



21 August 2008

Mr E.J. Hall
Chief Executive Officer
Queensland Competition Authority
Level 19, 12 Creek Street
BRISBANE, QLD 4000

By email: rail@qca.org.au

Dear Mr Hall,

Queensland Rail Network's 2008 Draft Access Undertaking

Asciano welcomes the opportunity to provide comments on the QR Network Pty Ltd's (**QR Network**) formal submission (dated 28 July 2008) to the Queensland Competition Authority (**QCA**) regarding their 2008 Draft Access Undertaking (**2008 DAU**).

Asciano accepts QR Network's comments and proposed amendments as outlined in Attachment F of its formal submission, which responds to Asciano's concerns regarding the assignment of infrastructure related assets into the new entities (as detailed in Asciano's June 2008 submission to the QCA's consultation on QR Limited's (**QR Ltd's**) preliminary submission dated 9 May 2008 on QR Networks 2008 DAU). Asciano appreciates that QR Network has given due recognition to stakeholders' concerns and has no further comments on this issue.

In regards to QR Network's proposed changes to the liability clauses 14 and 15 of the 2008 Operator Standard Access Agreement (**2008 OSAA**) Asciano believes there remains considerable confusion around the issue, and rather than debate this we have elected to put forward the following simple series of propositions:

- The basis on which QR Network has put forward the 2008 DAU is that there is no intention to change the 2005 Undertaking beyond that which is necessary to accommodate QR Ltd's revised corporate structure;
- The proposed amendments to the liability provisions in the 2008 OSAA are fundamental changes which substantially alter the relationship between QR and third party operators rather than address QR Ltd's revised corporate structure;
- The changes do not achieve the protection from consequential losses that QR Network is seeking to achieve (as previously outlined in section 4 of Asciano's June 2008 submission to the QCA Position Paper); and
- Therefore, it is inappropriate for QR Network to include these changes in the 2008 DAU.

In support of the above propositions Asciano submits the following comments for further consideration by the QCA. It is noted that QR Network has not amended the drafting of the proposed clauses from the preliminary submission, therefore the comments with regard to the drafting of these clauses in Asciano's previous submission remain relevant to the 2008 DAU.

Asciano's decision not to respond directly to the arguments put forward by QR Network in Attachment F to its submission to the QCA should not be taken as any acceptance of those arguments. It is merely that Asciano believes it will not assist the debate in responding to those arguments, many of which are not central to the issues of concern.

1 The Purpose Of The Amendments To The Proposed 2008 DAU

The stated aims in the proposed 2008 DAU were to:

- only make such changes as necessary to reflect the transfer of obligations from QR Ltd to QR Network, and
- preserve, to the extent possible, the regulatory principles contained in the 2005 Undertaking

This is evidenced by the quote below from page 4 of QR Network's July 2008 Submission to the QCA:

"Accordingly, QR Network's approach to the 2008 Undertaking has been on the basis that the document should preserve, to the extent possible, the regulatory principles contained in the 2005 Undertaking for a term equivalent to the remainder of the 2005 Undertaking. This will allow a valid access undertaking to continue to apply in respect of the declared service immediately following QR's restructure, whilst providing an opportunity for comprehensive consideration of the implications of the change in legal structure as part of the consultation on the 2009 Undertaking."

It is Asciano's view that the proposed changes to the liability and indemnity provisions in the OSAA are not necessitated by the restructure; but as noted in QR Network's submission to the QCA in July 2008 are explicitly aimed at addressing:

"a specific exposure to damage claims including economic loss under current arrangements that was not fully appreciated at the time the Operator Standard Access Agreement was prepared".

In addition, the QCA stated in its Position Paper that in considering the draft access undertaking it is seeking to ensure that the changes do not result in a dilution of QR Ltd's current obligations while adequately reflecting the changes to its corporate structure.

Asciano is strongly of the opinion that QR Network's proposed amendments:

- significantly dilute QR Network's current obligations;
- have a material impact on third party operators; and
- are not required to address a consequence of the revised restructure.

The proposed amendments to the liability provisions contained in the 2008 DAU are beyond the scope of this process, and therefore should not be permitted. Asciano believes these amendments however, could be tabled for future consideration during the comprehensive review process of QR Network's new 2009 Undertaking. This is consistent with QR Network's own proposal quoted above.

2 The Changes Are Fundamental, Not A Mere Adjustment

2.1 The Principle Of QR Network Passing On The Risk Of Its Own Negligence

Asciano believes QR Network should not attempt to pass the risk of its own negligence and any impact of that negligence on third parties, on to third party operators.

As currently worded the changes in the 2008 DAU substantially alter the risk position from the 2005 Undertaking, by requiring Asciano to indemnify QR Network against claims from a third party who has no relationship to QR Network. Satisfying this requirement would be extremely difficult, if not impossible for Asciano to comply with as it believes that end customers would simply refuse to agree to such terms.

2.2 The Need For A Level Playing Field

It is proposed by QR Network that the amendments will not apply to existing access arrangements. There is nothing particularly unusual in this proposition. However, in the current circumstances, where QR Ltd is the only party that has a relevant access contract (currently in the form of an internal, unenforceable agreement but intended to become an enforceable contract with the separation of QR Network), this proposal creates an unlevel playing field for new entrants to the Queensland coal industry.

In the specific case of Asciano, this company already has in place coal haulage agreements with customers, but does not have a relevant access contract and therefore does not benefit from this exemption. Thus, Asciano would not be able to manage the proposed new obligations without seeking the voluntary acceptance of amendments by producers to the existing haulage agreement – something that there is no reason to expect would happen.

This is typical of the likely outcome for any operator seeking to provide coal haulage services. The requirements of the QR Undertaking (both the 2005 Undertaking and the 2008 DAU) are such that, at times when capacity on the network is constrained (as it is forecast to be for some years to come), an operator is not able to obtain an access contract prior to securing a haulage contract with a coal producer – any attempt to pre-emptively acquire an access contract will result in the operator being placed, at best, third in a queue, behind the incumbent operator (QR Ltd through QRNational) and the producer. While it is true that QR Ltd would need to obtain new access contracts as each existing haul requires renewal, and therefore will lose the benefit of the exemption, this will be a very gradual process with the current QR Ltd arrangements continuing through to 2020.

Furthermore, Asciano believes this proposal provides QRNational Coal (as the incumbent) an unjust competitive advantage over new entrants. It would also create a disincentive for coal customers to want to contract with new entrants (like Asciano) and it would make competing against the incumbent more difficult.

2.3 The Current Access Holder Standard Access Agreement Is Unworkable

Part of QR's justification for the proposal is that there is an imbalance in the risk relationships between the Access Holder Standard Access Agreement (**AHSAA**) and the OSAA. Asciano remains of the opinion that the AHSAA and the OSAA contemplate two fundamentally different relationships and therefore it is not appropriate to equate the risk allocation of one with the other.

The AHSAA, in Asciano's view, is as yet untested and is somewhat an unworkable document in its current format. Asciano believes a better position would be to recognise the AHSAA not as a mere variation of the OSAA, but rather as a new type of arrangement requiring a different type of agreement. It is notable that, although coal producers have been vocal in their desire to manage their access to rail capacity, none have chosen to adopt the AHSAA in the years since it has been available.

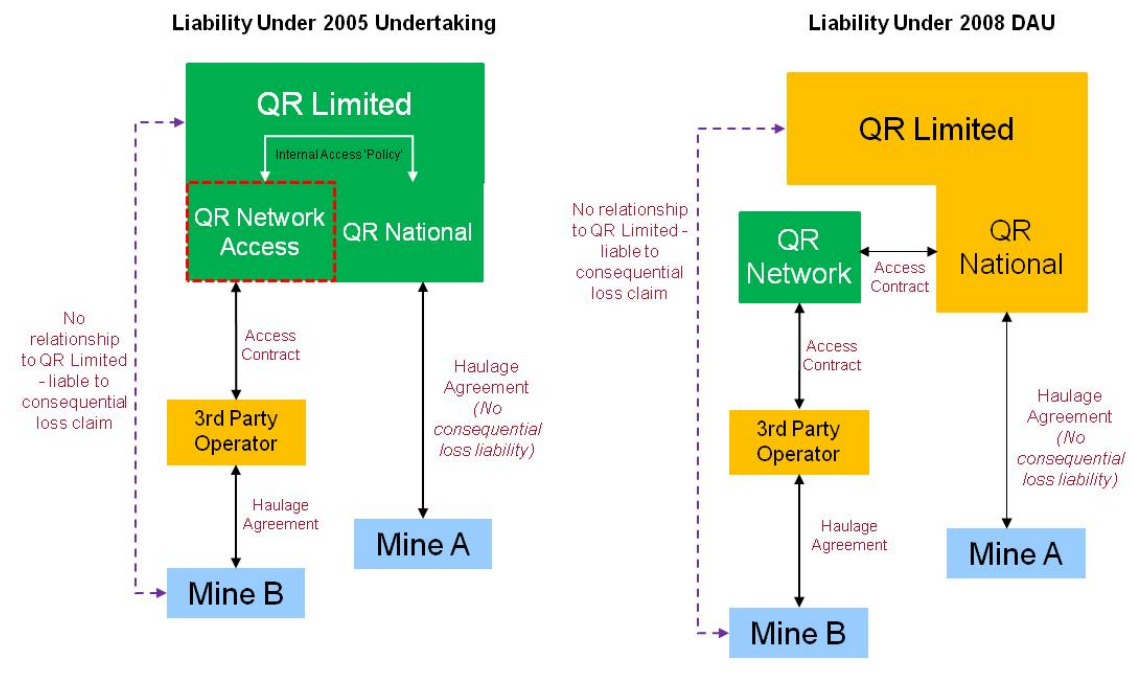
Asciano is aware that there is a strong expectation that the 2009 Undertaking will provide a different arrangement whereby producers will be able to hold rail capacity contracts that are decoupled from the access requirements for train operations. Asciano strongly supports this move. It is sufficient in the current context to recognise that the existing AHSAA:

- has failed to attract any support at all;
- is a poor model on which to justify changes to the OSAA; and
- is likely to be abandoned in support of a radically different model.

3 The Changes Do Not Achieve The Protection That QR Network Is Seeking

Asciano remains firmly of the view that the proposed changes do not achieve the result that QR Network is claiming it is seeking, ie to overcome an exposure to consequential loss that has, until now been covered through the QR Ltd haulage contracts.

Figure 1: Liability Positions



As shown in Figure 1, the relationship between QR Network/QR Ltd and a third party remains unchanged between the 2005 Undertaking and the 2008 Undertaking. In both cases (prior to the proposed changes to the 2008 Undertaking), QR Network/QR Ltd is exposed to claims from a producer as the producer is never in a direct contractual relationship with QR Network/QR Ltd. Both the 1999 Undertaking and 2005 Undertaking had/have standard access contracts that allow for this exposure, and it has never been an issue that this is inappropriate – if QR Ltd had not chosen to restructure at this time, presumably this issue would never have been raised. It is only QR Network that becomes exposed to claims where it previously had protection through the QR National (QR Ltd) haulage agreement (as claimed by QR Ltd). Therefore, the issue is an internal one for QR Ltd, not an issue for resolution through a general imposition of risk on third parties.

Given that the point of the access undertaking is to regulate third party access to the network, it is very peculiar that QR Network attempts to resolve this issue by seeking changes to the third party access arrangements – arrangements which are not affected by the problem.

To make the case for change even weaker, by virtue of the exemption to existing access contracts, the proposed changes will not change QR Ltd's access contract with QR Network and therefore the solution does become active for 100% of the existing volumes on the network during the proposed currency of the 2008 Undertaking. This creates the rather bizarre outcome that the remedy QR Network is seeking to impose (which will only apply to new access contracts) will not apply to any coal hauls during the currency of the 2008 Undertaking as all of those hauls will be covered by the existing QR National access contract, but it is likely to affect contracts negotiated during that period (including a contract that Asciano is currently negotiating with QR Network) for hauls commencing

after the 2008 Undertaking is due to expire. Thus the remedy is no remedy at all to the ill that QR is seeking to cure, but it has an enduring anti-competitive outcome for third party access seekers.

4 Inappropriate To Accept The 2008 Undertaking

On the basis of the foregoing, Asciano believes that the 2008 Undertaking should not be approved in its current form.

In summary Asciano's position remains that:

- the amendments are not directed to preserving the regulatory principles contained in the 2006 Undertaking, nor are they necessary to give effect to the QR Ltd restructure;
- the amendments proposed to the indemnity provisions are fundamental changes to the existing document and have a material impact on third parties seeking access to the network;
- in the specific circumstances, the amendments serve to unfairly advantage the incumbent;
- the amendments are poorly drafted and fail to remedy the problem used to justify their imposition; and
- on this basis the QCA should refuse to approve the 2008 DAU in its current form.

Should you have any questions in relation to this submission please contact me on (02) 8484 8043, or alternatively Philip Dixon-Flint, Manager Access and Regulation on (02) 8484 8066.

Yours sincerely

A black rectangular redaction box covering the signature of Dr Tim Kuypers.

Dr Tim Kuypers
Group General Manager
Access & Regulation