

Attachment 3 - Major Changes in Wording or Concept Between the 2013 QCA Approved TOA and the TOA Attached to the 2013 DAU Including Asciano Comment on These Changes

QCA Approved TOA Clause Reference	Clause Outline	2013 DAU TOA Clause Reference	Clause Outline	Asciano Comment
TRAIN OPERATIONS AGREEMENT - COAL				
1.2 (d) Interpretation	Does not exist.	1.2 (e) (xvii) Interpretation	New provision inserted which states “access or access rights does not include rights granted by Aurizon Network to a Railway Operator under a train operations agreement.”	The ability for a Railway Operator to operate Train Services either under an SOAA or TOA should be no different in relation to this provision.
N/a	Does not exist.	1.4 References to descriptors of Train Service Types	New provision inserted which states “In this Agreement, references to any descriptor of a Train Service or a Train Service Type (for example, ‘Destination’, ‘Loading Facility’, ‘Nominated Monthly Train Services’, ‘Origin’, and ‘Unloading Facility’) is to that descriptor as applicable to that particular Train Service or Train Service Type.”	<p>It is not clear why Aurizon Network has introduced the concept of ‘Train Service Types’.</p> <p>The introduction of Train Service Type diminishes the flexibility of access rights for an Access Holder and diminishes operational flexibility for an operator.</p> <p>For Asciano’s detailed views on Train Service Type refer to Asciano’s specific comments in the body of this submission.</p>
N/a	Does not exist.	2.2 No right of renewal	New provision inserted which states “The Operator has no right under this Agreement or in accordance with the Access Undertaking to seek a renewal of the Term”.	There needs to be a provision to state that if the corresponding EUAA is renewed, and the End User has elected to continue with their current Railway Operator for Train Services, then the TOA will be renewed for the Term consistent with the renewed EUAA.

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N/a	Does not exist.	3.1 Grant of Operational Rights	New provision inserted which states "On and from the Train Service Commitment Date for each Train Service Type until the Train Service Expiry Date for that Train Service Type, Aurizon Network grants, and will provide, to the Operator the Operational Rights for that Train Service Type in accordance with the Train Service Description for that Train Service Type for the operation of Train Services for that Train Service Type on the terms and conditions of this Agreement."	This differs from the TOA approved by the QCA, where access rights were in respect to Train Services, not individual Train Service Types. This will impact on the renewal provision (refer to clause 2.2 above) and restricts access and operational flexibility.
N/a	Does not exist.	3.2 Nature and scope of Operational Rights	<p>The following restrictions have been inserted:-</p> <p>“(a) The Operational Rights granted under clause 3.1 are non-exclusive contractual rights and do not give the Operator any right, title or interest of any proprietary nature in the Nominated Network.</p> <p>(b) The Operator must not:</p> <p>(i) operate on, or use any part of, the Infrastructure that is not specifically included in the Nominated Network; or</p> <p>(ii) use the Nominated Network for:</p> <p style="padding-left: 40px;">(A) carrying out any provisioning, inspection, testing or maintenance of</p>	<p>Under these restrictions Aurizon Network is now confining the provision of access between a specific origin and unloading facility.</p> <p>Existing Access Holders which have existing UT2 and UT3 access agreements in place will not be subject to these restrictions. Thus these existing Access Holders will have significant advantage over new Access Holders who will be subject to these new restrictions if they were to use the 2013 DAU TOA. Asciano believes that this may be inequitable for new Access Holders.</p>

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			<p>Rollingstock; (B) any marshalling, shunting or other relocation of Rollingstock; (C) storage of Rollingstock; or (D) any purpose other than the operation of Train Services, unless otherwise expressly: (iii) permitted or required to do so under this Agreement; (iv) directed to do so by Aurizon Network in accordance with this Agreement; or (v) expressly permitted under another agreement with Aurizon Network.”</p>	
N/a	Does not exist.	<p>5 Nomination of the Operator</p> <p>6 Variation of nomination of the Operator</p>	<p>These new provisions place obligations on Aurizon Network to provide replacement / amended schedules of the TOA if the nominated End User’s Access Rights change.</p> <p>If the End User withdraws all rights form the Operator, Aurizon Network will provide notice to terminate TOA.</p>	<p>Asciano questions if there is an ability for one TOA to contain Access Rights for more than one End User. If there is then this needs to be considered in these provisions.</p> <p>In addition, clarification is sought on how Ad Hoc Train Services will be treated if End Users access rights change.</p>
N/a	Does not exist.	7 (b) Interaction of rights	New provision inserted which states “The Operator has no right to renew, transfer (subject to clauses 36.2 - Assignment and 36.3 - Charging), vary or relinquish to Aurizon Network any part of the	There needs to be a provision to state that if the corresponding EUAA is renewed, and the End User has elected to continue with their current Railway Operator for Train Services, then the TOA will be renewed for the Term

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			Operational Rights, whether under this Agreement or Aurizon Network's Access Undertaking. The right to seek a renewal, transfer, variation or relinquishment of Access Rights is solely a right of the End User."	consistent with the renewed EUAA.
2.2 Charges	<p>This clause requires payment to be made within 14 days of invoice issue date.</p> <p>Clause 2.2 (d) allows Operator to give notice of dispute within 14 days of invoice issue date.</p>	8.4 Billing and Charges - Disputes	Revised wording requires payment to be made within 10 days of invoice issue date and an operator notice of dispute is reduced to 10 days.	The previous 14 day time frames should be reinstated.
N/a	Does not exist.	10.1 Operation of Train Services	<p>New provision inserted which states:</p> <p>"(a) Unless acting under a Train Control Direction, the Operator must not operate Train Services which do not comply with the applicable Train Service Description and this Agreement without the prior written approval of Aurizon Network (which approval may specify terms in addition to or varying the terms of this Agreement in respect of the Train Services to which the approval relates, including the Access Charges payable [under the End User Access Agreement] in respect of those Train Services).</p> <p>(b) Prior to operating a Train Service, the Operator must notify Aurizon</p>	<p>This additional provision adds an administrative burden to the parties and restricts the operation of Train Services by a Railway Operator.</p> <p>The treatment should be no different to any Railway Operator under any form of access agreements.</p>

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			Network of the End User for whom the Operator will operate that Train Service.”	
4.1 Train Service Entitlement	This clause has a broadly similar intent to the clause in the 2013 DAU.	10.2 Commencement of Train Services 10.4 Supply Chain Rights	<p>Clause 10.2 (a) now states certain activities must be completed prior to the commencement of services, including:</p> <p>10.2 (a) (ii) “the Operator has demonstrated, to the reasonable satisfaction of Aurizon Network, the matters which the Operator is required to demonstrate under clause 10.4(b) in respect of each Train Service Type;”</p> <p>10.4 (b) outlines that the Operator must demonstrate supply chain rights that proves they “hold, or has the benefit of, Supply Chain Rights for the operation of the Train Services for that Train Service Type” and</p> <p>“will continue to hold, or have the benefit of, those Supply Chain Rights until at least the Train Service Expiry Date for that Train Service Type (or at least the Train Service Expiry Date for that Train Service Type if the Operator or the holder of those Supply Chain Rights exercises an option granted in its favour to renew such Supply Chain Rights or extend the term of such Supply Chain Rights).”</p>	<p>Asciano strongly opposes this additional wording. The requirement to demonstrate these requirements may be difficult. For example the end user, rather than the operator, is likely to hold supply chain rights. This needs to be clarified.</p> <p>More generally Asciano is concerned with the general requirements in this clause, which could be subjective and may be used to discriminate between operators, and which will restrict flexible utilisation of access rights.</p>

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N/a	Does not exist.	10.3 Commencement of Train Services for Train Service Type	This section specifically links completion of matters to Train Service Type.	Previously, the completion of these matters related to Train Services. The new provisions are more onerous as they relate to individual Train Service Type. There should be no requirement to provide, for example, a certificate of compliance or Emergency Response Plans again if the current ones already in place and approved by Aurizon Network are sufficient for the introduction of the new Train Services.
N/a	Does not exist.	11.1 Reduction of Nominated Monthly Train Services under EUAA	This new provision gives rights to Aurizon Network to reduce the nominated monthly train services if at anytime the average annual payload of the Train Service Type operated by the Operator exceeds the Maximum Payload for the Train Service Type.	<p>This would give Aurizon Network the rights to 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.</p> <p>Asciano strongly believes that this does not promote efficiency for the supply chain as Operators will have no incentives to increase payloads if in return they lose rights.</p> <p>Clarity is sought on how existing UT2 and UT3 Access Holders will be treated in this scenario as based on the standard access agreements during these undertaking terms such provisions did not exist.</p>
N/a	Does not exist.	12.1 Notice of Intention to Increase Nominal Payload	This new provision states "The Operator acknowledges that Aurizon Network may give the End User a notice of Aurizon Network's	Under these provisions, Aurizon Network has the right to enforce Operators to operate trains with higher payloads. The carrying capacity of an

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			<p>intention to increase the Nominal Payload for a Train Service Type under the End User Access Agreement”</p> <p>Clause 12.2 allows for an Operator to advice of net financial effects as a result of the nominal payload increase and clause 12.6 obliges Aurizon Network to provide compensation under certain scenarios.</p>	<p>Operator’s Rollingstock should not be dictated to by the access provider.</p> <p>The procurement of rolllingstock is a Train Operator’s commercial decisions and takes several years to plan and commission.</p> <p>The operation of rolllingstock is a Train Operator’s operational decision.</p> <p>There are also no reciprocal provisions in the agreement (against Section 11.1 and 12.1) that the Train Service Entitlements be increased as a result of payloads being less than the average annual payload or nominal payload. .</p>
N/a	Does not exist.	14.2 Non-compliance by Operator with Train Service Description	This new section addresses an Operator’s non-compliance with the Train Service Description. If parties can agree to alter the Train Service Description reasonably expected to be achievable by the Operator, Aurizon Network has the right to vary the Access Charge Rates so that they are fully compensated for increased cost of risk to Aurizon Network and any increase in utilisation of Capacity. The only right an Operator has in these provisions is to dispute any variations by Aurizon Network.	<p>There is no specified assessment on how Aurizon Network determines that an Operator is not complying with the Train Service Description. Therefore, it is likely to be based on the subjective opinion of Aurizon Network.</p> <p>Aurizon Network also has introduced their recovery of cost of risk and claim for additional revenue when they believe more capacity is being utilised by an Operator. Asciano is seeking clarity as to how this works with the capacity multiplier (i.e. is there double recovery).</p>
N/a	Does not exist.	14.6 Compliance with Aurizon Network’s Accreditation	This new clause 14.6 (a) states that Aurizon Network would not be in breach in respect to any act or omissions to their compliance with	The access agreement requires the Operator to maintain their accreditation at all times. This clause should be reciprocated for Aurizon Network,

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			their accreditation.	where they must maintain and comply to their accreditation at all times.
N/a	Does not exist.	15 Operating Plan	<p>This new section deals with the submission of the Operating Plan and Aurizon Network's process to approve it prior to commencement of Train Services.</p> <p>There is a requirement that the Operating Plan satisfies all the requirements in Schedule C of the 2013 DAU.</p> <p>15.2 sets out amendment provisions in respect of Train Service Type.</p>	<p>Schedule C of the 2013 DAU contains matters that Asciano does not agree with for inclusion in an Operating Plan. (For example it includes stowage locations, Train Service Entitlements, tonnage profile, negative impacts to main line running, total number of consists and the minimum amount of consist to satisfy 100% of Train Service Entitlements)</p> <p>These inclusions seem onerous; an Operating Plan should simply address operational matters</p> <p>Asciano has provided additional comment on this in Attachment 2 of this submission.</p>
N/a	Does not exist.	16.2 (b) Alterations to Train Services by Operator	<p>This new section introduced additional provisions in relation to changes within and not within the 48 hours window.</p> <p>16.2(d) (vii) states that if the Operator does not take up an alternative time slot offered by Aurizon Network (where service alteration was advised less than 48 hours of original scheduled time), the service would be deemed to be cancelled by the Operator and treated as a consumption of a Train Service Entitlement.</p>	<p>This concept was introduced by Aurizon Network via the drafting of their proposed system rules which has yet to be endorsed by the QCA.</p> <p>Therefore, until the approval process of the system rules is resolved this section should be omitted from the TOA.</p> <p>In addition, Asciano is seeking clarity as to how will this rule will apply for Access Holders with existing UT2 and UT3 Access Agreement without these provisions.</p>

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N/a	Does no exist.	17.11 Variation to Access Charge Rates	This new section allows Aurizon Network to vary access charges so that they are fully compensated for: <ul style="list-style-type: none"> 1. increased cost of risk; or 2. increased utilisation of capacity, when compared to a Reference Train Services.	As per the comment under 14.2 above, Asciano is seeking clarity as to how this works with the capacity multiplier (i.e. is there double recovery). In addition Asciano is seeking clarity on how these charges will be determined
6.10 Amendments to System Wide Requirements	This clause is broadly similar to the 2013 DAU TOA clause although it allows a 30 day response time frame for an Operator.	18.2 (b) Response to a Discretionary System Amendment	This clause now states that if an Operator does not respond to an Amendment Notice issued by Aurizon Network within 20 Business Days, the Discretionary Amendments is deemed not to have any financial impact to the Operator.	The 30 day timeframe as approved by the QCA should be reinstated. In addition the provision should allow for an extension of the timeframe for an Operator to respond to an Amendment Notice if this is agreed between the parties.
N/a	Does not exist.	25.5 Variation of Access Charge Rate	This clause allows Aurizon Network to vary access charges so that they are fully compensated for: <ul style="list-style-type: none"> 1. increased cost of risk; or 2. increased utilisation of capacity, when compared to a Reference Train Services, as a result of the agreement to, or determination of the Interface Risk Management Plan or amendments to the Interface Risk Management Plan.	As per the comment under 14.2 above, Asciano is seeking clarity as to how this works with the capacity multiplier (i.e. is there double recovery). In addition Asciano is seeking clarity on how these charges will be determined.
Schedule 1 Train Service Entitlements	As per the current standard Access Agreement.	Schedule 2 Train Service Descriptions	This clause is now more specific in respect of a Train Service Type. Outlines items like Maximum Sectional Run Times, Nominated Train Service Entitlements and	As outlined throughout this submission Asciano disagrees with the introduction of Train Service Type as it limits access right flexibility.

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			Maximum Payload.	Aurizon Network must provide more details on why they have introduced the Train Service Type concept.
Schedule 5 Performance Levels	None specified.	Schedule 6 Performance Levels	This clause now specifically outlines performance levels to be agreed between the parties. The clause also outlines BRTT Thresholds and how they are calculated.	Refer to Asciano's submission regarding Asciano's position on KPI reporting.