

**Submission to the
QCA Review of the QR National
Draft Amended Access
Undertaking and Standard User
Funding Agreement as Submitted
to the QCA in December 2010**

March 2011

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1 EXECUTIVE SUMMARY

Asciano Limited (Asciano) has concerns about the vertically integrated nature of QR National which centre on QR National being the owner and operator of the monopoly below-rail assets and the largest above-rail user of these assets. In particular, Asciano has a concern that the proposed Draft Amended Access Undertaking (DAAU) amendments relating to investment frameworks and funding provide a potential channel for QR Network to either:

- facilitate discussions between QR National's above rail business and end users, to the detriment of other above rail businesses; or
- engage in cost shifting and cross subsidies via payments made under amended clauses in sections 6.5 and 7.5 in the DAAU to the detriment of other above rail businesses.

Asciano is seeking that QCA monitor any discussions and payments between QR Network and customers in relation to the investment and funding frameworks and related agreements in order to ensure that:

- any discussions are directly limited to below track issues only; and
- any payments to and from QR Networks are transparent to the QCA and are consistent with the Access Undertaking, particularly section 3.2 of the Access Undertaking.

Asciano also has a general concern that the December DAAU includes amendments to the October Access Undertaking which are not directly relevant to the requirement to incorporate the investment framework amendments to the Access Undertaking. In order to minimise uncertainty Asciano believes that amendments made to the Access Undertaking should be limited to those amendments required to give effect to section 7.6 of the Access Undertaking. In particular Asciano has concerns relating to amendments to sections relating to

- connecting infrastructure, which will be addressed via another process in coming months; and

- electricity tariff amendments, which should be addressed at the next full revision of the Access undertaking in 2013.

2 INTRODUCTION AND BACKGROUND

Asciano welcomes the opportunity to provide comments on the DAAU and Standard User Funding Agreement (SUFA).

Clause 7.6 (a) of QR Network's 2010 Access Undertaking required that, within three months of 1 October 2010 QR Network submit to the QCA a proposed SUFA and a DAAU incorporating amendments QR Network considered necessary to implement the principles in Schedule J of the Access Undertaking.

In December 2010 QR Network submitted a DAAU and SUFA to the QCA for approval. However, following this submission the QCA has formed the view that the submission does not comply with clause 7.6 (a) of the Access Undertaking. Asciano understands that the QCA is now intending to exercise its powers to develop a SUFA and related investment framework amendments.

The QCA has indicated that it will continue with the assessment of the QR Network submitted DAAU and SUFA in accordance with section 142 and section 146 of the QCA Act. Consequently the attached comments from Asciano are submitted in relation to the December 2010 submission of a DAAU and SUFA by QR Network to the QCA.

Asciano seeks that this submission be taken into account by the QCA when considering the QR Network submitted DAAU and SUFA. Asciano also seeks that this submission be taken into account by the QCA as the QCA exercises its power in developing a SUFA and investment framework as outlined in its notice of 2 March 2011.

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

3 DETAILED ASCIANO COMMENTS

Asciano, via Pacific National, is one of Australia's major coal rail haulage operators, and commenced transporting coal in Queensland in 2009 where Pacific National is the main competitor to QR National's above rail business.

Asciano is likely to be a future operator on user funded rail infrastructure in Queensland. The comments below are made from the perspective of Asciano as a current and future operator on the QR Network.

3.1 General Comments on the QR Network Approach

As the QCA is aware, Asciano has ongoing concerns about the current ownership and operating structure of QR National which centre on its vertically integrated nature as both the owner and operator of the monopoly below-rail assets and the largest above-rail user of these assets. In particular, Asciano has a concern that the proposed funding and construction amendments and agreements provide a potential channel for:

- cost shifting and cross subsidies between QR Network and QR National's above rail business to the detriment of other above rail businesses; and
- the facilitation of discussions between QR National's above rail business and end users through QR Network to the detriment of other above rail businesses.

Asciano is seeking that the QCA continue to monitor discussions between QR Network and end users in relation to these agreements to ensure that they are directly limited to below track issues. Asciano supports the expansion of QCA powers in this regard to the extent such additional powers are necessary to ensure complete separation of above rail and below rail discussions.

Asciano has had a broad concern with the regulatory approach that separates the consultation and implementation processes for various elements of QR Network Access Undertaking. Asciano believes that the elements of the Access Undertaking are all elements of a single package and should have all been determined and implemented as a single package. For example, numerous sections of the User Funding Construction Agreement (eg Section 11.1 c) and 11.5) assume the default access arrangement is an access holder access agreement, however there is

currently a separate regulatory process about to commence which will seek to further develop the access holder access agreement. This process may then in turn require some adjustment to the user funding agreements. Such re-iteration could be avoided if the Access Undertaking had been determined as a single package.

Asciano has concerns that the current approach to regulatory decision making may require an ongoing series of ad hoc adjustments to the Access Undertaking to take into account the consequences of each regulatory decision. Asciano believes this approach should be reconsidered in relation to future access undertakings, and that future undertakings be determined as a single package.

3.2 Comments on QR Network 24 December Draft Amended Access Undertaking

Asciano has a general concern that the December DAAU includes amendments to the October Access Undertaking which are not directly relevant to the Access Undertaking requirement to incorporate the investment framework amendments to the Access Undertaking. Asciano is unaware of any change in circumstances which would result in the QCA's Access Undertaking Final Decision in October 2010 no longer being appropriate by December 2010.

The Access Undertaking contains numerous requirements for QR Network to submit revisions to certain sections of the Access Undertaking over the next nine months. Asciano believes that amendments to the Access Undertaking should be limited to those revisions required by the Access Undertaking.

The regulatory model used in Australian infrastructure regulation is that a set of infrastructure access terms and prices are established for a period of time and access seekers and infrastructure providers can then act with certainty in the knowledge that the access environment is stable for a period of time. A regulatory approach which facilitates ongoing amendments to these access terms will provide neither certainty to incumbent access providers and access holders nor facilitate the entry of new access seekers.

In order to minimise such uncertainty Asciano believes that amendments made to the Access Undertaking at this time should be limited to those amendments required to give effect to section 7.6 of the Access Undertaking. Given the Access Undertaking is

terminating in twenty-seven months time major revisions not contemplated by the current Access Undertaking can be delayed until June 2013.

Comments on the Preamble

Asciano queries whether the inclusion of the statement that QR National is “Australia’s largest freight rail operator with over 145 years of experience” is relevant in a document which aims to facilitate access to QR Network below rail infrastructure. To the extent the access undertaking is to be used as a QR Network marketing document it should be used to encourage, rather than discourage, third party usage of QR network infrastructure.

The statement should be removed from the preamble.

Comments on Section 6.5.2 Access Conditions

The DAAU section 6.5.2 d) has been amended. This section relates to arrangements for customers paying Contributed Enhancement charges and Capital Contribution charges to QR Network in certain circumstances and arrangements for QR Network to provide certain rebates to these customers in certain circumstances.

Asciano has concerns that the payment of additional charges to QR Network or from QR Network raises the potential for QR Network to engage in activities contrary to section 3.2 of the Access Undertaking, such as anti-competitive cost shifting and cross subsidisation. For example QR National may, in total, require a certain level of revenue to be successful in winning a bid for a project, if QR Network receives additional payments from the project proponents this may then enable QR National above rail to be more competitive in its bidding in an above rail bid.

Asciano does not oppose the amendments in section 6.5.2 per se but seeks that QCA clarify how these payments will be policed to ensure section 3.2 of the Access Undertaking is not breached. In particular Asciano seeks that all such payments to and from QR Network are transparent to the QCA.

Comments on Section 7.5 Network Investment

The DAAU section 7.5.2 d) has been amended. This section relates to information transfer between parties, including QR Network and customers. Asciano has a concern that such processes provide a potential channel for QR Network to facilitate discussions between QR National’s above rail business and end users, to the detriment of other above rail businesses.

Asciano does not oppose the amendments in section 7.5.2 but seeks that QCA ensure information transfer relates only to below rail activities.

The DAAU section 7.5.5 relates to user funded expansions. This section allows for payments to be made from an access seeker or customer to QR Network or from QR Network to the access seeker or customer.

Similar to the concerns raised in the section above, Asciano is concerned that payments made to QR Network by customers may raise the potential for QR Network to engage in activities contrary to section 3.2 of the Access Undertaking, such as anti-competitive cost shifting and cross subsidies.

Asciano does not oppose the amendments in section 7.5.5 per se but seeks that QCA clarify how these payments will be policed to ensure section 3.2 of the Access Undertaking is not breached. In particular Asciano seeks that all such payments are transparent to the QCA.

Comments on Section 8.3 Connecting infrastructure

Under the proposed amendments to section 8.3 access seekers or holders will now have to meet QR Network's initial and ongoing costs associated with constructing, operating and maintaining connecting infrastructure. Asciano believes that it is both more equitable and more conducive to facilitating access if QR Network and the connecting party both pay their own costs.

Asciano notes that in any event QR Network is required to submit a standard rail connection agreement to the QCA by July 2011. Issues relating to connection agreements are best delayed until this process is underway so they can be addressed in a co-ordinated manner.

Asciano is concerned that changes to the Access Undertaking clauses relating to connection agreements prior to the formal process relating to standard rail connection agreements commencing may act to constrain the QCA. This is because in the event that the submitted QR Network standard rail connection agreement does not meet certain criteria the QCA has the ability to develop a standard rail connection agreement that is consistent with the Access Undertaking. Amending the Access

Undertaking clauses relating to connection agreements in the months prior to such a process potentially occurring has the appearance of attempting to constrain the QCA.

Comments on the Definition of Ad Hoc

The DAAU is seeking to amend the definition of “ad hoc train services” in section 12 of the DAAU. Asciano has no issue with proposed definitional amendment per se; however defining ad hoc services in relation to train service entitlements raises an ongoing Asciano concern with the accurate reporting of train service entitlements. Asciano believes that the development of an appropriate KPI reporting regime will allow ongoing issues with train service entitlements to be clarified and resolved.

Comments on Schedule F Part Electricity Traction Costs

The DAAU is seeking to amend the Schedule F Section 3.2.2 which relates to adjusting revenue for electricity cost.

Asciano has concerns relating to the proposed change. In particular Asciano is concerned with the allocation outlined in section 3.2.2 c) which appears to have the potential to take higher electricity costs arising from lower system use and spread them across a broader base than then system where the lower system use has occurred. Asciano believes that the calculation of the difference between the costs and revenue in 3.2.2 c) i) and ii) should be for each individual system (i.e. Goonyella system and Blackwater system) rather than for the whole of the Central Queensland Coal Region.

Asciano strongly believes that determining pricing by reference to the costs attributable to the individual coal system is more consistent with the both the economic principle of prices reflecting costs and with the QCA’s current approach to price determination.

Asciano notes that above rail operators may chose to use electric or diesel trains and QR Network amendments to electricity tariff calculations may act to benefit some above rail operators at the expense of other above rail operators. Asciano believes the QCA should not amend the sections of Schedule F relating to the electric tariff. Tariff sections should be amended as a whole at scheduled “whole-of-Access-Undertaking” revisions rather than by piecemeal amendment. This issue is particularly important as Asciano is making rolling stock investment decisions on the

basis of the current Access Undertaking and ad hoc amendments to sections of the Undertaking relating to electricity tariffs may act to delay these investments.

3.3 Specific Comments on User Funding Construction Agreement

This section of the submission contains specific comments on the User Funding Construction Agreement.

Section 11, Schedule 9 and Annexure A of the User Funding Construction Agreement have the effect of making it problematic to vary the operator access agreement away from the operator access agreement as approved under the relevant Access Undertaking without undergoing a dispute process. This limiting of any variation or modification to the operator access agreement is particularly concerning as it is likely that existing agreements may not necessarily address issues which may arise due to the development of individual green-fields infrastructure projects. The negotiation of operator access agreements in circumstances where the operation involves new infrastructure should be more flexible rather than less flexible in order to accommodate new issues that will inevitably arise.

Section 11.4 of the User Funding Construction Agreement relates to disputes regarding the access agreement. Asciano is concerned that in relation to the disputes process outlined the operator is excluded. For example under section 11.4 the definition of parties to the dispute is “collectively QR Network and the Customer”, and the operator is unable to appoint an expert. Asciano believes that where a dispute under section 11.4 materially impacts the customer nominated railway operator the operator should be allowed to be a party to the dispute or otherwise joined to the dispute. Asciano notes that section 11.8 allows “other funders” to be joined to a dispute resolution process. Asciano would envisage that operators should also be allowed to be joined to a dispute in a similar manner.

Similarly, Section 17 relates to disputes more generally. Asciano is concerned that in the disputes process outlined the operator is excluded. Asciano believes that where a dispute under section 17 materially impacts the customer nominated railway operator the operator should be allowed to be a party to the dispute.

Section 18 of the User Funding Construction Agreement relates to confidentiality. Asciano has concerns that section 18.2 may allow the disclosure of confidential information to the QR National above rail operator, which is related to QR Network. The

fact that the QR National above rail operator may obtain this confidential information may then place them at an advantage in negotiations when compared to other above rail operators who do not have access to this confidential information as they are not related to QR Network. Asciano believes that under section 12 confidential information should not be disclosed by QR Network to any related above rail operator for any purpose except in circumstances where they are the nominated rail operator.

The cost allocation principles in schedule 7 are currently blank. While Asciano appreciates that such principles may require some variation depending on the nature of the project being considered Asciano believes that the cost allocation principles used must be consistent with cost allocation approaches used in QR Network Access Undertaking and the QR Network Cost Allocation Manual (as described in Division 9 of the QCA Act).

Schedule 9 states “the Access Agreement is to be completed by including in the Access Agreement the particulars specified in annexure A”, however annexure A is currently blank. To the extent that a completed annexure A specifies particulars that materially differ from those that could reasonably be expected¹ Asciano seeks that it be able to further comment on annexure A.

Schedule 9 also requires that the operator access agreement would automatically terminate if the User Funding Construction Agreement is terminated under section 15.1. Asciano does not believe that an agreement between QR Network and an Operator should be automatically terminated due to the non-performance of a third party.

Asciano notes that sections of the document either shaded in highlight or not completed. To the extent that these sections are either substantially altered or further completed Asciano seeks that it be able to further comment on these sections.

3.4 Specific Comments on User Funding Participation Agreement

This section of the submission contains specific comments on the User Funding Participation Agreement.

Section 11 of the User Funding Participation Agreement relates to disputes. Asciano is concerned that in the disputes process outlined the operator is excluded. Asciano believes that where a dispute under section 11 materially impacts the customer

¹ A reasonable expectation would be that particulars should be similar to those required in current signed agreements or agreements approved under the current Access Undertaking

nominated railway operator the operator should be allowed to be a party to the dispute or otherwise joined to the dispute. Asciano notes that section 11.8 allows “other funders” to be joined to a dispute resolution process. Asciano would envisage that operators should also be allowed to be joined to a dispute in a similar manner

Section 12 of the User Funding Participation Agreement relates to confidentiality. Asciano has concerns that section 12.2 generally, and sections 12.2 b), d), g) and h) in particular, may all allow the disclosure of confidential information to the QR National above rail operator, which is related to QR Network. The fact that the QR National above rail operator may obtain this confidential information may then place them at an advantage in negotiations when compared to other above rail operators who do not have access to this confidential information as they are not related to QR Network. Asciano believes that under section 12 confidential information should not be disclosed by QR Network to any related above rail operator for any purpose except in circumstances where they are the nominated rail operator.

Asciano notes that were numerous sections of the document either shaded in highlight or not completed. To the extent that these sections are either substantially altered or further completed Asciano seeks that it be able to further comment on these sections.

4 CONCLUSION

Asciano has concerns about the vertically integrated nature of QR National; in particular Asciano has a concern that the proposed DAAU amendments provide a potential channel for QR Network to either:

- facilitate discussions between QR National’s above rail business and end users, to the detriment of other above rail businesses; or
- engage in cost shifting and cross subsidies via payments made under amended clauses in sections 6.5 and 7.5 in the DAAU to the detriment of other above rail businesses.

Asciano is seeking that QCA monitor any discussions and payments between QR Network and customers in relation to the investment and funding frameworks and related agreements in order to ensure that:

- any discussions are directly limited to below track issues only; and

- any payments to and from QR Networks are transparent to the QCA and are consistent with the Access Undertaking, particularly section 3.2 of the Access Undertaking.

Asciano also has a general concern that the December DAAU includes amendments to the October Access Undertaking which are not directly relevant to the requirement to incorporate the investment framework amendments to the Access Undertaking. In order to minimise uncertainty Asciano believes that amendments made to the Access Undertaking should be limited to those amendments required to give effect to section 7.6 of the Access Undertaking. In particular Asciano has concerns relating to amendments to sections relating to

- connecting infrastructure, which will be addressed via another process in coming months; and
- electricity tariff amendments, which should be addressed at the next full revision of the Access undertaking in 2013.