



**Asciano Submission to the  
Queensland Competition Authority  
in relation to the Queensland Rail  
2013 Draft Access Undertaking**

April 2013

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## **1 INTRODUCTION**

Asciano welcomes the opportunity to make a submission to the Queensland Competition Authority (QCA) on the Queensland Rail 2013 draft access undertaking. Asciano, via its subsidiary Pacific National, uses the below rail assets of Queensland Rail for intermodal and minerals haulage.

In February 2013, Queensland Rail withdrew its 2012 draft access undertaking (2012 DAU) and submitted a new draft access undertaking (2013 DAU) to the QCA. Asciano recognises that the 2013 DAU submitted by Queensland Rail takes into account some issues raised by stakeholders in their responses to the 2012 DAU.

Asciano has previously commented on the Queensland Rail 2012 DAU in July 2012 and September 2012. To the extent that issues raised in these submissions have not been addressed in the 2013 DAU Asciano is seeking that they be considered by the QCA in its 2013 DAU approval process.

Asciano welcomes the consultative approach that has been used by Queensland Rail throughout this process.

Asciano notes that the QCA and Queensland Rail are undertaking a series of consultation sessions on various issues relating to the 2013 DAU. Asciano understands that issues to be addressed at these sessions include:

- above rail operational issues;
- Western system coal pricing;
- aspects of the proposed Standard Access Agreement;
- Mount Isa pricing; and
- investment framework matters.

Asciano is intending to attend the consultation sessions relevant to Asciano's activities on the Queensland Rail Network.

This current submission addresses those issues raised in the 2013 DAU which are not the subject of a consultation session. Following the consultation sessions Asciano will make a further submission on above rail operational issues, aspects of the proposed Standard Access Agreement, Mount Isa pricing and investment

framework matters. For the purpose of clarity sections of the 2013 which Asciano has not commented upon are outlined in Attachment 1. These sections will be commented upon in a subsequent submission.

This submission is public.

## **2 ASCIANO COMMENTS ON QUEENSLAND RAIL AMENDMENTS MADE IN THE 2013 DAU**

Asciano notes that numerous changes have been made between the 2012 DAU and 2013 DAU. Asciano comments on these changes are outlined in the section below<sup>1</sup>.

### **2.1 Comments on the Preamble**

Asciano notes that Queensland Rail has included an expanded preamble to the 2013 DAU. The preamble (2013 DAU page 2) includes statements regarding the commercial viability of the network and the competitive position of the network compared to other transport modes.

Asciano does not believe that these statements should be included as part of an access undertaking. By having QCA approve an access undertaking containing these statements the QCA could be seen as endorsing Queensland Rail's view as to its market position. Asciano does not believe that the QCA should be required to approve subjective statements only tangentially related to access. The access undertaking should be restricted to matters of access.

Asciano notes that the 2013 DAU preamble (2013 DAU page 2) also includes amended wording which states

*It provides a balanced approach to the provision of Access and a framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Operators seeking Access to Queensland Rail's Network*

Asciano believes that views as to whether the undertaking is balanced, efficient and transparent are largely subjective and as such should not be included in the access undertaking.

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<sup>1</sup> These comments exclude comments on above rail operational issues, aspects of the proposed standard access agreement, Mount Isa pricing and investment framework matters.

Overall Asciano believes that the preamble, if necessary, should be restricted to objective description of the background to the access undertaking.

## **2.2 Comments on Section 2.6.5 Rail Safety and Other Considerations for Passengers**

Asciano notes that section 2.6.5 a) and d) now effectively state that if proposed access rights may adversely effect passenger train operations in Brisbane that access may be denied. Asciano appreciates that the drafting of 2.6.5 b) and c) indicate that Queensland Rail and the access seeker should work together to seek a solution to the issue, however Asciano is concerned that the final decision is at Queensland Rail's discretion.

This is of particular concern as there is potential for Queensland Rail as an operator of passenger trains may have a conflict of interest in making such a decision. Asciano believes that an independent body, such as the QCA, should be involved in such a decision making process to ensure neutrality.

## **2.3 Comments on Section 2.7.2 and 2.7.3 Access Seekers Competing for Access Rights and Renewals**

Section 2.7.2 effectively allows that in the event that there are competing access requests then the access request which provides the most favourable terms to Queensland Rail will be granted access priority, and in the event that the competing access requests are identical then the first application received will be accepted. The Section provides for unsuccessful applicants to be provided with reasons as to why their application was unsuccessful.

Asciano has no fundamental concerns with the principles in section 2.7.2 if there are no existing hauls or other access rights which are impacted. However, Asciano has a concern with the provision of even high level information to unsuccessful applicants. This information, as outlined in Schedule D, may include information which any successful access seeker would wish to keep from other access seekers, particularly as the same small group of access seekers is likely to be competing for multiple hauls over time.

Section 2.7.3 effectively allows that in the event of an access application impacting on an existing access right that the current access right holder or relevant nominee

the access holder and / or nominee will be informed. In addition, in the event that the access being sought is a reference service then the existing access holder can renew access if they match the terms being offered by the access seeker. The renewal right is only available on one occasion per access haul and the renewal application must be made two years prior to the current access rights expiring.

In its previous submissions Asciano made no substantive comment on the renewal of access rights.

Asciano is concerned with section 2.7.3 as

- the section is intended to meet concerns in relation to existing coal access, however Asciano believes that it should be broadened to include any existing access rights;
- the renewal rights should be allowed to be used more than once. Many mining projects have uncertain lives due to both physical and commercial factors;
- safeguards should be considered to prevent potential gaming by access seekers who may seek to drive up competitors access charges by submitting access applications which they have no intention of pursuing.

In addition Asciano has a broad concern that it may be in Queensland Rail's commercial interest to indicate that a current access right and an access application are in conflict in order to create competitive tension and drive up the price of access when, in reality capacity may exist to serve both hauls (or could be created to serve both hauls through relatively small levels of investment). Given this Asciano believes that Queensland Rail should be required to demonstrate that an access application genuinely impacts on an existing access right to the extent that they both cannot be accommodated and / or provide an estimate of the capital cost needed to accommodate both hauls.

## **2.4 Comments on Part 5 Reporting**

Asciano broadly supports the changes made in Part 5 reporting as they provide both increased detail in the reported information and greater safeguards to ensure the accuracy of the reported information.

However, Asciano remains concerned that issues such as the provision of increased cost information and greater separation of Queensland Rail functions have not been adequately addressed.

Asciano notes that Queensland Rail (Explanatory Submission February 2013 pages 19-20) continues to defend its position that it is not required to provide cost information under the QCA Act and that the provision of cost information in relation to hauls where pricing is based on market factors rather than cost factors is unnecessary.

Asciano believes that the “negotiate and arbitrate” access model is 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. The asymmetry in cost information between Queensland Rail and access seekers may be partially addressed by Queensland Rail providing cost information.

Asciano believes that the reporting templates outlined in Schedule E could be improved. In particular they could include scope for the provision of explanations for delays and cancellations of train service rather than just the reporting of statistics. Scope for the provision of explanations, for example the occurrence of a force majeure event, would provide context for the occurrence of unexpected statistics.

## **2.5 Comments on Part 6 Administrative Process**

In relation to section 6.3 Asciano believes that it should still be possible to send a notice by facsimile.

## **2.6 Comments on Schedule C Access Agreement Principles**

The Access Agreement Principles outline the principles on which access agreements are based. Asciano expects that its comments below on the Access Agreement Principles may be expanded upon in its 3 May 2013 submission following the session on the Standard Access Agreement. For example sections relating to noise mitigation, risk and indemnity and limitations on liability have all been amended in the Standard Access Agreement, and as such Asciano believes that the session on the Standard Access Agreement may impact on the amendments in the Access Agreement Principles.

Specific areas of Asciano concern in relation to the amendment to the Access Agreement Principles are outlined below:

### **Dangerous Goods**

Section 8 of the Access Agreement Principles now states that an access holder can carry dangerous goods with Queensland Rail's permission. The access holder has to demonstrate that the carriage of the dangerous goods is permitted by relevant laws and codes and that the access holder has any authorisations required. The access holder must notify Queensland Rail of the details of the dangerous goods and have an emergency plan which includes procedures for responding to the dangerous goods.

Section 11 of the Access Agreement Principles now states that the access holder must indemnify Queensland Rail against all claims relating to the transportation of dangerous goods whether or not caused or contributed to by Queensland Rail (including negligence) but excluding any part of the claim that would have arisen regardless of whether dangerous goods were being transported.

Asciano remains concerned that the Queensland Rail approach to indemnifying itself from any impact from dangerous goods (regardless of whether Queensland Rail negligence is a factor). This approach to dangerous goods indemnities is more onerous for above rail operators than approaches which apply in other Australian jurisdictions. Asciano believes that the rationale for the Queensland Rail dangerous goods approach should be more comprehensively explained. In particular the fact that the carriage of dangerous goods by an above rail operator indemnifies Queensland Rail regardless of Queensland Rail's its own negligence should be justified. Asciano believes that risks arising from a parties own negligence should be carried by the party and there should not be exceptions based on the nature of the goods being carried.

The current Queensland Rail approach shifts risk from the party which can best manage and control the risk. Asciano believes that Queensland Rail should bear the risk for incidents involving dangerous goods where the incident results from issues related to Queensland Rail infrastructure.

Asciano's position has consistently been that the liabilities associated with the carriage of these goods should be borne by whichever party is best able to control



the risk, but in any event the liability for any incident involving dangerous goods should be borne by whichever party's negligence resulted in the incident.

Asciano has a concern that the Access Agreement Principles 11) a) iv) applies only to mixed goods trains. The dangerous good indemnity position of the case of a Unit Train which is carrying a dangerous good should be clarified.

Asciano believes that the approach outlined in the Access Agreement Principles 11) a) iv) where liability may be split between the "non-dangerous goods component" and the "dangerous goods component" of any incident is problematic as it may result in definitional and delineation issues depending on the nature of the incident. Asciano believes that this issue may need to be further clarified in Access Agreements.

Overall Asciano believes that the Queensland Rail approach to dangerous goods indemnities is likely to shift the freight transport task for dangerous goods on to Queensland roads.

#### **Noise Mitigation**

Section 9 of the Access Agreement Principles requires an operator to pay a portion of any expenses related to noise mitigation, as reasonably determined by Queensland Rail.

Asciano believes that:

- noise mitigation should only be undertaken when relevant noise levels are breached;
- train operators should only be required to pay expenses related to noise mitigation when it is demonstrable that the train operation issues, rather than below rail issues, are responsible for noise. In addition if train operations are responsible for noise and more than one operator uses the track then further investigations should be conducted to determine whether a specific operator should bear the cost; and
- the expenses related to noise mitigation, as determined by Queensland Rail, should be able to be tested by an operator. For example Queensland Rail should be willing to provide tender documents, quotes and invoices to support any expenses which they seek to recover.

## 2.7 Comments on Schedule F Standard Access Agreement

Asciano expects that its comments below on the Standard Access Agreement will be expanded upon in its 3 May 2013 submission following the session on the Standard Access Agreement.

Asciano notes that section 11.1 of the Standard Access Agreement has removed the liability caps previously proposed. Given this issue relates to a change in the Standard Access Agreement Asciano will provide comment on this in its submission due May 3 2013.

## 2.8 Comments on Omissions

Asciano believes that the 2013 DAU should include an obligation to maintain the track at a level which is fit for purpose. This obligation is fundamental to the access undertaking as it seeks to ensure that there is a minimum level of access service being offered.

Asciano understands that Queensland Rail believes that this obligation should be in access agreements rather than the access undertaking.

Asciano believes that an obligation to maintain the track at a level which is fit for purpose should be in both the access undertaking and the agreement.

## 3 ASCIANO COMMENTS ON ISSUES PREVIOUSLY RAISED BY ASCIANO BUT NOT ADDRESSED IN THE QUEENSLAND RAIL 2013 DAU

Asciano previously provided comments on the Queensland Rail 2012 DAU in July 2012 and September 2012. While Asciano recognises that some issues raised in these submissions have been addressed by Queensland Rail in its 2013 DAU not all of the issues raised have been addressed. Asciano is seeking that these issues be considered by the QCA in its 2013 DAU approval process.

Of particular concern to Asciano are the following high level issues:

### Lack of Cost Information

Asciano's experience of the "negotiate and arbitrate" access model with other rail infrastructure owners in Australia is that this model is 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.

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.

Asciano appreciates that the provision of cost information may be problematic within the time frames of the current DAU process. If this is the case then the provision of such information should be prioritised for the next undertaking due in 4 to 5 years time.

#### **Lack of Provision of a Broader Suite of Reference Tariffs**

Asciano believes that 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 a regulatory approved reference tariffs overcomes the asymmetry of cost information problem outlined above.

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.

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.

### **Standard Form Access Agreement**

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 believes that, consistent with its view 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 appreciates that the provision of Standard Form Access Agreements for additional routes may be problematic within the time frames of the current DAU process. If this is the case then the development of such agreements should be prioritised for the next undertaking due in 4 to 5 years time. However, as a minimum Asciano believes that the existence of the West Moreton Coal Standard Access Agreement provides a useful access agreement template and Queensland Rail should be required to explain any variation between this Standard Access Agreement and any other agreements (for example agreements on the north coast line or Mt Isa Line) where the variation is to the benefit of 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 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 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 the regulatory process should impose a degree of vertical separation and transparent cost allocation on Queensland Rail. Such a separation minimises

- any cost shifting or cross subsidisation between the network business and passenger service business; and
- the 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.

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.

None of the high level issues above have been addressed by Queensland Rail in its amendments in DAU 2013.

In addition to the issues above there are numerous issues of detail which Asciano raised in previous submission which have not been addressed. Asciano is seeking that these issues be considered by the QCA in its 2013 DAU approval process.

#### **4 CONCLUSION**

Asciano remains concerned with elements of the Queensland Rail 2013 DAU, including newly added elements in relation to passenger priority, renewal of access rights issues, reporting and access agreement principles (including dangerous goods clauses and noise mitigation clauses). These concerns are detailed in the submission above.

In addition Asciano remains concerned that issues previously raised by Asciano have not been addressed. These issues have been outlined in detail in previous submissions by Asciano and include the lack of cost information provided by Queensland Rail, the lack of a broader range of reference tariffs and standard access agreements provided by Queensland Rail and the need to ensure a level of vertical integration for Queensland Rail.

Asciano will provide a further submission in May 2013 outlining additional Asciano concerns with above rail operational issues, standard access agreements, extensions and the Mount Isa line pricing.

**ATTACHMENT 1 - 2013 DAU SECTIONS WHICH ASCIANO HAS NOT BEEN COMMENTED UPON IN THIS SUBMISSION**

Asciano has not commented upon the 2013 DAU sections outlined below. Asciano will comment on these sections in a subsequent submission.

<b>2013 DAU Section</b>	<b>Rationale</b>
1.4 Extensions	To be further addressed following session on investment framework matters
4.2 Operating Requirements Manual	To be further addressed following session on above rail operational issues
Schedule F Standard Access Agreement	To be further addressed following session on standard access agreement