



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

September 2012

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## **1 INTRODUCTION AND BACKGROUND**

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

Asciano has made a previous public submission on this issue to the QCA in July 2012 as part of the first round of QCA consultation on this issue. Following this round of consultation the QCA considered that various respondents raised a number of issues in their submissions on which other respondents and stakeholders may wish to comment. Consequently this current Asciano submission is focussed on commenting on the issues raised in other respondent's submissions to this consultation process. This submission should be read together with Asciano's initial submission of July 2012.

There were eight submissions to the Queensland Rail DAU consultation process. Of these submissions seven submissions were from rail operators or end users (or industry groups representing these users) who use Queensland Rail infrastructure and one submission was from Queensland Rail itself, which supported the Queensland Rail DAU as proposed. This current Asciano submission will focus on the issues raised in the submissions from rail operators and end users. As Asciano does not operate in the West Moreton system, this current response will not make detailed comment on any proposals specific to the West Moreton system.

This submission is public.

## **2 OVERVIEW OF ASCIANO'S AND OTHER RESPONDENT'S PREVIOUS SUBMISSIONS TO THE QUEENSLAND RAIL DAU**

Asciano previously made a submission on this issue to the QCA identifying a number of concerns with the DAU. Similarly submissions from other rail operators and end users raised numerous issues with the DAU. Many of the comments of other respondents broadly align with the positions put forward by Asciano in its submission. As such Asciano generally supports comments which are broadly aligned with Asciano's own position. The table below identifies broad issues identified in submissions and position of Asciano and other respondents to these issues.

**Table 1: Broad Issues Identified in the July 2012 Submissions to the QCA in relation to the Queensland Rail DAU**

<b>Broad Issue<sup>1</sup></b>	<b>Asciano Position in its Previous Submission</b>	<b>Position of Other Respondents in their Previous Submissions</b>
Need to separate Queensland Rail's track access operations from Queensland Rail's above rail passenger operations.	Asciano supports ring fencing of Queensland Rail's track access operations from Queensland Rail's above rail passenger operations. Further to this Asciano supports a strengthened reporting and compliance regime.	Other respondents support ongoing Queensland Rail transparency on this issue (e.g. AMEC), ongoing Queensland Rail ring fencing on this issue (XStrata) or otherwise note that Queensland Rail's ongoing above rail operations may disadvantage freight operators ( e.g. QRN).
Appropriateness of a revenue cap as opposed to a price cap.	Asciano previously had no substantive comment on this issue.	New Hope support price cap over a revenue cap as it is more efficient.
Appropriateness of the level of information provision by Queensland Rail, particularly in relation to the facilitation of commercial negotiation.	Asciano believes that Queensland Rail must provide more detailed cost information in order to facilitate negotiations under the "negotiate and arbitrate" model; however such negotiations remain a second best solution to reference prices.	Other respondents (e.g. QRN, XStrata) support the provision of additional information by Queensland Rail in order to facilitate more balanced commercial negotiations.
Appropriateness of the development of a non-coal standard form agreement.	Asciano supports a standard non-coal access agreement (or agreements), with the COAG standard approach being preferred.	Xstrata also supports a standard non-coal access agreement.
Appropriateness of the price setting approach to be used in determining access prices, and in particular whether non-coal reference tariffs should be developed.	Asciano supports a standard non-coal reference tariff (or tariffs).	Xstrata supports the concept of a non-coal reference tariff being developed if requested by an access holder.
Need to ensure improved capacity assessment and system planning on constrained systems.		Other respondents (e.g. QRC, Peabody) seek the development of improved capacity assessment

<sup>1</sup> Respondents often identified a broad issue but may have characterised the issue in a different manner to other respondents or may have proposed a different solution to other respondents. This identification of broad issues necessarily summarises and synthesises these views.

Broad Issue <sup>1</sup>	Asciano Position in its Previous Submission	Position of Other Respondents in their Previous Submissions
		processes and system planning processes for constrained Queensland Rail systems.
Need for a higher standard of maintenance and improved maintenance obligations	Asciano supports higher maintenance standards.	Numerous users (e.g. Peabody Energy, QR National, QRC, and XStrata) supported higher standards of maintenance and / or improved obligations to maintain the network.
Options for the term of the DAU	Asciano supports a longer term (up to ten years) for the DAU.	New Hope supports a term for the access undertaking of 3.5 to 4.5 years.
Appropriateness of the framework supporting investment in extensions including issues relating to the third party funding of extensions and capacity allocation issues arising from any third party funding of extensions.	Asciano queries the definition of extension and the mismatch of risk and return in relation to developing extensions.	<p>Numerous users (e.g. AMEC, New Hope, Peabody, QRC and XStrata) had numerous concerns regarding the proposed extension framework. Issues raised included:</p> <ul style="list-style-type: none"> <li>• priority access for the user funding the extension;</li> <li>• removal of Queensland Rail's absolute discretion as to whether extensions are built, where this discretion is to be replaced by an objective test where extensions are funded by users;</li> <li>• requirement for Queensland Rail to demonstrate that their capital costs in constructing the extension are prudent;</li> <li>• inclusion of an option to allow the user to construct the extension and then transfer the extension to Queensland Rail;</li> <li>• requirement for Queensland Rail to develop a standard user funding agreement.</li> </ul> <p>Overall there was a general view that this section required clarification and improvement.</p>

Broad Issue <sup>1</sup>	Asciano Position in its Previous Submission	Position of Other Respondents in their Previous Submissions
Options relating to mechanisms for allocating capacity	Asciano supports transparent and objective capacity allocation approaches rather than the proposed subjective approach.	Numerous users (e.g. XStrata, Peabody) support an objective and transparent capacity allocation approach, with several users (e.g. AMEC, new Hope, Peabody) identifying queuing as an acceptable objective and transparent capacity allocation approach.
Options relating to mechanisms for the renewal of access rights	Asciano previously had no substantive comment on this issue.	Numerous users (e.g. AMEC, New Hope, Peabody, QRC and XStrata) had concerns regarding renewal rights. In particular there was a view that the renewal rights should be held by users and that there should be increased certainty of access agreement renewal. In addition users should be notified of time frames regarding renewal of access rights and other issues relating to renewals should be further clarified.
Options for access rights (and the renewal and transfer of these rights) being held by end users.	Asciano previously had no substantive comment on this issue.	<p>Numerous users (e.g. AMEC, New Hope, Peabody, QRC and XStrata) support the option of users holding access rights. In particular the following concepts were supported:</p> <ul style="list-style-type: none"> <li>• development of a standard access agreement for users holding access;</li> <li>• under a user agreement users should be able to transfer operators;</li> <li>• users should be able to transfer their access rights;</li> </ul> <p>In addition to the above concepts the issue was raised that in the event an operator holding access rights defaults or terminates then the access rights should pass to the user.</p>

Broad Issue <sup>1</sup>	Asciano Position in its Previous Submission	Position of Other Respondents in their Previous Submissions
Options for including connection principles in the DAU.	Asciano previously had no substantive comment on this issue.	XStrata supports the inclusion of a set of connection principles in the DAU.
The appropriateness of the Queensland Rail approach to risk management and risk allocation, including issues such as the treatment of liability and the treatment of dangerous goods.	<p>Asciano believes that the Queensland Rail approach to risk management is inappropriate as it seeks to shift all risk to users and operators rather than assign risk to those best placed to manage that risk. Examples of this include<sup>2</sup>:</p> <ul style="list-style-type: none"> <li>• operators should be able to carry dangerous goods subject to reasonable safeguards consistent with the <i>Australian Code for the Transport of Dangerous Goods by Road and Rail</i>,</li> <li>• operators should not indemnify Queensland Rail for claims made by the operators customers where the damage is related to an action by Queensland Rail;</li> <li>• limitations on liability are in favour of Queensland Rail.</li> </ul>	<p>Several respondents (e.g. QRN and XStrata) argued that the risk allocation between Queensland Rail and access holders is inappropriate. In particular XStrata identified numerous examples where there should be a more equitable sharing of risk including dangerous goods, liability, indemnity and force majeure.</p> <p>AMEC supported the DAU clauses relating to dangerous goods and Queensland Rail supported its position of dangerous goods with a consultant's report on managing the risks of dangerous goods.</p>
Numerous issues in the detailed drafting of the DAU and the standard form access agreement which act to favour Queensland Rail rather than reflect a more balanced approach.	<p>Asciano supports a more balanced approach. Examples of this include<sup>3</sup>:</p> <ul style="list-style-type: none"> <li>• currently access seekers are to pay Queensland Rail costs in some circumstances. This should be amended so that both parties pay their own costs;</li> <li>• currently access holders are to pay a security deposit. This should be amended so that both deposits are only paid in defined circumstances;</li> </ul>	<p>Respondents identified numerous issues with the drafting of the DAU and where the drafting favoured Queensland rail.</p> <p>Notably XStrata, QRC, Peabody and New Hope all identified an issue relating to clause 19 of the standard access agreement where currently the drafting allowing the reduction of access rights due to under utilisation are too restrictive and should be extended.</p>

<sup>2</sup> This listing of examples is not intended to be exhaustive.

<sup>3</sup> This listing of examples is not intended to be exhaustive.

Broad Issue <sup>1</sup>	Asciano Position in its Previous Submission	Position of Other Respondents in their Previous Submissions
	<ul style="list-style-type: none"> <li>currently under the dispute resolution clause some disputes may be resolved by Queensland rail. This should be amended so an independent party resolves the dispute.</li> </ul>	



### **3 GENERAL COMMENTS ON ISSUES RAISED IN SUBMISSIONS TO THE QUEENSLAND RAIL DAU**

The table in Section 2 above shows that there are relatively consistent positions from many respondents across many of the issues identified. This demonstrates that many of the issues identified are of genuine concern to both operators and end users and should be addressed by the QCA and Queensland Rail through this current regulatory process.

Some of the issues identified in the table in Section 2 above may be difficult to resolve with simple “one size fits all” amendments as different parts of the Queensland Rail network are utilised by different traffics with different operating and commercial requirements and different risk profiles. This heterogeneous usage profile creates issues for Queensland Rail in drafting a “one size fits all” access undertaking. As such, consideration should be given to having different regulatory approaches for these different network sections under the broad framework of an access undertaking. These different approaches could, for example, include different standard form access agreements, different approaches to end user funding of capital extensions and different approaches to having end users holding access rights.

Asciano believes that the three main sections of the network requiring different treatments are:

- the West Moreton Coal system – primarily coal traffics;
- the Mt Isa – Townsville system – primarily bulk minerals traffics; and
- the North Coast Line – primarily intermodal but with substantial bulk traffics in certain sections.

Asciano believes that while a single access undertaking can cover the entire network within the undertaking there should be different approaches for the different network sections which are designed to meet the different needs of traffic on these sections.

## **4 DETAILED COMMENTS ON SPECIFIC PROPOSALS AND ISSUES RAISED IN SUBMISSIONS TO THE QUEENSLAND RAIL DAU**

The table in Section 2 above identifies numerous broad issues which were raised in the responses to the Queensland Rail DAU. This section provides comment on the Asciano position on these issues within the context of comments made by other respondents<sup>4</sup>.

### **Separation and Ring Fencing**

Asciano continues to strongly support ongoing separation and ring fencing of Queensland Rail's track access operations from its above rail passenger operation. Asciano does not believe that any respondents support a removal of ring fencing protections.

In particular Asciano is seeking that ring fencing be supported by a strengthened reporting and compliance regime.

### **Price Cap Regulation**

Asciano notes that New Hope supports a move away from revenue cap regulation towards price cap regulation. This form of regulation typically provides increased incentives for operational efficiency and increased incentives to grow volumes. Asciano recognises that price cap regulation has benefits but believes that the decision on the form of regulation requires further information and discussion before a final position can be taken. In particular given the heterogeneous nature of traffic on the Queensland Rail network any details of a price cap mechanism would be complicated by considerations of what traffics and what sections of the system were subject to price caps, .

### **Level of Cost Information Provided by Queensland Rail**

Asciano continues to strongly support the provision of more detailed cost information by Queensland Rail in order to facilitate improved access price negotiations. Asciano does not believe that any respondents support a position where the level of detailed information provided by Queensland Rail is reduced.

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<sup>4</sup> In discussing the submissions of respondents in this section Asciano is not taking into account the submission by Queensland Rail. Queensland Rail has, quite properly, made a submission supporting the Queensland Rail proposal.

### **Development of Non-Coal Standard Form Agreements and Non Coal Reference Prices**

Asciano continues to strongly support the development of a non-coal standard access agreement. In particular Asciano supports the development of standard form agreements for both the Mt Isa – Townsville system and the North Coast Line. In particular Asciano believes that the COAG standard (i.e. the ARTC access agreement) is a useful template in developing a non-coal standard access agreement. This COAG standard provides a more balanced approach to risk management issues than the current Queensland Rail approach.

Asciano notes that XStrata also supports the development of such an agreement on the Mt Isa – Townsville system.

Asciano does not believe that any respondents oppose the development of a non-coal standard access agreement.

### **Improved Capacity Assessment and System Planning**

Several respondents sought that Queensland Rail develop improved capacity assessment processes and improved system planning processes for constrained Queensland Rail systems. Asciano supports the development of improved objective and transparent system processes and the development of improved capacity assessment processes and system planning processes. At a minimum any system plan should include system operating assumptions, system capacity, contracted capacity, actual and potential capacity constraints and capacity expansion options to address capacity constraints. The details of improved capacity assessment processes and system planning processes should be developed by Queensland Rail in consultation with the relevant operators and users.

In addition, Asciano supports Queensland Rail providing increased information to operators and end users on:

- the capacity impacts of planned and unplanned service interruptions; and
- the condition of the rail infrastructure.

### **Improved Maintenance**

Several respondents supported the introduction of processes which resulted in higher standards of maintenance and improved obligations on Queensland Rail to maintain the network. Of particular concern is the ability of Queensland Rail to shift the

consequences of poor maintenance on to operators and end users, who are not well positioned to manage this risk.

Asciano believes that further clarity and transparency on maintenance standards is required, and in particular information on how maintenance and service quality are combined with price for a service offering. Asciano supports the development of processes to establish higher standards of maintenance, where the benefits of such maintenance are greater than the costs of the maintenance.

Asciano believes that Queensland Rail should be liable for delays and damage resulting from maintenance below the objective standard. Furthermore Queensland Rail should warrant that the network is of an appropriate standard for operating the relevant train services.

#### **Term of the Access Undertaking**

Asciano supported a longer term for the access undertaking than the five years proposed by Queensland Rail.

Asciano notes that the current ARTC interstate access undertaking, which largely deals with intermodal traffic, has a term of ten years, whereas the current ARTC Hunter Valley access undertaking and QR Network access undertaking, which deal with coal traffic, has a term of five years. These different terms are driven by the needs of the different traffics carried by the networks and by their different risk profiles and commercial and operating requirements

Given the Queensland Rail network carries intermodal, bulk and coal traffics there is a problem in meeting the needs of all the traffics carried. While continuing to support a longer term Asciano does not oppose a five year term for the access undertaking.

#### **Extensions Policy**

Respondents, including Asciano, identified numerous concerns with the proposed extensions framework put forward by Queensland Rail. The concerns raised by the respondents covered numerous shortcomings of the current extensions proposal. As such Asciano believes that Queensland Rail should redraft the entire section relating to extensions and include the following concepts:

- an objective test as to when an extension is to be constructed, which may be linked to the availability of user funding;
- a standard user funding agreement to be developed. Asciano notes that QR Network are currently developing such an agreement and a simplified version of any agreement finally developed by QR Network is likely to be a suitable agreement to be used by Queensland Rail;
- an option for either a third party or Queensland rail to construct the extension, and
  - where Queensland Rail is constructing the extension there should be requirements that construction costs are efficient; and
  - where a third party is constructing the extension there should be a requirements that the extension is transferred to Queensland Rail upon completion unless otherwise agreed;
- a transparent process as to how capacity on an extension will be allocated when the extension is funded by a user.

Asciano further notes that as such extensions are expected to be funded by end users and that Queensland Rail should further consult with end users to develop its extensions policy.

#### **Capacity Allocation Policy**

Asciano and other respondents broadly supported the introduction of a more objective and transparent capacity allocation approach, with several respondents suggesting that a queuing process would be acceptable. Asciano has no fundamental concern with queuing as an objective and transparent allocation policy but any queuing process should address concerns relating to the renewal of existing access rights.

#### **Renewal of Access Rights**

Numerous respondents had concerns regarding the renewal of access right, in particular that renewal rights should be held by end users rather than operators and there should be increased certainty of access renewal.

Asciano has no concerns with end users holding renewal rights, assuming that such renewal rights are not used as a means to prevent new entrants from obtaining access.

### **End Users Holding Access Rights**

Asciano broadly supports the concept of providing end users the option of holding access rights in their own right in circumstances where trains serve a single end user (this is more likely to be the case where end users are miners rather than where end users are engaged in general freight operations).

Asciano believes that Queensland Rail should develop a standard form of end user access agreements and a standard form of operator agreements. These agreements should be developed for those line sections and markets where an operator access agreement is already in place or is required to be developed.

Asciano notes that the QCA is currently consulting on end users holding access rights on the QR National network. Asciano believes that the outcome of this consultation may provide a useful template for further development of the concept of end users holding access in the context of the Queensland Rail access undertaking; particularly as the current QCA process is likely to address the numerous issues of detail that will arise in considering this issue. One issue in particular that may arise is the potential for end users to transfer between operators; while Asciano does not oppose this concept per se, any further consideration of end users transferring between operators should involve consultation with operators to ensure that any proposals are workable in practice.

Related to the above issue of end users holding access, some end users sought to include wording in standard operator's access agreements which provided some rights to end users in certain circumstances. These proposals included:

- the right of renewal of the access agreement should attach to the end user rather than its incumbent operator;
- in circumstances where the operators agreement is terminated the end user should have a right to enter into a new access agreement within a certain time frame rather than lose its access;
- transfers of the access rights require the consent of the relevant end user;

Asciano has no issues in principle with these proposals but notes that they may be more applicable to trains which are used by a single end user (this is more likely to be the case where end users are miners rather than where end users are engaged in general freight operations).

### **Risk Management and Risk allocation**

Several respondents, including Asciano, identified that the risk allocation between Queensland Rail and the access holders is inappropriate. In particular Xstrata identified numerous examples where there should be amore equitable sharing of risk. Asciano support the examples identified by Xstrata.

Of particular concern to Asciano is the current Queensland Rail approach to the management of the liabilities and indemnities associated with dangerous goods and the fact that the carriage of such goods appears to be at Queensland Rail's absolute discretion. Asciano believes that a more appropriate position is one where rail operators can carry dangerous goods in accordance with the relevant laws and codes relating to the carriage of dangerous goods. (Such an approach is used by other rail infrastructure providers in Australia).

Asciano notes that Queensland Rail has submitted a document from PWC relating to the treatment of the liability of dangerous goods. This paper seems to incompletely identify dangerous goods, focussing on goods such as explosives, while not addressing mineral concentrates. Asciano believes that in considering issues related to dangerous goods it may be useful for Queensland Rail to more closely identify which dangerous goods cause it the most concern.

This PWC paper further takes the position that the access holder is best placed to manage all risks associated with dangerous goods even if these risks arise due to Queensland Rail's actions. This is an economically flawed argument and Asciano strongly disputes this position.

Asciano supports a position where access holders can carry dangerous goods where the appropriate safeguards are in place and there is compliance with the appropriate laws and codes. Under this approach the liabilities associated with the carriage of these goods should be borne by whichever party is best able to control the risk<sup>5</sup>, but in any event the liability for any incident involving dangerous goods should be borne by whichever party's negligence resulted in the incident.

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<sup>5</sup> This issue has previously been addressed by the QCA in relation to the QR Network Access Undertaking, specifically in the December 2009 QCA Draft Decision on the QR Network Access Undertaking. The QCA found that the allocation of risk is most efficient when borne by the party in the best position to manage the risk. Asciano does not believe that anything has occurred in the interim to change this QCA position.

If the appropriate safeguards are in place then Queensland Rail should not be able to refuse to provide access for dangerous goods or should not put in place an access regime that has the effect of making such access commercially non-viable through inappropriate liability and indemnity provisions.

Asciano notes that the policy outcome of the Queensland Rail position is that more dangerous goods will be carried by road, which is likely to expose the public to greater risks than if the goods were carried by rail.

## **5 CONCLUSION**

Overall Asciano supports the majority of positions put forward by the respondents to the QCA consultation process. In particular, there are relatively consistent positions from many respondents across many of the issues, demonstrating that these issues are of genuine concern and should be addressed.

Of particular concern to Asciano are:

- the need for ongoing ring fencing of Queensland Rail's above rail and below rail functions;
- the need for provision of more detailed cost information by Queensland Rail in order to facilitate improved pricing negotiations;
- the development of non-coal standard access agreements; and
- the need for a much improved approach to risk management by Queensland Rail as its current approach is completely inappropriate as it seeks to shift all risks to users. Of particular concern are the clauses relating to dangerous goods.

Asciano believes that this latter point in particular should receive further attention from the QCA.