



**Asciano Submission to the  
Queensland Competition Authority  
in relation to the Aurizon Network  
Proposed Standard Connection  
Agreement**

February 2013

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## **1 INTRODUCTION AND BACKGROUND**

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority (QCA) on the Aurizon Network proposed Standard Rail Connection Agreement (SRCA) for customer specific branch lines in accordance with clause 8.4 of the 2010 Access Undertaking. Asciano has made previous submissions on this issue to the QCA in September 2011 and August 2012.

In 2011 Aurizon Network submitted a proposed SRCA to the QCA in accordance with its access undertaking. Asciano made several submissions in the QCA consultation process relating to the SRCA submitted.

The QCA made a Final Decision on the SRCA in December 2012 which required Aurizon Network to make certain amendments before the SRCA could be approved. Asciano generally supports the QCA positions in the Final Decision.

Aurizon Network has since resubmitted an amended SRCA to the QCA which differs to the QCA Final Decision on several matters.

Asciano's subsidiary Pacific National operates trains on the Aurizon Network infrastructure. In the past Aurizon Network has been able to offer connection agreements to customers with limited regulatory scrutiny. For example Pacific National recently entered into a connection agreement and related agreements in regard to the connection of the Pacific National train maintenance facility at Nebo.

Asciano believes that the fact that Pacific National, or any other party, has previously agreed to a clause or concept in a connection agreement with Aurizon Network should not be used as a justification that the clause or concept is acceptable. These connection agreements typically form part of a much larger project and as they are being negotiated with a monopoly the scope for any meaningful negotiation away from the Aurizon Network position is very limited.

This submission is public.

## **2 ASCIANO CONCERNS WITH ISSUES RAISED IN “EXPLANATION OF PROPOSED AMENDMENTS TO THE STANDARD RAIL CONNECTION AGREEMENT”**

Aurizon Network has lodged a document with the QCA titled “Explanation of proposed Amendments to the Standard Rail Connection Agreement”. This document identifies ten areas where the amended SRCA submitted by Aurizon Network differs with the amendments required by the QCA.

Asciano notes that while this explanatory document identifies the primary differences between the SRCA of the QCA Final Decision and the SRCA lodged by Aurizon Network there seem to be some differences which are not addressed in the explanatory document. For example the changes in clauses in 11.7, 11.8 and 27.5 are not discussed in the document in any detail, if at all.

This raises concerns as to whether the issues which have not been identified in the explanatory document are considered by Aurizon Network to be material changes. Asciano believes that the rationale behind the changes in these clauses should be further explained.

Asciano has concerns with some of the areas identified in this explanatory document as outlined below. Asciano believes that these concerns should be addressed in any further iteration of the SRCA.

### **2.1 Insurance**

Aurizon Network has not accepted the QCA’s Final Decision in relation to insurance as it requires Aurizon Network to hold insurance cover which would be difficult to obtain, highly priced, would be inconsistent with Aurizon Network’s current insurance approach or duplicates insurance cover already required or held by Aurizon Network.

Asciano believes that as this SRCA is an agreement relating to a connection between two pieces of infrastructure the insurance for both parties should be reciprocal. To the extent that this results in duplication of insurances already existing for either party or self insurance for either party then this is an issue for the party and its insurer. Asciano believes that in the SRCA the same insurance clauses should apply to both parties. Obviously both parties should be free to negotiate different clauses in any amended connection agreement. To the extent that Aurizon Network

has issues with the SRCA this should provide an incentive for Aurizon Network to negotiate amended insurance clauses which could benefit both parties.

## **2.2 Confidentiality**

Aurizon Network has not accepted the QCA's Final Decision in relation to confidentiality. Aurizon Network is proposing a thirty year protection period for confidential information related to the SRCA in the form of Confidentiality Deed.

Asciano believes that such a thirty year term is excessive and needs to be strongly justified for it to be accepted. While Asciano believes that confidentiality is important Asciano does not believe that a thirty year protection period for confidential information is necessary. Asciano believes a term such as two to five years is more reasonable. (Asciano notes that access agreements do not have thirty year protection periods for confidential information.)

Asciano notes that each connection is related to a broader individual project with its own commercial drivers; in instances where both parties believe such a thirty year time frame is warranted due to the nature of the project then such a time frame could be negotiated.

More broadly Asciano notes that the complexity of the confidentiality surrounding the connection process may act to add additional costs to the negotiations for little benefit. A simpler confidentiality regime may be sufficient.

## **2.3 Restrictions on Aurizon Network's Ability to Deal with Connecting Infrastructure**

Aurizon Network has proposed an amendment not included in the QCA's Final Decision. This amendment would limit Aurizon Network's ability to encumber, transfer or dispose of connecting infrastructure except as part of a transaction involving the adjoining mainline infrastructure.

Asciano recognises that the intent of this amendment is to keep a consistent degree of management between the mainline and the connection. Asciano supports this intent but would welcome additional clarity on the impact on the private infrastructure owner in the event that the Aurizon Network mainline itself was sold. This clarity could be provided separately to the formal connection agreement.

## **2.4 Provision of Additional Services**

Aurizon Network believes that the current drafting is unclear in relation to instances where Aurizon Network is required to provide services under the SRCA but is not reimbursed for the costs of providing these services through access charges. Aurizon Network argues that it should be reimbursed for the reasonable costs of carrying out such services and has included an amendment to reflect this position.

Asciano believes that Aurizon Network should provide some clarity on the nature of these other services. This clarity could be provided separately to the formal connection agreement.

Asciano believes that it is reasonable for Aurizon Network to recover its costs for providing other services only when these services have been explicitly requested by the counterparty. Asciano's concern is that Aurizon network may be able to bundle other services with connection services in such a way that there is no other reasonable option for the counterparty but to take and pay for these services.

## **2.5 Time to Review Design Provided by Customer**

Aurizon Network has proposed an amendment to ensure that when design approval will take longer than 10 days Aurizon Network is able to extend the period by written notice.

Asciano believes that given the timelines associated with projects which require connection (such as mines) there should be a large amount of lead time where the parties can work informally towards the relevant approvals. Asciano believes that Aurizon Network should develop a process which allows for 10 days for approval, while recognising that in extraordinary circumstances a longer approval period may be needed. In these circumstances where both parties believe such a longer time frame is warranted due to the nature of the project then such a time frame could be negotiated.

More broadly Asciano queries why an approval process is required under clause 6 of the SRCA as Asciano assumes that obtaining the necessary approvals would be a prerequisite for entering into an SRCA and as such these approvals would sit outside the SRCA.

## 2.6 Provision of Train Services Plan

Aurizon Network is seeking to include the provision of a train services plan by the SRCA counterparty so that Aurizon Network has a clear understanding of what the maintenance requirement will be for the connection. Aurizon Network recognises that it could establish a maintenance profile based on Train Service Entitlements (TSE) under Access Agreements but argues that this may not necessarily provide sufficient information and that if Aurizon Network has to assume the use of a connection, and its assumptions are flawed, under or over maintenance of the connection may occur.

Asciano has strong concerns with this Aurizon Network position. Asciano believes that TSEs in access agreements are sufficient. Asciano believes that the detail of the train services plan would be provided to Aurizon Network via the Conceptual Operating Plan for the relevant Access Agreement and the separate provision of the plan is unnecessary. In addition such a plan is likely to change over time requiring ongoing contractual amendments.

If Aurizon genuinely believes that further information is needed on an individual project the option remains for Aurizon Network to negotiate with the party to obtain this information.

In any event the Train Services Plan contains commercial information relating to above rail movements. As such this plan is likely to have commercial value to Aurizon Network's related above rail operator and should be strongly protected by ring fencing provisions within Aurizon.

As it currently stands the provision of a Train Service Plan to Aurizon Network via the SRCA is unacceptable.

Note that Asciano has no comment on the Aurizon Network positions on:

- the treatment of connecting infrastructure at end of term of agreement;
- investigation of incidents;
- reciprocal rights of access to land in emergencies; and
- definition of "design".

### **3 ASCIANO CONCERNS WITH OTHER ISSUES RAISED IN THE STANDARD RAIL CONNECTION AGREEMENT**

Asciano has several other concerns with the SRCA other than those which were raised in the document titled "Explanation of proposed Amendments to the Standard Rail Connection Agreement". Asciano recognises that to the extent these concerns have been addressed in the QCA Final Decision that these concerns are unlikely to be revisited by the QCA.

These concerns are outlined below.

#### **Coal Loss Management Plan (CLMP)**

The SRCA incorporates CLMP requirements in the connection agreements. Asciano believes that it is inappropriate to force these requirements on to users via the SRCA, and in some instances such provisions are irrelevant for private infrastructure connections.

If these requirements are to be implemented they should be implemented in a consistent manner across the industry rather than via an ad hoc process which relies on parties entering into the SRCA. Such an approach may act to disadvantage new users who have to enter SRCAs.

If this is to be implemented Aurizon Network should clarify if private infrastructure owners with existing connection agreements with Aurizon Network are also subject to CLMP obligations.

#### **Annual Service Charge**

The derivation of the Annual Service Charge as outlined in clause 3.2 should be clarified. The derivation of the charge has a subjective element and as such the counterparty should have a right to review and agree the Annual Service Charge prior to it being invoiced.

#### **MCI as Escalator**

Asciano notes that amounts such as insurance amounts and security amounts are required to escalate by the Maintenance Cost Index, which is a cost index developed by Aurizon Network under the Access Undertaking.

Asciano believes that insurance amounts and security amounts are only tangentially linked to maintenance costs and as such should be escalated by an independent index such as the CPI if any escalation is required.

#### **Role of the Owner and Aurizon Network in an Incident**

Clause 11.7 states that if an incident occurs on private infrastructure but damages the connecting infrastructure on the Network the private infrastructure manager is responsible for the “overall co-ordination” of the response. Asciano believes that it would be more appropriate if the private infrastructure owner managed the response on its infrastructure and Aurizon Network managed the response on its infrastructure. The nature of the “overall co-ordination” should be clarified.

#### **Termination**

Clause 19.1 (a) (ii) allows Aurizon Network to terminate the agreement if they are of the belief that there will be no services using the connecting infrastructure. This timeframe should be extended and should only be exercised after consultation with the Owner where the Owner should have a right to request that the connection remain in place (where the Owner should provide reasons for this request).

#### **Wording Changes**

Several wording changes as outlined below should be considered:

- Clause 6.6 – the words ‘use its best endeavours to’ should be deleted to require Aurizon Network to procure an assignment of the obligations under the SRCA if the Connecting Infrastructure is transferred or disposed of;
- Clause 6.10 – there should be an obligation on Aurizon Network to use reasonable endeavours to notify and consult with the Owner where Aurizon Network is planning to introduce any modifications or upgrades to the connecting sections of the Network which will impact (or be reasonably expected to impact) on the Connecting Infrastructure or the Private Infrastructure prior to undertaking such modification or upgrade;
- Clause 8 – the obligation in this clause to attend training should be mutual (i.e. to include where Aurizon Network staff may be required to work in the immediate vicinity of the Private Infrastructure);
- Clause 11.5 – the word ‘Owner’ should be replaced with ‘Parties’ because Aurizon Network are also subject to IRMP and Emergency Response Plan under certain scenarios;

- Clause 15.2 – in the event that clause 15 is accepted then the timeframe of 14 days to provide updated train service plan should be replaced with ‘as soon as practicable’;
- Clause 17 (c) – the requirement to provide the other party with insurance policies should be deleted as insurance certificates should be sufficient evidence of proof of insurance. In the alternative, it should be amended to allow the other Party to view insurance policies but not be provided with copies. This issue has been an ongoing issue in relation to access agreements. Insurance policies are confidential and provision of copies of such policies is often problematic for both parties.

#### **4 CONCLUSION**

Asciano generally supports the position in the QCA’s Final Decision. While Asciano recognises that Aurizon Network has accepted many of the amendments required by the QCA Asciano believes that at a minimum the issues identified in this submission need to be addressed in any further iterations of the SRCA. In particular Asciano believes that the Aurizon Network position of requiring train services plan is not necessary.