However, Aurizon Network has weakened the audit provisions in 2013 DAU at the very time when Aurizon's strategy dictates they should be strengthened and expanded in scope.

The audit provisions proposed in 2013 DAU are no longer automatic (i.e. an audit is no longer required every year), the auditor no longer has to be approved by the QCA (as it did under the 2010 AU), the audit scope is limited (as it was under the 2010 AU) and the 2013 DAU provisions only give limited power to the QCA to ensure an effective audit is undertaken (as they were under the 2010 AU). There is no role for customers or competitors in the 2013 DAU audit process. Asciano believes that this is a major failing of the audit provisions proposed in 2013 DAU as third parties would be able to direct the auditor to examine areas of interest which may otherwise be overlooked.

Whilst some of the audit provisions in the 2013 DAU are appropriate Asciano believe that the following should be added to the regime:

- Auditor Approval Without Constraint - The auditor should be able to be approved and appointed by the QCA without constraint. Under the 2010 AU Aurizon Network were able to use an auditor whose independence had been undermined (the auditor sought to amend advice provided to Asciano related to the 2010 AU after Aurizon had been made aware that the auditor had undertaken the work for Asciano). In addition the auditor, PWC, earned fees from Aurizon in 2012/13 of \$2.136m<sup>6</sup> for non audit work and would be expected to earn an additional \$1-1.5m for conducting the financial audit. As a comparator, in relation to Asciano's undertakings as outlined above RSM Bird Cameron had no existing relationship with Asciano and earned no fees from Asciano. This requirement for independence is a common requirement in undertakings to the ACCC.
- Annual External audit - Each year an external compliance audit must be conducted. This audit should include an audit of Aurizon's Network's compliance with its access undertaking obligations under:
  - section 3 (Ring fencing Arrangements);
  - section 4 (Negotiation Framework);
  - section 7 (Capacity Allocation); and
  - section 10 (Reporting).

Other access undertaking sections may also be subject to audit at the discretion of the QCA and the auditor. In particular if a stakeholder presents a case for an audit of another section of

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<sup>6</sup> See the Aurizon Annual Report 2012 - 13 p26

the undertaking then this should be acted upon by the auditor. In addition, the QCA should also be able to undertake an audit of Aurizon's compliance at any time in relation to a complaint alleging a breach of the access undertaking or where the QCA reasonably believes such an audit is necessary.

- Stakeholder Consultation Required - The auditor should be required to consult with all access holders and above rail operators in advance of the audit to inform them of the focus of their audit. The auditor should also be allowed to consult with other stakeholder parties (e.g. end users, interconnecting infrastructure owners) during the course of the audit.
- Audit Report - The audit should provide both a confidential report (to the QCA) and a public report posted on the QCA's website outlining Aurizon Network's compliance or otherwise with its access undertaking. The public report should include any recommendations made to Aurizon Network to improve compliance.
- Implementation of Recommendations - Each annual audit should assess whether the previous year audit's recommendations to Aurizon Network have been effectively implemented. If the recommendations have not been implemented then the non-implementation should be a subject of the audit and the QCA should be able to require Aurizon Network to address any non-compliance identified.
- Repeat of Audit - The QCA should have a right to require the audit to be redone if it is not satisfied with the rigour of the audit.

#### **Summary of Recommendations for Improving the 2013 DAU In Order to Better Identify Discrimination**

The 2013 DAU should be amended to introduce a:

- regular internal audit;
- a confidential reporting line;
- requirement for internal compliance declaration from the CEO and all key senior managers across Aurizon; and
- an issues register that can be viewed by the auditors and the QCA.

The 2013 DAU should be amended to allow improved QCA information gathering powers and an improved audit procedure in order to increase the QCA's influence and provide transparency and accountability in the audit process namely:

- the auditor should be approved by the QCA without constraint and be certified by the QCA to be independent;
- each year an external compliance audit should be conducted;
- the auditor should be required to consult with all above rail operators;
- the audit should provide both a confidential report (to the QCA) and a public report;
- each audit should confirm the previous year's recommendations have been effectively implemented; and
- the QCA should be able to require the audit to be redone.

The restrictions on the QCA information gathering powers in 10.3.1 and 10.3.2.b should be removed.

## Preventing

The most effective way to prevent discrimination is to have management incentives aligned to compliance either via imposing significant consequences in the event of a breach and / or via independent management of the network business. Here there are not sufficiently serious consequences of breach to create incentives for compliance and therefore effective provisions for independent management are crucial. Independent management requires that the management is remunerated only on Aurizon Network's performance rather than Aurizon as a whole. In this way Aurizon Network's management will take decision in the best interests of the network and not seek to exploit its monopoly vertically integrated power by discriminating in favour of its above rail business. Management independence comes via a number of means, including:

- an independent Board;
- an independent executive management team;
- strong limitations on staff exchange; and
- strong information control, with minimal information transfer between the regulated entity and organisation as a whole.

In addition to the two key limbs of preventing discrimination (significant consequence and management independence), the prevention of discrimination also requires an effective and well resourced compliance program, continuing compliance training for all relevant staff, and most importantly there needs to be a culture which supports compliance within the organisation (such a culture is likely to flow from having senior management champion this culture). Asciano believes that at the present time there is little genuine commitment by Aurizon to ensure a strong ring fencing and compliance culture, with the current efforts being little more than a sham.

Asciano has strong concerns that the provisions aimed at preventing discrimination in the 2013 DAU have been significantly weakened since the 2010 AU. The weakening of these provisions needs to be rectified.

Asciano provides comment on the two key limbs of preventing discrimination below.

### *Consequences for Breach*

Currently there is opportunity through the QCA Act for the QCA or other third parties to take Aurizon Network to court for a breach of the QCA Act or of undertakings.<sup>7</sup> However, such action would only occur on significant breaches that would warrant the cost and management time and effort required to undertake a major court action. As a result there are no consequences for smaller breaches. For example the three 2010 AU breaches of which Asciano is aware have had no adverse consequences for either Aurizon Network or Aurizon.

<sup>7</sup> For example see section 158A and 153 of the QCA Act in respect of orders to enforce prohibitions on hindering access and unfair differentiation and orders to enforce approved access undertakings.

In order to remedy this issue Asciano recommends the introduction of a penalty regime similar to the Infringement Notices regime used by the ACCC<sup>8</sup>. Infringement notices are designed to provide a timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the Competition and Consumer Act. The ACCC may issue an infringement notice where it has reasonable grounds to believe that a person has contravened certain consumer protection provisions of the Competition and Consumer Act. To be valid, the ACCC must issue an infringement notice within 12 months of the alleged contravention.

The penalty amount in each infringement notice varies, depending on the alleged contravention, but in most cases is fixed at \$10,200 for a corporation and \$102,000 for a listed corporation.

The ACCC takes into account a broad range of sometimes competing factors in considering whether to seek to resolve a matter through the issuing of an infringement notice. The ACCC is more likely to the use of an infringement notice where:

- the contravening conduct is relatively minor or less serious;
- there have been isolated or non-systemic instances of non-compliance;
- there have been lower levels of consumer harm or detriment;
- the facts are not in dispute or where the ACCC considers the circumstances giving rise to the allegations are not controversial; and
- where infringement notices form part of a broader industry or sectoral compliance and enforcement program following the ACCC raising concerns about industry wide conduct.

A similar scheme to the ACCC Infringement notice regime should be included in 2013 DAU, allowing the QCA to issue infringement notice. Such a scheme would seem ideal in meeting the prevention requirement set out in Section 137.1A of the QCA Act, and whilst a legislative change may be required for the QCA to be able to impose a fine, it would be possible for the infringement notice to require forfeiting of some proportion of access fees relevant to the breach or to require other remediation steps to be undertaken.

Asciano remains concerned that in the absence of any meaningful consequences for breaches of the Undertaking there is no meaningful incentive on Aurizon to comply and there will be no genuine compliance culture within Aurizon.

### *Management Independence*

Board - Aurizon Network has a separate board from the Aurizon Holdings Board. However, the Aurizon Network board provides no independent management and (given its composition) cannot be said to provide governance separate from the interests of the Aurizon Holdings Board. The Aurizon Network board can neither independently nor effectively consider Aurizon Network issues separately from the broader Aurizon Holdings considerations.

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<sup>8</sup> See ACCC (2013) "Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission" available at the website below:

<http://www.accc.gov.au/system/files/Infringement%20notices%20%20Guidelines%20on%20the%20use%20of%20infringement%20notices.doc>

Table 6.1 below outlines the membership of the Aurizon Network Board<sup>9</sup> as at September 2013. Each of the Directors with the exception of Mike Carter as CEO of Aurizon Network also sits on the Aurizon Holdings board. Each has a substantial holding of Aurizon shares and each receives significant remuneration from Aurizon Holdings. Thus there is no independence of the Aurizon Network board and it is just a subset of the Aurizon Holdings board. Its members are remunerated not on the performance of Aurizon Network but the performance of Aurizon Holdings including the performance of the Aurizon related above rail operator.

**Table 6.1: Current Membership of the Aurizon Network Board**

Director	Position	Member of Aurizon Holding Board	Shares in Aurizon Holdings Ltd	Remuneration from Aurizon Holdings 2013
Lance Hockeridge	CEO & MD Aurizon Holdings	✓	872,096	6,110,000
John Atkin	Non Executive Director	✓	35,072	190,000
John Cooper	Non Executive Director	✓	20,000	190,000
Graeme John	Non Executive Director	✓	57,132	190,000
Mike Carter	EVP Aurizon Networks <sup>10</sup>	✓		1,954,000

Thus the Aurizon Network Board is controlled by directors who are also directors of Aurizon Holdings with only minimal restraints on the terms on which they can enter into agreements with a related company. The board of directors of Aurizon Network can take into account the interests of Aurizon Holdings in addition to Aurizon Network's own interests in making decisions, the only prohibition being that it must not enter into an access agreement with a related company unless it is reasonably satisfied the agreement is on arms-length terms<sup>11</sup>.

The requirement that the Board of Aurizon Network must be satisfied that any access agreement between Aurizon Network and another Aurizon company is on arms-length terms is of little use in protecting third parties from discriminatory conduct. The "arms-length" limitation does not address the way in which Aurizon Network negotiates with other rail operators as opposed to itself, nor

<sup>9</sup> Source ASIC search on 11 September 2013 and Aurizon Holding Annual Report 2012-2013

<sup>10</sup> Although it has been announced that Mike Carter would no longer be EVP Aurizon Networks he has not been removed from the Aurizon Network Board

<sup>11</sup> See section 438H of the Queensland Transport Infrastructure Act

does it address operational matters and other matters which may be discriminatory but which are not specifically addressed in the agreement.

In order to effectively reduce Aurizon Network's ability and incentives to favour the interests of its related above rail operator, the chairperson and the majority of directors of the board of Aurizon Network must be independent. Independence in this context is a much more fundamental requirement than not being a current or former employee of, or consultant or service provider to, an Aurizon company as embodied in the "eligible person" definition in the Transport Infrastructure Act.

To actually provide real independent governance and oversight the majority of the Directors on Aurizon Network's board must be independent of Aurizon Holding with independence defined as someone whom:

- is not a direct holder of securities of an Aurizon Party or an officer of, or otherwise associated directly with, a holder of securities of an Aurizon Party;
- has no material contractual relationship with any Aurizon Party or another group member other than as a Director; and
- is free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with the Director's ability to act in the best interests of Aurizon Network.

In addition, there should be an express obligation on the directors of Aurizon Network to act solely in Aurizon Network's best interests in matters which relate to its activities as network owner and operator under the Queensland access regime.

Executive Management Independence - Section 3 of 2010 AU deals with the issue of executive management independence. The purpose of Section 3 of the access undertaking has changed significantly and this is reflected in the proposed operative clauses. In 2010 AU the purpose is stated as:<sup>12</sup>

*... to ensure that the provision of Below Rail Services by QR Network is managed independently of the provision of Above Rail Services by Related Operators*

In the 2013 DAU the purpose of section 3 is to aid Aurizon's Network compliance with key clauses in the QCA Act which are restated in clause 3.1 (g). No thought has been given as to how this compliance will be achieved (i.e. there is very little in the following clauses that provide any constraint on Aurizon Network's behaviour). This change from the 2010 AU to the 2013 DAU is reflected in the 2013 DAU removing the key clause 3.3 in 2010 AU which requires the separation and audit of Aurizon Network. In the 2013 DAU, Aurizon Network is failing to meet the requirements of section 137 (1A) of the QCA Act by the significant weakening of section 3 of the access undertaking.

Clause 3.5 of the 2013 DAU purportedly provides some independent management protection. However, all it states is that the core access functions will not be undertaken by the Related Operator – which is narrowly defined as the functional unit that carries out above rail operations.

<sup>12</sup> See Aurizon Network's (then QR Network's) 2010 Access Undertaking clause 3.1.1

Thus any part of Aurizon Holdings, including any part which has a direct commercial interest in exploiting their vertically integrated monopoly position to restrict competition in above rail, can undertake many of Aurizon Network's core access functions. This is completely unacceptable and Aurizon's core network functions should be undertaken by an independent Aurizon Network operating in a non-discriminatory manner.

Clause 3.5 of the 2013 DAU also allows Aurizon Network to undertake non core access function (more accurately unregulated functions). Any organisation genuinely committed to compliance and non discrimination would have a separate organisation undertaking regulated activities to facilitate the implementation of compliance and checking and audit of compliance.

Clause 3.6 of the 2013 DAU attempts to provide some restrictions on staff providing services for both Aurizon Network and its Related Operator but these restrictions are illusory. The clause states that if an employee's work primarily involves the performance of core access related functions then they will work primarily for Aurizon Network and not undertake any work at the direction of a related operator. This limitation is very weak. So for example a Related Operator employee who is rewarded on the performance of the Related Operator could provide train control services as long as more than 50% of their time was spent on non core access issues (e.g. related operator or even Aurizon Network non core access issues). In remote areas particularly this is not an unlikely scenario. This is unacceptable and will lead to discrimination. Aurizon Network should effectively be staffed as a separate business.

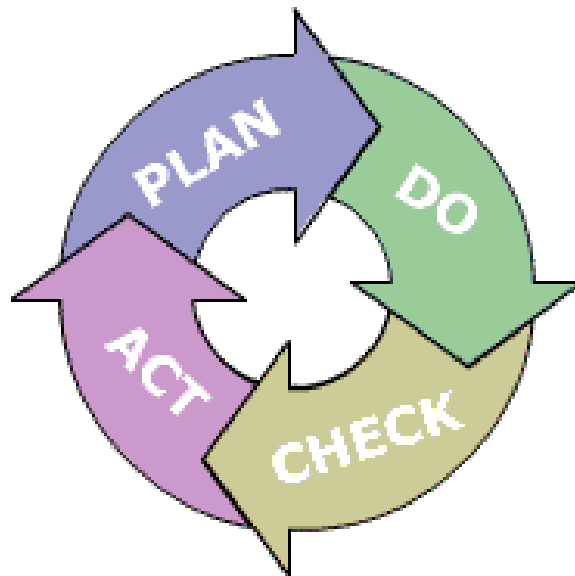
#### **Summary of Recommendations for Preventing Discrimination**

In order to prevent discrimination the 2013 DAU should at a minimum include:

- an Infringement Penalty regime operated by the QCA similar to that enforced by the ACCC;
- the requirement that the Chairman and majority of the Aurizon Network board are truly independent;
- the reinstatement of the clause in 2010 AU which requires the independent management of Aurizon Network;
- requirement that Aurizon's core network functions should be undertaken by Aurizon Network; and
- Aurizon Network staff should be prevented from undertaking non core access activities and Aurizon Network should effectively be staffed as a separate business.

#### **Remedying**

A standard approach to continuous improvement is the "plan, do, check and act cycle" as illustrated below. In the context of 2013 DAU the "Plan" is Aurizon's compliance plan, the "Do" is the actual operations, the "Check" is the audit and other compliance functions and the "Act" is responding to the result of the audits and other compliance monitoring. In this process the "Act" is the key for the remedying requirement of Section 137(1A) of the QCA Act.



In order to remedy any non-compliance there must be obligations in 2013 DAU on Aurizon to:

- implement the recommendations of the auditor including amending the access undertaking where required; and
- comply with a QCA order where the QCA requires changes to be made to ensure future compliance. For example this could include both a change to the undertaking and/or a change to Aurizon's compliance program.

Without these two clauses then the remedying part of Section 137 (1A) of the QCA Act cannot be met.

#### **Summary of Recommendations for Remedying Discrimination**

The 2013 DAU should include a requirement:

- to implement the recommendations of the auditor including amending the undertaking where required; and
- to comply with a QCA order where the QCA require the change to be made to ensure future compliance, including changes to the undertaking and/or changes to Aurizon's compliance program.

#### **Penalty Regime for Breaches**

The current penalties for breach of the undertaking are an order directing Aurizon to compensate anyone who has suffered loss or damage because of a breach or other order the Court considers appropriate (See sections 153 and 158A of the QCA Act, whereas the possible gains from driving out above rail competition and returning to an unregulated monopoly are substantially higher.

The penalties for serious or persistent breaches of the QCA Act and the Access Undertaking should be aligned with the possible gains that may arise from such breaches in order to provide a measure of deterrent.



## 6.2 Key Issue: Aurizon Network KPI Reporting

### Introduction

Key Performance Indicators (KPIs) are generally defined as measures that provide important information which enables an organisation and their stakeholders to understand the organisation's actual performance against the organisation's objectives and performance standards. In the case of Aurizon Network, stakeholders would be access holders and users and the organisation's broad objectives would be to establish:

*... processes for access negotiations and the utilisation of capacity that are expeditious, efficient, timely, commercial and non-discriminatory*

as specified as the intent of the 2013 DAU in clause 2.2 (b) (i).

The QCA Act clause 138 (2) (e) states that an undertaking should only be approved after having regard to the interests of persons seeking access. Asciano believes that it is in the interests of access seekers and access holders to have the performance of the access provider measured and recorded via a formal process.

Ultimately, Aurizon Network is a service provider of below-rail services, and like any service provider their performance should be should be measured against performance standards.

### Current KPI Programs

Clauses 9.1 and 9.2.2 of the 2010 AU required Aurizon Network to produce performance reports, however to date in practice these reports from Aurizon Network to the access holder are not either relevant or useful, particularly as the reports do not link performance to access agreements.

An access holder is effectively purchasing Train Service Entitlements from Aurizon Network but the access holder has a limited ability to monitor whether Aurizon Network is meeting its contractual obligations in relation to the contracted Train Service Entitlements they have been sold. In particular Aurizon Network's provision of access rights to access holders is not directly and transparently measured in these 2010 AU performance reports.

In addition to these 2010 AU KPI reports Asciano and Aurizon Network have been in discussions to develop more appropriate KPI reports. Asciano is seeking that these reports address actual performance against contracted Train Service Entitlements, transit times and track availability. Work on the development of these reports is ongoing but Asciano believes that there may be a benefit in including a requirement in the 2013 DAU to develop reports which address actual Aurizon Network performance against contracted Aurizon Network performance.

### 2013 DAU and KPIs

Clause 10.1.5 of the 2013 DAU obliges Aurizon Network to provide annual financial, compliance, cost, maintenance and operational reports to the QCA and have these reports made public via its corporate website. These reports contain high level and aggregated data and the information contained in these reports serves little purpose for an individual access holder as it does not provide them with timely information that allows them to monitor Aurizon Network's:

- performance against access agreements; and
- compliance with either the access undertaking or access agreements.

Asciano believes that in relation to operational information reporting, the 2013 DAU should include an obligation on Aurizon Network to report monthly on a set of operational KPIs to both the QCA and access holders. These KPIs should be measured consistently across all access agreements. The provision of this consistent information will allow the QCA to make comparisons of the level of service provided by Aurizon Network to different train operators and end users, and will more generally provide increased rail infrastructure performance information to supply chain participants which will in turn allow improved decision-making in relation to developing and implementing operational and commercial improvements in the coal supply chain.

Asciano believes that the KPIs outlined below measure the most important elements of Aurizon Network's performance, and these KPIs need to be measured and reported to meet the intent of the 2013 DAU as specified in clause 2.2 (b) (i) of the 2013 DAU. The KPIs below should be reported monthly as both monthly and year to date metrics so that the reporting is consistent with the contracted Train Service Entitlements (which is a monthly concept) and the contracted Take or Pay obligations (which is an annual concept).

These KPIs should be reported to the QCA and each access holder monthly by rail network system on an origin-destination pairing basis, an access agreement basis, an access holder basis (the aggregate of an access holders access agreement reports) and a total basis. Asciano notes that the 2013 DAU section 10.1.5 (c) currently seeks to exempt the Goonyella – Abbot Point system from separate reporting. Asciano believes that all systems with a separate tariff, including the Goonyella – Abbot Point system, must have their performance reported separately.

Asciano believes the KPIs to be reported monthly should include:

- Sectional Run Time (SRT) Performance: This KPI measures Aurizon Network's reliability where actual SRTs are assessed against SRTs contained in the relevant access agreements;
- Below Rail Transit Time (BRTT) Performance<sup>13</sup>: This KPI measures Aurizon Network's reliability where actual BRTTs are assessed against SRTs as contained in the relevant access agreement plus the published BRTT percentage factor as outlined in the 2013 DAU for the relevant coal system.
- Contracted against Actual Train Service Entitlements Consumption: This KPI measures an access holder's consumption of Train Service Entitlements and allows for the tracking of their Take or Pay liability. Actual Train Service Entitlement consumption is assessed against contracted Train Service Entitlements. The contracted Train Service Entitlements should identify and deduct those Train Service Entitlements that were cancelled as a result of Aurizon Network causes and force majeure events.
- Availability Days: This KPI measures network availability where the number of days the network was actually made available to deliver full contractual Train Service Entitlements is

<sup>13</sup> Asciano recognises that BRTTs are included in the 2013 DAU as a performance measure to be reported annually. However Asciano is seeking that BRTTs be reported monthly in relation to individual access agreements. In addition Asciano believes that BRTTs should be measured differently to the manner described by the DAU 2013 in the Standard Operator Access Agreement

assessed against the target number of days that is required to deliver full Train Service Entitlements.

- **Actual vs Forecast System Gross Tonne Kilometres (GTKs):** This KPI measures system performance where actual GTKs are assessed against the system forecast GTKs approved by the QCA.

Asciano believes that to the extent that further KPIs contained in the DAU 2013 section 10.1.5 can be reported monthly these should also be included in the monthly KPI reports.

In addition to the KPIs above Asciano believes that there should be a further obligation on Aurizon Network to produce further disaggregated KPIs (for example geographical KPIs) if requested by the QCA as a result of a reasonable complaint.

Asciano believes that the KPIs above should be incorporated into both the 2013 DAU and the KPI reporting obligations in individual access agreements (i.e. the KPI report obligations including the above KPIs should be included in the Standard Access Agreement). Each of the above KPIs must be measured and reported against each "origin to destination" pair in an individual Access Agreement. This will provide access holders with sufficient detail to enable them to make informed assessments and decisions on issues such as Take or Pay liability and Train Service Entitlement consumption. Under the 2013 DAU Aurizon Network should be obliged to compile, and the QCA should have access to, a master KPI report containing all of the KPI reports of each individual Access Agreement, which would act as an auditing and compliance tool. In particular such a report is likely to highlight any substantial or systemic differential treatment of above rail operators by Aurizon Network.

The establishment of KPI reporting is in the interests of access seekers and access holders as it allows the measurement of Aurizon Network's performance. More specifically, the establishment of KPI reporting gives access holders and the QCA the capability to assess whether Aurizon Network is complying with their obligations set out in the 2013 DAU and access agreements. It is important that the KPIs above are applied consistently across all Access Agreements to encourage non-discriminatory treatment of access holders.

Having the KPIs measured and visible to access holders also requires Aurizon Network to be more accountable for their performance. Having visible KPIs would provide greater comfort on issues of contractual compliance and should allow any non-compliances to be identified and rectified. The increased transparency arising from the KPIs will contribute to ensuring Aurizon Network complies with their obligations as set out in the Access Undertaking and Access Agreements.

In summary, in an environment where access rights operate under a Take or Pay arrangement and where Aurizon Network are protected by a revenue cap regime, Asciano strongly believes it is necessary that access holders have the ability to assess Aurizon Network's performance in relation to their provision of access rights against their obligations outlined in their access agreements and the access undertaking. Ultimately, Aurizon Network is a service provider, and their performance should be should be measured against performance standards.

### Summary of Recommendations for Improving KPI Reporting in the 2013 DAU

The 2013 DAU should be amended to introduce monthly operational KPI reporting to the QCA and access holders by system on an origin-destination pairing basis, an access agreement basis, an access holder basis and a total basis. KPIs to be reported should include at a minimum:

- sectional run time performance;
- below rail transit time performance;
- contracted vs actual Train Service Entitlements consumption;
- availability days; and
- actual vs forecast system GTKs.

Similar KPI reporting obligations should also be included in individual Access Agreements

## 6.3 Key Issue: Incentive Mechanism

There are no requirements in the 2013 DAU for Aurizon Network to develop and implement an incentive mechanism. Asciano is concerned that the 2013 DAU does not have sufficient performance related incentives in place to drive efficient behaviours by Aurizon Network and the lack of a 2013 DAU requirement to develop and implement an incentive mechanism exacerbates these concerns.

Aurizon Network has previously submitted to the QCA a proposed Draft Incentive Mechanism (DIM) via a proposed Draft Amending Access Undertaking on 30 April 2012. The DIM was submitted as per the requirement set out in clause 2.6 of the 2010 AU.

Asciano submitted a response on Aurizon Network's DIM proposal to the QCA in August 2012. The views Asciano put forward in the August 2012 submission have not changed. Asciano strongly supports the development of an incentive mechanism that drives efficiency improvements throughout both Aurizon Network's operations and the broader supply chain. Consequently Asciano strongly supports the inclusion of a requirement in the 2013 DAU that Aurizon Network develops and implements an incentive mechanism. Such an incentive mechanism will provide Aurizon Network with an incentive to efficiently maintain, operate and invest in rail infrastructure; this in turn will promote the efficiency of the coal supply chain.

The 2013 DAU regulatory framework has adopted a framework that minimises Aurizon Network's revenue downside by minimising Aurizon Network's exposure to volume risk and other risks. The risk minimising features of the 2013 DAU regulatory framework include the revenue cap regime, the take or pay methodology and the network development and expansion principles. These features of the 2013 DAU all minimise risk and result in Aurizon Network not having sufficient incentive to seek improvements in operating efficiency and investment efficiency.

Asciano believes that the QCA Act supports the implementation of an incentive mechanism. The objective of an access regime as outlined in section 69E of the QCA Act is to:

*... promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

Asciano believes that in order to meet this objective there must be mechanisms in place that ensure Aurizon Network is provided with sufficient incentives to efficiently operate and invest in rail infrastructure in such a way that promotes effective competition in the supply chain.

Similarly the QCA Act section 168A (d) outlines that one of the principles underpinning the pricing of access is that the price should:

*...provide incentives to reduce costs or otherwise improve productivity*

The development and implementation of an incentive mechanism with a linkage to pricing would enable this pricing principle to be met.

Asciano supports the development of an incentive mechanism that will allow some of Aurizon Network's revenue to be linked to Aurizon Network's performance on the basis that Aurizon Network should have commercial incentives to drive productive efficiencies.

Asciano believes that any Aurizon Network incentive mechanism must incorporate the following concepts:

- the incentive mechanism must contain performance metrics that are desirable and valuable to the coal supply chain. The performance metrics should represent service attributes that users value most highly.
- the incentive mechanism should be linked to contracted access entitlements of access holders. Performance metrics should have direct and strong links with the performance and commercial outcomes agreed between Aurizon Network and access holders in their respective Access Agreements.
- the incentive mechanism should not be linked to aggregate system performance as this approach has the potential to result in Aurizon Network providing different levels of service to different operators (and coal chain users) while still meeting incentive targets. In such a scenario there is potential for an operator (or coal chain user) to receive sub-standard service but still be required to pay a performance incentive to Aurizon Network. The incentive mechanism should not have any potential for targets to be averaged across all operators (and coal chain users) thus hiding discrepancies between operators (and coal chain users).
- the incentive mechanism must be consistent with the regulatory framework. The metrics provided, the calculation methodologies and targets proposed must have a direct correlation to the contractual outcomes that underpin the revenue generated under the System Allowable Revenue and reference tariff constructs.
- the incentive mechanism must be designed to ensure symmetry between benefits for over performance and penalties for under performance. Considering this there also needs to be an appropriate matching between risks and rewards offered under the incentive mechanism.
- the incentive mechanism must be a genuine incentive that drives Aurizon Network to improve productive efficiency by imposing both a level of financial accountability and financial reward based on performance.

In the development and implementation of an incentive mechanism Asciano is particularly conscious of Aurizon's vertical integration. Asciano is concerned that since Aurizon Network provides network services to a related party, this may impact on the design and method adopted for the incentive mechanism. Aurizon Network has recognised that the strongest incentive it has to improve performance is the vertical integration of Aurizon, stating<sup>14</sup>

*the strongest financial incentive that it has is its vertical integration. If QRNN [i.e. Aurizon Network] does not contribute towards improvements in supply chain performance or find ways to increase throughput (including expanding the network where required), it will only harm the business as a whole. The power of this incentive cannot be understated as it comes back to its fundamental commercial business drivers and is not present in a vertically separated business. Any regulatory incentive regime will be suboptimal relative to the commercial incentives attributable to a vertically integrated supply chain.*

Based on Aurizon Network's reasoning above, Asciano believes that Aurizon Network's only incentive is to improve performance for only Aurizon trains. Aurizon Network have no incentive to improve performance for the trains of any third party operator, (indeed the above quote implies that Aurizon Network view Aurizon above and below rail as an integrated whole and the commercial business drivers of vertical integration are stronger than the regulatory regime).

Given Aurizon Network's commercial drivers to improve performance only for Aurizon trains Asciano believes that it is essential that an incentive mechanism developed under the 2013 DAU provides strong incentives for Aurizon Network to treat all access holders in a non-discriminatory manner.

Asciano believes that the incentive mechanism must have an appropriate balance between risks and rewards for Aurizon Network. It should be designed such that:

- benefits are received for over performance. Asciano believes that these benefits could be linked to an additional percentage above the System Allowable Revenue which can be retained outside any revenue adjustment mechanism;
- penalties apply for underperformance. Asciano believes that these penalties could be linked to an additional percentage below the System Allowable Revenue which would be paid outside any revenue adjustment mechanism;
- the benefits and penalties are symmetrical; and
- the main variable driving the incentive mechanism is tonnes of throughput (for example the main driver behind the incentive mechanism could be actual system tonnages compared to forecast). The coal supply chain is ultimately focused on tonnages and benefits and penalties should be linked to the fundamental coal system objective rather than secondary objectives such as paths available or paths utilised.

Such an incentive mechanism would, to some extent, replicate a price cap approach where an increase in volumes results in an increase in revenue.

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<sup>14</sup> QR National Network Services, Draft Incentive Mechanism: Amendments to 2010 Access Undertaking April 2012 p6

A factor to consider in the development and implementation of an incentive mechanism is how the mechanism would address the current potential for over-investment in the network (i.e. “gold-plating”). While an incentive mechanism focused on operational performance is likely to drive productive efficiency it may not necessarily drive efficiencies in capital investment. Thus while Asciano is proposing that an incentive mechanism would focus on productive efficiency Asciano would support any additions to the incentive mechanism which add to incentives for efficient capital investment.

The development and implementation of an incentive mechanism will require the development of a transparent and agreed information base and transparent statistical methods. Asciano believes that prior to the finalisation of any incentive mechanism the following need to be agreed:

- a transparent information base;
- a methodology for the derivation of the key values which drive the incentive mechanism;
- an appropriate range of target value ranges;
- an appropriate mechanism to link changes in revenue to the target values; and
- a process for independently auditing input information, methodology and incentive mechanism results.

#### **Summary of Recommendations for Developing and Implementing an Incentive Mechanism in the 2013 DAU**

The 2013 DAU should be amended to provide for the development and implementation of an incentive mechanism. The mechanism must include:

- relevant performance metrics and KPIs which are linked to performance, contracted access entitlements and regulatory framework outcomes (such as System Allowable Revenue and Reference Tariffs);
- linkages to individual operators rather than whole of system performance – this is required to ensure that differential treatment of operators (and other coal chain users) is not hidden by aggregated performance metrics; and
- a degree of symmetry between the incentives linked to over performance and under performance.

The incentive mechanism requires a transparent and agreed information base, methodology and target values. The mechanism also requires the development of an independent audit process to audit the operation of the incentive mechanism.

## **6.4 Key Issue: Improved Reference Tariff Structures**

### **Overview on 2013 DAU Pricing Structure**

The pricing principles under section 168A of the QCA Act allow for cost recovery, multi-part tariffs where they add to efficiency and require non-discriminatory pricing (unless justified by cost differences) and incentives for cost reduction or increased productivity.

Asciano believes that the 2013 DAU does not meet these criteria, and in particular the tariffs are inefficient as:

- price components do not reflect cost components; and
- in the case of the AT<sub>5</sub> tariff, tariffs may be levied on users who do not use the service associated with the tariff.

In addition the 2013 DAU tariff structure provides no incentives for cost reduction or increased productivity.

### Background to Revenue Cap Pricing Structure

Aurizon Network currently operates under a revenue cap regulatory regime where any over recovery of its approved revenue cap or under recovery of its approved revenue cap is returned (or recovered) through reference tariff adjustments.

This revenue cap regime was introduced shortly after the QCA's approval of the 2006 Access Undertaking (UT2) to apply from 1 July 2006. In February 2007, Aurizon Network<sup>15</sup> submitted proposed amendments to its then access undertaking (Schedule F amendments) for the QCA's approval. This submission sought to amend the form of regulation from a price cap arrangement to a revenue cap arrangement. Following a QCA decision to not approve these original proposed amendments Aurizon Network revised and resubmitted amendments which were approved by the QCA in 2007.

In shifting from a price cap arrangement to a revenue cap arrangement Aurizon Network's argument was based on removing volume risk. In particular, the following points were raised in their submission to the QCA (Queensland Rail Proposed Schedule F Amendment - Submission to the QCA, February 2007 pp 6-7):

- under the price cap arrangement, Aurizon Network argued that they were bearing a significant element of volume risk, which they were not compensated for;
- coal end users were best placed to manage the volume risk, and as such the volume risk should be attributed to the party or parties with the greatest control over volume; and
- alignment of the form of regulation within the coal supply chain was seen as desirable. At the time Dalrymple Bay Coal Terminal (DBCT) was managed under a revenue cap approach. Aurizon Network believed moving to a similar arrangement would more closely align the regulatory treatment of these two regulated infrastructure elements of the coal supply chain. Aurizon Network argued that there were significant benefits to the coal supply chain in having consistent regulatory frameworks applying to coal supply chain infrastructure as it would assist in aligning the incentives of the various parties in the coal supply chain in relation to ways in which capacity was contracted and circumstances in which investments would be made for additional capacity.

In response to Aurizon Network's submission, as outlined in their Decision of QR's Proposed Schedule F Amendment May 2007 (section 1 page1), the QCA stated:

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<sup>15</sup> Aurizon Network was then known as QR Network. This submission refers to the organisation as Aurizon Network throughout the submission in order to avoid confusion.



*The form of regulation, pricing structure and associated incentive mechanisms implemented in a regulatory environment should promote economic efficiency, appropriate investment, revenue adequacy and the public interest, and should ensure that risks are allocated to those best able to manage them.*

The above quote makes the point that the form of regulation, in this case revenue cap regulation, should adopt a pricing structure that promotes economic efficiency. The revenue cap arrangement has been in place for eight consecutive years and over this time, Aurizon Network has sought various amendments to the Reference Tariff components covered by the revenue cap.

When the revenue cap arrangement was endorsed by the QCA, the components of the Reference Tariffs to be covered by the revenue cap arrangement were the tariffs reflecting the cost of incremental capacity and allocated costs (i.e.; AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub>) plus the Take or Pay component (if required), Relinquishment Fees component (if required) and Transfer Fees component (if required). The AT<sub>5</sub> Reference Tariff component was also made part of this revenue cap arrangement separately as the electric infrastructure access tariff for each of the Blackwater and Goonyella systems.

The incremental maintenance tariff component AT<sub>1</sub> and the electric energy charge EC were not intended to be covered by the revenue cap arrangement as they were considered as direct variable costs.

### 2013 DAU Pricing Structure

The 2013 DAU proposes a significant increase to the AT<sub>2</sub> tariff component for each Coal System. A comparison of the AT<sub>2</sub> tariff components (2013/2014 dollars) of the 2010 AU and 2013 DAU is presented in the following table 6.4.1.

**Table 6.4.1: Proposed AT<sub>2</sub> Reference Tariff component – 2013-2014**

System	Transition 2010 AU AT <sub>2</sub> (\$ per train path)	Proposed 2013 DAU AT <sub>2</sub> (\$ per train path)	% Variance
Blackwater	2,019.37	5,030	149%
Goonyella	1,279.38	2,488	94%
Moura	604.88	612	1%
Newlands (excl GAPE)	270.45	6,976	2479%
GAPE	-	6,976	n/a

The increases to the Blackwater, Goonyella and Newland AT<sub>2</sub> incremental capacity charge are as a result of Aurizon Network's changed approach to include in the tariffs a pricing signal for future expansion investment requirements<sup>16</sup>. Asciano strongly disagrees with this new Aurizon Network approach; Asciano believes that the AT<sub>2</sub> tariff component was originally intended to reflect the cost of small increases in capacity and this intent should be preserved. Asciano believes that if a pricing

<sup>16</sup> See the Aurizon Network Presentation "Aurizon Network UT4 Stakeholder Consultation: Revenue Management" 2 July 2013 p16 which notes that the sizeable increase in AT<sub>2</sub> reflects the higher capital costs to create new capacity and the increase will benefit and disadvantage different users.

signal for future expansion is required it should be addressed via a separate tariff component linked to the expansion.

The assessment of the cost of capacity increments reflected in the AT<sub>2</sub> tariff component is highly dependent on the existing rail network configuration and as such the AT<sub>2</sub> tariff component should only reflect the cost of incremental capacity increases (i.e. increases linked to the investment required to add an extra train path), rather than the cost of major expansions.

On the basis that the cost of capacity increments reflected in the AT<sub>2</sub> tariff component is highly dependent on the existing network configuration, this implies that incremental capacity should only assume those costs associated with capacity expansions that retain the current quality of the service provided by Aurizon Network, such as sectional running times and transit times. For example, the incremental cost of a passing loop constructed to ensure the average sectional running time is maintained on a particular section of track in relation to the incremental increase in capacity should be reflected in the AT<sub>2</sub> tariff component.

The increase in the AT<sub>2</sub> tariff component also increases the fixed charge component of a train service (AT<sub>2</sub> is levied on a one-way train path and it does not vary with distance). The fixed nature of the tariff component increases the certainty of Aurizon Network's revenue collection.

Based on a sample set of train services and the proposed Reference Tariffs in the 2013 DAU, the AT<sub>2</sub> represents:

- on average 22% of the total AT<sub>1</sub> to AT<sub>4</sub> of a return train service in the Blackwater system; and
- on average 14% of the total AT<sub>1</sub> to AT<sub>4</sub> of a return service in the Goonyella system.

A comparison of these percentages to the percentages that would apply under the current transitional Reference Tariffs applying in 2013-14 is shown in the table below. This table calculates the total tariff charge for a sample set of train services and shows the proportion of this charge which arises from each individual tariff components under both the 2010 AU and the 2013 DAU. The table 6.4.2 below clearly shows the increase in the AT<sub>2</sub> tariff charge as a proportion of the total charge.

**Table 6.4.2: AT<sub>2</sub> average percentage proportion of AT<sub>1</sub> to AT<sub>4</sub>**

		AT <sub>1</sub>	AT <sub>2</sub>	AT <sub>3</sub>	AT <sub>4</sub>
2013 DAU	Blackwater	9%	22%	37%	32%
	Goonyella	7%	14%	40%	39%
2010 AU	Blackwater	12%	13%	39%	36%
	Goonyella	8%	10%	42%	40%
Variance 2013 vs 2010	Blackwater	-3%	9%	-3%	-4%
	Goonyella	-2%	4%	-1%	-1%

This table shows that the proportion of the AT<sub>2</sub> tariff component has increased compared to the other tariff components.

Along with this proportionate increase in the AT<sub>2</sub> components, what the above table also shows is that Aurizon Network has also decreased the proportion that the incremental maintenance AT<sub>1</sub> tariff component represents. The average percentage proportion of AT<sub>1</sub> tariff component (the non revenue cap component) has decreased 3% and 2% respectively for the Blackwater and Goonyella systems. As a result, the average proportion of the combined AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub> tariff components (the revenue cap components) increased by 3% and 2% respectively. This shows that incremental maintenance costs are being shifted into the revenue cap arrangement (i.e. in AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub> tariff components).

Asciano believes this is counter to the QCA Act criteria of aiding efficiency. Fixed, variable and incremental costs are not accurately reflected in the fixed, variable and incremental tariff components of the multi-part tariff structure. This approach is inconsistent with the reason for using a multi-part pricing structure contained in the QCA Act. This is outlined in section 168A (b) of the QCA Act which sets out pricing principles in relation to the pricing of access, including the use of multi-part tariffs, stating:

*The pricing principles in relation to the price of access to a service are that the price should ... (b) allow for multi-part pricing and price discrimination when it aids efficiency...*

Asciano believes the multi-part reference tariff pricing structure in the 2013 DAU does not reflect costs, and as such does not aid efficiency and hence the rationale for such a tariff structure must be questioned.

The shifting of costs into AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub> tariff components presents implications for Take or Pay liability. The AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub> tariff components represent the revenue that Aurizon Network are entitled to earn and sets the base for the Take or Pay recovery. Take or Pay liability is intended to recover fixed costs from train services that did not operate, however if trains do not operate then incremental maintenance costs are not incurred. However, by shifting incremental maintenance costs into the AT<sub>2</sub>, AT<sub>3</sub> and AT<sub>4</sub> tariff components this creates an amount of "false" revenue that Aurizon Network is entitled to earn. This amount of "false" revenue should be treated as "incremental rather than fixed", and should only be recovered if train services operated. Under the current 2013 DAU approach it is implied that maintenance is required even though an asset is not used. Overall this rebalancing of price structures results in an inefficient pricing structure, where the price of a train service is more than the efficient cost of providing the train service.

Hence, the Reference Tariff structure proposed in the 2013 DAU is counter to the QCA Act section 168A (a) which indicates that the price of a train service should reflect the efficient cost of providing the service. It should not be priced beyond the efficient cost of providing a service.

Asciano believes the 2013 DAU Reference Tariff structure must be scrutinised by the QCA. Although the 2013 DAU outlines the various tariff components that make up the reference tariff structure, the 2013 DAU does not set the basis of how the System Allowable Revenue is allocated to each of these tariff components. This provides a level of freedom for Aurizon Network to determine how System Allowable Revenue is apportioned between each tariff component. This freedom could potentially be used by Aurizon Network to benefit some mines and / or above rail operators over others.

Asciano strongly supports having a prescribed and transparent methodology to determine how System Allowable Revenue is apportioned between each tariff component. Part 5 Division 9 of the QCA Act allows for the preparation and publication of an Aurizon Network cost allocation manual. Asciano believes that a substantial revision of the current cost allocation manual is required and that any such revision should provide guidance in the allocation of costs between tariff components. This will result in a transparent methodology to allocate and apportion costs between each tariff component

In addition Asciano supports a process whereby the determination of the incremental tariff components  $AT_1$  and  $AT_2$  are periodically examined by the QCA to ensure they are a true reflection of the incremental cost of providing a train service. The apportionment of the remaining System Allowable Revenue to the allocative tariff components  $AT_3$  and  $AT_4$ , after the incremental tariff components  $AT_1$  and  $AT_2$  are determined, must also be closely examined when Reference Tariffs are set each year to ensure the tariffs are both efficient and non-discriminatory.

Asciano also supports a process whereby the impact of the Reference Tariff structure on Take or Pay arrangements is more transparently considered. The tariff components  $AT_2$ ,  $AT_3$  and  $AT_4$  should reflect the true revenue amount that Aurizon Network is entitled to earn so that it sets the right basis for Take or Pay liability paid by Access Holders for unused capacity.

#### **Summary of Recommendations for Improving Reference Tariff Structures in the 2013 DAU**

The 2013 DAU proposes a significant increase to the  $AT_2$  tariff component for each Coal System and a rebalancing of tariffs such that a greater proportion of revenue is now recovered via the  $AT_2$  tariff component.

The  $AT_2$  tariff component increase is of particular concern as it has implications for take or pay by increasing the take or pay component of the tariff structure.

Asciano does not believe that this tariff increase and rebalancing is warranted. In particular Asciano believes that the Aurizon Network tariff structure no longer reflects the cost structure. Asciano strongly supports having a prescribed and transparent methodology to determine how System Allowable Revenue is apportioned between each tariff component.

#### **2013 DAU Pricing Structure – $AT_5$ Issues**

Over the past two years there has been an ongoing regulatory issue related to the determination of the Aurizon Network  $AT_5$  tariff component, particularly in the Blackwater system. This tariff component relates to the recovery of the costs of electric traction infrastructure. Asciano has outlined its strong concerns relating to Aurizon Network's proposed pricing for  $AT_5$  tariffs through numerous submissions to the QCA. Asciano continues to strongly oppose the Aurizon Network position on the  $AT_5$  tariff electric traction costs<sup>17</sup>.

The 2013 DAU Schedule G sets out proposed principles for pricing electric traction in the Blackwater system and in particular the 2013 DAU Schedule G clause 2 (c) states that:

<sup>17</sup> See for example the Asciano submission to the QCA on Aurizon Network DAAU Relating to Electric Traction Pricing in the Blackwater System – June 2013.

*All Access Holders [utilizing the Blackwater system] should contribute to Aurizon Network's recovery of the Blackwater Electric System Costs.*

Thus the 2013 DAU proposes that diesel traction operators and users pay for electric infrastructure which they do not use, meaning that the Aurizon Network charges to diesel users will not reflect actual costs incurred by these users, which in turn would result in cross subsidies from these diesel users to users of electric traction.

The 2013 DAU position remains fundamentally based on the unproven assumption that electric traction is more efficient than diesel traction. In order to prove that electric traction is more efficient than diesel traction, accurate modelling is required of preferences, capital constraints discount rates and costs of both traction options for all rail access seekers into the future, as well as modelling the impacts of technological change on both traction options<sup>18</sup>. Such modelling is not possible and thus the position that electric traction is more efficient than diesel traction is unproven; thus the assumption that electric traction is more efficient than diesel traction is flawed.

Asciano strongly opposes the inclusion of Schedule G in the 2013 DAU and opposes any specific requirement that diesel traction users contribute to the cost recovery of electric infrastructure and opposes any specific requirement that Goonyella users contribute to the cost recovery of electric infrastructure in the Blackwater system.

Asciano's position on the AT<sub>5</sub> tariff remains unchanged from its previous submissions. Any final position on the AT<sub>5</sub> tariff approved in the 2013 DAU must ensure that:

- market based decisions on traction choice are allowed in above rail markets;
- pricing methodologies and outcomes are efficient for electric and diesel traction operators and for users of both the Goonyella and Blackwater systems, and in particular:
  - diesel traction operators and users do not pay for electric infrastructure which they do not use;
  - operators and users in the Goonyella system do not pay for Blackwater electric infrastructure which they do not use;
- outcomes are non-discriminatory for above rail operators and traction types; that is it must not favour one rail operator or traction type over another, distort competition in the above rail market or have an anti-competitive impact in the above rail market; and
- future pricing is determined via transparent pricing methodologies.

### 2013 DAU Pricing Structure – Capacity Multiplier Issues

The 2013 DAU is proposing to continue applying a capacity multiplier to the AT<sub>2</sub> tariff for the extra capacity that Aurizon Network assume is consumed by non-reference trains. Aurizon Network is proposing that:

- the Blackwater AT<sub>2</sub> tariff increase by 149% and that the Goonyella AT<sub>2</sub> tariff increase by 94%; and

<sup>18</sup> For a more detailed discussion of this issue see the CEG Report "QR Proposed Electrics Undertaking Pricing April 2012" particularly pages 5-7 as attached to the April 2012 Asciano Submission to the QCA QR Network Draft Amending Access Undertaking – Electric Traction Services.

- the Blackwater capacity multiplier increase from 1.1 to 1.59 and that the Goonyella capacity multiplier increase from 1.52 to 1.63.

These changes appear targeted at driving non-reference trains out of both systems, particularly the Blackwater system and / or recovering Aurizon Network's electric infrastructure costs by making diesel operations more expensive. Thus under this capacity multiplier approach there remains the potential for diesel traction operators and users to pay for electric infrastructure which they do not use, resulting in cross subsidies from diesel traction users to electric traction users. Any final position on the AT<sub>5</sub> tariff, AT<sub>2</sub> tariff and capacity multiplier approved in the 2013 DAU must ensure that prices are efficient for both electric and diesel traction operators and users.

In the 2013 DAU, the capacity multiplier for the Blackwater system and Goonyella system is pre-determined without any consideration of these train's actual performance. Assumptions as to which types of traction choice and train configurations have faster cycle times and are more efficient are often not supported by actual data. Asciano believes that the capacity multiplier should not be pre-determined but that the capacity multiplier that is applied should be reflective of the performance capability of the individual train service to encourage efficient operations by above rail operators.

Asciano maintains that if any train (regardless of traction type) is inefficient then this issue is best addressed through some form of price adjustment such as a capacity multiplier. Such a capacity multiplier would seek to take account of the fact that different trains have different operating performance which impact on network capacity. (Noting that if there is no congestion in the system then no costs are incurred and hence no multiplier needs to be applied). This approach sends an appropriate pricing signal as trains which incur increased costs to the system are required to pay a higher access charge. A capacity multiplier of this type would support the pricing principles in section 168A of the QCA Act, namely to allow for multi-part pricing and price discrimination where it aids efficiency and to provide incentives to reduce costs or otherwise improve productivity.

#### **Summary of Recommendations for Improving AT<sub>5</sub> and Capacity Multiplier Tariff Structures in the 2013 DAU**

Asciano continues to strongly oppose the Aurizon Network AT<sub>5</sub> tariff proposals as put forward in the 2013 DAU and in previous Aurizon Network proposals. Any final position on the AT<sub>5</sub> tariff approved in the 2013 DAU must ensure that:

- market based decisions on traction choice are allowed in above rail markets;
- pricing methodologies and outcomes are efficient for electric and diesel traction operators and for users of both the Goonyella and Blackwater systems, and in particular diesel traction operators and users do not pay for electric infrastructure which they do not use and Goonyella system operators and users do not pay for Blackwater electric infrastructure which they do not use;
- outcomes are non-discriminatory for above rail operators and traction types; that is it must not favour one rail operator or traction type over another, distort competition in the above rail market or have an anti-competitive impact in the above rail market; and
- future pricing is determined via transparent pricing methodologies.

Asciano strongly opposes the capacity multiplier proposal as put forward by Aurizon Network. The current Aurizon Network proposal is based on unproven assumptions as to which trains are or are not efficient.

Asciano would support a proposal which applied a capacity multiplier to an individual train which was inefficient (regardless of traction type), where such a capacity multiplier is based on the actual performance of the train. This approach sends an appropriate price signal as trains which incur increased costs to the system are required to pay a higher access charge

## 6.5 Key Issue: Shift of Aurizon Corporate Costs to Aurizon Network

Clause 137 (1A) of the QCA Act states that any access undertaking for a service owned or operated by a related access provider (such as the Aurizon Network access undertaking) must include provisions for:

*.. preventing the related access provider recovering, through the price of access to the service, costs that are not reasonably attributable to the provision of the service.*

The pricing in the 2013 DAU is based on a cost allocation which is not reasonably attributable to the provision of the service, and in particular is based on an allocation of corporate costs not reasonably attributable to Aurizon Network.

The current 2013 DAU appears to be proposing a 36% tariff increase (on a dollar per net tonne basis) despite the fall in the proposed cost of capital.

This price increase appears to be driven by several factors including an increase in regulatory asset value; however one of the largest increases to the cost building blocks is the \$63 million increase in the operating costs, which have increased as follows:

- 2010 AU - 2012-13 operating cost – approximately \$143 million; and
- 2013 DAU – 2013-14 operating cost – approximately \$206 million.

This increase appears is largely attributable to a large increase in the allocation of corporate overhead costs to Aurizon Network. The allocation of corporate costs to Aurizon Network has approximately doubled from \$37 million<sup>19</sup> to \$66 million.<sup>20</sup>

Asciano queries why Aurizon Network is now carrying an additional \$30 million of Aurizon corporate costs. Asciano believes that this corporate cost allocation must be closely scrutinised by the QCA. Asciano has concerns that Aurizon Network has over-allocated Aurizon corporate costs to itself through the use of stand alone cost allocations. Rather than base its corporate cost allocations on a stand alone basis, Asciano believes that in allocating these shared costs Aurizon

<sup>19</sup>Aurizon Network 2013 Draft Access Undertaking Volume 3: Maximum Allowable Revenue and Reference Tariffs p198

<sup>20</sup>Aurizon Network 2013 Draft Access Undertaking Volume 3: Maximum Allowable Revenue and Reference Tariffs p238

Network should use a cost allocation approach that recognises the reality that Aurizon is an integrated organisation with multiple operating divisions.

Asciano has particular concerns regarding Aurizon Network's allocations of corporate costs as cost allocation decisions within the vertically integrated Aurizon have substantial impacts on the pricing and profitability of different parts of Aurizon, including Aurizon's above rail activities. This in turn impacts on the competitive position of Asciano as both a customer of Aurizon Network and as a competitor of Aurizon above rail services.

The immediate impact of the 2013 DAU cost allocation is that Aurizon above rail is no longer carrying a reasonable allocation of corporate costs which then provides Aurizon above rail with an advantage in competing with other above rail providers (who have to carry a reasonable portion of their corporate costs). (Furthermore these other above rail operators are effectively subsidising Aurizon above rail's corporate costs via their payments to Aurizon Network).

The object of part 5 of the QCA Act (section 69E) is

*to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets*

The cost allocation process used by Aurizon Network has not met these criteria. The prices it produces are not economically efficient as they are based on an over recovery of costs, and furthermore the cost allocation process acts to discourage competition in a related market (the market for train operations) rather than promote competition in a related market (which in turn impacts on the public interest in having competition in markets).

The over recovery of corporate costs by Aurizon Network impacts on end users, who pay more than the efficient costs of the service, and on independent above rail operators who are competing with an Aurizon related above rail operator which has an artificially deflated cost structure.

Aurizon Network has argued that these corporate costs are based on a stand alone cost model. Asciano recognises that any cost between marginal cost and stand alone cost could be considered theoretically efficient, but Asciano strongly queries the use of a stand alone basis for assessing costs in this instance given the obvious impact this cost allocation has in favouring Aurizon's above rail related party.

The reality is that Aurizon Network does have a related above rail business with which it can and does share costs. Aurizon Network's use of stand alone costing means that it can carry a large portion of Aurizon's above rail corporate overheads in order to place Aurizon's above rail business at an advantage in competing with other above rail businesses, as Aurizon's above rail business has a lower cost structure as its corporate overheads are now being partially funded by Aurizon Network.

This concern with cost allocation reinforces the need for the Aurizon costing manual to be reviewed in detail in the near future with a view to addressing such allocations. Asciano wrote to the QCA in July 2011 raising concerns if the cost allocation manual was not addressed stating:



*QR National [i.e. Aurizon] could allocate an inappropriate share of its corporate overhead costs to its below rail business, thus improving the competitive position of its above rail business*

These concerns regarding cost allocations have now been realised in the 2013 DAU. Asciano believes that a robust cost allocation manual with transparent and auditable processes is needed as a matter of priority to ensure efficient outcomes. In particular, given the vertically integrated nature of Aurizon there should be a strong focus on cost allocation under a costing manual being transparent, auditable and being based on commercial substance rather than company structuring or legal form. In developing such an approach to cost allocation the ideal starting point is an independently audited and ASIC lodged general financial statement for Aurizon signed off by Aurizon directors. These accounts can then be adjusted by a series of auditable adjustment statements based on clear cost allocation methodologies which will provide cost allocation information down to at least the level of individual rail systems. The basis for such cost allocation would be on the substance of the cost, transaction or event.

Asciano believes that in order to ensure that a robust cost allocation process is followed a requirement for Aurizon Network to update their costing manual should be included in the 2013 DAU. Ongoing concerns regarding Aurizon Network's potential to favour their related above rail operator would be reduced if Aurizon Network's cost allocations were consistent with a QCA approved cost allocation manual.

Alternatively, if Aurizon Network seeks to continue to benefit from the use of stand alone costing approaches then at the least it should implement a program to more completely separate its above rail activities from its below rail activities, so that the stand alone costing approach has some basis in fact.

#### **Summary of Recommendations Regarding Aurizon Corporate Cost Allocations in the 2013 DAU**

The costs underpinning the 2013 DAU tariffs include a substantial \$30 million increase in Aurizon Network's allocation of corporate costs. This 2013 DAU cost allocation should be reviewed to reflect the fact that Aurizon network is not a stand alone business.

The immediate impact of the 2013 DAU cost allocation is that Aurizon above rail is no longer carrying a reasonable allocation of corporate costs which then provides Aurizon above rail with an advantage in competing with other above rail providers. Thus the cost allocation is not economically efficient and acts to discourage competition in the market for train operations.

This concern with cost allocation reinforces the need for the Aurizon costing manual. A requirement for Aurizon Network to update their costing manual should be included in the 2013 DAU.

## 6.6 Key Issue: Removal of Key Clauses and Principles from the Access Undertaking

The 2013 DAU seeks to either remove numerous principles entirely from the access undertaking documents package or shift numerous principles and higher level concepts from the 2010 AU to the 2013 DAU proposed standard access agreements. Asciano believes that this removal and shifting of clauses previously in the access undertaking reduces transparency and certainty and increases the potential for Aurizon Network to negotiate discriminatory terms with its related above rail operator. Asciano believes that given Aurizon's stated preference for commercial negotiations in access agreements, such discrimination is more likely to occur. In particular, while moving clauses previously in the access undertaking to the standard access agreements may seem benign, such a move will make any identifying, preventing and remedying breaches of these clauses more problematic as there is less QCA oversight of the access agreements than the access undertaking. This is particularly the case as under the 2013 DAU there is no longer any obligation for Aurizon to make access agreements public.

This section of the Asciano submission outlines numerous areas where Asciano is concerned that Aurizon Network has removed principles from the 2013 DAU, however the examples identified in this section are not an exhaustive listing of all of the principles Aurizon Network has removed from the 2013 DAU. Section 7 and Attachment 2 of this submission identify numerous further examples where key clauses and important principles have either been removed from the DAU 2013 entirely or shifted from the access undertaking to the access agreements.

Asciano believes that, as a general principle, clauses either removed from the access undertaking documents entirely or shifted from the access undertaking to the access agreements should be reinstated into the access undertaking.

### Principles Removed from the 2013 DAU

The 2013 DAU has removed numerous clauses that were previously in the 2010 AU. In particular clauses related to capacity management and capacity allocation have been removed, for example some of these include:

Capacity Resumption Clauses: In the 2010 AU Aurizon Network was able to resume access rights from an access holder if over a consecutive four quarter period an access holder does not utilise at least 85% of their Train Service Entitlements (section 7.3.5 of 2010 AU). This capacity resumption provision has been removed from the 2013 DAU. Asciano believes Aurizon Network's capacity resumption ability must be reinstated in the 2013 DAU to ensure the method in which Aurizon Network resume Access Rights is applied transparently and consistently across all access holders. If capacity resumption provisions are not consistent for all access holders then Aurizon Network has the unconstrained potential to negotiate different capacity resumption provisions in different Access Agreements. This concern is amplified by the changes that have been made to the circumstances in which Aurizon's Network can resume capacity, such circumstances being much broader and more subjective than was the case in the 2010 AU. Asciano believes this has the potential to lead to discriminatory treatment of different access holders.

Transfer Fees and Relinquishment Fees: Asciano notes that the QCA Act section 137 outlines the contents of what an access undertaking may include, and section 137 (2) (da) specifies that an access undertaking may include arrangements for the transfer of all or part of the interest of a user of the service under an access agreement.

The 2010 AU clauses 7.3.6 and 7.3.7 set out the process by which capacity relinquishment and transfers are treated and how customer initiated capacity transfers are carried out. These sections cover specific aspects of how relinquishment and transfer fees are calculated, and on what terms the Train Service Entitlements are transferred from the transferor's Access Agreement to the transferee's Access Agreement under a transfer scenario. These sections have been removed from the 2013 DAU.

Asciano strongly believes that the management of capacity relinquishment and transfers across all Access Holders by Aurizon Network must be set out in the 2013 DAU. This ensures there is a certain level of transparency as to how access holders are treated in these scenarios and that all Access Holders would be treated fairly and consistently in relation to the management of capacity relinquishment and transfers. Asciano believes there is no reason why Aurizon Network should vary the way they manage capacity relinquishment and transfers between different access holders as the management of capacity by Aurizon Network should be undertaken in a non-discriminatory manner.

#### Principles Shifted from the 2013 DAU

The 2013 DAU has shifted numerous clauses that were previously in the 2010 AU into the access agreements. Some of these include:

Network Management Principles: The 2013 DAU clause 7.6.1 (b) states that

*Any dispute between an Access Holder and Aurizon Network in relation to compliance with the Network Management Principles will be dealt with in accordance with the dispute resolution process set out in the relevant Access Agreement.*

The Network Management Principles outline how Train Service Entitlements are planned and scheduled across all access holders, hence Asciano believes any dispute process between an access holder and Aurizon Network in relation to the Network Management Principles must be dealt with via the access undertaking (as the Network Management Principles impact on all access holders and users and must be applied consistently).

If disputes relating to Network Management Principles are addressed via access agreements then there is the potential for some train operators to gain an advantage. All disputes relating to Network Management Principles should be addressed in a consistent manner via an access undertaking process in order to ensure a non-discriminatory and consistent outcome.

Conditional Access Rights: The 2013 DAU section 8.7.2 (c) (i) states that:

*Conditional Access Rights of each Conditional Access Holder are reduced in accordance with its Access Agreement.*

Conditional Access Rights are access rights which are conditional on an expansion being completed.

Asciano believes that any Conditional Access Rights should be reduced amongst relevant Conditional Access Holders in a consistent manner in order to ensure a non-discriminatory process and outcome. Thus the process of how such any Conditional Access Rights are dealt with must be set out in the access undertaking rather than the access agreements.

Interface Risk Management and Environmental Risk Management: Aurizon Network has also shifted principles relating to the development and management of interface risk management processes and environmental risk management processes from the access undertaking to the standard access agreement. These principles are contained in the 2010 AU section 8.1 and 8.2. As these areas relate to an access holder's and Aurizon Network's procedures and responsibilities required to ensure safe network operations and the prevention of environmental harm. Asciano believes that these principles should be applied in a non-discriminatory and consistent manner across all access holders. The 2013 DAU should set out a level of minimum standards for the development and management of interface risks and environmental risks.

System Rules: System rules are the network rules which are used to order and schedule trains. System Rules essentially act as an extension of the Network Management Principles that are prescribed in the access undertaking. At the current time the Aurizon Network system rules are undergoing a regulatory review process, following which they will be approved by the QCA, if the relevant regulatory criteria are met.

Asciano notes the 2013 DAU section 7.6.4 now states that the system rules can be amended without the explicit approval from the QCA. This is of great concern to Asciano as any approved set of system rules arising from this current regulatory process may then be amended by Aurizon Network following the 2013 DAU regulatory process with minimal stakeholder consultation or QCA oversight. Asciano believes any amendments to System Rules must be subject to a QCA approval process and such a QCA approval process must be outlined in the 2013 DAU.

Furthermore Asciano believes that the System Rules are of sufficient importance that they should be more formally included in the 2013 DAU and be subject to QCA scrutiny. Asciano is concerned that there is a potential lack of regulatory oversight of future system rule amendments and that such oversight is best achieved by including the system rules in the 2013 DAU.<sup>21</sup>

## Conclusion

Overall Asciano believes that shifting key clauses and principles from the access undertaking to access agreements or removing the principles completely reduces transparency and certainty. In particular removing principles from the Access Undertaking removes the principles and concepts from detailed regulatory scrutiny and testing.

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<sup>21</sup> See for example the Asciano August 2013 correspondence to the QCA "Asciano Comments on the QCA Draft Decision on the Aurizon Network Capricornia System Rules" and the Asciano September 2013 submission to the QCA "Submission to the QCA Review of the Aurizon Network Draft Northern Bowen Basin System Rules" regarding the need for system rules and system rules amendments to be reviewed by the QCA.

Asciano recognises that Aurizon Network will argue that the shifting of numerous principles and higher level concepts out of the Access Undertaking adds to flexibility, however, in Asciano's view flexibility is not appropriate where the principles and concepts are fundamental to the relevant access regime and are not principles and concepts to which flexibility should be applied. To do so would have the effect of weakening the overall regime. Additionally Asciano's experience of negotiating with natural monopolies is that flexibility in commercial access negotiations is an illusory concept, and to the extent that any flexibility is realised it will be realised to the benefit of the natural monopoly. Given this experience Asciano strongly believes that the certainty, transparency and regulatory oversight of the access undertaking are preferable to the "flexibility" of the access agreement.

In addition given the vertically integrated nature of Aurizon there is a real concern that different above rail operators may have different levels of negotiating influence when negotiating with Aurizon Network. By shifting principles and higher level concepts from the current access undertaking to the proposed access agreements, Aurizon Network is providing itself with more scope to potentially favour a related party.

#### **Summary of Recommendations Regarding the Removal of Key Clauses and Principles from the 2013 DAU**

The 2013 DAU seeks to either remove numerous principles entirely from the access undertaking documents package or shift numerous principles from the 2010 AU to the 2013 DAU proposed access agreements. This removal and shifting of clauses reduces transparency, certainty and regulatory scrutiny, and increases the potential for Aurizon Network to negotiate discriminatory terms with its related above rail operator.

Principles and concepts which have been removed from the 2013 AU or shifted to the 2013 DAU proposed access agreements should be reinstated to the 2013 DAU.

## **6.7 Key Issue: Flexibility of Access Rights**

Asciano believes that the utilisation of the network could be substantially improved if the 2013 DAU, the Network Management Principles and the System Rules were amended to allow effective and timely transfers of access rights. A more effective transfer of access rights would facilitate the efficient use of rail infrastructure by ensuring optimal utilisation of this rail infrastructure.

Current rules relating to transfers need to be streamlined to allow access rights to be more effectively transferred (either within a single entity's portfolio or between entities). Thus the 2013 DAU should be amended to allow more flexible utilisation of access rights by an access holder.

### **Need for Flexibility of Access Rights**

The 2013 DAU continues to restrict the utilisation of Train Service Entitlements on the basis of specific "origin to destination" pairings. Asciano believes these pairings restrict the use of access rights because an access holder's ability to operate train services is limited by the "origin to destination" pairs that they have within their portfolio of Train Service Entitlements.

Asciano believes that an access holder should have the ability to freely nominate how their access rights are utilised regardless of the “origin to destination” pairings the access holder has in its portfolio of Train Service Entitlements. This would facilitate a more efficient use of access rights as these rights could then be managed more flexibly, thus meeting the objective of Part 5 of the QCA Act to promote the economically efficient use of significant infrastructure.

The current Aurizon Network approach does not optimise the usage of access rights and so is not economically efficient.

### **Specific Areas Where Flexibility of Access Rights are Needed**

The 2013 DAU Network Management Principles do not allow for the flexibility of access rights in several specific areas.

Train Service Types: The access agreements attached to the 2013 DAU now focus on the concept of Train Service Types rather than access rights and train services. Under the 2013 DAU access rights are only granted for each individual Train Service Type rather than for the broader train service (as is the case in the 2010 AU).

The Train Service Type is a detailed description of the train service involving up to twenty different variables. This detailed description of the train service is too restrictive and essentially acts to substantially reduce any flexibility in pathing and access rights. The Access Agreements also now require a substantial number of processes to be followed wherever there is a change to a Train Services Type and also give Aurizon Network new rights in relation to reductions, suspension and termination of train services in respect of Train Services Types. Asciano strongly believes that in order to increase supply chain capacity, greater flexibility in contracting and pathing is needed. The move towards Train Service Type as the basis of the access agreements introduces increased rigidity rather than increased flexibility into access contracting.

The focus on Train Service Types in access agreements shifts the focus of the access agreement towards the nature of the train operations. This raises concerns that the 2013 DAU and its access agreements are now more focussed on controlling train operations and differentiating between operators on the basis of Train Service Type rather than providing access. In particular, Asciano is concerned that the concept of the Train Service Type allows Aurizon Network to closely define train services giving Aurizon Network the potential to differentiate between similar train services. This differentiation in turn facilitates discrimination between train operators.

Asciano believes that the access agreements in the 2013 DAU should be focussed on the provision of more flexible Train Service Entitlements rather than the current focus of detailed and prescriptive Train Service Types.

It is not clear why this change towards Train Service Types has been introduced and given that it has significant impacts throughout the access agreements, Aurizon Network needs to provide more details on the rationale behind this fundamental change in contract structuring.

Contested Train Paths Process: Asciano believes that the Network Management Principles need to be amended to allow for more flexibility in train scheduling processes. A specific area of the 2013 DAU Network Management Principles which limits the flexible use of access rights is the

Contested Train Path principles contained in Schedule H, section 8.3 of the 2013 DAU. This section sets out rules, in order of precedence, of how a Contested Train Path is allocated to an access holder. In particular, clause 8.3 (a) (vii) requires Aurizon Network to determine which access holder is allocated a train path that is a Contested Train Path on the basis of which access holder is most behind in train service entitlements consumed for the relevant month. Aurizon Network assesses which access holder is most behind in their train service entitlements consumed by the following method. For each access holder Aurizon Network calculate a percentage based on the Train Service Entitlement for the relevant "origin to destination" pair consumed in the month to date plus the remaining balance of the Train Service Entitlement for that "origin to destination pair" for that month as set out in the Master Train Plan. This is then compared against the Train Service Entitlement for that "origin to destination" pair for the Access Provision Period set out in the Master Train Plan. That is, in any month Aurizon Network considers the Train Service Entitlement consumed to date plus the Train Service Entitlements allocated for the remainder of the month in the Master Train Plan divided by total Train Service Entitlements for the month in the Master Train Plan. The 2013 DAU Schedule H clause 8.3 (a) (viii) is similar with the exception that it is assessed on an annual basis. The access holder who has the lowest percentage would be considered the most behind and allocated the Contested Train Path.

The methodology outlined above for the assignment of a Contested Train Path would act to benefit those access holders that have an "origin to destination" pair with a larger proportion of access rights. These access holders would have a higher likelihood of being allocated a Contested Train Path, compared to those access holders that have an "origin to destination" pair with a lesser proportion of access rights. This is especially the case if the access holder that has an "origin to destination" pair with a higher proportion of access rights is also an access holder who consistently under utilises their access rights for the period.

Aurizon Network is seeking to facilitate a more flexible operational environment in the Contested Train Path principles of the 2013 DAU clause 8.3 (a) (iv) where

*The Access Holder whose request for the Contested Train Path is within the scope of its Train Service Entitlements for the relevant Coal System as set out in the MTP, for that Access Holder's pool of mainline paths....*

Asciano believes that this principle is not flexible enough. It should not be assessed on "mainline" pathing availability or restricted to paths held within an access holder's portfolio of Train Service Entitlements. Rather, it should apply from the "origin to destination" pair of a train service and access holders should be given the freedom to assign access rights to any "origin to destination" pairing, whether it is within their scope of Train Service Entitlements or not.

"Origin to Destination" Pair Concept and Process: A more efficient and flexible approach for access holders is to have the above assessment based on an access holder's portfolio of total access rights within an individual coal system, rather than based on an individual "origin to destination" pair. This ensures the consideration of an access holder's efficient use of their total access rights, rather than an individual "origin to destination" pair of a train service. This approach would also provide an access holder with an improved opportunity to recover train services within a period by being allocated a Contested Train Path, for example after a mine closure, as the access holder can

leverage off the other train services that they operate within the individual Coal System for the period.

Another area of the 2013 DAU that restricts the flexible use of access rights is the approach used to deem what access rights are to be scheduled and operated against the access holder's Train Service Entitlements. The 2013 DAU Schedule H clause 8.2 (c) (iii) (A) and (B) allows an access holder to submit train orders for less than its Train Service Entitlement for a particular "origin to destination" pair as set out in the Master Train Plan and also submit train orders for a different Train Service Entitlement for a particular "origin to destination" pair in excess of its Train Service Entitlement for that "origin to destination" pair as set out in the Master Train Plan.

Asciano believes that this under ordering and over ordering of Train Service Entitlements is restricted by what "origin to destination" pairs an access holder has in their portfolio of Train Service Entitlements. In practice, an access holder would not be able to assign access rights from an "origin to destination" pair they have to an "origin to destination" pair they do not have in their portfolio of Train Service Entitlements. This under ordering and over ordering system also cannot be applied to an "origin and destination" pair with zero Train Service Entitlements, which Asciano has experienced in the past. Asciano believe that the Train Service Entitlement contracting regime should be flexible enough to allow for:

- new "origin to destination" pairs in agreements; and
- "origin to destination" pairs with zero Train Service Entitlements. This will allow future ad hoc train operations between the "origin to destination" pair.

To create more flexibility in the utilisation of access rights, the under ordering and over ordering of Train Service Entitlements should allow an access holder to freely assign access rights to any "origin to destination" pair, whether it is within or not within their Train Service Entitlement portfolio. It should also not be restricted as to whether there are a specified number of train services against the "origin- destination" pair. Where access rights are under utilised for one "origin to destination" pair, the unused access rights should be able to be utilised by another "origin to destination" pair where there are no material impacts to the system capacity. This would create an environment that drives more efficient use of access rights by all access holders.

Take or Pay Process: For flexibility of access rights to be valuable for access holders and end users, it must also be consistently adopted for Take or Pay purposes. In particular, the "mine capping" Take or Pay arrangement under the 2013 DAU Schedule F, 2.4(i) should not be assessed on a specific "origin to destination" pair. Rather, train services operated, regardless of its "origin to destination" pair, should have the ability to automatically offset the Take or Pay liability of an end user's or access holder's Train Service Entitlements. That is, any additional revenue realised in relation to train services that exceeded its Train Service Entitlement for the year will offset the Take or Pay liability of an end user's or access holder's total Take or Pay liability.

The mine capping arrangement needs to be taken into account with the "operator capping" Take or Pay arrangements under 2013 DAU Schedule F, 2.4 (j), which is the subsequent step in determining the amount of Take or Pay applicable for an end user or access holder. It is arguable that if the mine capping arrangements are amended as suggested above, the operator capping arrangements would serve little purposes for Take or Pay calculations. The step requiring an



eligible operator to nominate Take or Pay groupings can be avoided, relieving administrative burden.

Asciano strongly believes if the flexibility of access rights is not translated to Take or Pay purposes as outlined above, there would be little incentive for Access Holders to efficiently make use of their access rights.

### Efficiency Gains from Increased Flexibility of Access Rights

Flexibility in the utilisation of access rights under the access undertaking would facilitate a more efficient use of access rights.

Overall the 2013 DAU continues to restrict the utilisation of train services entitlements on the basis of specific “origin-destination” pairs. The utilisation of access rights by an access holder should be flexible enough to allow them to combine their “origin-destination” train service entitlements and allocate them, in any portion, to another:

- access agreement (regardless of the access holder);
- train service (regardless of the origin/destination); or
- rail operator.

The 2013 DAU Network Management Principles do not accommodate such flexibility. Asciano believes that the Network Management Principles need to be amended to allow for more flexibility.

#### **Summary of Recommendations for Improving the 2013 DAU In Order to Introduce Increased Flexibility of Access Rights**

The 2013 DAU and the 2013 DAU Network Management Principles should be amended to;

- remove the concept of “Train Service Type”;
- introduce increased flexibility in the Contested Train Paths process;
- introduce increased flexibility in the design and use of “origin – destination” pairs, including consideration of a broader portfolio approach in the design and use of “origin – destination” pairs; and
- introduce increased flexibility in the application of access rights in the Take or Pay process.

The 2013 DAU should allow flexible utilisation of access rights by an access holder and in particular should allow an access holder to allocate their access rights to another access agreement, train service or rail operator.

## 6.8 Key Issue: Improved Forecasting

Volume forecasting is a critical component in the tariff setting process. Asciano is concerned that the forecasting process and outcomes are largely determined by Aurizon Network.

The Aurizon Network Reference Tariff review process is outlined in the 2013 DAU Schedule F, section 4.1. Under this process, prior to the beginning of each year Aurizon Network submits the Reference Tariff for each coal system (adjusted to account for variations in the System Allowable

Revenue and System Forecast) to the QCA. This is broadly consistent with the current requirement with the exception that the 2013 DAU is proposing to also seek a variation in maintenance costs (attributable to the difference between the approved System Forecast and revised System Forecast based on Short Run Variable Maintenance Cost Rates predetermined for each year of the 2013 DAU (as per DAU 2013 Schedule F, 4.1 (b) (iii))).

Asciano is particularly concerned that the System Forecast continues to be predominately determined by Aurizon Network. The System Forecast is a key determinant of the unit rates for each tariff component and given that the System Allowable Revenue is constant under a revenue cap regime, then the main driver of the individual unit rates of tariff components is the System Forecast. Thus if the System Forecast is set low then the unit rates for each tariff component will be high (and conversely, the unit rates of each tariff component would be low if the System Forecast is set high). Asciano believes that Aurizon Network may have incentives to set the System Forecast low as they would be driven to recover their System Allowable Revenue during the course of the Year, rather than seek recovery of revenue via Take or Pay and/or Revenue Adjustments Amounts in subsequent periods.

The System Forecast and unit rates of tariff components also have a consequential impact on an access holder's Take or Pay liabilities. If the System Forecast is set low, there would be a lesser exposure to Take or Pay for access holders as the chance of the System Forecast being met would be more achievable. Though for those access holders that trigger Take or Pay under this low System Forecast scenario they would be subject to higher  $AT_2$ - $AT_4$  unit rates, meaning more Take or Pay would be paid per unused train path in comparison to a Year where the System Forecast is set high with lower  $AT_2$ - $AT_4$  unit rates.

On the other hand, in a scenario where the System Forecast is set high, there would be a higher exposure to Take or Pay for access holders, as the probability of the System Forecast being met would be less likely. In this high System Forecast scenario, for those Access Holders that do trigger Take or Pay they would be subject to lower  $AT_2$ - $AT_4$  unit rates, resulting in less Take or Pay paid per unused train path in comparison to a Year where the System Forecast is set low.

From Aurizon Network's perspective they are always kept financially whole by the regulatory system due to the revenue cap, regardless of the volume forecasts. Based on the factors outlined above, the current regulatory framework encourages Aurizon Network to set System Forecasts as low as possible to drive Reference Tariff components up to ensure their System Allowable Revenue is achieved in that given Year. From an end user perspective this disadvantages the end user as end users are sold 100% of the system capacity by Aurizon Network, represented by Train Service Entitlements but the System Forecasts are set lower than 100% of the system capacity (thus end users are subject to higher Reference Tariffs). This creates an imbalance between the capacity sold by Aurizon Network and the capacity producers pay for.

Based on the issues outlined above associated with system forecasting, Asciano strongly supports a process where supply chain stakeholders are involved with the annual determination of System Forecasts. Stakeholders in this process must include all aspects of the supply chain, in particular coal producers and rail operators. The 2013 DAU must define a process where there is active involvement by these stakeholders in Aurizon Network's System Forecast setting.

The 2013 DAU should also include a process where annual System Forecasts are independently assessed. An expert should be engaged to verify the reasonableness of the System Forecasts submitted to the QCA by Aurizon Network for independent review. The expert would formulate its view for stakeholder evaluation based on parameters such as, market demand, domestic and international market conditions, mine and port capacity, and mine coal reserves. Similarly System Forecasts should be tested against actual system throughput with a view to assessing whether there is any forecasting bias.

#### **Summary of Recommendations for Improving Forecasting in the 2013 DAU**

The 2013 DAU should be amended to provide for improved forecasting. This is needed to address the potential of the current undertaking to encourage under-forecasting of volumes by Aurizon Network.

2013 DAU forecasting should involve a process where supply chain stakeholders are involved with the annual determination of forecasts and the annual forecasts are independently assessed by an expert.

## 7. Detailed Comment on Changes from the 2010 AU to the 2013 DAU

Asciano has numerous concerns with the proposed drafting of the 2013 DAU. This section contains more detailed comments on the changes from the 2010 AU to the 2013 DAU. In particular this section raises Asciano's concerns with a number of the changes between the 2010 and 2013 access undertakings.

A more detailed tabulated set of comments on changes between the 2010 AU and the 2013 DAU is contained in Attachment 2.

### 7.1 Comments on DAU 2013 - Part 2 – Intent and Scope

There have been a substantial number of changes to Part 2 of the 2013 DAU, Intent and Scope, when compared to the 2010 AU. In this section of the submission Asciano identifies those changes which either need reinstatement or further explanation.

Most importantly, there appears to be a fundamental shift away from the clear statement of intent in the 2010 AU of "Non Discriminatory Treatment". This shift is mirrored in the remainder of the 2013 DAU.

The second clause of the 2010 AU, clause 2.2 set out a statement of intent in relation to non-discriminatory treatment, the first sentence of which was that:

*This Undertaking will be consistently applied to all Access Seekers, Access Applications and negotiations for Access.*

As such, this clause set the tone for the 2010 AU.

This statement regarding non-discriminatory treatment does not appear in any form in the 2013 DAU. While there are elements of the matters dealt with in clause 2.2 of the 2010 AU set out in various other parts of the 2013 DAU, and in particular in Part 3 of the 2013 DAU (i.e. Ring Fencing) there is no similar, clearly stated and unambiguous inclusion of the concept of non-discriminatory treatment in the Intent and Scope of the 2013 DAU.

Aurizon itself notes that non-discrimination is not a "ring fencing specific issue"<sup>22</sup>. In fact, non-discrimination goes to the core of Aurizon's legislative obligations. Therefore, in contrast to the assertions of Aurizon that Part 3 of the 2013 DAU demonstrates an "upfront commitment to the general principles of non-discrimination"<sup>23</sup> the removal of this non-discrimination wording from the intent and scope section evidences the weakening of that commitment overall and essentially confines it to being a ring fencing issue.

This concern is further underlined by the shifting of the Ultimate Holding Company Support Deed from the 2013 DAU Part 2 (i.e. Intent and Scope) to the 2013 DAU Part 3 (i.e. Ring Fencing). Again this suggests that the Deed (together with the terms of the Deed) is a ring fencing specific

<sup>22</sup> Aurizon Network 2013 Draft Access Undertaking Volume 2: The 2013 Undertaking Proposal, p63

<sup>23</sup> Aurizon Network 2013 Draft Access Undertaking Volume 2: The 2013 Undertaking Proposal, p54

issue and does not have broader application and indeed the Deed has been drafted in a manner which reflects this narrower intention. This is not correct and nor is it appropriate. The obligations throughout the undertaking are relevant to all Aurizon Parties, and their actions and behaviours, and the deed should be drafted so as to reflect that position.

This position was at least recognised in the 2010 AU. The 2010 AU provided for:

- Aurizon Network to procure a deed from the Ultimate Holding Company. The 2013 DAU only provides for Aurizon Network to request the provision of the deed. This is a much weaker requirement.
- a deed which had a general obligation upon the Ultimate Holding Company to ensure that all Aurizon Parties would take such actions as are necessary to enable Aurizon Network to comply with its obligations under the undertaking where it is relevant for an Aurizon Party to do so. There is no such general obligation in the deed provided in the 2013 DAU.
- a deed which expressly requires compliance with particular obligations in the undertaking (for example, in relation to access to land, rail transport infrastructure, supply of electricity – see below for further discussion on each of these areas). The new proposed deed under the 2013 DAU only provides for the provision of obligations in respect of ring fencing.

Asciano does not consider that the narrowing of the focus of the obligations on the Ultimate Holding Company to only ring fencing obligations is appropriate. Aurizon states that it has narrowed the terms of the obligations of its Ultimate Holding Company to target those areas where the risks of vertical foreclosure are greatest<sup>24</sup>, however this overlooks all of the other areas in which there are real risks of vertical foreclosure and where there should also be obligations on Aurizon to reduce those risks.

In addition, the consequences of the failure to provide, or comply with, the terms of the deed by the Ultimate Holding Company (particularly when coupled with the weak ring fencing obligations in the 2013 DAU) are also very weak and do not provide a serious incentive on Aurizon Network or its Ultimate Holding Company to comply with these terms.

In respect of 'Intent' in clause 2.2, the 2013 DAU simply requires that the DAU achieves an appropriate balance between all elements of coal supply chains (of which access forms a part) in order to seek to maximize the performance of those supply chains. The 2013 DAU has removed a specific requirement present in the 2010 AU to both:

- establish principles and processes to guide cooperation of all elements of coal supply chains (in respect of which access forms a part) in order to seek to maximize the performance of those supply chains; and
- do so on an annualised basis,

While Asciano does not support the Aurizon Network having a central co-ordinating role in the coal supply chain, the removal of these above requirements is of concern to Asciano if Aurizon Network continues to have a co-ordinating role in the coal supply chain. The absence of a period to which this commitment applies, means that the commitment lacks clarity. Given that take or pay

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<sup>24</sup> Aurizon Network 2013 Draft Access Undertaking Volume 2: The 2013 Undertaking Proposal, p65

commitments are assessed annually, it is appropriate for the requirement to establish principles and processes to guide cooperation of the coal supply chain be on an annualised basis.

In respect of 'Scope' is clause 2.3 (d) of the 2013 DAU provides that

*Nothing in the Undertaking can require Aurizon Network or any other party to an Access Agreement or to a train operations agreement or a Train Operations Agreement, executed before the Approval Date, to vary that Access Agreement or train operations agreement or Train Operations Agreement or to act in such a way that is inconsistent with the relevant Access Agreement or train operations agreement or Train Operations Agreement.*

It is not clear what the uncapitalised term "train operations agreement" means in clause 2.3 (d). The clause already provides for the inclusion of a "Train Operations Agreement" as defined. If there is a further category of agreement that is to be protected by this clause, then that category of agreement needs to be specifically defined so that parties to those agreements know whether or not those agreements could be subject to variation as a result of the requirements of the 2013 DAU.

Asciano is concerned that in clauses 2.3 and 2.4 of the 2013 DAU, the obligations on Aurizon Network to:

- provide access to land upon which Rail Infrastructure is situated if it is owned by an Aurizon Party or if an Aurizon Party has authority to authorise Access Seekers to access that land; or
- to supply electric energy in connection with Access, if an Aurizon Party is a supplier of such electric energy,

have been pared back to only apply to Aurizon Network.

The practical impact of these amendments is that access seekers may be discriminated against in having to independently negotiate access and approvals to services that would have otherwise been available to have been provided directly by Aurizon Network. In addition, to the extent that rights and obligations are moved out of Aurizon Network and into other Aurizon related parties then the impact of this provision becomes more severe on access seekers as more elements will need to be negotiated separately with Aurizon related parties and such negotiations will not be subject to the undertaking. In particular, if an access seeker has to negotiate with an Aurizon related party which is a competitor of the access seeker it could be expected that these negotiations may be unsuccessful.

Clause 2.4 of the 2013 DAU also provides for obligations in respect of the supply of electricity. In the 2010 AU there was:

- a clear obligation on Aurizon Network that it could not refuse to sell or supply electric energy;
- a recognition that Aurizon Network would not be obliged to sell or supply electric energy if it was not lawfully entitled to do so or if it was on terms that would be unreasonable or un-commercial; and
- an ability to refer any dispute in relation to such supply, on the basis of a refusal or on that basis of the proposed terms and conditions, to dispute resolution under the undertaking.

In the 2013 DAU these obligations have also been pared back such that there is no specific obligation on Aurizon Network not to refuse to sell or supply electric energy and there is no right to go to dispute resolution in relation to any dispute. These rights should be reinstated in the 2013 DAU to ensure that there is no less favourable treatment of unrelated parties. The dispute resolution provision is very important as in practice electric energy is most likely to be provided by Aurizon Network.

In addition, where under the 2010 AU the sale and supply of electric energy was not part of access except as specifically referred to in that undertaking, this clause narrows the exception so that “the supply of electric energy by Aurizon Network is not a supply of access rights or otherwise governed by the undertaking (except to the extent that any reference tariff includes an electricity charge).

If electric energy is to be supplied by Aurizon Network it should be governed by the undertaking and this should be made clear in the drafting of undertaking.

Overall the 2013 DAU should be amended to include:

- a clause equivalent to the 2010 AU clause 2.2 in the Intent and Scope section of the undertaking;
- a requirement that the Ultimate Holding Company Support Deed should at the least be in the same form as the Ultimate Holding Company Support Deed in the 2010 AU;
- a requirement to achieve an appropriate balance between all elements of coal supply chains on an annualised basis;
- clarify what the uncapitalised term “train operations agreement” means in 2013 DAU clause 2.3 (d); and
- reinstatement of Aurizon Related Parties in the 2013 DAU clauses 2.3 and 2.4 and reinstatement of the related dispute resolution clause.

## 7.2 Comments on DAU 2013 - Part 3 – Ringfencing

Asciano objects to the inclusion of the Preamble to Part 3 of the 2013 DAU. In particular, the inclusion of statements in the 2013 DAU clauses 3.1(b) and 3.1(e) present the new functional unit structure of Aurizon Holdings as discussed above. In Asciano's view the structure of Aurizon Holdings itself is of concern as it is not consistent with a real commitment to compliance. In these circumstances the ring fencing obligations on this structure must be very strong to be able to satisfactorily address the fundamental issues which arise from the structuring of the Aurizon Group in this manner.

In particular, the 2013 DAU clause 3.1(b) means that Aurizon's Related Operator will get a competitive advantage where financial performance, capital expenditure programs and business plans are coordinated across the whole of Aurizon Holdings. Asciano strongly objects to this structure. Commercial decisions of Aurizon Network should be made by Aurizon Network and Aurizon Network only.

Clause 3.1(c) provides that Aurizon Network provides a regulated access service together with providing unregulated services in competitive markets. In contrast, the 2010 AU provides that the

primary function of Aurizon Network is to manage the provision of below rail services. Such a requirement should be reinstated in the 2013 DAU.

This reference to the role of Aurizon Network in the provision of unregulated services is repeated a number of times in this part (e.g. see 2013 DAU clauses 3.6(b) (v) and 3.7). If other services are going to be referred to in the 2013 DAU and / or Aurizon Network no longer has as its primary function the management of the provision of below rail services then much more detail is needed in respect of those unregulated services. It is not clear what these services are, why they are being provided by Aurizon Network and how they interface with the regulated access services. This needs to be made clear so that the undertaking addresses any risks that might arise in the provision of those services as a result of the vertical integration of Aurizon.

In addition, the statement in the 2013 DAU clause 3.1(h), that

*The purpose of this Part 3 is to aid Aurizon Network's compliance with the statutory obligations referred to above*

is far more generic than the specific obligation in the 2010 AU which provided that the ring fencing regime is intended to ensure that the provision of below rail services by Aurizon Network is managed independently of the provision of above rail services by Aurizon Network's related operators (see clause 3.1.1 of the 2010 AU). Asciano considers that this should be reinstated.

In respect of the General Principles of Non-discrimination in the 2013 DAU at clause 3.2, the non-discrimination principles have been reduced to apply only to Aurizon Network and there is no longer any requirement upon Aurizon Network to procure that its related parties do not engage in discrimination, similarly to the changes to Part 2 of the 2013 DAU. This obligation must be reinstated.

Clause 3.5(b) of the 2013 DAU provides that

*Aurizon Network will not undertake the operation or marketing of Train Services on the Rail Infrastructure, unless for the purpose of performing a Core Access related Function or the provision of services in respect of Private Infrastructure.*

It is not clear how the provision or marketing of Train Services could be required in respect of a Core Access related function. Aurizon Network needs to provide additional explanation as to what this clause is seeking to address as it could represent a significant carve out from Aurizon Network's commitments in respect of functional responsibilities and functional separation.

Clause 3.6 of the 2013 DAU relates to the staffing of Aurizon Network; this clause is wholly inadequate for an appropriate and successful ring fencing regime. The clause and the obligations within it rely heavily on the use of the word "primarily". Asciano has several serious concerns in relation to the use and impact of such imprecise language. Firstly, it is not clear what "primarily" means. This needs to be clarified. Secondly, as the obligations of Aurizon Network only apply to employees whose duties "primarily" involve the performance of Core Access-related Functions this means that there is no obligation on Aurizon Network in respect of those employees who perform Core Access Related Functions as part of their role but who do not do so primarily – the implication of which is that such employees could work for any Aurizon Party and could also undertake work at



the direction of a Aurizon Network's related operator at the same time, not in respect of work undertaken on Core Access Related functions. Thirdly, even those employees whose duties do primarily involve the performance of Core Access Related Functions only have to work "primarily" for Aurizon Network – so could still work a proportion of their time for other Aurizon parties, including Aurizon Network's related operator. None of these scenarios should be acceptable in a vertically integrated above and below rail operator such as Aurizon.

Clause 3.6 (b) (ii) and (iii) of the 2013 DAU state that the undertaking does not restrict secondments of employees or prevent Aurizon Network staff ceasing work with Aurizon Network and working for Aurizon Network's related operator as long as the handling of Protected Information requirements are followed as per the undertaking. These clauses do not provide sufficient protection. The 2010 AU provided for much stricter criteria in relation to the transfer of Aurizon Network employees to its related operator. For example, clause 3.4.3(c) of the 2010 AU stated that if activities affect or could affect the access of third party access holders or seekers, then Aurizon Network must ensure no Aurizon Network employees were transferred to such a Aurizon Network's related operator or working group. These provisions should be reinstated as a minimum, and should also apply in the reverse situation where Aurizon Network's related operator's employees are transferred to Aurizon Network. Asciano also believes that it is necessary and appropriate for Aurizon Network's new employees to sign an agreement to not work for Aurizon Network's related operator for a period after ceasing work with Aurizon Network. This would be no different to the post employment restraints put on employees of private firms agreeing not to work for a competitor for a period of time after ceasing work with the firm.

Overall, the 2013 DAU should be amended to:

- remove clause 3.1(b);
- amend clause 3.1(c) so that the primary function of Aurizon Network is to manage the provision of below rail services;
- clarify clause 3.5(b);
- clarify the use of the term "primary" in clause 3.6;
- include much stricter criteria in clause 3.6 (b) (ii) and (iii) in relation to secondments of employees;
- remove new wording in clause 3.7 and reinstate the requirements of the 2010 AU;
- tighten restrictions in clauses 3.8, 3.9 and 3.10 in relation to Aurizon Network management;
- remove clause 3.15 in relation to the disclosure of protected information to the Marketing Division;
- reduce and restrict the list of persons with access to Protected Information in Clause 3.16;
- reinstate clause 3.5 of the 2010 AU;
- remove clause 3.23;
- reinstate clauses 3.6 and 3.7 of the 2010 AU which provided for complaints handling and audits.

## 7.3 Comments on DAU 2013 - Part 4 – Negotiation Framework

### Overview of Negotiation

Prior to commenting on the detail of Part 4 of the 2013 DAU Asciano believes that it is important to recognise that any negotiation framework proposed by a natural monopoly such as Aurizon Network is likely to be problematic. Asciano's experience of negotiating with natural monopolies is that flexibility in negotiation is unlikely to occur, and to the extent that any flexibility is realised it will be realised to the benefit of the natural monopoly. In particular, natural monopolies will seek to transfer risk to access seekers, access holders and users (with no benefit to these parties) even though the natural monopoly is usually best placed to manage the risk.

Given this experience Asciano strongly believes that the certainty, transparency and strong regulatory oversight of a robust access undertaking are preferable to any increased commercial negotiation. Given the unequal power of the two negotiating parties the commercial negotiation framework does not appropriately balance the interests of access seekers, access holders and Aurizon Network. The only way in which these interests can be balanced is through a strong and detailed access undertaking whose provisions can, and will, be audited and enforced by a strong independent regulator.

In addition, given the vertically integrated nature of Aurizon, Asciano has strong concerns that different above rail operators may have different levels of negotiating influence when negotiating with Aurizon Network.

The comments regarding negotiation above apply equally to other sections of the 2013 DAU such as negotiating access agreements, negotiating expansions, negotiating connection agreements etc.

### Detailed Comment on Part 4 of the 2013 DAU

Asciano queries the need for the overview of the negotiation framework in clause 4.1 of the 2013 DAU.

Asciano is concerned about the removal of the queuing arrangements from Part 4 of the 2013 DAU. Under the new arrangements, Aurizon Network no longer has an obligation to establish a queue for access and advise access seekers of their place in the queue. Asciano considers that this is problematic as Aurizon Network now has substantially more freedom with whom they choose to negotiate and contract access rights. Asciano considers that the previous arrangement, which provided an objective test for capacity allocation is more appropriate than the proposed subjective approach.

Importantly and significantly, the 2013 DAU clause 4.3(c)(ii)(A) now provides that within 10 business days after receipt of an Access Application, Aurizon Network can request the access seeker to provide the following information, (which was not previously required in the undertaking):

- evidence or information regarding the access seeker's ability to fully utilise the requested access rights which may include factors such as supply chain rights, rollingstock, provisioning, maintenance and storage facilities and mine output (see the 2013 DAU clause 4.11 (c)); and

- information from other providers or infrastructure to be used as an entry or exit point to the rail infrastructure such operation of unloading facilities.

Asciano does not understand why such a level of detail and information is required simply to receive a response to an Access Application (e.g. an Indicative Access Proposal). Asciano believes that these information requirements will delay the access request process.

Furthermore the 2013 DAU clause 4.3 (d) allows Aurizon Network to cease an Access Application if the requested information is not received by them within 20 business days of their request. Asciano believes the combination of the information request and the ability of Aurizon Network to cease an Access Application if the requested information is not received has the potential to be manipulated to stop certain Access Applications. Asciano believes that these clauses should be amended.

Asciano also has concerns about the operation of various sections of clause 4.4 of the 2013 DAU. Clause 4.4(c) states that if an Access Application cannot be progressed in the absence of an Expansion or Customer Specific Branch Line (2013 DAU clause 8.2 and 8.7), Aurizon Network can provide notice to suspend (before or after issuing of Indicative Access Proposal) pending agreement on what Expansion or Customer Specific Branch Line is required and how it will be funded. Asciano can see a justification for the inclusion of this ability to suspend an Access Application. However,

- Clause 4.4 (f) then puts the obligation on an Access Seeker to write to Aurizon Network every 6 months to:
  - confirm its ongoing requirement for the suspended Access Request;
  - inform of any changes; and
  - if requested by Aurizon Network, provide evidence that the Access Seeker will fully utilise the requested Access Rights;
- Clause 4.4(g) then allows Aurizon Network to cease a suspended Access Request if the actions are not performed by the Access Seeker in clause 4.4 (f). Clauses 4.4(f) and (g) should be removed from the 2013 DAU because if the request is suspended it would be pending the negotiation outcome of Expansion and Customer Specific Branch Line works in any event and it is both burdensome and unnecessary to require the access seeker to undertake these tasks in those circumstances.

Asciano believes that the creation of a register or queue should also be considered for such suspended Access Requests.

Asciano also has a concern with clause 4.4(e) of the 2013 DAU which allows Aurizon Network to reject an Access Application if the access rights sought in the Access Request do not commence within 3 years. Asciano believes that this time limitation should be removed as it is too restrictive. This limits an access holder's ability to seek information or rail access certainty for longer term projects. Otherwise, at the very least a register with a queue (on a "first in, first served" basis) should be created so that the processing of the access request can recommence once it is within the given timeframes.

Asciano queries why the provision in the 2010 AU (see clause 4.2(g) of the 2010 AU) which provided for an access seeker to submit revised information in relation to an access request prior to the issuing of an Indicative Access Proposal has been removed from the 2013 DAU. There does not seem to be a clear and compelling reason given by Aurizon Network as to why an access seeker should not be given the opportunity to revise information in their access request instead of ceasing a current request and submitting a new one, when the time frames and process start again.

Asciano also queries why the dispute resolution provisions in relation to Access Applications have been removed from the 2013 DAU (see clauses 4.3(e) and 4.3 (h) (ii) of the 2010 AU). These provisions allowed an access seeker to refer to the dispute resolution process if they believed that Aurizon Network was not making reasonable progress or if they were not satisfied with their Indicative Access Proposal. Aurizon Network has stated that the dispute resolution provisions in Part 11 of the 2013 DAU will apply to negotiations for access however that process does not provide for dispute resolution when an access seeker is seeking access. The dispute resolution provisions in relation to access applications should be reinstated.

Clause 4.7 of the 2013 DAU which deals with multiple applications for the same access raises a number of significant concerns for Asciano, including the following:

- clause 4.7(a) (i) of the 2013 DAU provides that if one of the parties that applies is a customer, Aurizon Network will treat the customer as the access seeker and Aurizon Network may negotiate solely with that customer. Asciano queries why, if the customer has a Railway Operator, the clause does not give the customer an option to nominate a Railway Operator to be involved in negotiations.
- clause 4.7(a) (ii) of the 2013 DAU needs further clarification as if it is only Railway Operators applying for access then it is not clear why the access request is not just processed as usual with Indicative Access Proposals issued to each Railway Operator. There should not be a requirement for the customer to nominate which Railway Operator Aurizon Network should negotiate with.
- more detail and clarification is required in regard to how Aurizon Network proposes to share information relating to access requests under this clause. Asciano considers that confidentiality is a major concern (e.g. in parallel with the access negotiations the customer could be running a tender for the associated above rail haulage rights) and the clause could act to limit competitive negotiations as this 2013 DAU process may require a customer to nominate an above rail operator before a competitive tender is complete.

Asciano notes the 2013 DAU includes a new clause 4.8 which relates to the process for a Train Operator to request that negotiations commence for a Train Operations Agreement. This request must be in writing containing:

- the identity of the end user;
- a copy of the notification from the end user nominating them as Train Operator; and
- any information required by an access request or information reasonably required to complete the Train Operations Agreement.

Asciano seeks clarification of the definitions of Train Operators and Railway Operators as it considers that there is potential for confusion between those two definitions. Asciano also suggests that in requesting that negotiations commence for a Train Operations Agreement an option is included for a Train Operator to refer to an existing access request or Indicative Access Proposal already completed by either the end user or themselves for the access rights being included in the Train Operations Agreement.

Clause 4.9.1(d) of the 2013 DAU provides that if an Access Application ceases because available capacity is being reduced or planned enhanced capacity is unlikely to be realised, then before the cessation of the Access Application both Aurizon Network and the access seeker will discuss the matter with a view to agree an alternative means of providing access. If an agreement is not reached within 20 business days, or such other period as may be agreed, the negotiation period would cease. Asciano notes that this new provision means that the entire Access Application ceases if access rights cannot be provided. The 2010 AU provided that if any portion of access to be negotiated was possible then access for this capacity could proceed and the remainder of the application could be suspended and / or put in a queue. It is not clear why this approach has been removed and Asciano believes that the approach should be reinstated.

Clause 4.9.2(d) of the 2013 DAU provides for Aurizon Network to seek further evidence of an access seeker's ability to fully utilise the requested access rights (including matters in clause 4.11 (c) of the 2013 DAU) and from other providers of infrastructure such as operators of unloading facilities. The access seeker must provide such information within 20 business days (or such other period as agreed between the parties). Asciano queries the requirement for this information to be provided to Aurizon Network. Such information may be difficult to demonstrate during the development phase of a project, particularly if other access providers (such as ports) are also seeking evidence of the access seekers rail access etc. It is not clear why this requirement has been included in the 2013 DAU and it should be removed.

The 2010 AU placed obligations on Aurizon Network to investigate and design any necessary infrastructure enhancements to accommodate the access sought (see the 2010 AU, clause 4.5.2(e)). This provision should be reinstated in the 2013 DAU so that there is an obligation on Aurizon Network to investigate ways to assist the access seeker in obtaining access rights. Asciano is concerned that (in the absence of such an obligation on Aurizon Network), Aurizon Network may seek to provide some access seekers with such assistance but may not provide this assistance to other access seekers.

Asciano has serious concerns in relation to the provisions that have been put in place in respect of clause 4.11 of the 2013 DAU relating to the cessation of negotiations. Asciano raises the following issues with this clause:

- there is a lack of specificity as to the conditions when Aurizon Network can issue a Negotiation Cessation Notice and the timeframe in which it can do so (as per clause 4.11(a) and (b) of the 2013 DAU). These conditions and the timeframes should be well-defined and at a minimum address the matters provided for in the 2010 AU;
- there are a number of additional and burdensome criteria that access seekers now have to meet which, if not met, would trigger a right for Aurizon Network to issue a Cessation Notice

(clause 4.11(c) of the 2013 DAU). Aurizon Network must provide further explanation as to why such information is required in the access negotiations; and

- the inclusion of a right for Aurizon Network to recover costs incurred in negotiations with the Access Seeker (clause 4.11(e) of the 2013 DAU). Asciano believes that in commercial negotiations, such as those contemplated under the 2013 DAU, both parties should bear their own costs except in unusual circumstances where one of the parties are not negotiating in good faith. Aurizon Network should be required to provide substantive and objective evidence of “the lack of genuine intention” required by this clause before it is able to recover such costs.

## 7.4 Comments on DAU 2013 - Part 5 – Access Agreements

### Overview of Access Agreements

Asciano notes that the 2013 DAU was submitted to the QCA in April 2013. Subsequently in August 2013, in a separate regulatory process related to the 2010 AU, the QCA has approved a separate set of access agreements relating to the Alternate Form of Access.

Asciano believes that the access agreement document package relating to the Alternate Form of Access recently approved by the QCA in August 2013 is preferable to the access agreement package put forward by Aurizon Network in April 2013. Asciano is seeking clarity as to how the access agreement document package has primacy or whether the packages are intended to co-exist and / or interact.

### Detailed Comment on Part 5 of the 2013 DAU

Asciano welcomes the ability of the QCA or an expert to resolve the position where parties cannot agree on the terms of an access agreement. However, Asciano cautions for the need to ensure that the resolution by the QCA or an expert is not simply the adoption of a pro-forma Standard Access Agreement. Parties should still be given the option to put to the QCA or the expert variances to the standard form of access agreement.

In addition, the QCA or the expert should be able to have regard to circumstances where Aurizon Network has negotiated, or is negotiating, similar access arrangements with another access seeker and the terms Aurizon Network has offered, or is offering, in those circumstances. These terms should not be more favourable than the terms Aurizon Network is offering in the disputed agreement.

Asciano has serious concerns with the removal of clauses 5.3 and 5.4 of the 2010 AU. Clause 5.3 (a) of the 2010 AU states that if Aurizon Network develops an Access Agreement with an Aurizon related party for either new or renewed train services then the agreement will be subject to the undertaking. Clause 5.3 (b) in particular, stated that where an Access Agreement with an Aurizon Related Party for a new or renewed train service is consistent with the Reference Tariff and Standard Access Agreement, Aurizon Network will be deemed to have complied with clause 5.3 (a).

Clause 5.4 (a) of the 2010 AU obligates Aurizon Network to provide to the QCA upon their request the below rail aspects of these Access Agreements (including access charges) and 5.4 (b)

obligates Aurizon Network to permit disclosure of the Access Agreements to the public, subject to certain non-disclosure elements outlined in 5.4 (c).

The removal of both of these clauses is of serious concern to Asciano. Both of these clauses need to be reinstated to ensure that Aurizon Network does not have the ability, or even have the appearance of having the ability, to negotiate more favourable terms with their related operator. Without these clauses any third party operator confidence in the non-discriminatory nature of the access agreements is substantially diminished.

## 7.5 Comments on DAU 2013 - Part 6 – Pricing Principles

The 2010 AU provided that in developing Access Agreements with its related operator, Aurizon Network could not establish access charges for the purpose of preventing or hindering access by a third party. Asciano is concerned that this Aurizon Network obligation has been entirely removed from the 2013 DAU. Thus, Aurizon Network seeks to remove any obligations they have which prevents its favourable treatment of its related operator. This provision must be reinstated in the 2013 DAU, not to do so would run counter to section 168A (c) of the QCA Act which states that the pricing of access to a service should:

*not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider...*

Asciano also has concerns that under clause 6.2.4 (a) (iv) (A) of the 2013 DAU, which relates to access charges for train services which require an expansion, Aurizon Network may seek acceptance from customers and access holders in relation to developing variations of existing reference tariffs. This acceptance process does not include train operators. As train operators are active participants of the coal supply chain they must also be involved in the process, particularly as changes in existing tariffs may impact on train operations (for example tariff changes relating to electric infrastructure may impact on traction choice).

Clause 6.1.2 (e) of the 2010 AU allows an access holder to contest Aurizon Network if it applies a different access charge to another access holder that is in contravention of the limits on price differentiation. This clause has been removed from the 2013 DAU. To ensure Aurizon Network does not unduly price differentiate this clause needs to be reinstated in the 2013 DAU. Without this clause, any third party operator confidence in the non-discriminatory nature of the access agreements is substantially diminished.

Clause 6.3.1 (b) of the 2010 AU applies where capacity is limited and obliged Aurizon Network to assess whether expansions would satisfy additional capacity sought by Access Seekers prior to the Maximum Access Charge being applied. Asciano believes that this obligation should be reinstated – Aurizon Network should conduct an assessment so that any expansions must satisfy all access seekers prior to offering the Maximum Access Charge. Otherwise, the available capacity simply goes to the bidder willing to pay the Maximum Access Charge for the available capacity. Such an approach is less likely to promote downstream competition. Asciano believes the obligation for Aurizon Network to assess possible expansions that would result in additional

capacity being created so that all access seekers can be satisfied prior to the application and offering of the Maximum Access Charge should be reinstated in the 2013 DAU.

Clause 6.9 of the 2013 DAU addresses commercial terms and appears to have replaced the following 2010 AU sections:

- clause 6.5.2 Access Conditions;
- clause 6.5.3 Access Conditions Register;
- clause 6.5.4 Approval of Access Conditions; and
- clause 6.5.5 Prohibited Access Conditions.

The above 2010 AU sections address how Aurizon Network agrees with an access seekers on certain access conditions before access rights can be granted to them in order to ensure Aurizon Network's financial risks are mitigated. The provisions also require Aurizon Network to seek approval from the QCA if they are to enter such arrangements.

Asciano has serious concerns that the 2013 DAU provisions are much more relaxed than the 2010 AU provisions. Clause 6.9 of the 2013 DAU has the potential to allow Aurizon Network to set terms and conditions that discriminate in favour of certain access seekers. The definition of Commercial Terms allows Aurizon Network to agree varied or an additional Take or Pay arrangements and access charges with access seekers without QCA approval. The provisions previously included in the 2010 AU in relation to Access Conditions must be incorporated in the 2013 DAU so that Aurizon Network does not offer terms and conditions that are more favourable to certain access seekers, particularly in circumstances where there is less or no oversight of access agreements.

## 7.6 Comments on DAU 2013 - Part 7 – Capacity Allocation and Management

### Overview of Capacity Allocation and Management

Asciano has major concerns regarding Aurizon Network's proposed capacity allocation and management provisions in the 2013 DAU. Under the 2010 AU access was provided to access seekers via the operation of an objective queuing mechanism when mutually exclusive access rights were sought. The 2013 DAU no longer contains this objective queuing framework as a means of capacity allocation.

Under the 2013 DAU Aurizon Network can now select which access seekers they enter into access agreements with based on such considerations as supply chain rights, haulage agreements, rolling stock facilities, mine production and private infrastructure interfaces. Given the lack of an objective process and objective set of criteria to allocate capacity Aurizon Network can seek to favour its related party train operator and their end users in any decisions made in relation to capacity allocation.

Asciano sees few advantages in the 2013 DAU capacity allocation proposal and strongly believes that a transparent, objective and non-discriminatory capacity access allocation mechanism is a minimum requirement for any access undertaking to be approved under the QCA Act.



(Further Asciano comments on the capacity allocation and management provisions in the 2013 DAU are provided in Attachment 4).

#### Detailed Comment on Part 7 of the 2013 DAU

The 2013 DAU has removed an essential element in relation to the allocation of capacity amongst access seekers when mutually exclusive access rights are sought.

In section 7.3.3 and 7.3.4 of the 2010 AU Aurizon Network is required to form a queue, in chronological order based on access request receipt date, where mutually exclusive access rights are being sought by two or more access seekers. In the first instance, Aurizon Network is required to allocate access rights to the access seeker who is first in the queue, then to the Access Seeker second in the queue, etc. Otherwise, as set out in clause 7.3.4 (d) of the 2010 AU, Aurizon Network can allocate access rights to an access seeker not first and / or earlier in the queue based on specific criteria where their commercial performance is better served if:

- the access seeker's access request lower in the queue has an NPV that is 2% or more than the NPV of an earlier access request; and
- the access seeker lower in the queue is willing to execute an Access Agreement for a term at least 10 years and which is a longer term than an earlier access request.

If the queue order changes at any time, Aurizon Network is also required to inform access seekers impacted in the queue.

Asciano is concerned that the objective nature of the 2010 AU allocation of capacity to access seekers via a queue has been substantially diminished in the 2013 DAU. It has been replaced by clause 7.5.2 in the 2013 DAU, which in effect provides Aurizon Network with substantial freedom to choose which access seekers they grant access rights to. In particular under 7.5.2 (b) (ii) of the 2013 DAU Aurizon Network may enter into access negotiations if the access seeker has satisfied Aurizon Network that the access seeker will be able to use the access rights giving consideration to the factors in clause 4.11 (c). These matters relate to:

- whether the access seeker has secured, or is reasonably likely to secure, supply chain rights;
- whether the access seeker has secured, or is reasonably likely to secure, a rail haulage agreement for the operation of the train services that are the subject of the access application;
- whether the access seeker or its rail operator has sufficient facilities (including rolling stock, provisioning facilities, maintenance facilities and storage facilities) to enable it to run train services to fully utilise the access rights sought; and
- where the access rights are sought to transport the output of a mine, whether the anticipated output of the mine is sufficient to support full utilisation of access rights sought.

Given that the factors above all involve an Aurizon Network assessment of the likelihood of certain events occurring these factors are all substantially subjective. Furthermore some of these factors may be able to be actively influenced by either Aurizon Network or Aurizon Network's related operator. Given the subjective nature of this approach to allocating capacity the approach is not acceptable as there is potential for Aurizon Network to discriminate between access requests (and potentially favour its related parties) on the basis of these subjective factors.

Asciano believes the requirement for the demonstration of the above matters by an access seeker before access rights are granted has the potential to hinder and prevent the provision of access.

On this basis, Asciano strongly believes that an objective capacity allocation process should be developed, and in the absence of any other objective process Asciano believes that the queuing provisions set out in section 7.3.3 and 7.3.4 of the 2010 AU should be reinstated in the 2013 DAU to ensure an objective process is in place.

Aurizon Network has also removed provisions in the 2013 DAU in relation to capacity resumption and capacity transfers. In the 2010 AU, the method by which Aurizon Network resumes access rights from an access holder is set out in clause 7.3.5 (a) (i) of the 2010 AU. This method allows Aurizon Network to resume access rights from an access holder if over a consecutive four quarter period, an access holder does not utilise at least 85% of their Train Service Entitlements. This is applied consistently across all access holders. In addition, as discussed elsewhere in this submission, the circumstances under which Aurizon Network can resume capacity in the SOAA are now far more subjective than under the 2010 AU. These provisions have been entirely removed from the 2013 DAU. This means that access rights resumption provisions contained in individual access agreements would be applied. Asciano believes this would allow Aurizon Network to negotiate variations to how access rights can be resumed in individual access agreements leading to discriminatory treatment of access holders. The resumption of access rights should be dealt with consistently amongst all access holders and therefore must be clearly prescribed in the access undertaking. The resumption provisions must be reinstated in the 2013 DAU to ensure that the resumption of access rights is handled in a non-discriminatory manner by Aurizon Network.

Clause 7.3.7 of the 2010 AU outlined the process by which an access holder may relinquish or transfer access rights. Aurizon Network has removed these capacity relinquishment and transfer provisions in the 2013 DAU. This means that the relinquishment or transfer of access rights would now be governed by provisions contained in individual access agreements. This would allow Aurizon Network to negotiate variations to how access rights can be relinquished or transferred in individual access agreements leading to discriminatory treatment of access holders. Asciano believes all the capacity relinquishment and transfer provisions of the 2010 AU must be reinstated in the 2013 DAU to ensure these matters are dealt with consistently amongst all access holders and flexibility is given to access holders to transfer their access rights to other parties to promote efficiency in the supply chain.

In the 2013 DAU, Aurizon has also sought to introduce principles which Asciano believes must be scrutinised and assessed by the QCA. These principles are:

- clause 7.2 of the 2013 DAU - this clause allows Aurizon Network to refuse available access rights if the access seeker does not demonstrate certain matters including rights to load and unload train services, supply chain rights, a contract for rail haulage, sufficient facilities to enable the access seeker to utilise the relevant capacity and sufficient output from the mine to support full utilisation of the relevant capacity. As outlined above Asciano believes that these conditions are subjective and create the potential for Aurizon Network to discriminate between access seekers. This is also mirrored in the Supply Chain Rights requirement in the SOAA;

- clause 7.4.2 of the 2013 DAU – this clause introduces the concept of ancillary access rights. The determination of such ancillary access rights should be clarified and set out in the 2013 DAU to ensure consistent treatment is applied to both transferors and transferees of these rights; and
- clause 7.6.3 of the 2013 DAU – this clause relates to the making the initial system rules for a coal system. This clause only outlines the initial process for the QCA approval of the system rules. The clause does not provide for a formal QCA approval process for any future amendments of system rules which may be made by Aurizon Network. This issue has been raised by Asciano in other submissions<sup>25</sup> and must be addressed in the 2013 DAU. Otherwise, the clause will allow Aurizon Network to amend the system rules without any regulatory oversight or formal approval process.

## 7.7 Changes in DAU 2013 - Part 8 – Network Development and Expansion

Aurizon Network's financial performance, capital expenditure program and business plans are subject to oversight by the board and senior management of Aurizon Holdings as outlined in clause 3.1 (b) of the 2013 DAU. Thus Aurizon Holdings effectively drives Aurizon Network's development and expansion via their control of its capital expenditure and business plans. Aurizon Holdings also oversees the business of Aurizon Network's related operator, providing Aurizon Holdings with the potential to direct Aurizon Network's development and expansion to favour its related operator. (As outlined elsewhere in this submission this is a major concern for Asciano).

Asciano believes more rigour needs to be included in the 2013 DAU to ensure Aurizon Network's investment decisions are made by their board and senior management on an 'arms-length' and independent process basis.

Clause 8.2.1 (b) of the 2013 DAU states that Aurizon Network will not be obliged to fund, construct or permit an extension, enhancement, expansion, augmentation, duplication or replacement of all or part of the rail Infrastructure unless the expansion is technically and economically feasible and where their legitimate business interests are protected.

If Aurizon Network does choose to commit to a new expansion, Aurizon Network has introduced Standard User Funding Agreements (SUFA), under which users can fund the cost of an expansion necessary to create additional capacity on the network. The current SUFA arrangements are part of a QCA consultation and approval process. Asciano believes that the outcome of the current QCA SUFA consultation process should be incorporated into the 2013 DAU.

Asciano has raised concerns with the Aurizon Network SUFA proposal in its August 2013 submission to the QCA. Asciano continues to support the positions put forward in this SUFA submission.

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<sup>25</sup> See for example the Asciano August 2013 correspondence to the QCA "Asciano Comments on the QCA Draft Decision on the Aurizon Network Capricornia System Rules" and the Asciano September 2013 submission to the QCA "Submission to the QCA Review of the Aurizon Network Draft Northern Bowen Basin System Rules"

The inclusion of the expansion funding arrangements in clause 8.6 of the 2013 DAU raises concerns in relation to Aurizon Network's ability to receive above regulated returns. This seems to be a possibility where there is an alternative for Aurizon Network to allow users to fund the expansions subject to Commercial Terms, rather than via a SUFA arrangement. Asciano is concerned that using Commercial Terms rather than a SUFA arrangement may be used to favour one train operator over another.

In addition, Asciano seeks clarity as to whether Commercial Terms are treated as above regulated returns and how these arrangements will be treated against Aurizon Network's Maximum Allowable Revenue.

Aurizon Network's argument has been that their proposed SUFA arrangement was constructed to ensure that the network is kept whole by ensuring that user funded assets are to form part of a single rail system owned and operated by Aurizon Network. So it is assumed that if users fund expansions on the basis of Commercial Terms, these Expansions would also form part of Aurizon Network's rail network on the basis of the same principle. Asciano believes that if such expansions are made part of the regulated rail network then the expansions should be subject to the regulated WACC. If the expansion is integrated with existing regulated rail infrastructure that Aurizon Network owns and manages, it would be included in the Regulatory Asset Base and therefore subject to the regulated WACC. Asciano believes that the issue of the WACC to be applied to these expansions should be considered by the QCA.

In the 2010 AU at clause 7.5.4 (c) Aurizon Network was obligated to provide the QCA with reasons why they refused to undertake or fund an extension and if the decision to refuse such an investment was made by their Ultimate Holding Company, Aurizon Network must procure a written statement with reasons of the refusal from their Ultimate Holding Company. These provisions have been removed from the 2013 DAU. As Aurizon Network is subject to the same board and senior management oversight as their related operator, Asciano believes it is important that similar provisions be reinstated in the 2013 DAU to ensure that decisions for such investments are handled at arms length and in a non-discriminatory manner.

Aurizon Network has also introduced new concepts in relation to network development and expansions. Asciano has concerns with the following concepts:

- clause 8.2.2 - Interdependence and Sequential Nature of Expansions – this clause outlines the principle that multiple expansions incrementally build on each other in sequence to increase capacity. Asciano is concerned that this would be problematic as capacity planned to be created by the expansions will not be unconditionally allocated until the outcomes of the other expansions in the sequence are known. This would present major difficulties for an access seeker whose investments are dependent on securing a specific level of access rights. Asciano believes if there is a situation where a capacity shortfall results then there must be an obligation on Aurizon Network to bear the risk of additional investments that would make up the capacity shortfall. As Aurizon Network has full control of the planning and design of the expansions, they should be held accountable for any capacity shortfalls that result.
- clause 8.2.3 - Determination of Sufficient Demand for an Expansion – the provisions in clause 8.2.3 of the 2013 DAU should allow parties other than Aurizon Network to be involved in

determining whether there is demand for an expansion following which Aurizon Network will be obligated to carry out studies after a prudency process is passed. Under the current drafting of clause 8.2.3 it is likely that expansions will always be initiated and determined by Aurizon Network.

- clause 8.6 - the term 'Funding Users' in this section seems to only include access holders, access seekers and customers, but not a Railway Operator. Railway Operators should be permitted to be a Funding User.
- clause 8.6.5 states that any capacity or capacity shortfalls as a result of User Funding Expansions will be dealt with in the relevant User Funding Agreement. As this deals with the allocation of capacity, Asciano believes it must be outlined in the 2013 DAU rather than individual agreements. This ensures a consistent approach to the allocation of capacity is applied across all access seekers. The 2013 DAU must also outline a process to determine how existing capacity impacts as a result of expansions should be treated. For example, the introduction of the Goonyella - Abbot Point expansion had an adverse impact on the capacity of the existing Goonyella system.
- clause 8.8.2 results in the system operating assumptions for a coal system being effectively determined by Aurizon Network. While there is the potential for input from other parties there is no obligation on Aurizon Network to incorporate the views of these other parties. Similarly under clause 8.8.3 Aurizon Network can undertake a capacity review without any requirement to consider the views of other parties. Asciano believes that independent oversight is needed for both system operating assumptions and capacity reviews.
- the term "Interested Participants" under section 8.10.3 excludes Railway Operators. As active participants in the coal supply chain, Railway Operators must be included as "Interested Participants" on the basis that they too are impacted by capital expenditure projects introduced to the Aurizon Network.

## 7.8 Comments on DAU 2013 - Part 9 – Connecting and Private Infrastructure

### Overview of Connecting and Private Infrastructure

A Standard Rail Connection Agreement (SRCA) was approved by the QCA in April 2013 after a lengthy consultation process. Asciano believes the approach recently approved by the QCA in relation to the SRCA is a reasonable approach.

Asciano notes that the 2013 DAU was submitted to the QCA in April 2013 and so may not have fully incorporated elements of this final decision on connection agreements.

Given the recent QCA approval of the SRCA, Asciano believes that there is no reason why the proposed SRC in the 2013 DAU should differ from the version approved by the QCA in April 2013.

### Detailed Comment on Part 9 of the 2013 DAU

Clause 8.3 (b) of the 2010 AU obligated Aurizon Network to do all things reasonably necessary, and in a timely manner, to ensure that the connecting infrastructure is physically connected to the

rail infrastructure and to facilitate the movement of trains. Clause 8.3 (c) of the 2010 AU obligated Aurizon Network to provide train control and planning services for the connecting infrastructure in a manner consistent with the Aurizon Network operated network. These obligations contained in clause 8.3 (b) and (c) of the 2010 AU are not contained in the 2013 DAU. Asciano believes these obligations must be reinstated in the 2013 DAU to ensure Aurizon Network carries out negotiations, design and construction of the connecting infrastructure in a timely manner to not delay and impact on a private infrastructure owner and/or producer's developments.

The following elements have all been removed from the 2013 DAU:

- matters relating to the Interface Risk Management Process and Environmental Risk Management Process have been removed from the 2013 DAU. These provisions were previously outlined in sections 8.1 and 8.2 of the 2010 AU. Asciano believes these should be reinstated;
- clause 8.1 of the 2010 AU obligated Aurizon Network to ensure that interface risks are appropriately managed on the network. The processes by which an Interface Risk Management Plan, Operating Plan and Rollingstock Authorisation are developed, audited and reviewed between Aurizon Network and an access seeker / holder are also outlined. Aurizon Network is also required to provide relevant training to an access seeker / holder if it required as a control element in the risk assessment.
- clause 8.2 of the 2010 AU outlined the procedure of how an Environmental Investigation and Risk Management Report are developed between Aurizon Network and an access seeker / holder. These have been removed from the 2013 DAU.

The removal of the above elements from the 2013 DAU should be assessed to ensure that appropriate safety and environmental laws are adopted by the parties in the development of these documents. Asciano believes that these provisions should be included in the access undertaking to ensure there is a level of consistency on how they are developed across access seekers / holders and that a minimum standard is set in the production of these documents. The QCA should consider reinstating these provisions as they are essential elements in the provision of access.

In addition to the above points Asciano notes that SRCA as currently drafted includes coal loss mitigation provisions (CLMPS). These provisions require the private infrastructure owner to take various measures when handling and loading coal. Asciano does not believe that CLMPS should be included in the SRCA, which is by definition an infrastructure connection agreement rather than a coal management agreement. Asciano believes that it would be more appropriate to address CLMPS issues through a separate process or agreement.

Aurizon Network should not be able to suspend the right to use a connection through the use of CLMPS provisions. Asciano believes that there is potential for Aurizon Network to use such a clause in a discriminatory manner in order to favour its related above rail operator.

## 7.9 Comments on DAU 2013 - Part 10 – Reporting

Overall, Asciano is concerned by the limitations inherent in the reporting obligations under the 2013 DAU. As noted in section 6.1 of this submission the 2013 DAU contains a breach reporting process at which provides for any breaches to be reported to the QCA. Asciano believes that this process is adequate in regard to reporting to the QCA but could be extended.

Clause 10.2 of the 2013 DAU provides for the reporting to the QCA of any breaches of the undertaking of which Aurizon is aware. Asciano considers that Aurizon Network should be obliged to also provide that information to any access seeker, access holder or train operator if such a breach adversely affects their interests. There should not be a need for such an impact to be “direct”. In the absence of such a notification, there is no other way for an access seeker, access holder or train operator to gain the knowledge of the impact of the breach on their interests. Such a process would aid in the transparency of the access regime and encourage a culture of compliance within Aurizon Network.

Asciano has concerns about the removal of the publication of access agreements and other corresponding changes to clause 10.3.1. These changes while ostensibly providing the QCA with the ability to request disclosure of access agreements, effectively limit that access to the “Below Rail aspects”<sup>26</sup> of specified, signed Access Agreements. Asciano has several concerns in this regard; the term “Below Rail aspects” is not defined so it is not clear what information will be provided to the QCA or whether that information will be consistently provided across Access Agreements. All that is provided in the 2013 DAU at clause 10.3.1(c)) is a non-exhaustive list of elements that are considered not to be “Below Rail aspects”. Many of these elements are areas in which discrimination could occur (for example Aurizon Network could require different insurances from different access holders).

Asciano has concerns with the requirement that the QCA has to request specific, signed access agreements, and believes that a minimum the QCA should be able to gain access to any, and all, signed access agreements. Additionally, the QCA should not have to specify which agreement it wants access to as it may not have the information available to it to be able to specify which agreements it requires.

Asciano is also concerned by the removal in clause 10.3.2 (a) of the 2013 DAU of the reference to the QCA's ability to request information required for the purposes of performing its obligations or functions in accordance with an access agreement. The 2010 AU provided (in clause 9.5(a) (i)) for the QCA to request information required for the purposes of performing its obligations under both the undertaking and an access agreement. This ability to request information in relation to an Access Agreement should be reinstated.

In addition Clause 10.3.2 (a) of the 2013 DAU has removed the specific reference in clause 9.5(a)(i) of the 2010 AU to the QCA's ability to request information required for the purposes of determining whether it should exercise powers in the undertaking, such as required the conduct of an audit. This reference should be reinstated.

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<sup>26</sup> Asciano notes that the term below rail aspects was used in the 2010 AU and was not defined in the 2010 AU

Generally, Asciano notes that the audit provisions in the 2013 DAU are quite limited and restrictive.

Asciano believes that the QCA should be given greater powers to request audits on any matters relating to the undertaking or any access agreements. Asciano also believes that the QCA should be specifically allowed to require an audit of Aurizon Network upon the request of an access holder, access seeker or customer rather than having to rely on the reasonable grounds provision.

Asciano queries why clause 10.7(c) of the 2013 DAU has been drafted in a way which appears to limit the matters that can be dealt with in any audit report. For example, if Aurizon Network has failed to comply in any way (even in a way that is allegedly non-material) then the audit report should address those non-compliances. This is important as there may be multiple allegedly non-material non-compliances that when taken together have a very material impact or which otherwise indicate a systemic failure in Aurizon Network processes. Additionally, if an audit identifies areas where Aurizon Network is in breach of its obligations under the undertaking or any Access Agreement, even if those obligations were not the subject of the audit, the audit report should identify and deal with such non-compliances. As currently drafted, an audit report is only required to identify whether Aurizon Network has complied with those obligations which were the subject of the required audit. In addition, as discussed elsewhere in this submission, Aurizon Network should be obliged to not only implement recommendations of any auditor but also have such implementation monitored or checked.

Asciano is concerned that there is no longer a capacity for the QCA to request an audit in relation to non-discriminatory treatment. The 2010 AU provided that the QCA could seek an audit of Aurizon Network's compliance under clause 2.2 of the 2010 AU. This provision has now been removed and replaced only with the ability to request an audit for a breach of Part 3 of the 2013 DAU (i.e. a breach of ring fencing provisions). As previously discussed, there is no comparative clause to clause 2.2 in the 2013 DAU and this omission is of significant concern to Asciano.

In regard to clause 10.8 of the 2013 DAU Asciano notes the following matters of concern in the proposed audit process:

- under clause 10.8(a) of the 2013 DAU QCA no longer has the right to approve the auditor, a right which it had under the 2010 AU. Asciano considers that the QCA should retain this right; and
- the auditor no longer has to be independent of Aurizon Network and other Aurizon parties. The only requirement is that the auditor must not be an employee of Aurizon Network or another Aurizon party. This is not acceptable. An auditor must be independent – many parties other than employees can lack independence.

## 7.10 Comments on DAU 2013 – Part11 – Dispute Resolution and Decision Making

Asciano suggests that the dispute process outlined in the undertaking should take precedence over the dispute process in any access agreement. Clause 11.1.1(b) of the 2013 DAU provides that unless otherwise agreed in writing, any disputes in connection with an Access Agreement or Train Operations Agreement shall be dealt with under the provisions of the relevant Access Agreement or Train Operations Agreement. Based on past disputes that Asciano has had with



Aurizon Network (for example disputes regarding take or pay charges and transfer fees) this clause is quite limiting as it has meant that the issues in dispute have been confined to addressing largely procedural matters under the Access Agreement, rather than addressing the more fundamental issues which are more likely under the undertaking. For example, in the take or pay disputes, Asciano had to dispute the invoice issued by Aurizon Network rather than the more fundamental issue of Aurizon Network's approach to the calculation of take or pay.

In addition, under the dispute process mechanism:

- there should be an option where the QCA can be chosen by the parties to arbitrate before expert determination; and
- minimum time frames in the expert determination process need to be included.

Clause 11.1.1(a) of the 2013 DAU does not deal with disputes relating to access seekers prior to them having an access application accepted by Aurizon Network. This is a result of the new, more limited definition of "Access Seeker", which provides that an access seeker is a person who has properly completed an Access Application and met the more onerous obligations required for a properly completed Access Application under the 2013 DAU. Asciano considers that given the process now involved with meeting the requirements of an Access Application, it is important that the dispute resolution procedure is also available to a person who has attempted to make such an Access Application, and who under the 2010 AU would have been an access seeker and as such would have had the dispute resolution procedure available to them, as it is entirely conceivable that a dispute could arise over the application of the undertaking to the acceptability or otherwise of an Access Application.

## 7.11 Comments on DAU 2013 – Part12 – Definitions and Interpretation

Asciano has concerns that many definitions of terms in the 2013 DAU have changed from the 2010 AU, thus changing the intent of various provisions. Some of these concerns have been raised in this submission in the context of the clauses in which the definition is used. Asciano has also identified below definitions with which it has particular concerns together with the reasons for the concern or request for further information or clarity to be provided.

Asciano believes that any material changes in definitions between the 2010 AU and the 2013 DAU should be justified by Aurizon Network.

Asciano has a general concern that many of the definitions used in the 2013 DAU have the capacity to create confusion. In particular, the definitions of Access Holder, Railway Operator, Train Operator, Access Holder Access Agreement and Operator Access Agreement all have elements which do not seem to make logical sense to a reader, for example an Access Holder (as defined) is not necessarily the person who holds access under an Access Holder Access Agreement (as defined).

Asciano has specific concerns with the following definitions in the 2013 DAU:

- Access Application - The definition of Access Application is narrower in the 2013 DAU than was the case under the 2010 AU. This has implications for the definition of Access Seeker

and in turn the rights that an access seeker has under the 2013 AU. Asciano's concern is that a person who may have been properly classified as an access seeker under the 2010 AU and who would have had rights under the 2010 AU may now be excluded from the process and not recognised under the 2013 DAU.

- Access Charge - In the 2013 DAU the term Access Charge excludes amounts paid to Aurizon Network in accordance with Commercial Terms, Studies Funding Agreements, User Funding Agreements or Rail Connection Agreements. However, the 2013 DAU contain provisions that allow Aurizon Network to include the cost build up of these elements in the Reference Tariffs. For example, clause 9.1 (b) of the DAU 2013 implies that Connecting Infrastructure costs can be rolled into the cost build up of Reference Tariffs where it states that "to the extent that Aurizon Network's costs of operating, maintaining and renewing the Connecting Infrastructure are included in the cost build up for Reference Tariffs or are otherwise included in Access Charges for Train Services". This must be assessed by the QCA to ensure that there is no ability for Aurizon Network to recover revenue from these sources via more than one method.
- Access Holder and Access Seeker - In the definition of Access Holder, Asciano queries the requirement for the use of the words "unless expressed to the contrary" and the circumstances in which that would be the case. Asciano also notes that the use of the term Train Operator in this definition introduces confusion as to whether an Access Holder includes train or rail operators. Asciano understand that the definition is intended to include Rail Operators but as noted below (in comments on the definition of Train Operator) Asciano considers that the use of the term Train Operator should be replaced with term that reduces rather than increases confusion.

If it is intended that the terms Access Holder and Access Seeker exclude all Train Operators then this is of concern for Asciano as it changes the ability of a Train Operator to seek Access Rights and negotiate for Access. The ability of a Train Operator to seek Access must be clarified by Aurizon Network. This is a particularly significant concern as it would mean that a Train Operator is not protected by the non-discriminatory principles outlined section 3.2 of the 2013 DAU which state:

*Aurizon Network will not:*

- i) *engage in conduct for the purpose of preventing or hindering an Access Seeker's or Access Holder's Access;*
- ii) *unfairly differentiate between Access Seekers in a way that has a material adverse effect on the ability of one or more of the Access Seekers to compete with other Access Seekers;...*

The terms Access Holder and Access Seeker and their application throughout the 2013 DAU must be closely scrutinised by the QCA.

- Aurizon Network Cause – In the 2013 DAU the term Aurizon Network Cause has been changed to exclude anything attributable:
  - to an Access Holder, Railway Operator or their Customers;
  - to the unavailability of the relevant Access Holder's loading facility or unloading facility;

- to the failure to load a Train at the relevant Access Holder's loading facility within the maximum time at loading facility (as specified in the relevant Access Agreement) for that Train Service, or unload a Train at the relevant Access Holder's unloading facility within the maximum time at unloading facility (as specified in the relevant Access Agreement) for that Train Service; or
- in respect of a Train Service that will operate on Private Infrastructure prior to entering and/or exiting the Rail Infrastructure as part of its journey, to the unavailability of, or cancellation of train services on, that Private Infrastructure.

Asciano believes that the current definition of this term should be clarified as to how issues which have multiple attributions are treated. In particular, an event which is primarily Aurizon Network Cause should not be excluded due to a relatively minor issue related to a third party. This definition will have implications for an Access Holder's take or pay liability if the definition is not clarified.

- Below Rail Transit Time - In the 2013 DAU the Below Rail Transit Time is "the meaning given to that term in the Standard Access Agreement (Operator)". Asciano believes that the actual meaning should simply be stated in the definition contained in the 2013 DAU as the Below Rail Transit Time should be measured and applied consistently across all operators. Having operational metrics defined separately in separate access agreements would allow for variations to be negotiated in individual access agreements between Aurizon Network and an access holder, including Aurizon Network's related operator. The Below Rail Transit Time should be measured consistently for all access holders as it is assessed against the system Below Rail Transit Time Factors prescribed in Schedule F of the 2013 DAU.
- Capacity Multiplier – In the 2013 DAU the Capacity Multiplier is 1.59 and 1.63 for the Constrained Section of the Blackwater and Goonyella system respectively after 1 July 2015. Aurizon Network must justify how these predetermined figures were derived. Asciano strongly believes that there should not be a blanket application of the capacity multiplier, but rather the capacity multiplier should be applied to reflect the actual operational performance of a train service (as outlined in section 6.4 and Attachment 4 of this submission).

Further to the issue of the Capacity Multiplier the 2013 DAU defines the constrained sections as between Edungalba and Tunnel for the Blackwater system and between Broadlea and Coppabella for the Goonyella system. Asciano believes that this needs to be supported by capacity analysis or other evidence from Aurizon Network that these are physical constraining sections of the network.

- Commercial Terms - In the 2013 DAU Aurizon Network has broadened its ability to negotiate arrangements and conditions which will not be governed by the access undertaking. The definition of Commercial Terms has been broadened to allow Aurizon Network to negotiate varied take or pay arrangements. Asciano is particularly concerned that Aurizon Network will have an ability to negotiate varied take or pay arrangements which will not be visible by the QCA. As take or pay is directly related to the Reference Tariffs prescribed in the 2013 DAU and has direct linkages on the System Allowable Revenue that Aurizon Network is allowed to recover in any relevant year, any variability of take or pay arrangements that Aurizon Network

negotiates in individual access agreements could disadvantage other Access Holders. For example, Aurizon Network can negotiate take or pay arrangements that are more favourable to a particular Access Holder, other Access Holders would have to absorb the take or pay liability as a result of this arrangement. This is because Aurizon Network is protected by a revenue cap framework, where any under-recovery of their System Allowable Revenue would be recouped by either take or pay from individual access holders or the revenue adjustment mechanisms outlined in Schedule F of the 2013 DAU. This would be unfair to other Access Holders. Given this, the definition of Commercial Terms should be scrutinised by the QCA.

- Train Operator - the definition of Train Operator is confusing and Asciano suggests a definition such as "TOA Operator" would be less likely to cause confusion as it is clearly referable to the Train Operations Agreement to which the currently defined Train Operator relates.

## 7.12 Comments on DAU 2013 – Schedules

Asciano has numerous concerns with the Schedules attached to the 2013 DAU, these are outlined below:

- Schedule A – Preliminary, Additional and Capacity Information - under this schedule the Goonyella Abbot Point Expansion system will not be reported separately. As noted above in section 6.2 of this submission each system should be reported separately if it has a separate tariff.
- Schedule B – Access Application Information Requirements – under this schedule additional information is now required by Aurizon prior to processing Access Application. As noted in Section 7.3 and Attachment 4 of this submission much of the additional information required is unnecessary and may be used by Aurizon Network as the basis on which to discriminate against an Access Application or otherwise hinder an application.
- Schedule C - Operating Plan Requirements – Aurizon Network has now required Train Service Entitlement levels to be included in the operating plan. Asciano believes that Train Service Entitlement information should be addressed via the access agreement. The operating plan should address operating issues.
- Schedule D – Ultimate Holding Company Support Deed - As noted above in section 7.1 of this submission Asciano has serious concerns about this deed. Asciano believes that the deed in its current form provides little confidence to third party users.
- Schedule E – Regulatory Asset Base – Asciano has several concerns about the detail of the calculation and roll-over of the Regulatory Asset Base and the approval of capital expenditure. These concerns are outlined in the table in Attachment 2 of this submission. Asciano understands that other parties may be better placed to comment on the impact of the calculation of the Regulatory Asset Base on access tariffs.
- Schedule F – Reference Tariffs - Asciano has numerous concerns about the detail of Schedule F including:
  - Schedule F 1.3 (e) seems to be inconsistent with the way in which Train Service Entitlements were previously calculated. Aurizon Network should clarify the changes to the Train Service Entitlement calculation methodology and outline the implications (if any) for Train Service Entitlements held under current agreements;

- Schedule F 2.3 has changed the calculation for cross system train services. Aurizon network should clarify that the changed methodology does not result in cross subsidies and should clarify how the proportion of the distance the cross system train service travels on a particular system is taken into account;
- Schedule F 2.4 has changed some aspects of the Take or Pay approach. Asciano has broader concerns with the Take or Pay tariff components and the impact of Take or Pay approach on system flexibility as outlined in this submission in Sections 6.4, 6.7 and Attachment 4;
- Schedule F 4.3 should require Aurizon Network to include any ancillary revenue related to access to be included in its revenue calculations;
- Schedule F7.1 (iii) now states that the reference train in the Blackwater system uses electric traction and Schedule F 8.1 (iii) states that the reference train in the Goonyella system uses electric traction. Asciano believes that the reference train should not be defined by traction type. An operator and a user should be free to choose a traction type. Asciano has previously responded extensively to the QCA on the issue of traction in the Blackwater system. Asciano's broader position on this issue is restated in this submission in Section 6.4 and Attachment 4;
- Schedule F 7.2 (d), 8.2 (c), 9.2 (b), 10.2(c) and 11.2 (b) now specify the net tonne payload of the nominal train in the Blackwater, Goonyella, Moura, Newlands and GAPE systems respectively. Aurizon Network should clarify both how these payloads were derived and the purpose of these payloads; and
- other areas of concern in Schedule F are listed in Attachment 2 to this submission.
- Schedule G – Principles for Pricing of Electric Traction Services in the Blackwater System – Asciano has previously responded extensively to the QCA on this issue. Asciano's position is restated in this submission in Section 6.4 and Attachment 4. This schedule should be removed from any approved undertaking.
- Schedule H –Network Management Principles - Asciano has numerous concerns about the detail of Schedule H including:
  - Schedule H 7.4 (c) now gives Aurizon Network an ability to depart from the application of the traffic management decision making matrix following a network incident or Force Majeure event. This should only be reserved during circumstances where Aurizon Network has absolutely no choice in relation to restoring the network to normal operations. Re-starting of train services and services that can operate normally during this period should still be subject to the traffic management decision making matrix. In addition Schedule H 7.4 (c) needs to include a maximum time period that this departure from the decision matrix can apply;
  - Schedule H 8.2 (c) (iii) and 8.3 (iv) introduce concepts of pooled entitlements. These need to be clarified.

## 8. Detailed Comment on the Access Agreements Attached to the 2013 DAU

Asciano has numerous concerns with the proposed drafting of the access agreements attached to the 2013 DAU. Given Asciano's current role in the coal supply chain as an above rail operator this section focuses on concerns with the Operator Access Agreement – Coal (SOAA) and the Train Operations Agreement (TOA).

In relation to the changes made to the 2013 DAU access agreements Asciano has general concerns regarding the large numbers of incremental changes being made to clauses in the agreements. While of themselves these changes are minor in themselves, aggregated together these incremental changes result in a substantial change to the agreements. In particular many of these changes seek to further minimise Aurizon Network risk or seek to put further constraints on operator's utilisation of the network. While Asciano has not commented on these incremental changes Asciano believes that the QCA should test the rationale behind many of the minor wording changes in these access agreements.

This section contains detailed comments on the SOAA and TOA, including where appropriate changes in the access agreements between the 2010 AU Standard Access Agreement and the 2013 DAU access agreements.

Asciano notes that the TOA attached to the 2013 DAU was submitted to the QCA in April 2013; however in August 2013 the QCA approved a TOA following an extensive consultation process. Asciano believes that the TOA approved by the QCA in August 2013 is preferable to the TOA attached to the 2013 DAU and this approved TOA should replace the TOA in the 2013 DAU. Aurizon Network has not explained why the TOA approved so recently should be cancelled. (A more detailed tabulated set of comments on changes between the TOA approved by the QCA in August 2013 and the TOA attached to the 2013 DAU is contained in Attachment 3).

Asciano recognises that many of the issues relating to the wording of the 2013 DAU raised in section 7 of this submission above will flow through into the various access agreements. Asciano is not restating these concerns in this section.

### 8.1 Comment on Operator Access Agreement (SOAA)

The overall structure of the 2013 DAU SOAA has changed quite significantly from the 2010 AU. The SOAA now focuses on Train Service Types and relates the whole agreement to Train Service Types rather than access rights and train services as was the case in the 2010 AU Operator Access Agreement Coal (AAC). It is not clear why this change has been required and given that it has significant impacts throughout the SOAA and the manner in which the SOAA operates, Aurizon Network needs to provide more details on the rationale behind this new contracting structure.

In this section of the submission Asciano comments on a number of its concerns with the changes to, or drafting of, the SOAA but as stated above this is not an exhaustive list of Asciano's concerns in this regard.

Asciano is concerned by the new renewal process set out in clause 2.2 in the SOAA. The most serious concern is that the renewal provision no longer deals with a renewal of the term of the agreement, but rather limits renewal to a renewal of each of the Train Service Types operated under the agreement. This means that an operator must now seek renewal of each separate Train Service Type rather than a renewal of the agreement as a whole. In addition, an operator is prohibited from seeking a renewal of a Train Service Type if it is more than 36 months before the Train Service Expiry Date for that Train Service Type. This seems to be unnecessarily confusing and means that an agreement cannot be simply extended but can only be extended piecemeal as access for particular Train Service Types expires.

Asciano has concerns with the way in which the SOAA deals with access rights generally and makes the following comments about clause 3 of the SOAA:

- access rights under the 2010 AU were granted in respect of Train Services, however under the SOAA access rights are only granted in respect of each individual Train Service Type and only apply for each Train Service Type from the Train Service Commitment Date to the Train Service Expiry Date. This will have an impact in relation to renewals and flexibility, as discussed above;
- Asciano queries why it has been specifically provided in clause 3.2(b) (iii) to (v) of the SOAA that an operator may do any of the things set out in clause 3.2(b) (including carrying out provisioning, inspections, testing or maintenance, storage or shunting of rollingstock) where “permitted or required” to do so under the SOAA or where expressly permitted under another agreement with Aurizon Network. This would appear to allow for these matters to be dealt with in both the SOAA and other agreements. Asciano is concerned by this as it considers that these are areas in which discrimination could easily occur; and
- it is not clear to Asciano why Aurizon Network is not obliged under this clause to make infrastructure available and use reasonable endeavours to reschedule contracted Train Services for Ad Hoc Train Services. If Aurizon Network has made the Ad Hoc Train Service available to the operator by scheduling that service then Asciano considers that it should comply with the other relevant provisions of the SOAA as it would for any other Train Service.

In respect of payments under the SOAA, Asciano has the following issues:

- Asciano considers that it is not sufficient for “reasonable” details to be provided by Aurizon Network under clause 5.2(d) of the SOAA in relation to invoices for the calculation of take or pay charges; specific details are required in relation to how Aurizon Network determines the amount of the charge (as was provided for in clause 2.2(f) of the 2010 AU AAC).
- Asciano also queries the ability of Aurizon Network to unilaterally change the payment method for the payment of access charges under clause 5.3(b) (iii) of the SOAA.
- Asciano is concerned by the changes that have been made to the payments of monies (to either Aurizon Network or to an Operator) following the resolution of a dispute under clause 5.4 of the SOAA. In particular:
  - if monies are to be paid to Aurizon Network, under clause 5.4(c) (i) of the SOAA the number of days to make such a payment has been reduced from 14 days to 5 business days. Given that interest is already payable on the relevant amounts Asciano cannot understand why this timeframe has been significantly reduced; and

- if monies are to be paid by Aurizon Network to the operator, then under clause 5.4(c) (ii) (A) of the SOAA there seems to be a discrepancy in the drafting such that if the credit to be applied against the next invoice to be issued is greater than the actual value of that invoice then there does not appear to be a mechanism for those additional funds to either be credited against the next invoice or to be repaid to the operator. This should be clarified.
- Clause 5.6 of the SOAA provides that Aurizon Network's has a right of set off, whereas clause 5.3 of the SOAA specifically provides that an operator has no right of set off or deduction from its obligations to pay access charges. The right to set off is generally a reciprocal right in agreements. Asciano strongly believes that these rights should be reciprocal and so either Aurizon Network should have no right of set off or an operator should have right of set off.

In regard to clause 6 of the SOAA, and the requirement to provide security, Asciano is concerned that there is no guidance given as to the circumstances in which security will be required by Aurizon Network. It is clearly contemplated that it will not be required in all circumstances given that Schedule 1 provides a "yes / no" answer as to whether it will be required. This is of concern as the decision as to whether or not to require security could be made in a discriminatory way and indeed the requirement on a party to have security in place could also be discriminatory or have a discriminatory effect. Asciano believes that clear guidance as to this requirement in the SOAA would alleviate these concerns of potential discrimination. Asciano believes that reference to an objective or external measure, such as an independent credit rating, would provide clear guidance as to whether security is required.

In regard to clause 7 of the SOAA, Asciano is concerned by the number of additional matters that an Operator now needs to address prior to it being able to operate a Train Service as compared with the corresponding clause in the 2010 AU AAC (see clause 7.2(a) of the SOAA and clause 3.1 of the 2010 AU AAC). Asciano is also concerned that an Operator has to repeat this process each time an additional Train Service Type is added to the agreement or if the Train Service Description for an existing Train Service Type is varied (see clause 7.3 of the 2013 SOAA). Asciano considers that this is a relatively onerous process, is not necessary and should not be required for variations, particularly where there is likely to be ongoing minor changes to the Train Service Type given the level of detail required and the number of different variables in a Train Service Type.

Asciano also notes that a separate Access Interface Deed is now potentially required for each Train Service Type. It is not clear why this is required and why a single Access Interface Deed that applies generally to the Access Rights under the Agreement is not sufficient (as it was under the 2010 AU AAC).

The 2013 DAU SOAA proposes an expanded requirement in relation to Supply Chain Rights. Asciano has raised concerns in relation to the requirements in respect of Supply Chain Rights in respect of access applications elsewhere in this submission and these concerns are echoed here. The definitions of Private Facilities, Supply Chain Rights and the operation of clause 7.2 itself are all greatly expanded from clause 5.11 of the 2010 AU AAC. It is not clear why this increased level of detail is required by Aurizon Network and further to this Asciano believes that the level of detail required could have a negative effect on operators, or allow Aurizon Network to favour some operators over others. For example, the requirement to demonstrate that an operator will hold



Supply Chain Rights for the term of the Train Service Type could impact on the term that an operator can seek for such rights as, while an operator might have a reasonable expectation of having the Supply Chain Rights for the term it requires the Access Rights, it may not have those rights at the time it is required to demonstrate these matters to Aurizon Network. Aurizon Network states<sup>27</sup> that this clause will encourage operators to align the term of their access to private facilities with the term of their Access Agreement; Asciano agrees that such alignment is generally preferred but it may not always be possible to align these agreements. Currently, the 2010 AU AAC only requires that an operator have the rights to enable the operator to use them in the manner contemplated by the agreement and to only use reasonable endeavours to maintain these rights. Asciano also queries why Aurizon Network now has a right to require a demonstration of these Supply Chain Rights at any time (see clause 7.5(b) (ii) of the SOAA). At the very least, such a right should be qualified by a requirement to have a reasonable basis to believe that an operator no longer has the requisite supply chain rights.

As mentioned elsewhere in this submission, Asciano has a number of serious concerns regarding the "Resumption of Access Rights". These rights are set out in clause 8 of the SOAA. Asciano's concerns include:

- the level of detail and information required to be provided by the Operator;
- the addition of several different mechanisms which allow Aurizon Network to resume access rights;
- reduced rights to access the dispute resolution provisions in relation to resumption of access; and
- the significant additional complexity that had been added to the resumption of access rights regime in the SOAA as compared to the AAC.

The current 2010 AU regime has one simple objective trigger for the resumption of access rights based upon non usage of Train Services over a set period of time, which achieved the ends required. The 2010 AU regime process regarding the resumption of access rights is also far less intrusive and subjective than the new proposed 2013 DAU regime.

Asciano queries the introduction of the new concept of an "Underutilisation Event" in the regime regarding the resumption of access rights. An "Underutilisation Event" as defined in section 1.1 of the SOAA as:

*... any cause, event, or circumstance, or combination of causes, events or circumstances (other than the failure by Aurizon Network) to make the Access Rights available) which will have or will likely have a sustained or permanent impact on the Operator's ability to utilise or need to utilise the Access Rights for that Train Service Type (including the Operator, as applicable) ceasing to hold, or have the benefit of any Supply Chain Rights).*

This definition is very broad and allows for a much greater level of subjectivity as to the occurrence and the likely effect of such events, than the test in the 2010 AU test which simply provides for the non-usage of train services.

<sup>27</sup> Aurizon Network 2013 Draft Access Undertaking: Volume 2: The Undertaking Proposal p368

Clause 8.1 of the SOAA provides that an operator must promptly notify Aurizon Network of an Underutilisation Event as soon as it becomes aware of one occurring and the occurrence of the underutilisation event then becomes a Resumption Trigger Event (even without a notification by the operator to Aurizon Network) this allows Aurizon Network to take a number of actions including issuing a Proposed Resumption Notice. Asciano queries why:

- an Underutilisation Event should become a Resumption Trigger Event without any notification by the Operator to Aurizon Network; and
- an Underutilisation Event should have the same consequence for the operator as the non usage of train services over a set period of time.

The second category of Resumption Trigger Event is the non-usage of train services. Asciano notes that Aurizon Network has reduced this trigger event from the non operation of at least 15% of train services over any four consecutive quarters (see clause 3.2(a) of the AAC) to the non operation of at least 15% of train services which the Operator was entitled to operate during a quarter, for any two out of any three consecutive quarters (as defined in section 1.1 of the SOAA). This is a substantial reduction; Asciano objects to this reduction and considers that the previous numbers for the trigger event should be reinstated.

Asciano also believes that an operator should have the right to take a proposed resumption of access rights to dispute at any time during any process involving a reduction, or a proposed reduction, of access rights rather than only after a resumption notice has been issued as is now provided for in the 2013 DAU. Under the current AAC an operator can take a dispute at any time following the issue of the initial resumption notice. This right should be reinstated.

In respect of changes that can be made to an operator's monthly train services during the term of an agreement, Asciano is greatly concerned by the introduction in clauses 10 and 11 of the SOAA of a mechanism which provides for the ability of Aurizon Network to reduce an Operator's nominated monthly train services if a maximum payload is exceeded by the Operator or if the nominal payload is increased by Aurizon Network.

More broadly the introduction of clauses 10 and 11 of the SOAA facilitates changes to the fundamental structure of access contracting; being that the access rights for train services is driven by the introduction of the unnecessary concept of Train Service Type. Asciano is concerned with the rigidity of the factors included in the Train Service Type and the consequences of changes to the Train Service Type during the term of the SOAA.

In regard to Relinquishment of Access Rights in clause 12 of the SOAA, Asciano is concerned about the apparent removal of the obligation on Aurizon Network to pursue opportunities that would result in a lessening of a relinquishment fee (such an obligation was contained in clause 3.3(i) of the AAC). More broadly as outlined in section 6.6 of this submission Asciano is concerned that the 2013 DAU has removed relinquishment fee provisions from the undertaking and confined them to the access agreements (for example clause 12 of the SOAA). This allows Aurizon Network to negotiate variations in relinquishment fee provisions in individual access agreements that may benefit certain operators or access holders over others.

In respect of transfers, Asciano considers that further clarity is required in relation to the concept of "Ancillary Access Rights" as used in clause 13 regarding the transfer of Access Rights by the Operator. Asciano is also concerned by the addition a number of enhanced and further obligations in respect of the matters required to be addressed prior to a transfer being implemented (see clauses 13.2 and 14.2 of the SOAA). More broadly as outlined in section 6.6 of this submission Asciano is concerned that the 2013 DAU has removed transfer fee provisions from the undertaking and confined them to the access agreements, for example clauses 13 and 14 of the SOAA). This allows Aurizon Network to negotiate variations in transfer fee provisions in individual access agreements that may benefit certain operators or access holders over others.

Asciano objects to the broad matters dealt with by clause 16 of the SOAA and in particular has concerns with clauses 16.2 and 16.3 of the SOAA. Asciano considers that if Aurizon Network requires the rights outlined in these clauses then given the significance of the matters being dealt with, for example, entitlement to operate and releases from liability, these matters should be dealt with in the context of each particular clause to which these clause 16.2 and 16.3 are said to apply so that an operator can more clearly consider its position regarding the impact of those matters and ensure that its rights are adequately protected.

In regard to clause 18 of the SOAA Asciano is concerned by the introduction of the right for Aurizon Network to vary the Access Charge Rates to fully compensate it for any increased cost or risk or any increased utilisation of the capacity in clause 18.2. Asciano does not consider that this is an appropriate manner for dealing with such non compliances and views this change as a further demonstration of Aurizon Network's dual approach of minimising any risk (by allowing price increases if costs or risks increase) and seeking to further limit flexibility in an operator's utilisation of the network.

Furthermore Asciano queries the need for the new provision at clause 18.6 and believes that if it is retained that prior to any action being taken Aurizon Network should contact all access holders seeking permission to reasonably vary their access agreements in order to preserve its accreditation. In this instance an access holder should not refuse any reasonable request. Such a process should be transparent, and in particular if a third party access holder is required to vary its access agreement in a certain manner but Aurizon Network's related operator is required to vary its access agreement in a different manner or not at all this should be reported to QCA, who should then scrutinise the reasoning behind the request. Furthermore operators should have the right to dispute any action taken by Aurizon Network in respect of this clause 18.6. Asciano believes that Aurizon Network could clarify this issue by providing examples of the types of operator actions which it believes could jeopardise Aurizon Network's accreditation

In regard to clause 20 of the SOAA Asciano queries why clause 20.1 of the SOAA does not require Aurizon Network to use reasonable endeavours to operate train services in compliance with the relevant Daily Train Plan and otherwise comply with other Scheduled Times. This obligation now only applies to the Operator. This obligation should be reciprocal as it was under the 2010 AAC.

Asciano is also concerned by the number of changes to clauses 20.2 and 20.3 of the SOAA in relation to alterations to train services. In particular, Asciano is concerned with the following:

- Aurizon Network is broadening the requirement as to when an operator has to notify it of a cancellation, for example, the 2010 AAC required notification of a cancellation whereas the 2013 SOAA requires notification of a decision or awareness of a cancellation (see SOAA clause 20.2(a));
- Aurizon Network is limiting the circumstances in which it will be obliged to use reasonable endeavours to reschedule a cancelled train (see SOAA clause 20.2(b)); and
- The allocation or otherwise of the Aurizon Network cause under SOAA clauses 20.2(d) (iv) and 20.3(d) (iv).

Asciano believes that these concerns should be scrutinised by the QCA.

In regard to clause 21 of the SOAA Asciano is concerned by the new regime that has been introduced regarding the authorisation of rollingstock and rollingstock configurations. Asciano queries the need for the establishment of another complex process which places further obligations on operators in the place of the more simple and appropriate process that was previously in place under the AAC. Asciano believes that any regime relating to rollingstock authorisation and configuration should apply to all operators equally. Placing the requirements for the authorisation of rollingstock and rollingstock configurations in the SOAA rather than the undertaking allows Aurizon Network to differentially negotiate the authorisation of rollingstock and rollingstock configurations, which may be used to benefit some operators over others.

In regard to clause 24 of the SOAA Asciano has made extensive comments in section 6.2 and Attachment 4 of this submission in relation to the inadequacy of the performance measures provided by Aurizon Network and these comments extend to the inadequacy of clause 24 in relation to performance levels under the SOAA.

As noted throughout this submission, the addition of the concept of Train Service Type into the 2013 DAU document package has a continued impact on the drafting and the obligations of an operator. For example in clause 26 of the SOAA the concept of Train Service Type results in the operator having to amend and seek re-approval for its already approved Emergency Response Plan whenever a Train Service Type is added or varied, a process which requires the Operator to cease operating the relevant train services until the amended Emergency Response Plan is approved. This process seems cumbersome and unnecessary and Asciano considers that the previous arrangements should be reinstated.

In regard to clause 31 of the SOAA Asciano has ongoing concerns with the insurance provisions in Aurizon Network access agreements. In particular clause 31.3 (b) of the SOAA requires the operator to provide copies of its insurance policies to Aurizon Network. Asciano believes that given the confidentiality requirements attached to such insurance agreements clause 31.3 (b) is problematic for operators.

Asciano has some concerns with the amendments that have been made to the liability and indemnity regime under the SOAA. In particular, Asciano seeks that the following issues be addressed:

- the consequential loss exclusion should not be removed from operation in the additional circumstances that have been included in the agreement, (namely in relation to transfers in clause 14.2(i) and third party indemnities under clause 32.3);
- clause 33.3 should be removed;
- as noted above, the circumstances in which Aurizon Network is required to use reasonable endeavours to reschedule a train have been reduced in clauses 20.2 and 20.3 of the SOAA. Clause 33.5(a) of the SOAA now further limits the ability of an operator to make a claim where a train service has not been able to be operated under those clauses. The 2010 AAC provided simply for the ability to make a claim where Aurizon Network was unable to re-schedule a train service at a reasonable alternative time. This should be reinstated;
- the extension of the Aurizon Network carve out in clause 33.5 (d) to customers, other railway operators customers and their employees, contractors, volunteers and agents is excessive; and
- the inclusion of "Operational Constraints" as a "carve-out" in clauses 33.5 and 33.6 is excessive.

Under the 2013 SOAA Aurizon Network has greater rights of suspension and termination than it had under the 2010 AAC. Clauses 38 and 39 of the SOAA and Schedule 9 of the SOAA now provide a much more prescriptive list of circumstances in which Aurizon Network has the right to suspend or terminate train services or the agreement than was previously the case under the AAC. Asciano is concerned by these increased rights given to Aurizon Network. Suspension and termination are rights that should only be exercised in circumstances where there has been a material departure from the requirements of a contract. They should not be exercised for a minor breach or for breaches which could be managed in a less intrusive way.

Asciano is also concerned about the establishment of a new category of suspension and termination rights and in particular about the suspension and termination rights in respect of Train Service Types. Asciano queries the need for the establishment of this additional category. This concern largely relates to Asciano's general concern about the establishment of Train Service Types as a concept under the 2013 DAU document package as outlined throughout this submission, and the enhanced level of information required by Aurizon Network and the creation of additional processes which result from establishment of Train Service Types as a concept.

In regard to clause 43 of the SOAA Asciano has some concerns about the licence provided in respect of an operator's intellectual property and considers that further details and clarity are required as to the requirement for such a licence and the purposes for which it can be used.

## 8.2 Comment on Train Operations Agreement

The overall structure of the Train Operations Agreement (TOA) in the 2013 DAU has changed quite significantly when compared to the version recently approved by the QCA on 1 August 2013, following a lengthy consultation and approval process. Asciano believes that as the TOA was only recently approved by the QCA this version of the TOA should be used in the 2013 access undertaking document package.

If there are differences between the TOA approved by the QCA on 1 August 2013 and the proposed 2013 DAU TOA, due to consequential changes made in the 2013 DAU, each of these changes must be justified by Aurizon Network. (A more detailed tabulated set of comments on changes between the TOA approved by the QCA in August 2013 and the TOA attached to the 2013 DAU is contained in Attachment 3).

The 2013 DAU TOA proposed by Aurizon Network differs from the version approved by the QCA in many respects. One of the key differences is the introduction of the Train Service Types concept. As outlined in section 6.7 of this submission this concept is of concern to Asciano as the Train Service Types concept has a significant impact on how train services operate and how access rights apply.

The term Train Service Type has essentially replaced the terms Access Rights and Train Services previously used in the 2010 AU standard access agreements and the version of the TOA approved by the QCA in August 2013. This changes the overall intent of the terms and conditions of the 2013 DAU TOA and will have a significant impact on operators who will be subject to the TOA.

Asciano believes the introduction of the term Train Service Type is not only restrictive but overly onerous. Aurizon Network seeks to restrict access rights to specific Train Service Type as outlined in Schedule 2 of the 2013 DOA. The Schedule links Train Service Type to nominated monthly operational rights and route and facility parameters (such as origin and destination and maximum payload). This linking of Train Service Type to these parameters will reduce the ability of the train operator to flexibly use access rights, thus reducing utilisation of the network. Asciano strongly believes that the flexible use of access rights should be encouraged, not discouraged.

Asciano is seeking clarification of how existing access holders and train operators (subject to terms and conditions of an access agreement approved in previous access undertaking periods) will be treated in relation to the introduction of the concept of Train Service Type. As these existing access holders will not be subject to the term Train Service Type in their access arrangements, Asciano believes that these existing access holders will have a clear advantage over new access holders (i.e. new entrants) who may potentially acquire access rights under the 2013 DAU. Potential new entrants will be subject to these additional onerous provisions, which will most likely make new entrants less competitive, and so these potential new entrants will not be able to successfully enter the market.

The QCA must seek an explanation from Aurizon Network of the rationale behind the introduction of the Train Service Type concept.

There are sections in the 2013 DAU TOA where Aurizon Network seeks additional revenue. Aurizon Network seeks to have ability to vary access charges so that they are fully compensated for increased cost of risk and increased utilisation of capacity. These are specifically included in:

- clause 14.2, where Aurizon Network has the right to vary the access charges to account for the increased cost of risk and utilisation of capacity as a result of changes to the Train Services Description;

- clause 17.11, where Aurizon Network can vary the access charges so that they are compensated for increased cost of risk and utilisation of capacity when train services differ from the Reference Train Service; and
- clause 25.5, where Aurizon Network can vary the access charges so that they are compensated for increased cost of risk and utilisation of capacity in relation to any amendments of an Interface Risk Management Plan in comparison to a Reference Train Service.

Asciano is concerned that in relation to the above clauses there is no process by which the variation to the access charges is triggered or calculated. Such processes must be prescribed in the 2013 DAU to ensure they are applied consistently across all access holders. As it currently stands these increases will be based on the subjective assessment and method of Aurizon Network and applied on an agreement by agreement basis, which provides Aurizon Network with the potential to treat different operators inconsistently.

Asciano also questions how such variations to access charges will be treated against the System Allowable Revenue and the application of the capacity multiplier to ensure there is no double recovery by Aurizon Network. Asciano does not consider that the above clauses are an appropriate manner for dealing with such risks.

More broadly, Asciano views the Aurizon Network approach in the 2013 DAU to both the Train Service Type concept and access charge variations as a further demonstration of Aurizon Network's dual objective in the 2013 DAU of further limiting the flexibility in an operator's utilisation of the network and further minimising any risk (by allowing price increases if costs or risks increase).

Other provisions introduced in the 2013 DAU TOA that Asciano has concerns with are outlined below:

- clause 2.2 of the 2013 DAU TOA states that;  
*The Operator has no right under this Agreement or in accordance with the Access Undertaking to seek a renewal of the Term.*  
Asciano believes that there needs to be a provision to state if the corresponding End User Access Agreement is renewed where that End User has nominated to continue with their current Railway Operator for the operation of Train Services, then the TOA will be renewed for the same term consistent with that relevant corresponding End User Access Agreement;
- clause 3.2 of the 2013 DAU TOA contains specific restrictions on an operator's use of the network. As these restrictions were not specifically contained in previous forms of standard access agreements, Asciano believes new entrants will be clearly disadvantaged. The QCA should seek Aurizon Network clarity regarding the necessity for these restrictions;
- clause 3.3 of the 2013 DAU TOA states that the inclusion of Ad Hoc Train Services in the 2013 DAU TOA can only be allowed if it is nominated by an End User or operated on behalf of an End User. Asciano believes that the treatment of Ad Hoc Train Services should be the same across any form of access agreements;

- clauses 5 and 6 of the 2013 DAU TOA relate to the nomination and variation of an operator. Asciano is seeking clarification from Aurizon Network as to how Ad Hoc Train Services will be treated upon termination of the TOA once the End User has nominated to withdraw all Access Rights from the Operator. Also, Asciano is seeking clarification from Aurizon Network as to whether there is the ability for one TOA to contain Access Rights for more than one End User, and if so, how would it be considered against these provisions;
- clause 10.4 (a) (ii) of the 2013 DAU TOA requires an Operator to demonstrate Supply Chain Rights in respect of each Train Service Type to the reasonable satisfaction of Aurizon Network prior to the commencement of Train Services. This is not only restrictive but based on the subjective nature of what Aurizon Network believes to be a demonstration of Supply Chain Rights. The parameters listed against Supply Chain Rights are very extensive and Asciano queries whether such an extensive list or parameters is required. In particular Asciano is concerned that a subjective application of the concept of supply chain rights between different access holders and operators may result in Aurizon Network favouring one access holder or operator over another;
- clause 11.1 of the 2013 DAU TOA gives Aurizon Network the ability to reduce the nominated monthly train services if at any time the average annual payload of the Train Service Type operated by the Operator exceeds the Maximum Payload for the Train Service Type. This would give Aurizon Network the rights to effectively resume Train Service Entitlements if an Operator's average payload over a 12 month period exceeds the Maximum Payload specified as the Train Service Type. Asciano believes this does not promote efficiency for the supply chain as Operators would have no incentives to increase their carrying payloads (consistent with good engineering practice) if in return Train Service Entitlements are taken from them. This effectively allows Aurizon Network to appropriate efficiency gains made by the operator, thus removing the operator's incentives to realise efficiency gains and increase supply chain throughput. In addition, Asciano seeks clarity on how existing Access Holders will be treated in this scenario as (based on the standard access agreements during previous access undertaking periods) such provisions did not exist;
- clause 12.1 of the 2013 DAU TOA states

*The Operator acknowledges that Aurizon Network may give the End User a notice of Aurizon Network's intention to increase the Nominal Payload for a Train Service Type under the End User Access Agreement.*

Under these provisions, Aurizon Network has the right to require Operators to operate trains with higher payloads. Asciano strongly believes that within the bounds of good engineering practice the carrying capacity of an operator's rollingstock should not be dictated by the access provider. The procurement of rollingstock is specific to a Train Operator's commercial decisions and the planning and commissioning of rollingstock is an extensive process taking several years. Asciano believes that traction type, train configuration and rollingstock are all issues that rightly should be made by the operator and end user rather than the network provider.

Asciano notes that there are no reciprocal provisions in the 2013 DAU TOA that the Train Service Entitlements are to be increased as a result of payloads being less than the average annual payload or nominal payload.



- clause 16.2 (b) of the 2013 DAU TOA includes the additional concept of the “48 hour window”. This concept was introduced by Aurizon Network in the drafting of proposed system rules which are currently undergoing a QCA consultation process. Until the system rules are approved by the QCA this should be omitted from the 2013 DAU TOA. Further to this Asciano notes that the system rules should apply to all operators equally. Asciano queries why such a system rules concept is included in an agreement as opposed to a broader over-arching document (such as the undertaking).

## 9. Responses to Questions in the QCA Consultation Paper

In August 2013 the QCA released a consultation paper on the 2013 DAU. The QCA Consultation paper put forward numerous questions on a broad range of issues. A detailed set of Asciano responses to the questions put forward by the QCA is contained in Attachment 4.

Asciano believes that the QCA Consultation paper has identified many areas of the 2013 DAU which are of concern to Asciano. In particular Asciano is concerned with the following issues raised in the QCA Consultation Paper:

- cost and price structures in the 2013 DAU, particularly AT<sub>2</sub> and AT<sub>5</sub> tariffs and the application of the capacity multiplier;
- the nature of volume forecasts in the 2013 DAU regulatory framework;
- the nature of commercial negotiations in the 2013 DAU regulatory framework;
- the lack of an incentive mechanism in the 2013 DAU;
- the detailed negotiation framework in the 2013 DAU and how it may be manipulated by Aurizon Network;
- the need for recently finalised regulatory processes relating to alternative standard access agreements and standard rail connection agreements to be incorporated into the 2013 DAU;
- access agreement issues, including the new focus in the standard operator's access agreement on train service types;
- the inclusion of the CLMPS in SRCA, the CLMPS should be addressed via another mechanism which has less potential to be manipulated by Aurizon Network;
- the replacements of the previous objective capacity allocation mechanism with a more subjective capacity allocation mechanism which has the potential to be manipulated by Aurizon Network;
- ring fencing issues; in particular Asciano has serious concerns as to potential for the 2013 DAU to allow Aurizon Network to engage in discriminatory behaviour and hinder third party access. A strong ring fencing and compliance regime is fundamental to facilitating third party access, particularly where the access provider is a vertically integrated natural monopoly. The 2013 DAU does not contain such a regime;
- reporting issues, in particular Asciano is concerned that high level annual reports of information provide little assistance either access holders or the QCA in managing access agreements or identifying potential access undertaking breaches; and
- dispute resolution issues.

## 10. Conclusion

As outlined in this Asciano submission, Asciano has numerous concerns with both the general direction and the detailed proposed drafting of the 2013 DAU.

Asciano strongly believes that many aspects of the 2013 DAU must be further tested and examined by the QCA to ensure that the 2013 DAU meets the requirements of the QCA Act and that the 2013 DAU ensures that there is continued confidence in the Queensland coal supply chain.

In particular there should be focus on:

- ring fencing issues - A strong ring fencing and compliance regime is fundamental to facilitating third party access, particularly where the access provider is a vertically integrated natural monopoly. The 2013 DAU contains numerous provisions that seek to weaken the existing ring fencing regime. The 2013 DAU must contain a strong ring fencing regime which can identify, prevent and remedy any ring fencing breach. If the full benefits of above rail competition are to be realised then the ring fencing and compliance regime must be substantially strengthened rather than weakened.

Asciano has serious concerns that the weakened 2013 DAU ring fencing regime will allow Aurizon Network to engage in discriminatory behaviour and hinder third party access.

- improved performance monitoring regimes - Such regimes are complementary to an improved ring fencing regimes, and allow both access holders and the QCA to monitor Aurizon Network's performance across access agreements and between different access holders. The 2013 DAU seeks to provide only high level annual information to access holders and the QCA which will be of little assistance in either managing access agreements or identifying potential access undertaking breaches.
- a requirement for an incentive mechanism – The 2013 DAU no longer contains a requirement for the development of an incentive mechanism. Such a mechanism is required to drive efficiency improvements in Aurizon Network's operations.
- cost and tariff structures - The 2013 DAU is seeking to move away from cost reflective tariffs and tariff structures particularly in relation to the AT<sub>2</sub> and AT<sub>5</sub> tariffs and the application of the capacity multiplier.

Any final position on the AT<sub>5</sub> tariff approved in the 2013 DAU must ensure that pricing methodologies and outcomes are efficient for electric and diesel traction operators, and in particular diesel traction operators and users do not pay for electric infrastructure which they do not use. Any final position on the AT<sub>5</sub> tariff must not favour one rail operator or traction type over another, distort competition in the above rail market or have an anti-competitive impact in the above rail market.

In addition the 2013 DAU cost allocations are seeking to attribute Aurizon corporate costs to Aurizon Network to the potential benefit of Aurizon's above rail operator.

- the shifting of key clauses and principles from the access undertaking – The 2013 DAU either removes key clauses and principles entirely from the access undertaking documents package or shifts clauses and principles from the 2010 AU to the 2013 DAU proposed access

agreements. This removal and shifting of clauses reduces transparency, certainty and regulatory scrutiny, and increases the potential for Aurizon Network to negotiate discriminatory terms with its related above rail operator.

- reduced flexibility - The 2013 DAU is seeking to diminish access holder flexibility in the utilisation of their access rights (for example by use of the Train Service Type concept), when it should be allowing a more flexible utilisation of access rights by an access holders;
- the commercial negotiation framework - The 2013 DAU commercial negotiation framework has introduced increased subjectivity into access negotiations and has the potential to be used by Aurizon Network to favour one operator over another;
- the capacity allocation framework - The 2013 DAU capacity allocation framework has introduced increased subjectivity into access negotiations and has the potential to be used by Aurizon Network to favour one operator over another.

Overall, Aurizon Network's ring fencing regime, access negotiation framework, contracting framework and capacity management framework should be transparent and accountable. If Aurizon Network seeks to emphasise their "support for transparency and accountability in the operation of the central Queensland coal network"<sup>28</sup> this commitment should be evident in the 2013 DAU.

Asciano believes this transparency and accountability can only be achieved by Aurizon Network if there is a substantial revision of the 2013 DAU that considers the issues identified in this submission.

Asciano strongly believes that the 2013 DAU cannot be approved in its current form.

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<sup>28</sup> Aurizon Network's 2013 Draft Access Undertaking Volume 1 - Overview and Summary p4

## Attachment 1- List of Asciano Submissions to 2010 AU Processes

Since October 2010 Asciano has made numerous submissions to QCA consultation processes. Asciano is seeking that, to the extent that the content of these previous submissions to the QCA is relevant, these submissions be considered in the QCA's determination in regard to the 2013 DAU.

In particular Asciano notes that there are numerous issues where consultation is still ongoing including but not limited to electric infrastructure tariffs, Goonyella Abbot Point Expansion tariffs, incentive mechanisms and standard user funding agreements. To the extent that the 2013 DAU mirrors previous Aurizon Network positions on these issues then previous Asciano submissions on these issues should be seen as comment on the Aurizon Network 2013 DAU proposals.

In addition Asciano notes that in recent months the QCA has brought down final decisions in relation to the standard connection agreement and the standard end user access agreement. Asciano believes that both of these QCA decisions should be reflected in the QCA final decision on the 2013 DAU. Asciano does not believe that there is any value in re-opening these issues shortly after final decisions have been released by the QCA.

Submissions made by Asciano to QCA are as follows (all of these submissions are on the QCA website):

### **Access Undertaking Time Extension DAAU – 2013**

Asciano Submission – May 2013

### **Connection Agreements**

Asciano Submission – October 2011

Asciano Submission – September 2012

Asciano Submission – March 2013

### **Costing Manual**

Asciano Submission and Attached Report– August 2011

### **Electric Traction Pricing - DAAU Consultation 2011**

Asciano Submission and Attached Report – April 2012

Asciano Submission – September 2012

Asciano Submission and Attached Report – November 2012

### **Electric Traction Pricing - DAAU Consultation 2013**

Asciano Submission – June 2013

Asciano Submission – August 2013

**GAPE Pricing - DAAU Consultation 2012**

Asciano Submission – October 2012

**GAPE Pricing - DAAU Consultation 2013**

Asciano Submission – May 2013

**Incentive Mechanism**

Asciano Submission – August 2012

**Revenue Cap Adjustments**

Asciano Submission – January 2011

Asciano Submission – June 2012

Asciano Submission – December 2012

**Review of Reference Tariffs**

Asciano Submission – May 2011

Asciano Submission – June 2012

**Standard Access Agreements**

Asciano Submission – September 2011

Asciano Submission – October 2012

**Standard User Funding Agreement Consultation**

Asciano Submission – March 2011

Asciano Submission – August 2013

**System Rules - Capricornia**

Asciano Submission – October 2011

Asciano Submission – August 2013

**System Rules – Goonyella and North Bowen Basin**

Asciano Submission – September 2011

Asciano Submission – September 2013

## Attachment 2 - Comments on Changes between 2010 AU and 2013 DAU

The attached table outlines major changes in wording or concept between the 2010 AU and the 2013 DAU. The table contains Asciano comments as to appropriateness and acceptability of these changes.

## Attachment 3 - Comments on Changes in the TOA between 2013 QCA Approved TOA and 2013 DAU TOA

The attached table outlines major changes in wording or concept between the 2013 QCA approved TOA and the TOA attached to the 2013 DAU.

The table contains Asciano comments as to appropriateness and acceptability of these changes



## Attachment 4 – Responses to Questions Raised in the QCA August 2013 Consultation Paper

In August 2013 the QCA released a consultation paper on the 2013 DAU. This paper put forward numerous questions on which the QCA is seeking stakeholder responses. A detailed set of responses is contained in this attachment.

### QCA Questions

#### General Questions – QCA Consultation Paper Page 14

*Are Aurizon Network's proposed reference tariffs consistent with the criteria in the QCA Act (including the section 168A pricing principles)? What are the expected impacts of the proposed reference tariffs on stakeholders' interests?*

The QCA Act pricing principles allow for cost recovery, multipart tariffs where they add to efficiency and require non-discriminatory pricing (unless justified by cost differences) and incentives for cost reduction or increased productivity. In addition the QCA Act Clause 137 (1A) states that for any access undertaking for a service owned or operated by an access provider with a related party (such as the Aurizon Network) the undertaking must prevent the related access provider recovering costs that are not reasonably attributable to the provision of the service.

Asciano believes the pricing as proposed does not meet these criteria as:

- the general level of tariff increase (e.g. a 36%<sup>29</sup> tariff increase on a dollar per net tonne basis) immediately raises concerns that tariffs are being increased by more than efficient costs;
- the calculation of corporate costs (as outlined in this submission in section 6.5) results in costs being recovered which should not be attributable to the service;
- The multipart tariff structure proposed by Aurizon Network does not have pricing components reflecting cost components, (as outlined in this submission in section 6.4). The current tariff proposal increases take or pay exposures for end users; and
- the tariff proposal contains no genuine incentives for either cost reduction or increased productivity. The 2013 DAU has removed the requirement for an incentive mechanism and under the 2013 DAU Aurizon Network is effectively guaranteed revenue regardless of volume throughput. The lack of genuine incentives to reduce costs and increase volumes impacts on all members of the supply chain, particularly mines and above rail operators whose revenues are not effectively guaranteed and who rely on increased volumes and reduced costs to drive their revenue.

Overall, the over recovery of costs in the 2013 DAU tariffs impacts on both end users, who pay more than the efficient costs of the service and on independent above rail operators who through the over charging of corporate costs are effectively funding their competitors corporate overheads.

<sup>29</sup> QCA Consultation Paper Aurizon Network 2013 Draft Access Undertaking p9

*Are the levels of maintenance and operating costs and capital expenditure proposed by Aurizon Network consistent with efficient costs? The proposed costs are based on a stand alone network – are users being asked to pay for costs that are not reasonably attributed to the provision of the declared service?*

Asciano notes that maintenance costs have increased 28 per cent (from 2012-13 of the 2010 AU to 2013-14 of the 2013 DAU) and operating costs have increased 44 per cent (from 2012-13 of the 2010 AU to 2013-14 of the 2013 DAU). The general level of these cost increases immediately raises concerns that costs are being increased by more than efficient costs.

Of particular concern to Asciano is the 44 per cent increase in operating costs. This increase in costs is substantially driven by Aurizon Network assessing its operating costs on a stand alone basis (i.e. assuming that its above rail business is not a related party). These concerns are further outlined in this submission in section 6.5.

Asciano strongly queries the use of a stand alone basis for assessing costs. The reality is that Aurizon Network does have a related above rail business with which can and does share costs. Aurizon Network's use of stand alone costing means that it is carrying a large portion of Aurizon's above rail corporate overheads. This puts Aurizon's above rail business at an advantage in competing with other above rail businesses as the Aurizon's above rail business has a lower cost structure as its corporate overheads are being partially funded by Aurizon Network, and hence by those who pay for access.

If Aurizon Network seeks to continue to benefit from the use of stand alone costing approaches then at the least it should implement a program to more completely separate its above rail activities from its below rail activities, so that the stand alone costing approach has some basis in fact.

*How does the proposed fixed eight year price path for electric traction services (AT5) fit with the rest of Aurizon Network's proposed tariff structure, including the changed approach to the AT2 incremental capacity charge, and capacity multiplier?*

Asciano has outlined its strong concerns relating to the proposed price path for AT<sub>5</sub> tariffs in this submission in section 6.4 and through other submissions to the QCA on this issue in response to Aurizon Network's various attempts to seek recovery of their electric traction costs. (These other Asciano submissions are listed in Attachment 1).

Under the 2013 DAU Schedule G there remains the potential for diesel traction operators and users to pay for electric infrastructure which they do not use, resulting in cross subsidies from diesel traction users to electric traction users. In particular, the 2013 DAU Schedule G states that all access holders utilising the Blackwater system should contribute to Aurizon Network's recovery of the Blackwater Electric System Costs. This position is unacceptable.

Asciano's position on the recovery of electric infrastructure costs via the AT<sub>5</sub> tariff remains unchanged. Any final approved position on the AT<sub>5</sub> tariff must ensure that market decisions on traction choice are allowed, prices are efficient for both electric and diesel traction operators and users (and in particular parties which do not use electric infrastructure do not pay for this infrastructure) and outcomes are non-discriminatory for above rail operators and traction types.

The 2013 DAU is proposing to continue applying a capacity multiplier to the AT<sub>2</sub> tariff for the extra capacity that Aurizon Network assumes is consumed by non-reference trains. Aurizon Network is proposing that:

- the Blackwater AT<sub>2</sub> tariff increase by 149% and that the Goonyella AT<sub>2</sub> tariff increase by 94%; and
- the Blackwater capacity multiplier increased from 1.1 to 1.59 and that the Goonyella capacity multiplier increased from 1.52 to 1.63.

These changes appear targeted at driving non reference trains out of both systems, particularly the Blackwater system, and are anti-competitive.

Asciano maintains that if any train (regardless of traction type) is inefficient then this issue is best addressed through applying a capacity multiplier which takes into account the actual trains operating performance and how that impacts on network capacity (noting that if there is no congestion in the system then no costs are incurred and hence no multiplier needs to be applied). This approach sends an appropriate price signal as actual trains which cause actual increased costs in the system are required to pay a higher access charge.

In the 2013 DAU the capacity multiplier for the Blackwater system and Goonyella system is pre-determined to apply to non-reference trains without any consideration of these trains actual performance. As noted in Asciano's submission to the QCA in April 2012 relating to the AT<sub>5</sub> tariff issue, assumptions as to which types of traction choice and train configurations have faster cycle times and are more efficient are often not supported by actual data. Asciano believes that any capacity multiplier that is applied should be reflective of the performance capability of the individual train service to encourage efficient operations by above rail operators and the value of the multiplier should be based on actual congestion or delays which result (i.e. the price signal sent to the operator should be based on the actual cost).

Asciano's other concerns with the AT<sub>2</sub> tariff are outlined in this submission in section 6.4.

*Is the proposed WACC consistent with the criteria in the QCA Act (including that prices for access to services should generate expected revenue that includes a return on investment commensurate with the commercial and regulatory risks involved, and the other pricing principles in section 168A)? In particular is the proposed WACC based on the risks associated with a regulated, stand alone, coal railway network?*

Asciano believes that other stakeholders are better positioned to address the issues raised in this question.

*Which volume forecasts do stakeholders consider are a more reliable forecast of expected railings, Aurizon Network's proposal or the lower forecasts estimated by Energy Economics?*

Asciano has outlined its concerns with system forecasting in section 6.8 of this submission. As noted in section 6.8 of this submission Asciano believes that the 2013 DAU forecasts should be independently assessed (in consultation with stakeholders) and this assessment should be tested.

One of Asciano's major concerns is that if the Aurizon Network forecasts are not met there are subsequent substantial tariff adjustments. This issue is particularly important as the Aurizon

Network AT<sub>5</sub> tariff proposals are predicated on a certain level of volumes being reached. If these volumes are not achieved then it is likely that diesel traction users will be required to cross subsidise the funding of Aurizon Network's electric infrastructure. Asciano has written to the QCA about this issue in August 2013.

*Is it consistent with the criteria in the QCA Act (including the section 168A pricing principles) to make adjustments to the reference tariffs for maintenance costs as part of the annual reset and revenue cap mechanisms?*

The QCA Act pricing principles allow for cost recovery, multipart tariffs where they add to efficiency and require non-discriminatory pricing (unless justified by cost differences) and incentives for cost reduction or increased productivity. Annual adjustments to tariff components to reflect changes in efficient costs do not seem to run directly counter to these principles although by being able to pass through costs there is a reduced incentive on Aurizon Network to actively seek to reduce costs or increase productivity. Furthermore, it should be recognised that such a pricing model reduces Aurizon Network's exposure to the risk of cost increases. This risk reduction should be reflected in the broader pricing model.

As outlined in sections 6.4 and 6.5 of this submission Asciano believes that there has been a misallocation of costs between the tariff components.

*Is Aurizon Network's proposed approach to the AT<sub>2</sub> incremental capacity charge and AT<sub>4</sub> allocative tariff consistent with the criteria in the QCA Act (including the section 168A pricing principles)? Do the proposed higher charges provide a better signal of the cost of adding capacity on a system running at high levels of utilisation?*

As outlined in section 6.4 of this submission Asciano believes that there has been a misallocation of costs between the tariff components and as such this approach is not consistent with the QCA Act. Specifically Aurizon Network has mis-allocated costs from AT<sub>1</sub> into AT<sub>2</sub>. Aurizon Network argues that the AT<sub>2</sub> tariff is intended to signal the costs of adding an extra path; however given the substantial increases in the AT<sub>2</sub> tariff component (e.g. Blackwater AT<sub>2</sub> tariff has increased by 155%<sup>30</sup>) Asciano queries this rationale.

AT<sub>2</sub> is not intended to reflect the costs of future expansion. If a pricing signal for future expansion is required it should be addressed via a separate tariff component linked to the expansion. The AT<sub>2</sub> tariff component should only reflect the cost of small increases in capacity (i.e. increases linked to the investment required to add an extra train path).

*Is Aurizon Network's proposed approach to the capacity multiplier a suitable way of charging for congestion (consistent with the criteria in the QCA Act (including the section 168A pricing principles)), caused by trains that consume disproportionate numbers of paths?*

The 2013 DAU continues to apply a capacity multiplier to the AT<sub>2</sub> tariff for the extra capacity that Aurizon Network assumes is consumed by non-reference trains. This approach is flawed.

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<sup>30</sup> QCA Consultation Paper Aurizon Network 2013 Draft Access Undertaking p13

As stated above and in section 6.4 of this submission Asciano does not oppose the concept of a capacity multiplier per se but believes that a capacity multiplier must be based on the principle that if any train (regardless of traction type or configuration) is inefficient then this should be addressed through applying a capacity multiplier which takes into account the actual train's operating performance and how that operating performance impacts on network capacity. This approach will send an appropriate price signal as actual trains which add increased costs to the system will be required to pay a higher access charge, and hence this will encourage efficient operations by above rail operators.

In the 2013 DAU the capacity multiplier for the Blackwater system and Goonyella system is pre-determined to apply to non-reference trains without any consideration of these train's actual performance. Asciano believes that such an approach is flawed and potentially anti-competitive.

Under the DAU 2013 Aurizon Network is proposing large increases in the Blackwater AT<sub>2</sub> tariff, the Goonyella AT<sub>2</sub> tariff and the Blackwater and Goonyella capacity multipliers.

These changes appear targeted at driving non reference trains out of both systems, particularly the Blackwater system and / or recovering Aurizon Network's electric infrastructure costs by making diesel operation more expensive. Thus under this capacity multiplier approach there remains the potential for diesel traction operators and users to pay for electric infrastructure which they do not use resulting in cross subsidies from diesel traction users to electric traction users. Any final position on the AT<sub>5</sub> tariff, AT<sub>2</sub> tariff and capacity multiplier approved in the 2013 DAU must ensure that prices are efficient for both electric and diesel traction operators and users (and in particular parties which do not use electric infrastructure do not pay for this infrastructure) and outcomes are non-discriminatory for above rail operators and traction types.

*Is it appropriate, given the criteria in the QCA Act, to remove the requirement that access conditions ('commercial terms') be related to mitigating a financial risk associated with providing access, and to remove the requirement for the Authority's approval of them?*

Asciano's concerns with the 2013 DAU's new Commercial Terms provisions are outlined in sections 7.5 and 7.11 of this submission. Asciano has serious concerns that the 2013 DAU provisions are not as strict as the 2010 AU provisions.

The definition of Commercial Terms in the 2013 DAU now allows Aurizon Network to negotiate a broader range of arrangements and conditions which will not be governed by the access undertaking, and which may potentially favour some train operators over others. Such discrimination is counter to the QCA Act. Given this, the definition of Commercial Terms should be scrutinised by the QCA in this access undertaking review, and especially in light of the bargaining power held by Aurizon Network as a natural monopoly.

Asciano does not believe that it is appropriate for Aurizon Network to remove the requirement that any "access condition payments" be related to mitigating a financial risk associated with providing access. Asciano strongly believes that in rare cases when such "access condition payments" may be required that they should only be related to a well documented need to mitigate a financial risk and that this process be subject to QCA scrutiny and approval.

At a minimum the provisions previously included in the 2010 AU in relation to Access Conditions must be incorporated in the 2013 DAU so that Aurizon Network does not offer terms and conditions that are more favourable to certain access seekers.

### Intent and Scope of the Access Undertaking Questions – QCA Consultation Paper Page 22

*Is the emphasis on facilitating commercial negotiation for the provision of access consistent with the statutory scheme set out in the QCA Act and does it provide an appropriate balance between the interests of access seekers and the legitimate business interests of Aurizon Network? If not, how should it be amended to provide better balance? Are Aurizon Network's proposed negotiation arrangements consistent with standard commercial practices? If not, why not?*

As outlined in section 7.3 of this submission Asciano recognises that Aurizon Network argues that commercial negotiation adds to flexibility but Asciano's experience of negotiating with natural monopolies is that flexibility is an illusory concept, and to the extent that any flexibility is realised it will be realised to the benefit of the natural monopoly. In particular natural monopolies will seek to transfer risk to users (with no benefit for the users) even though the natural monopoly is usually best placed to manage the risk (and is charging a profit for the provision of its service).

Given this experience Asciano strongly believes that the certainty, transparency and strong regulatory oversight of a robust access undertaking are preferable to the "flexibility" of commercial negotiation. Given the unequal power of the two negotiating parties the commercial negotiation framework does not appropriately balance the interests of access seekers, access holders and Aurizon Network. The only way in which these interests can be balanced is through a strong and detailed access undertaking whose provisions can, and will, be audited and enforced by a strong independent regulator.

In addition, given the vertically integrated nature of Aurizon, Asciano has strong concerns that different above rail operators may have different levels of negotiating influence when negotiating with Aurizon Network.

Furthermore Asciano also notes that the regulatory regime is designed to keep Aurizon Network whole so any revenue conceded by Aurizon Network in any negotiation will ultimately be recovered from other users.

Overall Aurizon is the party most likely to benefit from "increased" commercial negotiation.

*Does Aurizon Network's proposed approach to electricity supply promote effective competition in the supply of electricity to operators of coal trains in central Queensland? Is it appropriate for the dispute resolution process to apply to the supply of electricity?*

Asciano believes that other stakeholders are better positioned to address the issues raised in this question.

*Is the continued development of an incentive mechanism beneficial? If so, what should such a mechanism focus on, how would this generate value across the industry and should the design of any incentive mechanism be undertaken collaboratively across the industry?*

In section 6.3 of this submission Asciano notes with concern that the 2013 DAU no longer includes a requirement for Aurizon Network to develop and implement an incentive mechanism to encourage it to operate, and invest in, the rail infrastructure efficiently and in a way that promotes efficiency of a coal chain. As outlined in section 6.3 above Asciano strongly believes that an incentive mechanism is a necessary pre-requisite for a productively efficient and an allocatively efficient coal rail network, and if Aurizon Network is no longer required to develop and implement an incentive mechanism then Asciano doubts that Aurizon Network has any incentive to promote the economically efficient operation of, use of and investment in the Queensland coal rail network.

Asciano believes that the need for an incentive mechanism is supported by both section 69E of the QCA Act (the objective of the access regime is to promote economically efficient operation and investment of the relevant infrastructure) and section 168A d) of the QCA Act (pricing is to provide incentives and increase productivity).

Asciano strongly supports the development of an incentive mechanism to drive efficiency improvements throughout both the rail infrastructure provider's operations and the broader supply chain. An incentive mechanism should allow some of Aurizon Network's revenue to be linked to its performance. Asciano strongly believes that the incentive mechanism created must consider the following:

- The incentive mechanism must contain performance metrics that are desirable and valuable to the coal supply chain.
- The incentive mechanism should be linked to contracted access entitlements of access holders.
- Having an incentive mechanism linked to "whole of system" performance will be ineffective as it has the potential to result in Aurizon Network providing different levels of service to different operators while still meeting incentive targets.
- The incentive mechanism must be consistent with the regulatory framework.
- It must be designed to ensure symmetry between benefits for over performance and penalties for under performance.
- The incentive mechanism must be a genuine incentive that drives Aurizon Network to improve productive efficiency by imposing both a level of financial accountability and financial reward based on performance.

These points are further developed in section 6.3 above.

Asciano is concerned that since Aurizon Network provides network services to a related party, this may impact on the design and method adopted for the incentive mechanism.

Asciano notes that there is currently an incentive mechanism proposal before the QCA for approval under the 2010 AU. The outcome of this current process should act as the basis for the further design and implementation of an incentive mechanism. Asciano believes that any mechanism approved under this current regulatory process should be included in the 2013 DAU.

**Managing Negotiations Questions – QCA Consultation Paper Page 22**

*Does the proposed negotiation framework support effective negotiations and timely resolution of issues? Do the proposed provisions simplify and clarify the process? Do the proposed provisions provide adequate certainty? Are they balanced?*

As outlined in section 7.3 of this submission Asciano does not believe that the negotiation framework is necessarily clear, simple, timely or balanced. Section 7.3 of this submission identifies numerous concerns which Asciano has with the detail of the negotiation process. In particular Asciano is concerned with the removal of the objective queuing approach as a capacity allocation mechanism and the revised and more onerous access application process. Both of these have added to uncertainty in the negotiating process.

As outlined above Asciano's experience of negotiating with natural monopolies is that, given the unequal power of the two negotiating parties, the commercial negotiation framework does not appropriately balance the interests of access seekers, access holders and Aurizon Network. The only way in which these interests can be balanced is through a strong and detailed access undertaking whose provisions can, and will, be audited and enforced by a strong independent regulator.

Given the dilution of ring fencing and other safeguards in the 2013 DAU and the vertically integrated nature of Aurizon, Asciano has a real concern that different above rail operators may have different levels of negotiating influence when negotiating with Aurizon Network. This adds to the imbalance in the negotiating process. For assurance that the negotiation process treats all parties equally the 2013 DAU will require substantially stronger compliance audit and compliance remedy provisions.

Any approved negotiating process must:

- remove the onerous provisions introduced into the access application process;
- introduce an objective capacity allocation mechanism; and
- include sufficient safeguards to ensure the negotiation process treated all parties equally.

Asciano believes that the certainty, transparency and strong regulatory oversight of a robust access undertaking are preferable to commercial negotiation. Overall Aurizon is the party most likely to benefit from "increased" commercial negotiation.

*Are the information requirements imposed on access seekers always relevant for gaining access to the network? Do stakeholders think that the proposed information requirements on access seekers will clarify and streamline the negotiation process?*

As outlined in section 7.3 of this submission, Asciano believes that many of the information requirements imposed on access seekers are not always relevant for gaining access and may be used to discriminate between access requests. In particular Aurizon Network's ability to request further information from the access seeker and terminate the request if the information is not forthcoming has the potential to be used in a targeted manner against some access seekers but not others. There should be a single standard information template that should be completed by all access seekers, including Aurizon Network's related party.



Asciano is also concerned with the information requirements in the event that they require provision of information regarding privately owned infrastructure (e.g. a mine loop). Asciano believes that while it is reasonable for Aurizon Network to seek information regarding operations on its own assets it should not seek information regarding operations on the assets of third parties.

Further detailed Asciano concerns with the information requirements and the access application process are outlined in section 7.3 of this submission.

Asciano believes that any access application process must treat all parties equally, and that such a process requires a ring fencing regime strong enough that there is no means by which information can be passed from Aurizon Network to its related party. For assurance that the access application information provision process treats all parties equally and that there is no scope for the transfer of information the 2013 DAU will require substantially stronger compliance audit and compliance remedy provisions.

*In what circumstances is it reasonable for Aurizon Network to reject an access application?*

As outlined in section 7.3 of this submission Asciano believes that the current provisions under which Aurizon Network can reject an access application are too broad. For example access requests should not be rejected due to an inability of the access seeker to supply further information requested subjectively by Aurizon Network within a given time frame or should not be rejected if the access rights do not commence within three years.

Asciano is concerned that relatively minor incompletions in access application documentation could be used by Aurizon Network as an excuse not to engage in the negotiation process. In instances where access applications are incomplete at a minimum Aurizon Network should notify the access seeker that the application is incomplete and, depending on the nature of the incompleteness, should then offer reasonable assistance to the access seeker to complete the application. Furthermore Asciano is concerned that an access seeker is liable for Aurizon Network's negotiation costs where Aurizon Network believes that the access seeker has no intention of using access in the way envisaged in the access application and Indicative Access Proposal. In any commercial negotiation Asciano believes that both parties should bear their own costs.

Overall, Asciano believes that in relation to access applications Aurizon Network should assume good faith on the part of the access seeker. Asciano does not believe that it is appropriate for any access application to be rejected by Aurizon Network unless the application is self-evidently frivolous or vexatious or if the party seeking access is self-evidently not a bona fide access seeker.

*Should only the end user be considered an access holder under the alternative form of SAAs structure? Does the access undertaking provide sufficient protection for operators?*

As outlined in section 7.4, section 8.1, section 8.2 and Attachment 3 of this submission, Asciano has substantial concerns with the access agreements being proposed by Aurizon Network, including train operations agreements. Asciano does not believe that the 2013 DAU access agreements provide sufficient protection to operators.

Under the Standard Access Agreements approved by the QCA in August 2013 there are several broad access models, namely:

- a model where the train operator holds the access on behalf of the end user;
- a model where the train operator and the end user are the same entity; and
- a model where the end user holds the access and the train operator acts as an operator only rather than a holder of access.

Asciano notes that the 2013 DAU was submitted prior to the QCA approval of these Standard Access Agreements. Asciano believes the approach recently approved by the QCA is a reasonable approach which provided sufficient protections for operators. The Standard Access Agreements approved by the QCA should be incorporated into the 2013 DAU; or, at the least, the relationship between the 2013 DAU access agreement proposal and the QCA August 2013 approved Standard Access Agreements should be clarified.

It should be noted that both Asciano and Aurizon operate trains on the ARTC network in the Hunter Valley where only the end user is the holder of access rights. Thus Asciano has no fundamental issue with only the end user being considered an access holder but Asciano believes that (given the recent QCA approval of the alternative SAA approach) this approach should be given an opportunity to operate before major amendments are made to the approach.

*Should non coal agreements be based on SAAs (modified as required)? Should Aurizon Network develop an SAA for non coal services?*

Asciano currently operates non-coal services on some sections of the Aurizon Network. Asciano believes that most, if not all, non-coal services using the Aurizon Network have origins and destinations on the adjoining Queensland Rail network and undertake the majority of their journey on the adjoining Queensland Rail network. Given this Asciano believes that it is appropriate that any Aurizon Network non-coal access agreement reflects the Queensland Rail network access agreement. (Asciano notes that to date its non-coal access agreements with Aurizon Network have reflected the Queensland Rail access agreements).

The Queensland Rail network currently does not have a standard non-coal access agreement, and given this Asciano believes that it would be premature for Aurizon Network to develop a standard non-coal access agreement. If in the future the Queensland Rail network currently does develop a standard non-coal access agreement then this issue could be revisited.

#### **Private Infrastructure Question – QCA Consultation Paper Page 22**

*Is the proposed framework for connecting private infrastructure effective and does it adequately recognise the interests of access seekers?*

Asciano's position on connecting infrastructure is outlined in section 7.8 of this submission.

The QCA approved the Standard Rail Connection Agreement (SRCA) in April 2013. Asciano notes that the 2013 DAU was submitted to the QCA in April 2013 and so may not have fully incorporated elements of this final decision on connection agreements. Asciano believes the approach recently approved by the QCA in relation to the SRCA is a reasonable approach.

The SRCA approved by the QCA should be incorporated into the 2013 DAU.

The SRCA framework should allow both existing access holders and prospective access seekers to connect to the Aurizon Network.

### Standard Agreement Questions– QCA Consultation Paper Page 23

*How does the introduction of the concept of 'train service type' in the SAAs affect operators and the access charges they pay?*

As outlined in section 6.7 and section 8 of this submission the 2013 DAU and its access agreements now focus on the concept of Train Service Types rather than access rights and train services. Under the 2013 DAU access rights are only granted for each individual Train Service Type rather than for the broader train service (as is the case in the 2010 AU). In particular the 2013 DAU clause 5.2 now states that Train Service Entitlements and access charges are now linked to a Train Service type. The Train Service Type is outlined in Standard Operator's Access Agreement Schedule 2 which contains a detailed description of the train service involving up to twenty different variables. In addition the Standard Operator's Access Agreement appears to no longer explicitly reference Train Service Entitlements.

This detailed description of the Train Service Type is too restrictive and essentially acts to substantially reduce the flexibility available to operators with regard to pathing and access rights. Asciano strongly believes that in order to increase supply chain capacity, greater flexibility in contracting and pathing is needed. (The need for increased flexibility in the 2013 DAU is discussed in section 6.7 of this submission).

The 2010 AU access agreements were based on Train Service Entitlements; given that Train Service Entitlements were effectively what Aurizon Network was selling this intuitively made sense as the basis of the contracting relationship. However, the 2013 DAU Standard Operator's Access Agreement is now based on Train Service Types, this shifts the focus of the access agreement from what Aurizon Network is selling to the nature of the train operations. This raises concerns that the 2013 DAU and its access agreements are now more focussed on controlling train operations and differentiating between operators on the basis of train service type rather than providing access. In particular, Asciano is concerned that the concept of the Train Service Type allows Aurizon Network to closely define train services giving Aurizon Network the potential to differentiate between train services; this differentiation in turn facilitates discrimination between train operators.

It is not clear why this change towards Train Service Types has been required and given that it has significant impacts throughout the access agreements, Aurizon Network needs to provide more details on the rationale behind this fundamental change in contract structuring.

Asciano believes that the access agreements in the 2013 DAU should be focussed on the provision of more flexible Train Service Entitlements rather than the current focus of detailed and prescriptive Train Service Types.

*Do the proposed SAAs provide reasonable terms and conditions (bearing in mind the statutory criteria in section 138(2) of the QCA Act of, amongst other matters, the interests of access seekers and the legitimate business interests of Aurizon Network)?*

As outlined in section 7.4, section 8.1, section 8.2 and Attachment 3 of this submission, Asciano has substantial concerns with the access agreements being proposed by Aurizon Network, including train operations agreements. Asciano does not believe that the 2013 DAU suite of access agreements being proposed by Aurizon Network provides reasonable terms and conditions.

Asciano believes that the 2010 AU access agreements including the access agreements recently approved by the QCA provide a more reasonable set of terms and conditions than those agreements being proposed by Aurizon Network.

*Should the standard operator access agreement allow Aurizon Network to take (or not take) any action to preserve its accreditation status without breaching the agreement?*

The 2013 DAU SOAA clause 18.6 currently proposes to allow Aurizon Network to take any action to preserve its accreditation. Asciano recognises that Aurizon Network has to maintain its accreditation and as such Asciano would be unlikely to hinder any reasonable request by Aurizon Network relating to an action taken to preserve its accreditation status.

However, Asciano believes that prior to any action been taken Aurizon Network should contact all access holders seeking permission to reasonably vary their access agreements in order to preserve its accreditation. In this instance an access holder should not refuse any reasonable request. Such a process should be transparent, and in particular if a third party access holder is required to vary its access agreement in a certain manner but Aurizon Network's related operator is required to vary its access agreement in a different manner or not at all this should be reported to QCA, who should then scrutinise the reasoning behind the request.

Furthermore Asciano believes that an operator should have the right to dispute any action taken by Aurizon Network in respect of this clause 18.6.

Asciano believes that Aurizon Network could clarify this issue by providing examples of the types of operator actions which it believes could jeopardise Aurizon Network's accreditation.

*Is it reasonable under the alternative form of SAAs that Aurizon Network can suspend/terminate the agreements if end users or train operators fail to comply with any obligation of those agreements?*

As outlined in section 7.4, section 8.1, section 8.2 and Attachment 3 of this submission, Asciano has substantial concerns with the access agreements being proposed by Aurizon Network.

Asciano is concerned that, as currently drafted, the Aurizon Network proposal to suspend the end user's access rights or train operator's operating rights if they fail to comply with any obligation of the relevant agreements. This implies that suspension or termination may occur for relatively minor breaches.

Asciano believes that to the extent that Aurizon Network, an end user or an operator substantially and or persistently breaches its contractual obligations then suspension or termination is a

reasonable contractual response, but such a response should be tempered by the nature and impact of the breach.

However, in any scenario involving a breach Aurizon Network is benefitted as it is a natural monopoly and as such the other parties will be reluctant to take contractual remedies against Aurizon Network as the other party has no other viable below rail service option. Similarly, in the event Aurizon Network suspends or terminates a contract then any fall in volumes will be corrected for via the revenue adjustment mechanism so Aurizon Network would not suffer any loss from the suspension or termination.

The QCA approved the alternative form of SAAs in August 2013. Asciano notes that the 2013 DAU was submitted prior to the QCA approval of these SAAs. Asciano believes these alternative forms of SAAs recently approved by the QCA are reasonable and provide sufficient protections for operators. This SAA model approved by the QCA should be incorporated into the 2013 DAU.

On a related issue, as noted below, Asciano also believes it is unacceptable for Aurizon Network to be able to suspend or terminate a SRCA if coal loss mitigation provisions are not met.

*Should the SRCA apply to all connections? Does the proposed SRCA provide sufficient scope to cover the different requirements of different connections? If the SRCA did not apply to all connections, should the access undertaking include principles for the development of other (non-coal) connections?*

The SRCA as approved by the QCA in April 2013 should apply to all connections. Asciano notes that if both parties agree the terms of the SRCA could be varied to address any issues specific to a particular connection.

*Are the proposed CLMPs reasonable? Do the CLMPS appropriately balance Aurizon Network's and users' interests and responsibilities? Do the proposed CLMPs reflect good practice? How will the proposed CLMPs affect operations?*

The coal loss mitigation provisions (CLMPS) provisions as currently drafted in the SRCA require the private infrastructure owner to take various measures when handling and loading coal. The CLMPS should not be included in the SRCA, which is by definition an infrastructure connection agreement rather than a coal management agreement. As such it may be that the infrastructure owner is not in the best position to manage the handling and loading of coal at all load out sites served by the infrastructure.

As outlined in section 7.8 of this submission, Asciano believes that it would be more appropriate to address CLMPS issues through a separate process or agreement. For example, these issues may be better addressed through a document similar to the Access Interface Deed, which is a deed under the 2010 AU relating to various network – mine interface issues between Aurizon Network and the relevant miner.

Aurizon Network should not be able to suspend the right to use a connection through the use of CLMPS provisions. Asciano believes that there is potential for Aurizon Network to use such a clause in a discriminatory manner in order to favour its related above rail operator.

*Do the proposed CLMPs provide adequate scope for parties to flexibly deal with changes in environmental legislation and/or changes in technology over the life of the agreement?*

Asciano believes that other stakeholders are better positioned to address the issues raised in this question.

#### **Existing Capacity Questions– QCA Consultation Paper Page 32**

*Is Aurizon Network's proposed capacity allocation framework consistent with the object of Part 5 of the QCA Act and the remaining criteria in section 138(2) of the QCA Act?*

Section 7.6 of this submission further outlines Asciano's position on the proposed capacity allocation and management position in the 2013 DAU.

Under the 2010 AU, access was provided to access seekers via the operation of an objective queuing mechanism. The 2013 DAU no longer contains the 2010 AU queuing framework as a means of capacity allocation. Under the 2013 DAU clause 7.5.2 the capacity allocation is now considerably more subjective. Under this clause Aurizon Network can now select which access seekers they enter into agreements with based on such considerations as supply chain rights and haulage agreements. Given the lack of an objective process and objective set of criteria to allocate capacity, Aurizon Network can seek to favour its related party train operator and its end users in any decisions made in relation to capacity allocation.

The object of Part 5 of the QCA Act states

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

The 2013 DAU capacity allocation mechanism is counter to the object of Part 5 of the QCA Act as the capacity allocation mechanism can be used by Aurizon Network to favour its related party train operator and so it can be used to actively discourage competition in related markets, including the market for train operations.

Section 138 (2) (e) of the QCA Act states

*... the Authority [QCA] may approve a draft access undertaking only if it considers it appropriate to do so having regard to...the interest of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected.*

The 2013 DAU capacity allocation mechanism is inconsistent with the interests of persons seeking access as the mechanism is non-transparent, subjective and has the potential to be applied in a discriminatory manner.

This new capacity allocation mechanism should be replaced by another mechanism which is transparent and includes both an objective process and objective set of criteria to allocate capacity.

In addition to the general concerns with the 2013 DAU capacity allocation mechanism as outlined above Asciano has several specific concerns including:

- Under 2013 DAU clause 7.2 Aurizon Network has introduced additional criteria that access seekers have to meet before they can be granted access rights. These criteria include rights to load and unload, supply chain rights, rail haulage contracts, sufficient rolling stock provisioning maintenance and storage facilities, sufficient mine output to underpin the access rights and rights of entry and exit to the network. Where an access seeker cannot meet these criteria then access can be refused. Asciano believes that many of these criteria go beyond the role of Aurizon Network as the provider of regulated infrastructure services and are indicative of Aurizon Network seeing itself as the de facto supply chain co-ordinator rather than a participant in the supply chain. In particular Asciano is concerned that Aurizon Network is seeking information on contracts to which Aurizon Network is not a party – Asciano is concerned that information on these contracts may then be passed to Aurizon's related party train operator.

Asciano believes that these additional criteria are unnecessary and should be removed.

- Under 2013 DAU Aurizon Network has removed relinquishment and transfer provisions which allowed an access holder to transfer access rights under two years with a zero transfer fee. Asciano believes that the provisions which allowed an access holder to transfer access rights under two years with a zero transfer fee should be reinstated.

*Is the proposed framework consistent with section 100(2) of the QCA Act, which relates to unfair discrimination between access seekers?*

Section 7.6 of this submission further outlines Asciano's position on the proposed capacity allocation and management position in the 2013 DAU.

The QCA Act section 100(2) states

*In negotiating access agreements, or amendments to access agreements, relating to the service, the access provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers.*

The proposed capacity allocation framework is counter to this section of the QCA Act as Aurizon Network can now use the capacity allocation mechanism to favour its related party train operator and so differentiate between access seekers.

The capacity allocation mechanism appears to be at least partially based on information relating to rail haulage contracts, rolling stock facilities, mine production and private infrastructure interface rights and rights of entry and exit to the network. Aurizon Network can use this information to unfairly differentiate between access seekers.

In addition to the general concerns outlined above Asciano has several specific concerns including:

- the 2013 DAU has removed the method by which Aurizon Network resumes capacity from access holders. This would allow Aurizon Network to negotiate variations in individual Access

Agreements that may benefit certain access holders over others. The 2010 AU prescribed the method by which Aurizon Network could resume access rights from Access Holders. This needs to be re-introduced in order to ensure that Access Holders are treated equally.

- the 2013 DAU has removed transfer fee and relinquishment fee provisions. This would allow Aurizon Network to negotiate variations in individual Access Agreements that may benefit certain access holders over others. The 2010 AU prescribed the method by which Aurizon Network could levy transfer fees and relinquishment fees. This needs to be re-introduced in order to ensure that Access Holders are treated equally.

*What are the advantages and/or disadvantages for access seekers and holders of Aurizon Network's proposed capacity allocation framework? How does this compare to the current framework?*

Section 7.6 of this submission further outlines Asciano's position on the proposed capacity allocation and management position in the 2013 DAU.

Under the 2010 AU, capacity was allocated to access seekers via the operation of an objective queuing mechanism. Under the 2013 DAU capacity is to be allocated via a more subjective process whereby Aurizon Network selects which access seekers they allocate capacity to. Given the lack of an objective process and objective set of criteria to allocate capacity, Aurizon Network can seek to favour its related party train operator and their end users in any decisions made in relation to capacity allocation.

Asciano sees few advantages in the 2013 DAU capacity allocation proposal and strongly believes that a transparent, objective and non-discriminatory capacity access allocation mechanism is a minimum requirement for any access undertaking to be approved under the QCA Act.

Capacity allocation must be dealt with in the Access Undertaking; it should not be dealt with in individual access agreements. There is no reason why Aurizon Network should vary the way they allocate capacity amongst access holders as the management of capacity by Aurizon Network should be undertaken in a transparent and non-discriminatory manner.

The 2013 DAU capacity allocation mechanism is non-transparent, subjective and has the potential to be applied in a discriminatory manner (and in particular it may be used by Aurizon Network to favour its related party train operator). This new capacity allocation mechanism should be replaced by another mechanism which is transparent and includes both an objective process and objective set of criteria to allocate capacity.

*Are there advantages and/or disadvantages to moving capacity treatment provisions from the access undertaking into the standard access agreements?*

As outlined in section 6.6 of this submission, there are substantial disadvantages in moving any provisions from the access undertaking into the standard access agreements and, as noted in section 6.6 above, the fact that the 2013 DAU has removed numerous capacity management and capacity allocation clauses from the access undertaking is of particular concern.



Asciano believes that shifting principles from the access undertaking to access agreements or removing the principles completely reduces transparency and certainty and removes the principles and concepts from detailed regulatory scrutiny and testing.

In addition, by moving these provisions out of the access undertaking it allows these provisions to be differentially applied in separate access agreements. Thus, given the vertically integrated nature of Aurizon, there is a real concern that different above rail operators may have different levels of negotiating influence when negotiating capacity issues with Aurizon Network. By shifting principles from the current access undertaking to the proposed access agreements, Aurizon Network is providing itself with more scope to potentially favour a related party.

Separate to the issue of whether capacity provisions should be in the undertaking or the access agreements, Asciano has substantial concerns with the content of the capacity provisions as outlined in section 7.6 of this submission and in Attachment 4 above.

*Aurizon Network has proposed to manage access holder's utilisation of access rights by requesting evidence the access seeker, or its operator, has sufficient supply chain rights. What is the practicality of such a request? Is this a reasonable request to make? Will the implementation of this promote alignment across the supply chain?*

Section 7.6 of this submission further outlines Asciano's position on the proposed capacity allocation and management position in the 2013 DAU.

Under DAU 2013 Aurizon Network can now seek information on an access seekers supply chain rights, rolling stock, provisioning plans, maintenance and storage facilities and mine output. Much of this information, such as mine output and the nature of maintenance facilities is not directly related to their activities as a network access provider. However such information could be used by Aurizon Network to advantage its related above rail operator or to otherwise obstruct a new entrant into the above rail market.

Asciano strongly believes that it is unreasonable for Aurizon Network to seek to manage an access holder's utilisation of its own access rights. An access holder should be able to utilise its own access rights as it sees fit without having its utilisation of these rights being micro-managed by Aurizon Network.

More broadly Asciano sees that Aurizon Network is seeking to position itself as the Queensland coal chain central planning authority; however Aurizon Network's role is as a participant in the coal chain. If Aurizon Network expanded its planning role then it would use this unregulated role to favour its related above rail operator.

#### **New Capacity and Capacity Management Questions – QCA Consultation Paper Page 32**

*Do stakeholders share Aurizon Network's view that the underlying principles for expansions, outlined in section 4.2.1, are appropriate? Does Aurizon Network's proposal meet the proposed principles? Where stakeholders do not agree with Aurizon Network's proposed principles, what should the principles be? Are the proposed principles consistent with the criteria in section 138(2) of the QCA Act?*

*Do stakeholders consider the level of discretion Aurizon Network wishes to have with respect to identifying expansions (and the justification provided) an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and otherwise consistent with the criteria in section 138(2) of the QCA Act? If not, what alternative arrangements would you propose?*

*Aurizon Network proposes a new process for undertaking and funding pre-feasibility and feasibility studies, as well as for the allocation and removal of conditional capacity allocations - do stakeholders consider these proposals (and the justification provided) an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and otherwise consistent with the criteria in section 138(2) of the QCA Act? If not, what alternative arrangements would you propose and why?*

*Do stakeholders consider Aurizon Network's proposals for user-funding are an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and otherwise consistent with the criteria in section 138(2) of the QCA Act?*

Asciano has chosen to answer the four questions above in a single response.

Asciano's position on network development and expansion are outlined in section 7.7 of this submission. Asciano's main concern in regard to network development and expansion is that all operators are treated equally and that operators be involved in the development of expansion projects when the operator's interests are impacted.

Given train operators are unlikely to enter into SUFA agreements (or other agreements relating to capacity expansion) under the current regulatory framework; Asciano believes that it more appropriate for parties that are likely to enter into SUFA agreements to provide detailed responses to the QCA questions above.

*Do stakeholders consider the amended voting provisions allow for a considered evaluation and pre approval (or rejection) of a capital expenditure project?*

Although train operators are unlikely to enter into SUFA agreements (or other agreements relating to capacity expansion) Asciano is concerned with voting provisions related to the approval or rejection of a capital expenditure project. Asciano's concern is that although operators may not be funding a capital expenditure project their operations and business model may be impacted by the capital expenditure. For example, an operator's operations and business model could be impacted by the electrification of a previously non-electrified line (particularly in the current AT<sub>5</sub> tariff proposals are accepted). In such instances the operator should have at the least a right to put their views forward to the voters.

*Is Aurizon Network's approach, and its justification thereof, to supply chain coordination and supply chain master planning consistent with the criteria in section 138(2) of the QCA Act? What, if any, alternative approaches are available?*

Asciano notes that under the DAU 2013 clause 8.8.1 Aurizon Network will participate in a supply chain group but will not be obligated to take any action due to its involvement in this group.

Asciano remains concerned that more broadly in part 7 and Part 8 of the 2013 DAU, Aurizon Network is seeking to manage the coal supply chain and specifically manage an access holder's utilisation of its own access rights.

Asciano does not believe that any Aurizon Network role as a coal supply chain co-ordinator is consistent with the section 138(2) of the Act. The legitimate business of the access provider is to provide access. The access provider should not seek to extend its business to co-ordinating upstream, downstream and related markets.

Due to both its monopoly position and vertically integrated position Aurizon Network's proper role is as a participant in the coal supply chain rather than the co-ordinator of the supply chain. By seeking to position itself as the Queensland coal chain central planning authority, Aurizon Network is seeking to put itself in a position to advantage its related above rail operator.

To the extent that any coal supply chain co-ordinator is needed this co-ordinating body should not be a monopolistic or vertically integrated participant in the supply chain. The co-ordinating body should make decisions which are genuinely in the interests of the whole of the supply chain rather than potentially make decisions for the benefit of a related party.

*Will Aurizon Network's proposed approach to assessing (spare) capacity be reliable and robust? Is Aurizon Network's approach, and its justification thereof, to system operating assumption and capacity reviews consistent with the criteria in section 138(2) of the QCA Act? What, if any, alternative approaches are available?*

In the 2013 DAU, clause 8.8.2 the system operating assumptions are effectively determined by Aurizon Network. While there is the potential for input from other parties there is no obligation on Aurizon Network to incorporate the views of these other parties.

Similarly under clause 8.8.3 Aurizon Network can undertake a capacity review without any requirement to consider the views of other parties.

Asciano believes that these processes as currently outlined do not meet section 138(2) of the QCA Act as such processes, by marginalising the views of third parties, are unlikely to consider the public interest or the interests of access seekers, and more broadly are less likely to promote competition as there is no mechanism whereby potentially anti-competitive outcomes can be raised.

Asciano believes that independent oversight is needed for both system operating assumptions and capacity reviews. For example, processes similar to current QCA reviews of the Aurizon Network capital expenditure could be used to ensure a degree of independent oversight to the process.

#### Ringfencing Questions – QCA Consultation Paper Page 37

*Are there terms in the 2013 DAU (including standard agreements) that would reduce the effectiveness of the protection provided by the statutory prohibitions on Aurizon Network engaging in conduct for the purpose of preventing or hindering access?*

*Do the proposed non discrimination provisions under Part 3 provide an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and are they*

*consistent with the QCA Act? Does the 2013 DAU contain sufficient provisions (as assessed against the requirements of the QCA Act) to identify, prevent and remedy unfair differentiation between access seekers and users?*

*Do the proposed provisions simplify and clarify the ringfencing process? Do the proposed provisions provide adequate certainty? Do they provide an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and are they consistent with the QCA Act? Are there more effective alternatives available?*

Asciano is answering the three questions above in the single answer below.

Asciano's position on the ring fencing provisions of the 2013 DAU is outlined throughout this submission, particularly in section 6.1 and section 7.2 of this submission.

Asciano has serious concerns as to potential for the 2013 DAU to allow Aurizon Network to engage in discriminatory behaviour and hinder third party access. A strong ring fencing and compliance regime is fundamental to facilitating third party access, particularly where the access provider is a vertically integrated natural monopoly.

Asciano is very concerned that the 2013 DAU contains numerous provisions that seek to weaken the existing sub-standard ring fencing and compliance regime. Amongst the failings in relation to ring fencing, the 2013 DAU:

- reduces the effectiveness of the statutory prohibitions on Aurizon Network engaging in conduct for the purpose of preventing or hindering access;
- does not provide a balance between Aurizon Network and access seekers and access holders;
- does not provide sufficient provisions to identify, prevent and remedy unfair differentiation; and
- weakens the ring fencing process.

In order to be approved, the DAU must be consistent with the QCA Act section 137 (1A) and include provisions for identifying, preventing and remedying discrimination. 2013 DAU does not contain provisions that would achieve this and needs to be amended.

*Do stakeholders have a view on the use of 'protected information' as against 'confidential information'? Do the proposed measures regulating protected information provide adequate confidence to stakeholders regarding handling of information by Aurizon Network? Do they provide an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and are they consistent with the QCA Act?*

Section 7.2 of this submission contains additional Asciano comments on Protected Information.

Asciano prefers the 2010 AU provisions relating to confidential information rather than the 2013 DAU provisions relating to Protected Information. Asciano does not believe that proposed Aurizon Network measures relating to protected information provide an appropriate balance between the interests of the parties and nor do they provide adequate confidence to stakeholders.

Clause 3.6 (b) of the 2013 DAU states that the undertaking does not restrict secondments of employees or prevent Aurizon Network staff ceasing work with Aurizon Network and working for Aurizon Network's related operator as long as the handling of Protected Information requirements

are followed as per the undertaking. These clauses do not provide sufficient protection. The 2010 AU provided for much stricter criteria in relation to the transfer of Aurizon Network employees to its related operator.

In addition, clause 3.15 in the 2013 DAU states that Aurizon Network must not disclose Protected Information to the "Marketing Division". Asciano strongly believes that Protected Information should not be disclosed to any party outside of Aurizon Network, and in particular it should not be disclosed to any party associated with Aurizon Network's related operator.

Similarly clause 3.16 in the 2013 DAU includes a listing of staff within Aurizon Holdings that can have access to Protected Information. Asciano believes that as a minimum this listing should be shortened considerably and the recipients of the information should be bound by non-disclosure processes outlined in clauses 3.17 and 3.19 of the 2013 DAU.

*Do the proposed decision making processes ensure arm's length dealing between Aurizon Network and its related operator and protect the interests of third party operators?*

As outlined throughout this entire submission, Asciano has serious concerns as to potential for the 2013 DAU to require Aurizon Network to make genuine arm's length decisions regarding its related operator.

Asciano continues to be concerned that Aurizon's vertical integration will provide Aurizon Network's related operator with a competitive advantage as both Aurizon Network's and related operator's financial performance, capital expenditure programs and business plans are coordinated and integrated across the whole of Aurizon

Asciano remains concerned as to the ability of Aurizon Network to engage in discriminatory behaviour and hinder third party access.

#### Reporting Questions – QCA Consultation Paper Page 37

*Are the proposed reporting arrangements appropriate (in the sense of providing an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and otherwise being consistent with the QCA Act)? In particular, do stakeholders consider an annual operational data report adequate (in place of the quarterly report) and that GAPE does not need to be separately reported?*

Asciano's position on the reporting provisions of the 2013 DAU is outlined in section 6.2 and section 7.9 of this submission. These sections outline numerous concerns with the reporting provisions including concerns with the dilution and removal of audit requirements, and concerns with operational reporting.

Clause 10.1.5 of the 2013 DAU obliges Aurizon Network to provide annual financial, compliance, cost, maintenance and operational reports. These reports contain high level and aggregated data and the information contained in these reports serves little purpose for an individual access holder as it does not provide them with timely information that allows them to monitor Aurizon Network's:

- performance against access agreements; and
- compliance to the Access Undertaking and Access Agreements.

As such these reports do not meet the business interests of access seekers or access holders.

In particular Asciano believes that in relation to the operational information reporting the 2013 DAU should include an obligation to determine and report monthly on a set of operational KPIs to both the QCA and access holders. These KPIs should be measured consistently across all Access Agreements. This consistent information will allow comparisons to be made by the QCA of the level of service provided by Aurizon Network to different train operators and will more generally provide more information to supply chain participants which will in turn allow improved decision-making in relation to developing and implementing operational and commercial improvements in the coal supply chain.

Asciano believes that if a network system has a separate tariff structure, such as the GAPE, then there should be an obligation on Aurizon Network to report separately on system finance, cost, compliance, maintenance and operations.

*Do the proposed changes to the quality assurance processes and auditing requirements provide an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and are they consistent with the QCA Act?*

Asciano's position on the auditing provisions of the 2013 DAU is outlined in section 6.1 and section 7.9 of this submission.

Clause 10.8 of the 2013 DAU provides for Aurizon Network to appoint an auditor to conduct the audits required by the access undertaking. There is no QCA involvement in the appointment of the auditor. As outlined in section 6.1 of this submission, Asciano has serious concerns with this proposal and believes that it is fundamentally inadequate.

An effective independent external audit is needed to identify discrimination by Aurizon Network. Asciano has been frustrated with the lack of effectiveness and transparency in the 2010 AU audit regime and believes it should be strengthened, however Aurizon Network has sought to weaken the audit provisions in 2013 DAU.

The audit provisions proposed in 2013 DAU are no longer automatic, the audit scope is limited and the 2013 DAU provisions only give limited power to the QCA to ensure an effective audit is undertaken.

Asciano believe that the following should be added to the audit regime in the 2013 DAU:

- Auditor Approval Without Constraint - The auditor should be able to be approved and appointed by the QCA without constraint.
- Annual External audit - Each year an external compliance audit must be conducted. This audit should include an audit of Aurizon's Network's compliance with its access undertaking obligations under section 3 (Ring fencing Arrangements), section 4 (Negotiation Framework), section 7 (Capacity Allocation) and section 10 (Reporting). Other sections may also be subject to audit at the discretion of the QCA and the auditor.
- Stakeholder Consultation Required - The auditor should be required to consult with access holders and operators in advance of the audit to inform them of the focus of their audit.

- Audit Report - The audit should provide both a confidential report (to the QCA) and a public report posted on the QCA's website outlining Aurizon Network's compliance or otherwise with its access undertaking.
- Implementation of Recommendations - Each annual audit should assess whether the previous year audit's recommendations to Aurizon Network have been effectively implemented.
- Repeat of Audit - The QCA should have a right to require the audit to be redone if it is not satisfied with the audit's rigour.

#### Disputes Questions – QCA Consultation Paper Page 37

*Is the proposed dispute resolution mechanism comprehensive in scope? Does it provide an effective dispute resolution mechanism, including fair and timely resolution of disputes which provides an appropriate balance between the legitimate business interests of Aurizon Network and access seekers and is it otherwise consistent with the QCA Act? Will the addition of the mediation option ensure efficient resolution of disputes?*

Asciano believes that in relation to dispute resolution:

- disputes under access agreements should be able to be dealt with under the access undertaking. Previously Asciano has had experience with disputes under Aurizon Network access agreements which have been more complex and time consuming than necessary. The dispute process outlined in the undertaking should take precedence over any access agreement;
- the 2013 DAU should be amended to allow either party to the dispute to seek to resolve a dispute by QCA mediation; and
- minimum time frames need to be included in the expert determination process.

*Are there terms in the 2013 DAU (including standard agreements) that would limit the Authority from making determinations on matters in a manner consistent with the objectives of the access regime set out in the QCA Act and in a manner consistent with the intent of the various provisions in Part 5 of the QCA Act regulating the conduct of access providers?*

Asciano believes that (given the object of the Part 5 of the QCA Act) there should be no terms in an approved undertaking that would limit the Authority from making determinations on issues in a manner consistent with the objectives of the access regime.

As noted in this submission, Asciano currently believes that the 2013 DAU does not meet the requirements of the object of the Part 5 of the QCA Act.





