



**Asciano Submission to the
Queensland Competition Authority
in relation to the Queensland Rail
Ltd Draft Access Undertaking**

July 2012

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1 EXECUTIVE SUMMARY

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority (QCA) on the Queensland Rail Draft Access Undertaking (DAU).

Asciano is concerned that the DAU is focussing on a “negotiate and arbitrate” model rather than QCA approved standard form access agreements and pricing. Asciano’s experience is that commercial negotiations under a “negotiate-and-arbitrate” model will be more expensive and more complex with a less efficient outcome than reliance on approved regulated reference prices and standard agreements (where there remains scope for some negotiation). Thus Asciano is seeking that:

- other Reference Tariffs should be included in the DAU, including, for example an intermodal or general freight tariff for the north coast line,; and
- other Standard Form Access Agreements should be included in the DAU, including, for example an intermodal or general freight agreement for the north coast line.

Asciano is also seeking that a level of ring fencing and cost separation should be applied to Queensland Rail. While Queensland Rail does not directly compete with access holders, Queensland Rail does operate above rail passenger services which impact on above rail freight services via operational restrictions and the impact of cost allocations on pricing.

Asciano also has numerous detailed concerns with the details of the DAU and the Standard Form Access Agreement. Many of these concerns are focussed on the one sided nature of Queensland Rail’s approach to liability caps, insurance and indemnity. In particular Asciano is concerned that Queensland Rail seeks to shift risk to the operator, even though Queensland Rail is in a better position to manage that risk. Queensland Rail’s positions are inconsistent with industry norms and in particular the standard ARTC access agreement.

Other major concerns with content of the DAU and the Standard Form Agreement include:

- the extensions policy;
- the capacity allocation process including the process of re-contracting for access; and
- the lack of a continuing strong ring fencing regime and the attendant QCA powers to monitor and audit such a regime.

2 INTRODUCTION AND BACKGROUND

2.1 Introduction

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority on the Queensland Rail Draft Access Undertaking.

Asciano, via its subsidiary Pacific National, currently uses the below rail assets of Queensland Rail for intermodal haulage along the north coast corridor, bulk minerals and concentrate haulage on the Mt Isa to Townsville corridor and some coal haulage on an ad hoc basis, primarily on the north coast corridor. In addition Pacific National stores coal wagons at Queensland Rail sites at Auckland Point (in Gladstone) and at Rockhampton. These wagon storage functions are not covered by the current or proposed access regime.

Since 1 July 2010, Queensland Rail has been providing access to its below rail network under QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice. Asciano welcomes the move by Queensland Rail towards an Access Undertaking which better reflects the market and industry structures facing Queensland Rail.

Queensland Rail has previously consulted with Asciano on the DAU and appears to have taken into account some of the comments made by Asciano in this previous consultation. Asciano welcomes the consultative approach of Queensland Rail in relation to the DAU.

This submission is public.

3 ASCIANO'S GENERAL POSITION ON THE DAU

Asciano recognise that Queensland Rail commenced business as a separate entity in July 2010, but that Queensland Rail continue to provide access under an Access

Undertaking which was drafted to address access and market issues which may no longer completely apply to the Queensland Rail's current situation.

Asciano has some concerns that the DAU is seeking to move away from a regulatory approach based on QCA approved standard form access agreements and QCA approved pricing towards a regulatory approach based on the "negotiate and arbitrate" model. Asciano has experience of the "negotiate and arbitrate" access model with other rail infrastructure owners in Australia. Asciano's experience is that, in the absence of regulated prices and access agreements, these negotiations are often more complex and protracted than would otherwise be the case and outcomes are often inefficient due to an asymmetry of information between the two parties.

More generally Asciano believes that there are some inconsistencies between Queensland Rail's stated desire to move towards a more commercial negotiation model and Queensland's Rail ongoing positions in relation to issues such as extensions, dangerous goods, indemnities and liability that demonstrate Queensland Rail continues to be a risk averse organisation. Asciano believes that there is a fundamental mismatch between Queensland Rail's move towards a commercial negotiation model and Queensland Rail's risk averse culture. Asciano's concern is that this will result in a veneer of commerciality but Queensland Rail will use its position as a natural monopoly infrastructure provider to ensure that the details of contracts and operational procedures will continue to shift all risks to access seekers and access holders. Economic efficiency requires that those parties that control risk should bear the cost of the risk. An uncommercial shift of risk to access providers will result in economically inefficient outcomes. Evidence of this can be seen in the fact that although the DAU is intended to be a document which facilitates commercial negotiation, Queensland Rail has the ability to use its "absolute discretion" at least seventeen times in the DAU, often in relation to issues such as extension where it is expected there could be genuine and material commercial differences.

3.1 Asciano's View Regarding the Negotiate Arbitrate Model and Regulated Tariffs

The Queensland Rail DAU only contains Reference Tariffs for West Moreton Coal traffics. These tariffs are effectively based on an escalation of the current West Moreton Coal tariffs and are not based on any transparent cost information.

Asciano believes that these coal Reference Tariffs are included in the DAU largely due to historical reasons, as when Queensland Rail and QR National were a single entity coal reference tariffs were a major issue in the central Queensland coal region. Following the separation of Queensland Rail and QR National these coal Reference Tariffs on the Queensland Rail network remain. Asciano believes that other haulage tasks such as intermodal haulage and minerals haulage are now proportionately much more important to Queensland Rail than they were to the previous combined entity, and as such reference tariffs for these haulage tasks should be implemented.

Under the DAU as proposed, tariffs for other hauls, such as intermodal haulage and minerals haulage, will be negotiated (and if necessary arbitrated) as there are no non-coal Reference Tariffs in the DAU; although floor and ceiling revenue limits are discussed, including a derivation of the ceiling revenue limit but no actual cost data appears to be provided in respect of this the derivation of this limit.

As noted above, Asciano have experience of the “negotiate and arbitrate” access model with other rail infrastructure owners in Australia. These negotiations are often problematic due to a lack of cost information, which places access seekers at a disadvantage in negotiating access prices with the access provider, as only the access provider has detailed knowledge of their costs.

Asciano believes that several other reference tariffs should be included in the DAU, including, for example an intermodal or general freight tariff for the north coast line (Brisbane to Cairns). Negotiation around rates for particular hauls will still occur but the regulatory approved reference tariffs overcome the asymmetry of cost information problems discussed earlier.

Asciano notes that the under the DAU (2.4.2 c)) the Indicative Access Proposal will

... provide a methodology for calculating Access Charges (including an initial estimate of any applicable rates or other inputs for formulae

and more generally the DAU (2.6.2 a) i)) provides that

... Queensland Rail will provide to the Access Seeker additional information relevant to the negotiations, as requested by the Access Seeker

and DAU (2.6.2 a) v)) provides that

Queensland Rail will provide a methodology for calculating the Access Charges (including any applicable rates or other inputs for formulae)

Asciano welcomes the provision of information under these clauses, particularly cost information, by Queensland Rail but believes that the cost information provided needs to be consistent over time and at such a level that it provides sufficient information to access seekers to allow them to negotiate pricing on an even basis with Queensland Rail. (In addition Asciano notes that the DAU (2.6.2 a) v)) quote above implies that the methodology for calculating access charges is fixed by Queensland Rail, Asciano believes that to the extent a negotiate arbitrate model applies then the calculation methodology should be negotiable rather than be fixed by the monopoly infrastructure provider).

Given the fundamental asymmetry in cost information between Queensland Rail and access seekers Asciano believes that the provision of this cost information by Queensland Rail of itself is unlikely to address Asciano's concerns in relation to price negotiation.

The issue of the asymmetry in cost information between Queensland Rail and access seekers may be partially addressed by Queensland Rail providing consistent and publicly available cost information to the QCA on an ongoing basis, where such costs are allocated according to the QCA approved cost allocation manual. Such an approach will allow a degree of cost certainty and consistency; however this approach remains a second best solution in relation to the determination of Reference Tariffs by the QCA.

Overall Asciano is seeking that additional Reference Tariffs be provided in the DAU for haulage tasks such as freight tariff on the north coast line. Asciano believes that there would still be scope to negotiate around these tariffs depending on the precise nature of the haulage task involved. The provision of these reference tariffs should not be onerous given they relate to existing traffic (and so should be costed internally) and given Queensland Rail is already providing a coal reference tariff (and so should have appropriate regulatory pricing models).

3.2 Asciano's View Regarding Standard Form Access Agreements

The Queensland Rail DAU only contains a Standard Form Access Agreement for West Moreton Coal traffics, although Asciano notes that the DAU (2.8) contains provisions for the introduction of new standard access agreements for other train services if sought by the QCA.

Asciano's view is that commercial negotiation with a monopoly service provider on the details of an agreement requires the commercial negotiation to be guided by the existence of, at a minimum, an indicative access agreement which has been reviewed in a regulatory process. Asciano's view is that the acceptability and workability of terms and conditions contained in access agreements ultimately determines whether there is an environment that is conducive to effective negotiations.

Asciano believes that, consistent with its view in section 2.1 above, several other Standard Form Access Agreements should be included in the DAU, including, for example an intermodal or general freight agreement for the north coast line (Brisbane to Cairns). (Asciano believes that the inclusion of section 2.8 in the DAU which allows for new Standard Form Access Agreements indicates that Queensland Rail is expecting the development of such new agreements at some time in the term of the access undertaking). Given these are existing traffics with existing access agreements this should not be an onerous task.

Before the inclusion of any other Standard Form Access Agreements in the DAU there should be a public consultation process conducted by the QCA on these proposed Standard Form Access Agreements.

3.3 Asciano Concerns Regarding Queensland Rail Vertical Integration

Queensland Rail operates both a below rail network which provides third party access and above rail passenger train services, thus Queensland Rail is a vertically integrated business. This vertical integration results in some concerns for above rail operators, such as Asciano, who use the Queensland Rail network.

Asciano recognises that Queensland Rail does not operate freight train services in direct competition with third party users such as Asciano and, as such, there is no direct commercial competition. However, the above rail services operated by

Queensland Rail do still impact on the operations of third party users such as Asciano. Typically these impacts are operational impacts relating to issues such as pathing priority and track occupations or cost allocation impacts relating to the allocation of Queensland rail costs between above rail and below rail services.

This dual role of Queensland Rail provides it with an incentive to develop processes which minimise the potential for freight rail operations to interfere with Queensland Rail above rail passenger operations.

Asciano notes that Queensland Rail (Queensland Rail DAU Explanatory Note page 7) seeks that it:

.. should effectively be treated as if it were a non-vertically integrated access provider in respect of access to its rail network.

Asciano has concerns with this request from Queensland Rail. Asciano believes that it is more appropriate that the regulatory process treat Queensland Rail as a vertically integrated access provider, albeit one which has substantially reduced financial incentives to discriminate against third party users of its network as they are not in direct commercial competition with Queensland Rail in the contestable sectors of the rail industry. Thus while Asciano recognises that Queensland Rail seeks to provide access for freight rail the potential for this access to conflict with the needs of Queensland Rail passenger services means that the regulatory process should impose a degree of vertical separation and transparent cost allocation on Queensland Rail. Such separation minimises the potential for any conflict.

Asciano notes that (Queensland Rail DAU Explanatory Note page 8 states that:

Ringfencing requirements are only relevant for a vertically integrated monopoly that is competing with third party operations in downstream competitive markets. While Queensland Rail is vertically integrated, it does not compete with third party operators of train services.

Ringfencing provisions are not appropriate for Queensland Rail's business. However, AU1 does set out confidentiality provisions to protect the confidential information of access seekers and access holders, and Queensland Rail will

maintain separate accounting records in accordance with section 163 of the QCA Act.

Asciano opposes this position. Queensland Rail remains a vertically integrated monopoly and as such there should be a ring fencing regime which ensures that:

- any cost shifting or cross subsidisation between the network business and passenger service business is transparent and approved via an external process (such as the current cost allocation manual approved by the QCA). In particular Asciano is concerned that the DAU (3.1.1) allows that if Queensland Rail earn excess revenue from Access Charges and Transport Service Payments then Queensland Rail may seek to reduce Transport Service Payments rather than Access Charges. Asciano believes that it is more appropriate that the reduction in Transport Service Payments or Access Charges be aligned with revenue source responsible for the excess revenue; and
- there is no potential for Queensland Rail decision-making on operational or commercial matters in its above rail passenger business to disadvantage third party users of the Queensland rail below rail business.

Asciano believes that ring fencing is a useful discipline in ensuring rigorous and consistent cost allocation and should be used in Queensland Rail as a matter of good regulatory practice.

In seeking a ring fencing regime Asciano recognises that in all of Asciano's dealings with Queensland Rail, Queensland Rail has acted appropriately, however Asciano believes that a ring fencing regime provides a level of confidence to users of the monopoly service that they can continue to operate in the market and make long term investment decisions with a degree of confidence that they will not be disadvantaged in the future.

3.4 Asciano's Concerns Regarding Interfaces with QR Network

The Queensland Rail network contains several interfaces with the QR National Network. In particular, the main North Coast Line is

- owned and operated by Queensland Rail from Brisbane to Parana (near Gladstone);

- owned and operated by QR National from Parana to Rocklands (near Rockhampton);
- owned and operated by Queensland Rail from Rocklands to Merinda;
- owned and operated by QR National from Merinda to Durroburra; and
- owned and operated by Queensland Rail from Durroburra to Cairns.

Other interfaces also exist around Auckland Point (in Gladstone) and at other points in regional Queensland where the Queensland Rail network meets QR Network.

To date Queensland Rail and QR National have essentially shared an identical Access Undertaking and so there has been no material divergence in access principles and processes. However, with the development of the current Queensland Rail DAU and the expected further developments of the QR National Access Undertaking in June 2013, Asciano is concerned that, given the development of these two separate access undertakings, there may be a level of divergence in regulatory principles and processes between the two networks over time, which in turn will lead to a divergence in operational processes over time. These divergences are likely to be most problematic on the North Coast Line.

Asciano is seeking a commitment from Queensland Rail, via a clause in the Undertaking that it will continue to seek to make these interfaces as seamless as possible. In particular Asciano is seeking that the DAU Schedule B Network Management Principles remain consistent with QR Network operations to the extent that this is possible.

3.5 Asciano's Views Regarding Uplift of Access Undertaking Outcomes into Existing Access Agreements

Asciano recognises that Queensland Rail currently has numerous access agreements with various third party users and that Queensland Rail are likely to reach further agreements following the finalisation of the proposed Access Undertaking.

Asciano notes that the DAU (1.2.1 b) i) B) and 1.2.1 c)) notes that the DAU does not apply to access agreements currently in place.

Asciano believes that current access agreements should be retained as they are in relation to commercial terms and conditions, but in areas where common approaches

are needed to ensure efficient and effective operation Asciano believes that Queensland Rail should consult with existing contracted third parties in order to amend agreements if required. Asciano believes that to the extent that any amendments are required they are likely to be operational amendments (for example including any amended network management principles), and as such these amendments are not likely to be contentious.

4 ASCIANO'S SPECIFIC COMMENTS ON THE DAU

4.1 Term

The DAU has a term of at least four years but not more than five. Queensland Rail (Queensland Rail DAU Explanatory Note page 7) notes that this term is consistent with Australian rail regulatory precedent.

Asciano believes that the term of the Queensland Rail Access Undertaking should be longer. Asciano notes that the current ARTC Interstate Access Undertaking, which largely deals with rail infrastructure used by intermodal traffic, has a term of ten years. This longer term provides increased regulatory certainty for long term contracting of above rail haulage agreements (some of which may require substantial capital investment in rolling-stock).

4.2 Extensions

The DAU (1.4) addresses extensions where extensions are defined to include "enhancement, expansion, augmentation, duplication or replacement". Asciano queries whether replacement assets should be included in the definition of extension. Asciano believes that the terms extension implies some increase in capacity rather than the replacement of an asset with a similar asset.

More generally Asciano believes that the extension framework outlined in the DAU (1.4) is weak and effectively allows Queensland Rail to own an asset and receive a return while incurring no risk in developing, constructing and funding the asset. Asciano believes that the mismatch of risk and return in the extension framework should be addressed and to the extent that Queensland Rail is seeking a zero risk position then Queensland Rail should receive zero return on the asset.

Under the DAU (1.4) Queensland Rail can effectively own and operate the extension although the extension is funded by a third party. Asciano believes that the DAU

should clarify how such an extension is treated with regard to the calculation of the regulatory asset base and the calculation of pricing both for parties who fund such extensions and parties who use the extension but did not initially fund the extension.

4.3 Access Application

The DAU (2.1) should clarify whether access applications are considered to be confidential. Asciano believes that Access Applications should be treated as though they are confidential by Queensland Rail¹.

4.4 Negotiation Cessation

The DAU (2.6.3 c)) essentially requires that in the event of an unsuccessful negotiation the access seeker must pay Queensland Rail's negotiation costs. Asciano believes that this position is commercially inappropriate. In commercial negotiations both parties pay their own costs.

To the extent that Queensland Rail is seeking to move towards a more commercial negotiation for access then it should accept commercial practices in relation to negotiation rather than the more risk averse practices of a government owned monopoly infrastructure provider.

4.5 Capacity Allocation and Queuing

The DAU has no queuing mechanism and the allocation of capacity between competing access seekers relies on Queensland Rail's opinion as to which access seeker will, in the opinion of Queensland Rail, be the most favourable to Queensland Rail in terms of access charges, costs, access agreement terms and other factors (DAU 2.7.2 a) iv)).

This approach is not acceptable to Asciano as it is neither transparent nor objective and raises the potential for perceptions of "favoured treatment" for some access users by other access seekers, particularly where both access seekers are seeking to serve the same user or haulage task.

Asciano believes that a transparent path allocation methodology and process is much more preferable to a process with a substantial subjective element. In particular:

¹ Note that in Asciano's experience Queensland Rail currently de facto treats Access Applications as confidential.

- where there is potential for conflict between Queensland Rail's above rail passenger services and Queensland Rail's below rail network business then this decision making on capacity allocation should be transparent; and
- in the event that there is congestion on particular lines, perhaps due to minerals developments and port developments, then option of queuing should be considered as a transparent and objective capacity allocation option.

Asciano's main concern is that the path allocation be objective and transparent. In the event that the capacity utilisation assessment approach used by Queensland Rail is transparent and objective then Asciano would not oppose such a capacity allocation mechanism.

The DAU (2.7.2 b), c) and d)) addresses capacity allocation where an access seeker seeks access for capacity currently held by an access holder. Queensland Rail propose various measures to address this although under DAU (2.7.2 d)) these measures do not apply if the access holder submits its Access Application to Queensland Rail less than a year before the expiry of the access holders access agreement. Asciano believes that given the negotiation time lines in DAU (2.6 b) ii) d)), where nine months is identified as a maximum time frame for negotiations, the one year requirement in DAU (2.7.2 d)) is inconsistent with this. Given that the re-negotiation of an existing agreement may be undertaken in a time shorter than that envisaged in DAU (2.6 b) ii) d)) Asciano believes that if any time frame is to apply in DAU (2.7.2 d)) it should be six months (or less).

4.6 Reporting

The DAU (5.1) requires Queensland Rail to provide aggregated train performance reports. Asciano believes that the DAU (5.1) should also allow for Queensland Rail to provide confidential disaggregated reports (consistent with the reports in DAU 5.1) to access holders which relate to services specific to those access holders.

The version of the DAU previously circulated in 2011 contained clauses in section 5 which allowed the QCA to audit Queensland Rail's compliance with its access undertaking. These clauses have been deleted from the current version of the DAU and there has been no specific discussion of this deletion in the Queensland Rail DAU Explanatory Note. Asciano believes that Queensland Rail should explain why the deletion of these clauses occurred.

Asciano strongly supports the implementation of a strong compliance regime in regard to rail regulation in Queensland and believes that the ability of QCA to undertake compliance audits of Queensland Rail should be reinstated into the DAU.

Asciano believes that the QCA should have the explicit power to audit the quarterly and annual reports outlined in DAU section 5, although such audits do not need to be undertaken on all reports.

4.7 Dispute resolution

The DAU lacks an option for resolution by an expert in the dispute resolution clause (Clause 6.1). Asciano believes that dispute resolution is desirable in any access model, and as such dispute resolution by an expert is likely to be a valuable option for access holders, access seekers and access providers, particularly in specialist areas of dispute such as engineering, finance or rail operations where a more general dispute resolution approach may not be practical.

Asciano appreciates that options for resolution by an expert may be included in the dispute resolution clause in an access agreement, but believe that inclusion of such a clause in the access undertaking is also appropriate.

4.8 Notices

The DAU (6.3.4 c)) notes that a party is not entitled to object to a notice by fax being illegible unless the party requests a re-transmission within four hours. Asciano believes that this is inappropriate. If a notice is illegible then it cannot be acted upon and a party should be able to object to illegibility without reference to a time frame.

Asciano believes the clause should be deleted as parties acting in good faith could be expected to resolve the issue of illegibility without reference to an access undertaking clause.

4.9 Access Agreement Principles

The DAU Schedule C contains a series of principles to be used for access agreements.

Asciano understands that COAG (the Council of Australian Governments) has indicated its preference for using the ARTC standard form agreement (as determined

via an ACCC process) as a base rail access agreement template. To this end Asciano believes that Queensland Rail should consider using the ARTC standard form agreement as the basis for any future standard form access agreement. Asciano believes that the ARTC standard form agreement is more even handed and efficient in relation to risk management clauses than the DAU, the Access Agreement principles in the DAU and the Queensland Rail standard form agreement attached to the DAU.

Asciano's specific comments on these principles are as follows:

- 5.1 d) - allows Queensland Rail to perform Rail Infrastructure Operations (i.e. construction, repairs and maintenance) at any time without the access holders consent. Asciano believes that there should be an obligation placed on Queensland Rail to use reasonable endeavours to consult with access holders prior to performing Rail Infrastructure Operations and for Queensland Rail to use best endeavours to minimise the impact on access seekers ;
- 8.1 - requires that the access holder not carry dangerous goods, except as expressly provided for in the Access Agreement. Asciano believes that access holders should be able to carry dangerous goods provided the access holder complies with the relevant laws and codes;
- 10 and 11 – these sections largely act to indemnify Queensland Rail and limit Queensland Rail's liability in certain circumstances. These sections essentially shift risk from Queensland Rail to the operator. Asciano believes that these sections are generally inappropriate as Asciano believes that the party which can best manage and control the risk should bear the consequence of the risk. Thus for many risk factors it is Queensland Rail rather than the operators who should be bearing risk. In particular it should be noted that operators may not be able to obtain insurance for factors which are under control of the track access provider.

More generally the accepted commercial practice is for each party to indemnify (i.e. insure) the other against claims made against one party as a result of the negligence or breach of the other party. Thus it is inherently unfair for Queensland Rail to seek that operators indemnify Queensland Rail for claims made by the operator's customers where the cause of the damage

suffered by our customers is something done or not done by Queensland Rail;

- 14 - requires the access holder to provide a security deposit to Queensland Rail. Asciano believes that a security deposit should only be required if the access holder cannot meet certain financial criteria (e.g. credit rating). Asciano notes that it is not required to provide a security deposit to other rail infrastructure providers if financial criteria are met;
- 16 c) – allows Queensland Rail to determine disputes in some instances even where Queensland Rail may be a party to the dispute. Asciano does not believe that a dispute resolution clause that allows a party to a dispute to settle the dispute is appropriate in principle;
- 17 b) – allows Queensland Rail to elect to not replace infrastructure damaged by a force majeure event until the funding of the repairs is agreed with the other parties. Asciano believes that such a position poses additional fundamental risks on operators and shippers and is fundamentally unfair. Asciano accepts that operators and / or users may have to fund infrastructure improvements but Asciano believes that it is inappropriate to require operators and / or users to fund repairs to existing infrastructure which result from a force majeure event. Asciano believes that the risk of such events and the attendant repair costs is implicit in the rate of return received by Queensland Rail.
- 18.2 b) – provides for a detailed and prescriptive process for the determination of the fee payable when an access holder relinquishes their access rights. (The process outlined is effectively the process used in raiing coal in Queensland and is explicitly linked to take or pay charges that would have been payable). For the purposes of a broad set of access agreement principles which are intended to form the basis of a commercial negotiation across a range of rail traffics a relinquishment fee as outlined in clause 18.2b) is inappropriate and should be removed. If any relinquishment fee is required it should be determined in negotiation with reference to the nature of the traffics and access sought.

5 ASCIANO'S SPECIFIC COMMENTS ON THE STANDARD FORM ACCESS AGREEMENT

The comments below are on the Standard Form Access Agreement for West Moreton coal traffics. Asciano recognises that some of these clauses may be specific to West Moreton coal traffics but Asciano remains concerned that once approved these clauses may then be used in other negotiated agreements or new Standard Form Agreements implemented under DAU 2.8.

These comments can also be read in the context of the Schedule C Access Agreement Principles, whereby to the extent that the clause commented on below reflect the proposed Access Agreement Principles the comments below apply to the Access Agreement Principles.

Clause 6.5 Operator to Supply Information

This clause requires the operator to maintain software, hardware and communications links with Queensland Rail, where Queensland Rail can alter these at its absolute discretion. Asciano believes that such an obligation has the potential to impose substantial costs on operators. Asciano believes that there should be an obligation placed on Queensland Rail to consult with access holders prior to substantially amending software, hardware and communications links and performing Rail Infrastructure Operations and for Queensland Rail to use its best endeavours to minimise cost and disruption for the operator.

Clause 6.6 Queensland Rail May Supply Data

Clause 6.6d) indicates that:

Any intellectual property rights in relation to the Operator's business or Train Services that are discovered or developed, or otherwise come into existence, in connection with the Data are assigned to and vest in Queensland Rail ...

This clause is too broad and should be limited to either the specific train services or rolling stock. It should not extend to cover the business of the operator.

Clause 6.8 Operating Requirements

This clause allows Queensland Rail to amend the operating requirements, and though in making these amendments Queensland Rail must consult with the operator, Queensland Rail is under no obligation to compensate the operator when

these amendments result in a material financial impact on the operator. In addition Queensland Rail should include a best endeavours obligation to minimise the impact on the operator.

Access agreements should allow compensation of operators.

Clause 10.2 Operators Indemnity

The entire indemnity clause is one sided and essentially shifts risk from Queensland Rail to the operator. Queensland Rail is not offering any indemnities to the operator. Asciano believes that this clause in general is inappropriate as the party which can best manage and control the risk should bear the consequence of the risk.

Clause 10.2 requires the operator to indemnify Queensland Rail against claims and losses including claims and losses arising from claims by customers and third parties. Asciano believes that:

- clause 10.2 d) which indemnifies Queensland Rail from claims by the operator's customers. This clause should be deleted from Standard Form Access Agreements. Asciano believes that it is unfair for Queensland Rail to seek that operators indemnify Queensland Rail for claims made by the operator's customers where the cause of the damage suffered by the operator's customers is something done or not done by Queensland Rail. The cost of risk should be borne by the party that can best control that risk. Queensland Rail is best able to insure against these costs; and
- clause 10.2 e) which indemnifies Queensland Rail from claims by third parties with whom the operator has shared data. This clause is too broad and should be deleted in Standard Form Access Agreements unless it is substantially narrowed to address a specific area of particular concern. In particular it should be noted that;
 - clause 6.6 addresses issues of relating to data, and this clause should be sufficient; and
 - to the extent that data is provided by Queensland rail they could place conditions on the provision of that data (for example they could require that to the extent data is shared with third parties that the operator has an obligation to ensure that the third parties are aware that they should not rely on the data, but rather should form their own views).

Clause 11.1 General Caps on Liability

This clause caps Queensland Rail's liability. This limitation on liability is only in favour of Queensland Rail. This is an inefficient approach to risk management.

Queensland Rail is able to (and to Asciano's knowledge currently do) insure for this risk; the Operators cannot insure for this risk, or if they can they would have to incur a significant increase in their costs. Thus Queensland Rail should insure for these risks and then pass the insurance cost onto the operator through the access charge. This is the most efficient approach to the costs of risk management.

The most efficient outcome is one where the party which can best manage and control the risk should bear the consequence of the risk. In many instances this party may be Queensland Rail.

Clause 11.3 Exclusion of Liability

This clause excludes liability or limits liability to 41 for certain liabilities. The exclusions and limitations of liability apply to Queensland Rail only. Asciano believe that to the extent that a liability exclusion is required and then agreed then it should be reciprocal.

In any event, Asciano seeks that clauses 11.3 d), e) and f) be deleted even if a modified form of this non-reciprocal cap were to continue.

Clause 11.4 Limitation on Claims

This clause limits claims between the parties to an amount above \$500,000 in relation to one event (or related series of events).

Asciano believes that the twelve month time frame and claim limit are too restrictive. Asciano notes that it has smaller limits with other track access providers.

Clause 13.4 Termination for Change in Control

This clause allows Queensland Rail to terminate the access agreement for a change in control of an operator. Asciano believes that such a clause is too broad and that Queensland Rail should at least be required to provide some material reason for such a termination relating to either bona fide operational or safety concerns or bona fide concerns regarding financial strength. The new owner of the operator should be allowed an opportunity to address any Queensland Rail concerns (for example by providing safety accreditation or a security deposit).

Clause 14.2 Insurer

This clause requires the operator's insurer is licensed to carry out an insurance business in Australia and has a particular financial rating.

Asciano notes that it in its experience it is impossible to obtain insurance for rail operations from any insurer in Australia for the amounts that Queensland Rail is requiring and as such the requirement for the insurer to be Australian based cannot be met.

Clause 14.3 Essential Terms and Conditions (Of Insurance)

This clause indicates that Queensland Rail is a co-insured party and that due to this co-insurance a severability clause and non-imputation clause are required and a subrogation clause should be waived.

This clause is not likely to be commercially acceptable as written as Asciano does not believe that insurers are likely to agree to the essential terms sought. The approach adopted elsewhere is to note the track provider's interest on the insurance policy.

Clause 14.6 Disclosure of Insurance

Under this clause an operator may be required to produce copies of its insurance policies. Asciano's insurance policies are confidential and as such cannot be supplied. Asciano understands that this is likely to be the case for the insurances of other access seekers and holders.

It is standard industry practice to supply certificates of currency.

Clause 17.5 Resolution of Disputes by Queensland Rail

Under this clause if a dispute is in relation to the IRMP or safety and the dispute is not otherwise resolved it may be resolved by Queensland Rail.

Asciano believes that this clause is unfair as a party to a dispute (Queensland Rail) is effectively the final arbiter of the dispute to the extent the dispute concerns safety or the IRMP. Asciano believes that any such dispute should be resolved by the Rail Safety Regulator or failing that another safety expert acceptable to both parties.

6 CONCLUSION

Overall Asciano is concerned that the DAU is focussing on a “negotiate and arbitrate” model rather than QCA approved standard form access agreements and pricing. Asciano’s believes that commercial negotiations may be more expensive and complex than reliance on approved regulated reference prices and standard agreements (where there remains scope for some negotiation). Thus Asciano is seeking that:

- other Reference Tariffs should be included in the DAU, including, for example an intermodal or general freight tariff for the north coast line, (and that if such reference tariffs are not included Asciano is seeking that Queensland Rail supply further cost data to facilitate equitable price negotiations); and
- other Standard Form Access Agreements should be included in the DAU, including, for example an intermodal or general freight agreement for the north coast line.

Asciano is also seeking that a level of ring fencing and cost separation should be applied to Queensland Rail. While Queensland Rail does not directly compete with access holders, Queensland rail does operate above rail passenger services which may impact on above rail freight services via operational restrictions and the impact of cost allocations on pricing.

Asciano also has numerous detailed concerns with the details of the DAU and the Standard Form Access Agreement. Many of these concerns are focussed on the one sided nature of Queensland Rail’s approach to liability, insurance and indemnity. Asciano is particularly concerned that Queensland Rail is seeking to minimise risks which it is in a better position to manage than other parties.

Other major concerns include the extensions policy, capacity allocation, re-contracting for access and the need for the continuation of both a ring fencing regime and QCA powers to monitor and audit such a regime.