Submission to the Queensland Competition Authority

QR Network Draft 2009 Access Undertaking

November 2008

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Abbreviations

The following abbreviations are used in this submission:

ACCC	Australian Competition & Consumer Commission
Asciano	Asciano Limited ACN 26 123 652 862
ARTC	Australian Rail Track Corporation
cl	clause
COAG	Council Of Australian Governments
CQCR	Central Queensland coal region
COP	Conceptual Operating Plan
CPI	Consumer Price Index
DORC	Depreciated, optimised, replacement cost
GAP	Goonyella – Abbot Point Project
GTK	gross tonne kilometres
IAA	Indicative Access Agreement
IAC	Indicative Access Charge
IAP	Indicative Access Proposal
MCI	Maintenance Cost Index
NSWRAU	NSW Rail Access Undertaking
QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997
QCA Issues Paper	Queensland Competition Authority, "Issues Paper, QR Network 2009 Draft Access Undertaking", October 2008
QRC	Queensland Resources Council
QR Limited	QR Limited and the predecessor entities trading as QR.
QR Network	QR Network Pty Ltd a subsidiary of QR Limited and the owner of the rail network that is the subject of UT3.
QR Network's Submission	QR Network, "QR Network's Access Undertaking (2009)", September 2009 (Volumes 1 & 2)
RAB	Regulatory Asset Base
UT1	The QR Access Undertaking approved by the QCA in 2001.
UT2	The QR Access Undertaking approved by the QCA in 2006.
UT2008	The QR Network 2008 Access Undertaking approved by the QCA in 2008 to replace UT2 dues to the change in QR structure.
UT3	The QR Network 2009 Draft Access Undertaking that is the subject of this submission.

Terminology

References in this submission to the various QR Limited & QR Network undertakings are as follows:

UT1	QR 2001 Access Undertaking
UT2	QR Limited 2006 Access Undertaking
UT2008	QR Network 2008 Access Undertaking
UT3	QR Network 2009 Draft Access Undertaking

A reference to UT2 is intended to reflect both the UT2 and UT2008 undertakings as the two are substantially the same in their operating provisions. Where the reference to UT2 is intended not to cover UT2008, this will be indicated either expressly or by context.

References to Asciano include its rail freight operations as Pacific National.

For the most part, references in this submission to QR Network can be taken to include a reference to the former QR Network & Access Group of QR Limited, or where the context indicates, the whole of QR Limited. Where it is necessary to distinguish QR Network from QR Limited, the two companies are identified separately.

A full list of abbreviations used in this submission can be found at page ii.

1 EXECUTIVE SUMMARY

Asciano welcomes the opportunity to comment on QR Network's Draft 2009 Access Undertaking (UT3), which was submitted to the Queensland Competition Authority (QCA) on 9 September 2008.

Asciano recognises and appreciates the proactive approach taken by QR Network in its prior engagement with industry and stakeholders regarding the potential changes proposed for inclusion in UT3. Asciano believes this was a fruitful process, which allowed a number of issues and general principles to be discussed and considered during the development of UT3.

The documentation provided with UT3 for public comment is extensive. This is a most welcome development from previous approaches and Asciano wishes to recognise the effort that QR Network has made to argue the merits of its case. However, in stark contrast to this approach, QR Network has again claimed confidentiality over all of the relevant cost data. This has meant that stakeholders have not been able to provide any meaningful commentary on the wide range of issues surrounding the calculation of QR Network's revenue cap and its access prices. Further, the lack of any comparative data on access prices between UT2 and UT3 has further constrained stakeholders in their understanding of the proposed changes. In the absence of this data, stakeholders are necessarily reliant solely on the QCA to determine the merit of the prices and pricing structures proposed in UT3.

It is also unfortunate that the standard access agreements are not available to consider alongside the undertaking. Experience suggests that the relationship between the regulatory and commercial documents requires consideration of both together to avoid unnecessarily "locking in" positions in the undertaking that impact on the underlying contract. It may therefore be necessary to revisit some of the views that expressed in this submission in the light of the standard agreements once they are available for comment.

UT3 is necessarily a complex document and the positions expressed in this submission should be read in detail to understand the comments that are provided in summary below.

Comment 1: Scope of UT3

Asciano is generally supportive of the scope of infrastructure covered by UT3.

Asciano is concerned that there may be unintended consequences from the exclusion of some declared infrastructure from UT3. To this end, the QCA should require QR Limited and QR Network to investigate and report on whether any ancillary activity would require access to the excluded infrastructure.

If, on investigation, there is (or is the potential for) a requirement to use the excluded infrastructure to allow efficient use of the network, then UT3 should provide a mechanism for securing the required access without requiring an access seeker to enter into a separate arrangement with QR Limited or an associated entity.

Asciano considers that:

(i) the existing regulation concerning declaration of the relevant network is ambiguous, and

(ii) it is appropriate for all track managed by QR to be treated in the same way,

and therefore submits that it would be appropriate for the QCA to bring to the Queensland Government's attention that the regulation should be amended so it is clear that all infrastructure managed by QR Network is declared.

Comment 2: Early termination

Asciano does not support the inclusion of a list of events giving rise to automatic termination prior to the intended termination date given that the QCA Act s 148 provides an appropriate mechanism for early termination.

Asciano believes that insufficient effort has been taken to make UT3 robust and is concerned that it will be subject to frequent amendment even though its nominal term is relatively short.

Comment 3: Negotiation framework

Asciano does not oppose the option for an applicant to provide customer details where appropriate, but does not support the provision of information directly between QR Network and end customers where there is no direct relationship between them.

In its current form, the proposed customer information provision is ineffective to deal with the concerns raised by the QRC.

If there is a need to make capacity information more transparent, Asciano would support the making of all capacity data (including existing allocations) publicly available.

Comment 4: Capacity registers

It is not clear what practical benefit arises through the CNR. It appears to be a waiting list without any certainty that the sought after capacity will ultimately be available or when it might become available.

Notwithstanding this, Asciano does not oppose the proposed changes to the capacity registers.

It is noted that the use of queuing for allocation of capacity is ineffective to deliver the capacity requirements of industry.

Comment 5: Negotiation period

The drafting of UT3 cl 4.5.1(b) is obscure and appears inconsistent with cl 7.3.5. The lack of explanation from QR Network on the proposed change prevents comment as to the intended change of position.

It is unclear from the drafting of cl 4.5.1(b) that QR Network has an obligation to negotiate with anyone other than the party first in the queue provided that the access rights commence within 2 years of an unstated event.

Whatever it is intended to mean, the clause requires redrafting.

Comment 6: Time limits for processing of applications

Asciano opposes the extension of access application time limits.

Comment 7: Additional information requirements

Asciano does not oppose QR Network being able to request information reasonably required to prepare an IAP as proposed in UT3 cl 4.2. However, Asciano does oppose the proposal in UT3 cl 4.2 if that provision is intended to permit the request to be used to determine whether the application should be refused on the basis that it is speculative.

Asciano would not oppose a provision that allowed QR Network to refuse an application that was manifestly unreasonable, frivolous or vexatious provided that appropriate balance is maintained to protect genuine access seekers.

Comment 8: Management of Major Projects

Asciano accepts that major projects may require a different approach to capacity allocation and the negotiation of access agreements compared to the normal processes set out in UT3, though QR Network has not identified the specific issues that it is seeking manage.

Asciano is concerned that the proposed mechanism in UT3 cl 4.8 would allow both the allocation of capacity and the negotiation of access to be removed from the protections of the undertaking.

It is not clear why $300m should be chosen as a threshold for triggering the Major Project process. The 30% trigger appears unhelpful given the diversity of values of the different systems. Asciano believes that it is likely that most new capacity would fall into the Major Project category and therefore effectively circumvent the UT3 capacity allocation provisions for a completely unknown process.

Asciano is of the view that the dispute resolution process as proposed in UT3 cl 4.8(g) will be ineffective, impractical and unworkable.

Comment 9: Changes to standard agreement during negotiation

Given the extended time it takes to negotiate an access agreement, it is frequently the case that the standard agreement changes during the negotiation period. UT3 does not address this issue and there are no obviously ideal solutions. Asciano would welcome the opportunity to work with QR Network and the QCA to resolve this issue.

Comment 10: Adoption of a system approach to planning and capacity allocation

UT3 fails to link infrastructure planning and capacity allocation to the system requirements for each coal chain.

It is important that UT3 adopt a system perspective for the planning of rail infrastructure and the allocation of capacity.

Comment 11: Queue reordering

UT3 cl 7.3.5(d)(iii) allowing longer term agreements to be promoted in a queue should be removed as it is potentially discriminatory against smaller producers and is likely to reduce the depth in above rail market competition.

Comment 12: Committed capacity

Asciano supports the continued intention to provide coal producers with an option to extend access to capacity. However, Asciano does not support the proposed mechanism in UT3 cl 7.4(d) to provide the end customer option.

Asciano suggests that an acceptable option mechanism would be focussed solely on the coal producer and would require a mere notification process rather than a formal application.

Asciano supports the arrangements for the Committed Capacity Register for non-CQCR coal capacity.

Comment 13: Capacity transfer

Asciano supports the capacity transfer provisions in UT3.

As the proposed short term "aggregation" process is to be contained in the System Rules and these have not yet been drafted, Asciano is unable to comment on the detail of that process.

Comment 14: Network Management Principles

Asciano supports the proposed changes to the Network Management Principles.

Comment 15: All CQCR reference coal trains to be cyclic

Asciano supports the mandating of reference coal trains in the CQCR as cyclic.

Comment 16: Capacity management

Asciano supports the adoption of a different trigger for the capacity resumption mechanism applicable to coal trains. However, Asciano does not support a 90% trigger on a quarterly basis.

Asciano would support a 90% trigger based on a 12 month moving average. It is understood that this is QR Network's intention but the drafting does not reflect this.

Asciano supports the remaining capacity management provisions.

Comment 17: Ring-fencing

UT3 should include an explicit commitment that QR Network will not differentiate between QR access seekers and non-QR access seekers in its application of the various processes under UT3.

Asciano generally supports the proposed changes to UT3 regarding ring-fencing.

Comment 18: Confidential information

It is unclear why the confidentiality arrangements do not apply to QR Network related access seekers. This omission undermines the perception of separation that QR Network is keen to generate.

Asciano suggests the removal of the requirement to put in place special arrangements to allow sharing of information regarding the application and negotiation for access with end customers nominated in the access application.

Although the same drafting has been carried over from previous undertakings, Asciano questions the reason for the carve-out in UT3 cl 3.3(b)(ii) that has the effect that non-access related information provided by an access seeker to QR Network is not confidential.

Asciano is of the view that any QR Limited employee provided with confidential information under UT3 clause 3.3.2(h) should be made aware of the importance of maintaining the confidentiality of non-QR information.

Asciano does not object to the removal of the confidentiality deed from UT3.

Comment 19: Decision making principles

It is Asciano's view that the decision making principles ought to be expressly set out in UT3 and that compliance with those principles form part of the annual audit.

Comment 20: Removal Of Network Diagrams

Asciano does not support the removal of the Line Diagrams from UT3 unless an alternative visual depiction of the network is provided.

Asciano suggests that two sets of diagrams be provided on QR Network's website:

- one set "locked" to show the network as approved by the QCA; and
- one set updated bi-annually, to reflect the current network.

The definition of Line Diagrams needs be amended to remove the inconsistency with UT3 clause 3.6(a).

Comment 21: Public reporting requirements

Asciano supports the proposed changes to public reporting in UT3.

Asciano suggests that the thresholds to define the on-time arrival of trains are inappropriate and alternative thresholds are suggested in Table 1 on p 36 of this submission.

Comment 22: Annual vs whole of term pricing

Asciano believes that the whole of term pricing in UT3 coupled with significant annual revisions does not provide any certainty to access seekers while at the same time adding complexity to the undertaking. Any stability in pricing that arose under the price cap regulation with whole of term pricing has evaporated under revenue cap regulation.

In place of the pretence of whole of term pricing, Asciano strongly prefers a genuine annual price setting process.

Comment 23: Escalation of maintenance costs by MCI

Much of QR Network's justification for the use of the MCI is based on the difference between the Rawlinson Index and CPI, but QR Network has not provided any evidence to establish that the changes in its costs are represented by the Rawlinson Index.

Asciano is not able to support the MCI as currently proposed. QR Network has not demonstrated that the MCI is a suitable alternative to CPI to reflect the changes to input costs for the maintenance task. Further, the simplistic escalation of input costs without regard to scope is inappropriate.

QR Network has not indicated how frequently it expects to need to invoke the change of scope provision to review maintenance costs. Asciano would not be surprised if this was an annual event through the life of UT3.

Comment 24: Capital expenditure

Asciano prefers the use of a genuine annual price setting mechanism and therefore there is no requirement for a "capital indicator". However, if there has to be a "whole of term" pricing approach, then the "capital indicator" proposed in UT3 is appropriate.

QR Network's proposal to update the discount rate and market parameters of the WACC annually has merit and will reduce QR Network's risk. Asciano supports this along with the associated reduction in QR Network's WACC.

Asciano supports QR Network's proposal to capitalise major feasibility studies.

Comment 25: Asset lives

Insufficient justification is given by QR Network to move away from the previously utilised QCA asset life assumptions. Asciano submits that the QCA should retain its asset lives unless a compelling case for change is made, noting that no such case has so far been presented by QR Network.

Asciano does not support the introduction of a 20 year asset life cap. Whilst identifying broad risks, QR Network provides no justification for its 20 year cap.

Asciano supports the proposed treatment of asset sales and disposals.

Asciano is concerned that QR Network has indicated that assets required to provide declared services might be transferred out of QR Network, seemingly in contravention to UT3 cl 3.6(c). If there is an acceptable reason for these transfers, QR Network needs to make the case.

The possibility of asset transfers to other parts of the QR group raises significant regulatory incentive problems. The QCA should seek clarification on QR's motives and ensure that network users are not disadvantaged as a result of any asset transfers.

Comment 26: Cost of capital

QR Network doubles dips in its WACC calculation for the claimed impact of asymmetric investment risk. If the asset life truncation is allowed, this would amount to "triple dipping" as QR Network argues that the reason for the truncation is to offset the perceived risk in asset stranding.

Comment 27: Operating costs

As a result of confidentially claims Asciano's ability to comment on QR Network operating costs is limited.

Inefficient increases in operating costs due to QR Network's restructure should be excluded from the allowable operating costs.

Asciano supports QR Network being reimbursed for its efficient insurance costs.

Any continued material non-compliance by QR Network with conditions imposed by the QCA regarding self-insurance must be regarded as a serious matter.

Comment 28: Maintenance costs

The increase in maintenance costs is substantial and requires a rigorous and thorough review by the QCA.

Little publicly available justification is given for the increase in costs and as such the QCA should focus on benchmarking the costs and looking at the inefficiencies QR Network's own advisors identify.

Comment 29: Tariff increases

The significant tariff increase allied with the incentives of an integrated operator competing with a non integrated competitor, necessitate a through and rigorous review of all QR Network claims. Asciano does not have access to data that would allow any comment to be made as to the appropriateness of the increases.

With regard to the calculation of both the AT_1 and AT_2 values proposed in UT3, Asciano is concerned that there appear to be a number of unanswered questions and apparent differences in the reported outcomes that prevent any conclusion being formed.

Comment 30: Access conditions

Asciano supports the proposal to allow QR Network to price outside of the revenue limits where it has received specific QCA approval to do so.

While it may be reasonable in some circumstances for QR Network to impose an "access condition", the provision as drafted in UT3 would allow QR Network to over-recover on its investment.

Asciano suggests that the inclusion of a requirement on QR Network to prove that it is not over-recovering its investment through the imposition of the access condition would provide an appropriate safe-guard while allowing QR Network to legitimately offset a disproportionately large risk.

Comment 31: Changes to Schedule F

Comments in this submission must be considered preliminary in the absence of any data that would allow a fair comparison between the existing reference tariff structure and that which is being proposed in UT3. Similarly, the lack of illustrative examples for the application of the common cost contribution and system test prevents a firm view being formed.

Asciano supports the adoption of single tariffs in each of the larger systems and the abandonment of the cluster system.

Asciano supports the concept of common cost contribution and the system test. In principle, the premium and discounts derived appear sound but Asciano is unable to comment on the quantum derived in each case.

Asciano supports the concept for determining cross-system charges.

Comment 32: Pricing for electric infrastructure

Asciano accepts the benefit of having a single AT_5 tariff where electric locomotives are able to be used interchangeably between systems.

As interchangeability does not currently exist for the new generation electric locomotives, Asciano is unable to support the adoption of a single AT_5 at this time.

Comment 33: Removal of incentives from the revenue cap

Asciano supports the removal of the incentives (positive and negative) from the revenue cap as these are ineffective to drive system performance.

Comment 34: Calculation of the reference train path multiplier

Asciano supports the current formula for the determination of the multiplier.

Comment 35: Liability & indemnity issues

Asciano supports the change to Schedule E cl 15. However, the definition of Consequential Loss (UT3 cl 11.1) should be modified so it is clear that all QR entities constitute "third parties" for the purposes of that definition.

Asciano strongly objects to the proposed imposition of liability for dangerous goods claims on the access holders regardless of cause or contribution.

Comment 36: Accommodation of split contracts

It is likely that Schedule E and clauses 5.1 and 5.2 will require amendment to accommodate standard access agreements that no longer include all the elements currently contained in the standard contracts.

Comment 37: Other matters

It would be helpful for QR Network to explain its intentions with regard to the removal of cl 4.6(a) and whether it sees this having any impact on its queuing arrangements.

Asciano is of the view that the Costing Manual serves no useful purpose and should be abandoned.

Asciano is of the view that the inclusion of the "natural justice" provision, UT3 cl 10.2, is provocative and otiose. It should be deleted.

2 INTRODUCTION

2.1 Asciano

Asciano is the operator of major port stevedoring and rail freight businesses throughout Australia. Through its rail operator, Pacific National, Asciano has current operations in Queensland both on the standard gauge interstate corridor and the narrow gauge line between Brisbane and Cairns.

More recently, Asciano has secured contracts to haul coal in the Goonyella and Blackwater coal systems. This represents the first direct competition to the incumbent QRNational's train operations on the Central Queensland Coal Region network.

Asciano has been involved extensively in the UT1 and UT2 regulatory processes and has substantial experience in negotiating access agreements with QR Network as well as with other track owners across Australia. As the QR Network undertaking has a direct impact on the ability of non-QR train operators to compete successfully in Queensland, UT3 will have the added dimension that it will be the undertaking that governs the relationship between track owner and train operator during the introduction of competition between operators for coal haulage services. As such it takes on an added importance when compared to past undertakings.

2.2 Unavailability Of Key Documents

Asciano has used its best endeavours in providing the comments in this submission based on the documents available in October 2008. Unfortunately the standard access agreements were not available at the time this submission was written. As the standard agreements are a critical element of the undertaking and provide substantial insight into the proposed application by QR Network of the undertaking, the positions articulated in this submission cannot be considered final.

Asciano assumes that the QCA will seek further comments from stakeholders once the standard agreements are publicly released. At that time, and in the context of the standard agreements, Asciano may need to amend the views expressed in this submission. Therefore Asciano requests the QCA provide an opportunity for stakeholders to make such amended comments once the standard agreements are available for consideration.

In addition, due to QR Network claiming confidentiality over important aspects of its operating expenses, Asciano is only able to offer limited comments on a number of the pricing aspects of UT3 and must rely on the QCA's oversight of the detail. Given the scale of the increase in prices being sought by QR Network, the unavailability of any information that would allow stakeholders to gain an understanding of the reasonableness or otherwise of the claim is particularly unfortunate and seriously erodes the value of the public consultation process.

3 Non-Price Issues

This section of the submission responds to the questions raised in the QCA Issues Paper relating to non-price issues. Where appropriate, questions concerning related issues have been grouped together.

3.1 Scope & Term

"The Authority seeks comments on whether stakeholders believe that the limitation on the scope of QR Network's undertaking significantly erodes the effectiveness of the rail access regime in Queensland. And, if so, what remedies exist to redress this issue?"

"The Authority seeks comments on whether it is reasonable for QR Network to be able to terminate the 2009 undertaking before the end of the proposed four-year term to address specified events, including a change in ownership or financial structure."

3.1.1 Scope

At a general level, Asciano is comfortable that the scope of UT3 covers all of the narrow gauge freight network that was previously available under UT2.

Ancillary & Incidental Requirements

It is unclear whether the changes from UT2 might impact ancillary access requirements that might have an impact (albeit unintended) on efficient access to the network. An example of a possible problem would be if the change prevented QR Network providing safe access for freight crews to trains where they might otherwise have used a station platform as a crew change point. Such an example would most likely affect operations in the Brisbane metropolitan region where there is a large number of platforms. To date Asciano has not required the use of a station platform as a crew change point in its operations, and is therefore not able to point to any specific current example. However any operator that engages in substantial operations around the Brisbane metropolitan area may well find this to be a practical issue.

It would therefore be appropriate for the QCA to clarify with QR Network and QR Limited whether there are extant examples of the use platforms for ancillary access such as this example and if so, what QR Network intends to do to procure that access in the future. It would not be acceptable for QR Network to avoid finding a solution if it is found that it is a current practice for excluded infrastructure to be required for the most efficient use of the network.

Status Of The Standard Gauge Line

The definition of "Rail Infrastructure" means that UT3 applies only to services that are declared. Asciano considers that the *Queensland Competition Authority Regulation 2007* arguably means that the standard gauge freight network is declared, and therefore covered by UT3, at least in respect of intrastate traffic, despite QR Network's assertion that the standard gauge network is not declared.

For the purposes of this submission, the regulation, which "continues" the existing (ie 1997 regulation) declaration, deals with two categories of service.

The first service is use of rail transport infrastructure for providing transportation by rail between Queensland and another state if:

- the infrastructure is a public facility;
- QR is the manager; and
- it is standard gauge.

This service is not declared under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act), the part that governs access undertakings.

The second service is use of rail transport infrastructure where QR Network:

- is the railway manager; and
- the infrastructure is a public facility.

This second service is declared under Part 5 of the Act and UT3 would apply.

There is an anomaly between the drafting of these categorisations in that the first service is in fact a sub-section of the second service, yet the two services are treated differently for the purposes of the regulation. These categorisations also raise practical anomalies. For example, a train on the standard gauge track (ie the track that has historically been described as the interstate, undeclared track) may make a movement that is not an interstate movement, eg between Acacia Ridge and Fisherman Islands. Accordingly, some services over the standard gauge track would be declared under Part 5 of the QCA Act and therefore subject to UT3, and others over the same section of track would not be declared.

If this view is correct, UT3 would need to include network diagrams covering those parts of the standard gauge line to which UT3 might apply and also a clear explanation of the delineation between which services are included and excluded.

In Asciano's view, the form of the regulation reflects the historical arrangements, under which different entities managed the standard and narrow gauge track.[1] Asciano considers it appropriate that all track managed by QR Network in Queensland be treated in the same way, and submits that the regulation should be amended to clarify that all track managed by QR Network is declared. To this end, it would be appropriate for the QCA to bring to the Queensland Government's attention the deficiency in the current coverage of the declaration and recommend that the declaration be amended to cover all of the rail infrastructure services provided by QR Network.

Comment 1 Scope Of UT3

✓ Asciano is generally supportive of the scope of infrastructure covered by UT3.

? Asciano is concerned that there may be unintended consequences from the exclusion of some declared infrastructure from UT3.

The QCA should require QR Limited and QR Network to investigate and report on whether any ancillary activity would require access to the excluded infrastructure.

If, on investigation, there is (or is the potential for) a requirement to use the excluded infrastructure to allow efficient use of the network, then UT3 should provide a mechanism for securing the required access without requiring an access seeker to enter into a separate arrangement with QR Limited or an associated entity.

? Asciano considers that:

(i) the existing regulation concerning declaration of the relevant network is ambiguous, and

(ii) it is appropriate for all track managed by QR to be treated in the same way,

and therefore submits that it would be appropriate for the QCA to bring to the Queensland Government's attention that the regulation should be amended so it is clear that all infrastructure managed by QR Network is declared.

3.1.2 Term

UT3 provides for its automatic early termination should any of several events occur. On the one hand, one might give QR Network credit for identifying possible events that (in its thinking) justify the automatic termination of the undertaking. However, as the QCA has identified in its Issues Paper,[2] this leaves the duration of UT3 somewhat at large. As the events are all ones that are under QR Network or related entity control, the argument for early termination is not compelling.

Asciano is of the view that there is an appropriate mechanism within the QCA Act under s 148 that allows QR Network to apply to the QCA at any time to withdraw UT3 once it is approved.

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[1] In the past, the standard gauge track south of Greenbank was maintained and controlled by the NSW track owner due to the majority of movements being interstate trains. It is only in recent years that QR Network has resumed these functions.

[2] QCA Issues Paper, p 5

This provides QR Network with all that it needs to manage any change to its affairs (such as contemplated in the list of termination of events) while retaining the integrity of UT3. A demonstration of the effectiveness of this mechanism is the recent early withdrawal of UT2.

Asciano therefore does not support the inclusion of the proposed list of termination events.

The 4 year term of UT3 can be contrasted with the proposed 10 year term of both the ARTC Interstate Undertaking and the ARTC Draft Hunter Valley Undertaking.[3] As discussed elsewhere in this submission, the insistence on maintaining the pretence of whole of term pricing necessarily requires a shorter term undertaking than would otherwise be desirable.

It is also apparent from the QR Network Submission that a number of amendments are already being contemplated to UT3 even before it has been approved. There is good reason to expect that UT3 will be no more stable than UT2. One can therefore be forgiven for suggesting that QR Network undertakings, in practice, have a term measured in months and it is debateable just how much certainty is provided to any party through the current processes.

While it is accepted that the QR Network rail network is undergoing substantial changes, and that these might require adjustments to an undertaking, Asciano believes that insufficient consideration has been taken to put in place a regulatory structure that will minimise the otherwise constant amendment to QR Network's undertaking. It is not clear that this is a necessary outcome of the existing legislative framework, and Asciano is keen to see efforts being made to make UT3 more robust so as to at least minimise future amendments.

Comment 2 Early Termination

- ✘ Asciano does not support the inclusion of a list of events giving rise to automatic termination prior to the intended termination date.

  The QCA Act s 148 provides an appropriate mechanism for early termination.

- ✘ Asciano believes that insufficient effort has been taken to make UT3 robust and is concerned that it will be subject to frequent amendment even though its nominal term is relatively short.

3.2 Application & Negotiation Process

"The Authority seeks comments on whether QR Network's proposed changes to the negotiation framework:

- will improve the timely conclusion of access agreements substantially; or
- substantially alter the rights of access seekers."

3.2.1 Provision Of Customer Details

Asciano has no particular issue with the provision of end customer details to QR Network. The current Conceptual Operating Plan (COP) currently used by QR Network[4] provides for the end

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3 ARTC, "Interstate Access Undertaking", July 2008, cl 2.3
ARTC, "2008 Hunter Valley Access Undertaking Preliminary Discussion Draft V1.0", July 2008, cl 2.1(a)(ii)

4 referred to in the QR Network Submission as the Access Application pro-forma: see QR Network Submission p 52.

customer to be identified by name and ACN.[5] This seems to be contrary to the QR Network submission that suggests:

"The pro forma provides only for the Access Seeker's name to be provided"[6]

As QR Network requires an application to be substantially in the form of the COP, the end customer information would normally be provided, at least where there is a direct relationship between the train service and an end customer, as would be the case for coal trains. Further, the nature of the queuing processes set up by QR Network for coal traffic would require identification of the end customer in any case. Therefore, to this extent, the requirement for the provision of the end customer details is not controversial.

A greater difficulty lies in the provision of information regarding the application back to the end customer. Asciano would expect that, under normal circumstances, the train operator and end customer would have a commercial relationship and it is difficult to imagine that there would be any problem arising with QR Network providing the notices as proposed. However, as a matter of principle, it is not appropriate for a third party supplier such as QR Network to interfere in the information flows between the train operator and the end customer (noting that the issue does not arise if the end customer is the access seeker itself). Such information flows ought to be governed by the direct relationship between the operator and end customer.

Asciano recognises the frustrations expressed by the Queensland Resources Council (QRC), as reported in the QR Network submission[7] about the lack of information provided to its members about access applications. Under the current arrangements, if a train operator makes an application for access, it is in the context of a relationship solely between the operator and QR Network and does not entertain any direct relationship with the end customer. The end customer relationship in this case is with the operator and any bi-lateral solution ought to be addressed through that relationship, not the undertaking. If the end customer has an interest in its service provider's progress in obtaining access, then the most obvious avenue is for the end customer to direct its enquiries to the service provider. Any attempt to circumvent that relationship is inappropriate as it confuses and complicates the positions of the various parties. It is recognised that the current position arises through the fact that all access for coal services is through the incumbent train operator, QRNational and that, for whatever reason, coal producers have not been able to secure the level of information they desire from their service provider. However, Asciano suggests that the solution lies not in distorting the relationships between the parties but by allowing the competition for above rail services to evolve solutions that meet end-customer needs.

Asciano recognises that there is a strong interest in splitting the current provision of access into the provision of capacity separately to the management of train operations. Such a move has the potential to make it significantly easier for end customers to have a direct relationship with QR Network without having to take on the onerous operating obligations that currently are attached to the Access Holder Standard Access Agreement. Asciano supports such a move. Amongst other things, this would remove the disconnect between end customers and their desire to manage rail capacity. It is a recognition that, at least with respect to some rail users, the above/below rail split is too simplistic and that it is necessary to recognise that the track provider is selling two products:

- the availability of capacity on the network; and
- the right to use that capacity.

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5 See http://www.networkaccess.qr.com.au/Images/COP_Coal_Freight_tcm10-2875.pdf p 1

6 QR Network Submission, Volume 1 p 53

7 ibid

While often those two products can be treated as one, in the case of at least coal movements, different value is added for different parties and it is appropriate to recognise this.

Notwithstanding the splitting of access contracts, one might suggest that, if the problem is one of lack of industry transparency, as appears to be the core of the QRC concern, a better solution than the one proposed in UT3 is for available rail capacity and the allocation of committed capacity to become publicly available information, so that all parties are able to understand the true position. This would not entail the provision of information directed towards a specific application (though such information might arise through incremental changes to the information base as each application is made) but would provide a clearer picture to all interested parties.

In responding to this issue, Asciano notes that the QCA Issues Paper (p 6) suggests that the requirement to provide the additional information is at QR Network's discretion. Asciano's interpretation of UT3 suggests that the provision of the information is at the option of the applicant as it is couched in terms of:

"If a request for Access specifies … then QR Network will provide …"[8]

If it is correct that the provision of end customer information is at the discretion of the applicant, then the proposal becomes useless to address the concern expressed by the QRC which is that the applicant is not providing the information that QRC members want. Presumably making it optional for the applicant to request QR Network to pass on the information instead of the applicant doing this itself will not cause the applicant to change its approach to the provision of the information and the request will not be made.

A further point relating to this issue is that UT3 currently does not automatically allow the applicant to share access information with end-customers. This issue is discussed in Section 3.4.2 at p 31 of this paper.

Comment 3 Negotiation Framework

- ✘ Asciano does not oppose the option for an applicant to provide customer details where appropriate, but does not support the provision of information directly between QR Network and end customers where there is no direct relationship between them.
- ✘ In its current form, the proposed customer information provision is ineffective to deal with the concerns raised by the QRC.
- ? If there is a need to make capacity information more transparent, Asciano would support the making of all capacity data (including existing allocations) publicly available.

3.2.2 Capacity Notification Register

Asciano is of the view that the emphasis in UT3 (and UT2 and UT2008) on queuing mechanisms is unhelpful. The emphasis ought to be instead on providing capacity where sufficient demand has been identified and appropriate commitments made to support the investment. Putting people on waiting lists is not a solution, merely a process for orderly processing people through a constrained system. The queuing arrangements (both currently in place and proposed for UT3) provide no certainty that the capacity will ultimately become available nor any information as to when it might become available and therefore serve no useful purpose in ordering investment in track, train, new mining or port capacity.

[8] UT3 cl 4.1(f)

Asciano is hopeful that the move to the proposed split contracts will provide a radically different environment whereby end customers are able to make long term commitments to expansion projects so that the queuing process should become substantially less important in the management of the Queensland coal systems.

It is far from clear to Asciano what purpose the Capacity Notification Register (CNR) is intended to serve and whether it will be effective. It appears to be a waiting list without providing any certainty that the sought after capacity will ultimately be available or when it might become available. Asciano's expectation is that the CNR will have little practical relevance.

Notwithstanding the above comments, Asciano does not object to the proposed withdrawal of the Capacity Resumption Register and the introduction of the CNR.

Comment 4 Capacity Registers

? It is not clear what practical benefit arises through the CNR. It appears to be a waiting list without any certainty that the sought after capacity will ultimately be available or when it might become available.

✓ Asciano does not oppose the proposed changes to the capacity registers.

× It is noted that the use of queuing for allocation of capacity is ineffective to deliver the capacity requirements of industry.

3.2.3 Negotiation Period

"If QR Network has established a queue in accordance with Clause 7.3.5, QR Network may negotiate with any Access Seeker in that queue, but QR Network is only obliged to do so if:

(i) at that time, QR Network can provide the requested Access Rights to the Access Seeker within two (2) years; and

(ii) were QR Network to execute an Access Agreement with that Access Seeker, QR Network's ability to provide Access Rights to any Access Seeker earlier in the queue would not be adversely affected."[9] (emphasis added)

Changes Not Discussed

Asciano is concerned that the obligation on QR Network to negotiate has been substantially altered in UT3 cl 4.5.1 from UT2 but this does not appear to have been discussed or even mentioned in the QR Network Submission.

Section 5 of the QR Network Submission details the changes to UT3 with regard to the negotiation process and discusses the reasoning behind this. One would expect, therefore, the substantial change in QR Network's obligation to negotiate as contained in UT3 cl 4.5.1 would be identified and argued. Asciano was unable to find any reference to this change.

The change appears to be intended as significant, moving from the UT2008 position:

"If QR Network has established a queue in accordance with Paragraph 7.4.1(c), QR Network has no obligation to negotiate with an Access Seeker other than the Access Seeker whose Access Application

[9] UT3 cl 4.5.1(b)

is first in the queue and only in respect of the Access sought by that Access Application." (emphasis added)

ie that QR Network is only obliged to negotiate with the party first in the queue, to the position in UT3 cl 4.5.1:

"If QR Network has established a queue in accordance with Clause 7.3.5, QR Network may negotiate with any Access Seeker in that queue …" (emphasis added)

ie that QR Network may, subject to certain qualifications, negotiate with any party in the queue.

Notwithstanding that Asciano believes the proposed drafting to be ineffective as it is both artificially constrained and inconsistent with another part of the undertaking, it is of concern that this change has been proposed without appropriate discussion. Given the complexity and volume of documentation provided with UT3 coupled with the limited time and resources available, stakeholders have necessarily placed reliance on QR Network's Submission to fairly and completely identify the major changes from UT2. The identification of at least one major area where that reliance has proved inappropriate again reinforces Asciano's view that UT3 requires scrutiny beyond the time allowed by the QCA.

Restriction to 2 years

UT3 cl 4.5.1(b)(i) constrains QR Network's ability to negotiate with any access seeker in the queue to when it can provide access within 2 years. It is assumed that this is a reference to 2 years from the date of the application, however it could also be from the commencement of the negotiation period, or perhaps even the date of the formation of the queue. UT3 does not refer to the event with which this period is associated.

In addition to this lack of clarity, Asciano is unable to understand why the restriction of 2 years has been made. The lack of discussion in the QR Network Submission means that comment can only be made on the drafting as it stands, without the benefit of the underlying rationale. There is no clear logic that suggests 2 years is the appropriate length for any constraint, nor why the constraint exists at all.

Inconsistent With UT3 Cl 7.3.5

UT3 cl 4.5.1(b)(ii) appears inconsistent with UT3 cl 7.3.5. which requires the formation of a queue when the access rights being sought are mutually exclusive:

"If, in accordance with Clause 7.3.4(a), this Clause 7.3.5 applies in respect of Access Applications for mutually exclusive Access Rights, QR Network will form a queue to determine which Access Seeker will be allocated those Access Rights. …"[10] (emphasis added)

UT3 cl 4.5.1(b)(ii) prevents negotiation with a party later in the queue only if the resulting access rights "earlier in the queue would not be adversely affected".[11] This appears to be an impossible outcome given that the queue only arises (by virtue of cl 7.3.5) when the access rights are mutually exclusive – by definition, one could not provide access to one party without depriving the other of the access that it is seeking.

As a result, the apparent change would seem to be negated such that QR Network can only complete an agreement with the first party in the queue. But this cannot have been the intention of QR Network otherwise there would be no need to draft the provision in this way.

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10 UT3 cl 7.3.5(a)

11 UT3 cl 4.5.1(b)(ii)

The answer to this conundrum might lie in the first part of cl 4.5.1(b); QR Network may negotiate with anyone in the queue, and the qualifications in (i) and (ii) only come into play to oblige QR Network to negotiate with a party. If this is correct, then it is not clear that QR Network is obliged to negotiate with any party in the queue at all, including the first party in the queue, if cl 4.5.1(b)(i) (the 2 year criteria) is not fulfilled. In other words, if the queue is for capacity that will not arise until after 2 years (from whatever the event that determines the start of that period) then QR Network has no obligation to negotiate with anyone.

The drafting of cl 4.5.1(b) and its interactions with other parts of UT3 are obscure and may, or may not, achieve what QR Network intends. As we have no knowledge of what QR intends, it not possible to comment on whether the intention is appropriate or not. Either way the current drafting should not be allowed to stand.

Comment 5 Negotiation Period

× The drafting of UT3 cl 4.5.1(b) is obscure and appears inconsistent with cl 7.3.5. The lack of explanation from QR Network on the proposed change prevents comment as to the intended change of position.

It is unclear from the drafting of cl 4.5.1(b) that QR Network has an obligation to negotiate with anyone other than the party first in the queue provided that the access rights commence within 2 years of an unstated event.

The clause requires redrafting.

3.2.4 Time Limits For Processing Of Applications

QR Network's argument for increasing the time for approval of applications is that it routinely fails to achieve the current requirements. This would suggest either:

- the current allowances are insufficient; or
- that QR Network has not put in place the appropriate systems and processes to manage access applications effectively within the allotted time.

Asciano has made a number of applications for access both with regard to coal and non-coal movements, we are in a position to make the following general comments:

- the staff within QR Network make genuine attempts to follow through the processes set out in the undertaking as expediently as possible in the circumstances and are to be commended for their efforts, but …
- the QR Network processes are unnecessarily convoluted and complex;[12]
- despite the minutely detailed process contained in UT3, negotiations seem continually beset by uncertainty due to changes of QR policy or circumstances (this is further discussed in section 3.2.7 of this paper);[13]

[12] As a broad indication, the ARTC Interstate Undertaking deals with the negotiation process in 6 pages, UT3 achieves the same task in 12. The dispute resolution in the ARTC document is handled in 2 pages, while UT3 takes 4. Obviously this is a simplistic comparison but it is indicative of the complexity to be found in UT3.

[13] For example, during 2008 QR there have been uncertainties about the QR structure leading to changes to the access agreement, but in addition to this QR Network has been seeking other changes to terms and conditions merely due to a change of policy – and these have also been "in limbo" during the regulatory review process.

- the risk averse culture within QR Network coupled with the complexity of the task makes the processes unnecessarily bureaucratic and vulnerable to delay.

At the time of writing, Asciano is in the process of negotiating 3 separate access agreements with QR Network. In each case the process has extended over many months. It would be most unfortunate to further extend the process by increasing the time allowances for an access application. Asciano does not support the extension of time allowed for applications; the emphasis should be on improving current performance through streamlining the process, empowering individuals to make decisions and removing bureaucracy, not formalising a failure of process. Asciano is only too aware that an excessive focus on detail and on providing for all eventualities quickly ties an access application in knots.

With respect to the proposal for written agreement by the access seeker to an extension of the period to produce the Indicative Access Proposal (IAP),[14] Asciano notes that this is a somewhat unhelpful provision giving the access seeker a Hobson's choice. The alternatives are:

- withdrawal of the application; or
- raising of a dispute.

Neither of these alternatives is palatable:

- Withdrawal of a third party application is always to QR Limited's advantage as it represents a direct reduction of competition.[15] Thus the withdrawal of an application provides no incentive to QR Network to provide the IAP more promptly.
- The raising of a dispute itself will involve significant delay even if the result is to require QR Network to work more expeditiously. A pyrrhic victory indeed.

Asciano recognises that there are occasions where the access seeker might be agreeable to an extension and in such a circumstance, it is not unreasonable for there to be provision for extension by agreement. The difficulty lies in how one might distinguish consent at the point of a sword from consent freely given based on the reasonableness of the case.

Comment 6 Time Limits For Processing Of Applications

✘ Asciano opposes the extension of access application time limits.

3.2.5 Additional Information Requirements

The Issues Paper identifies that UT3 seeks to allow QR Network to request additional information to mitigate against speculative access requests. It is noted the UT3 clause 4.2 provides QR Network with the opportunity to seek any additional information or clarification:

"if **reasonably needed to prepare an Indicative Access Proposal** (either because the request for Access did not satisfy the Application Requirements, or because there are special circumstances which result in the additional information being reasonably necessary for QR Network to prepare an Indicative Access Proposal)"[16] [Emphasis added]

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[14] UT3 cl 4.3(b)(ii)

[15] An exception to this outcome is where QR Limited would not have engaged in the provision of the underlying service for which access was being sought.

[16] UT3 cl 4.2(a)(i)

By itself, this appears to be a reasonable approach and not significantly different in substance to UT2. It is only in the Principles Paper[17] that QR Network suggests that the purpose of this provision is mitigate against speculative access requests.

Asciano is of the view that it is legitimate and appropriate for QR Network to seek additional information that is necessary to allow the preparation of an IAP. However, Asciano does not accept that this extends to requiring information to allow QR Network to determine whether the application is speculative – that goes beyond what is required for the preparation of the IAP.

Asciano accepts that QR Network ought to be allowed to avoid the trouble and expense of preparing an IAP where there is no real possibility of an access agreement resulting. However, such a right must be carefully balanced against any overzealous rejection of applications; it may often be the case that the availability and cost of access will be inputs into potential projects and the only mechanism available for obtaining this information is through an access application, and what may appear "speculative" might also be a genuine project under evaluation. It may not always be easy to determine what is "speculative" in the sense of an unreasonable and unwarranted application. Therefore, Asciano is of the view that if QR Network wishes to include a mechanism to avoid unreasonable or "speculative" applications, such a mechanism should be explicit and stand by itself; it should not be obscurely wrapped up in the legitimate mechanism for obtaining more information genuinely required to prepare the IAP. It is noted that UT3 cl 4.6 provides an appropriately balanced mechanism for the withdrawal from negotiations under specified circumstances and might be used as a model for a refusal of an access application.

Comment 7 Additional Information Requirements

✓ Asciano does not oppose QR Network being able to request information reasonably required to prepare an IAP.

✗ Asciano does oppose the proposal in UT3 cl 4.2 if that is intended to permit the request to be used to determine whether the application should be refused as speculative.

? Asciano would not oppose a provision that allowed QR Network to refuse an application that was manifestly unreasonable, frivolous or vexatious provided that appropriate balance is maintained to protect genuine access seekers.

3.2.6 Management Of Major Projects

Asciano accepts that there may be an argument that major projects sometimes require a different approach to capacity allocation and the negotiation of access agreements compared to the normal processes set out in UT3, though it is not necessarily obvious that this is the case and the need for alternative processes is asserted in the QR Network submission rather than demonstrated.

Asciano is, however, concerned that the process is completely open-ended and without any guidance as to the criteria that would be used to determine allocation for a major project. As currently drafted, a Capacity Allocation Process could effectively remove the project and the resulting capacity from the protections afforded by the undertaking. Given that an access application for capacity in a major project is not made through the UT3 application process – it is expressly excluded from that process - it must be assumed that there is no obligation for the process to conform with the requirements of the UT3 general negotiation process. Asciano

[17] QR Network, "Principles Paper – Network Management Principles", August 2008 – provided as Attachment B to the QR Network Submission, Volume 1, section 4 (no page nos.)

does not support the undermining of the undertaking by allowing a project to be dealt with effectively outside of the undertaking.

It is unclear how the $300m value has been determined. Asciano is concerned that $300m may be too low a limit for the nomination of a major project. The explanation provided in the QR Network Submission[18] suggests that only the largest projects would fall into this category, but review of recent QR Infrastructure Master Plans[19] suggests that most projects would be included. This means that the allocation of the majority of the future capacity in each coal system would occur through an unspecified process outside of the undertaking.

A similar comment can be made for the 30% of asset value threshold. For the smaller systems (Moura and Newlands), this results in quite low expenditures falling into the Major Project category while for the larger systems the value may be too high. It is arguable whether this trigger is at all helpful.

Given these concerns regarding the threshold values, it would be helpful for QR Network to provide a list of known projects showing whether they would, or would not fall into the Major Project category.

Asciano recognises that UT3 allows for a dispute resolution process with regard to the Capacity Allocation Process in certain circumstances. This may be ineffective because:

- There will be strong pressure on potential participants to accede to the process in order to have the capacity made available in a timely manner.
- A party responding to QR Network under UT3 cl 4.8(e), while seeking changes to the process, may, or may not, wish to proceed to dispute over the matter. As drafted in UT3, the process has the character of "negotiation by submission" and therefore the adoption of a particular position in the access seeker's response may not necessarily be definitive. Thus it is not clear what constitutes a party that is "not satisfied with the proposed Capacity Allocation Process" (cl 4.8(g)).
- The dispute may be raised by the dissatisfied parties, collectively. This implies that QR Network advises all participants as to the identity and views of the other participants – otherwise it is not clear how the parties would be able to determine whether they have achieved the necessary 40% threshold. This may raise concerns about the confidentiality of participants. Asciano is not aware of producer views regarding this, and it may be acceptable to them, particularly if the expansion is linked to system expansion plans. However, neither the linkage nor any explicit reference to the public nature of the process feature in UT3 and if this is the intention, then these should be mentioned.
- A dispute resolution through multiple parties will be cumbersome at best and likely to be even more time consuming and expensive than a bi-lateral dispute. It is also unclear precisely who the parties to the dispute will be, eg will it include only the disputing potential applicants or all potential applicants? A party that is comfortable with the "pre-dispute" process might have an interest in the dispute to avoid an outcome that is no longer acceptable to it.
- Asciano has not investigated the issue, but it is not obvious that a party that is not a formal applicant under the undertaking would have standing to bring a dispute before the QCA should the matter come to arbitration. Given that the proposed process in UT3 cl 4.8 is prior to an application for access being made, no disputant would be an applicant for access. It would be appropriate to clarify this issue if the QCA is otherwise intending to accept this mechanism.

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18 QR Network Submission, Volume 1 pp 62,63

19 QR Network, "Coal Rail Infrastructure Master Plan Second Edition" - Industry Consultation Draft, December 2007
QR Network, "Coal Rail Infrastructure Master Plan 2nd Edition", October 2008

Comment 8 Management Of Major Projects

? Asciano accepts that major projects may require a different approach to capacity allocation and the negotiation of access agreements compared to the normal processes set out in UT3, though QR Network has not identified the specific issues that it is seeking manage.

× Asciano is concerned that the proposed mechanism in UT3 cl 4.8 would allow both the allocation of capacity and the negotiation of access to be removed from the protections of the undertaking.

? It is not clear why $300m should be chosen as a threshold for triggering the Major Project process. The 30% trigger appears unhelpful given the diversity of values of the different systems. Asciano believes that it is likely that most new capacity would fall into the Major Project category and therefore effectively circumvent the UT3 capacity allocation provisions for a completely unknown process.

× Asciano is of the view that the dispute resolution process as proposed in UT3 cl 4.8(g) will be ineffective, impractical and unworkable.

3.2.7 Changes To Standard Agreement During Negotiation

Asciano's experience is that the process of negotiating an access contract is complex and time consuming. This is not an issue solely connected to contracting with QR Network – it appears to be the nature of all access negotiations.

However, in the case of negotiations with QR Network, this has been exacerbated by an almost constant revision of the standard agreement through the UT2 period introducing uncertainty as to the rights and positions of the parties and the need to enter into difficult negotiation over matters that might have been expected to be settled. A recent example of this is the changes being sought by QR Network to the indemnity and liability clauses in the standard agreement in UT2008. Asciano was actively negotiating an access agreement with QR Limited/QR Network through this period and it was impossible for the parties to agree on the outcome until the regulatory decision was made. It often takes 6 months or more for a change to the undertaking or standard agreement to be approved. In fact the period is even longer than this as once QR Network has determined that it wishes to pursue a change (but prior to application to the QCA) it is likely to avoid agreeing to the relevant standard provision. This introduces a significant (and presumably unintended) lacuna in the negotiation process.

While the change to a standard contract is, in itself, not an unusual business practice, the fact that there is a lengthy regulatory approval process combined with a lengthy negotiation process together serve to produce this problem. Asciano recognises that it will be necessary from time to time to make changes to the standard agreements, but any changes must be considered in context of the impact that the process of change might have on the negotiation of an agreement, especially those well progressed.

Several possible classes of solution appear possible:

- The status quo; ie the parties negotiate without agreement as to the treatment of any changes to the standard that occur during the negotiating process.
- Negotiations are conducted on the basis of the standard contract as it stands at the time the application for access is made (or possibly when the indicative access proposal is provided), and the parties accept that the executed document will not include the impact of any regulatory decisions beyond that time.

- Negotiations are conducted on the standard applicable at the time but the parties are required to adopt any regulatory decision made prior to execution.
- All agreements contain a "make to standard" clause so that the parties are committed to renegotiate any agreement to be consistent with future changes to the standard. The recent ARTC draft Hunter Valley Access Holder Access Contract provides a recent example of this approach.[20]
- The standard agreements are held constant through the life of the undertaking.

None of these approaches is ideal. Asciano has not formed a firm view as to the best solution to this issue at this time. Asciano would welcome the opportunity to work with QR Network and the QCA to find an acceptable solution.

Comment 9 Changes To Standard Agreement During Negotiation

? Given the extended time it takes to negotiate an access agreement, it is frequently the case that the standard agreement changes during the negotiation period. UT3 does not address this issue and there are no obviously ideal solutions. Asciano would welcome the opportunity to work with QR Network and the QCA to resolve this issue.

3.3 Capacity Management Principles

"The Authority seeks comments on whether QR Network's proposed capacity management principles:

- provide an appropriate balance between
  - the needs of the access provider to manage bona fide access applications in an orderly manner; and
  - the needs of access seekers to have a well-defined and simple queuing mechanism that protects their rights to gain access to the declared services.
- provide QR Network with sufficient ability to manage the allocation of capacity to individual access holders, access seekers and customers, in a manner that maximises the benefits to all parties; and
- provide a sufficiently flexible mechanism that allows access holders and their customers to manage their affairs as they may change from time to time."

"The Authority seeks comments on whether:

- the proposed changes to Train Service Entitlements, including the development of System Rules and System Paths, are reasonable;
- it is reasonable to provide for System Rules in the access undertaking, before the details of the System Rules have been established for each system;
- it is reasonable to declare all coal rail services in central Queensland as cyclic traffic; and
- the proposed changes to the Train Management Decision Making Matrix to allow priority to late trains provide adequate measures to prevent one operator being unreasonably favoured over another."

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[20] ARTC, "Draft Indicative Access Holder Agreement", July 2008 cl 16.1

3.3.1 System Principles

In recent times, it has been recognised that the CQCR rail systems are part of the wider coal chains which they service. It is somewhat disappointing therefore that the capacity allocation mechanisms in UT3 place no emphasis on linking into coal chain system capacity. While there is provision within Schedule G to adopt system rules, this relates only to the management of trains in the short term for scheduling and operations.[21] The capacity allocation process described in UT3 Part 7 does not mention any meaningful link into system planning or capacity allocation process. The only references in the body of UT3 to system rules are:

- cl 4.3(c)(iii) which merely allows QR Network not to carry out a capacity assessment in the preparation of the IAP if the system rules provide that this is not required;
- cl 4.5.2(a)(vi) again merely serves to allow QR Network not to carry out an assessment of infrastructure enhancements during the negotiation period if the system rules provide that this is not required;

in neither case do these provide any meaningful linkage between rail capacity allocation and system capacity. It is noted that cl 4.8 dealing with major projects could include links to system capacity, given that it merely provides for a process to be developed, however, this by no means suggests that there is any intention that this be the case.

Also the provision in cl 4.5(d)(ii) relating to securing port capacity, while potentially providing a link, does not achieve this in any comprehensive way and is also discretionary. Similarly the provision in 4.6(c)(i) is directed at QR Network refusing an application rather than adopting a positive linkage to system capacity.

The Master Planning Process in Schedule A clause 4 includes participation by coal producers and port operators, but this is directed to dealing with the development of the railway and is not part of a wider coal chain development process.

In contrast, the recent ARTC preliminary discussion draft undertaking demonstrated very close links between system capacity and rail capacity both for planning and allocation purposes. While the proposed mechanisms in the ARTC document require further development, Asciano is strongly supportive of the concept of linking rail capacity to system capacity through the undertaking.

Asciano believes that is most important for the efficient management of the CQCR coal chains that such linkages be established. To the extent that the mechanisms such as centralised coal chain planning are not currently in place to support such links, it is important that UT3 allow for the future development of them. This is the approach taken for scheduling and live-run management in UT3 Schedule G so it one would imagine there would be little objection to applying this to planning and capacity allocation.

Comment 10 Adoption of a system approach to planning and capacity allocation

✗ UT3 fails to link infrastructure planning and capacity allocation to the system requirements for each coal chain.

? It is important that UT3 adopt a system perspective for the planning of rail infrastructure and the allocation of capacity.

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[21] QR Network Submission, Volume 1, p 80

3.3.2 Management Of Queues

QR Network itself recognises that queues are intended to be temporary only to deal with "short-term imbalances between demand and supply".[22] It is therefore of some concern that UT3 (continuing the practice established in UT2) has intricate arrangements for the management of queues including their reordering. The subtle interplay between the labyrinthine structure of allocation rules and the byzantine architecture of the negotiation provisions must be considered a wonder of the modern age, but these do little to address the basic issue that a queue is merely a symptom of inadequate supply.

The position under UT3 is even more complex than under UT2 with the addition of cl 7.3.5(d)(iii). Asciano is concerned that the queue reordering provisions will lead to unintended complications, potential discrimination against smaller producers and the distortion of the above rail market.

Even without cl 7.3.5(d)(iii), the position is difficult enough for an applicant. For example, a queue can only form once there are at least two mutually inconsistent applications. Unless these applications arrive on QR Network's doorstep simultaneously, it is inevitable that the first applicant will have progressed through the negotiation process to some extent. It is quite possible that an applicant has progressed substantially through the process prior to a queue forming and QR Network determines that the second applicant provides it with a better outcome. This raises the potential for considerable uncertainty for any applicant. Given that the negotiation of an access agreement, in Asciano's extensive experience, takes at least 6 months and often much longer, an applicant is in an invidious position and any arrangements dependent on securing access (eg acquiring rollingstock) will be at risk until the access agreement is executed.

Under UT2, in the case of an applicant for a CQCR coal haul, an applicant could avoid this uncertainty by submitting an application for a 10 year period.[23] This secured the applicant's place in the queue.[24] The addition of UT3 cl 7.3.5(d)(iii) provides that QR Network may advance "an application for a term that is substantially longer than the term sought by one or more of the other Access Applications higher in the queue". This removes the previous "safe harbour" provided by a 10 year application and is likely to make UT3 cl 7.3.5(d)(ii)[25] redundant. The most likely outcome is that producers will feel forced to seek as long a term for access as possible. This has at least two consequences:

- A smaller producer may be unable to offer a contract as attractive to QR Network as a larger producer that has a broader range or mines over which to spread risk.
- Given that producers have found the existing Access Holder contract untenable, a producer would need to align itself with a train operator for a very long period or risk losing its place in the queue. A flow-on consequence is that this reduces market depth for above rail services as contracts are secured for long term arrangements thus reducing the frequency of opportunities for market entry for new entrants.

Asciano believes that the move to the "split" contract whereby capacity can be secured independently of train operations will obviate these problems. However, until these new arrangements in place, access agreements will need to be managed through the existing mechanisms. In Asciano's view, at the very least, cl 7.3.5(d)(iii) should be removed.

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22 QR Network Submission, Volume 1, p 61

23 UT2 cl 7.4.1(g)

24 The applicant might lose its place in the queue for reasons other than QR Network securing a better outcome but these are mostly under the applicant's control.

25 This is the UT3 equivalent of UT2 cl 7.4.1(g)

Comment 11 Queue reordering

- UT3 cl 7.3.5(d)(iii) should be removed as it is potentially discriminatory against smaller producers and is likely to reduce the depth in above rail market competition.

3.3.3 Committed Capacity

Asciano has had recent experience dealing with the complexity of the UT2 Committed Capacity Register process. In particular, this issue raises a fundamental question as to who "owns" the capacity. It is clear that coal producers have a strong view that the provision is meant solely for their benefit, not the incumbent operator's, but the way in which the provision is drafted (both in UT2 and the proposed drafting in UT3) is that the benefit of the option is intended to go to both the incumbent access holder (who happens to be a train operator in all existing cases) and the end customer.

Notwithstanding to whom the right is intended to belong, the existing process has unintended consequences and uncertainties that gave rise to considerable concern to both Asciano and its customers. The key concerns lay around:

- the timing of an access application;
- the interaction between the access applications and negotiations between the end customer and potentially more than one train operator.

These concerns ultimately manifest themselves in a reluctance for end customers to approve the train operator making an access application as early as might have been desired due to the fact that haulage negotiations with one or other operator might still be in progress. The announcement of an application by one operator through the Committed Capacity Register process to the other competing (and incumbent) operator has the potential to impact on commercial negotiations for haulage services.

These concerns are subtle and not immediately apparent when one considers capacity allocation by itself. However, the effect is very real and has considerable practical implications for both end customers and train operators.

Because of this experience, Asciano is reluctant to support to new arrangements in UT3 cl 7.4(d). While the simplification of the provision is welcome, the new mechanism requiring the incumbent access holder and/or the end customer to lodge an access application close to 3 years from the termination of the current rights is likely to have the following effects:

- the provision encourages the placement of "holding" applications. Indeed, the Principles Paper seems to suggest that this is, if not desired, at least the expected outcome;
- the incumbent would be ill-advised not to make an application even if it has not secured the haulage rights (which may well be still under negotiation at the time, or negotiations might not have even commenced). In such a situation, the application could only be described as "speculative" and this reinforces the concerns previously raised regarding the rejection of speculative applications;
- the end customer may be poorly placed to make an application in its own right (eg it may not have sufficient knowledge of the operational and technical requirements necessary to fulfil the "Application Requirements" and may not be sufficiently advanced in negotiation with a train operator to be able to rely on the train operator making that intellectual property available to it to enable the application to proceed effectively.

Again, the advent of split access contracts may well provide a solution to problem of end customers securing long term capacity (without having to take on the train operator role) and if so the problem will diminish. However, until such an arrangement is in place, it is necessary for UT3 to provide an effective mechanism.

Asciano is of the view that the problem that requires solution is that:

- coal producers in the CQCR coalfields, by virtue of UT2 have been granted an option to secure capacity on the network for the haulage of their product to port;
- this option is currently confusing, unnecessarily complex, contains flaws and requires fixing.

If this is the case, then it would be better to remove the facade of providing that option to the incumbent access holder and any other "interested party", and make that option solely available to the coal producer. There is nothing to be gained in confusing the issue by suggesting that the incumbent operator or any other party should have the right to roll over the capacity if the intention of the provision is that the option is for the benefit of the producer. If the option is not for the benefit of the producer, then one must question the whole point of the provision.

Asciano suggests that the solution is to be found by requiring the end customer merely to provide a notification to QR Network of the intention to seek to either enter into an access agreement (whether the current standard type or the proposed split capacity type) or procure the services of a train operator for that capacity. The timeframe could be the same as that proposed in UT3 cl 7.4(b). It would not be unreasonable for QR Network to require 6 monthly updates on the end customer's expectations with regard to a formal application being made and it would be appropriate to place a limit on the reservation of the capacity so that the formal application must be made within say 12 months of the termination of the existing access rights. QR Network would process the application supported by the end customer as first in the queue as proposed under UT3 cl 7.3.5(d)(ii)(B). This would:

- relieve the end customer of the burden of making a formal access application;
- remove the impact of securing capacity on haulage negotiations;
- place the incumbent operator in the same position as any competitor with regard to securing the required track capacity;
- relieve QR Network of the burden of processing speculative access applications; and
- QR Network would be in no worse position than it would be under the proposal in UT3.

The simplification of the arrangements for the Committed Capacity Register for non-CQCR coal capacity is supported.

Comment 12 Committed Capacity

✓ Asciano supports the continued intention to provide coal producers with an option to extend access to capacity.

× Asciano does not support the proposed mechanism in UT3 cl 7.4(d) to provide the end customer option.

? Asciano suggests that an acceptable option mechanism would be focussed solely on the coal producer and would require a mere notification process rather than a formal application.

✓ Asciano supports the arrangements for the Committed Capacity Register for non-CQCR coal capacity.

3.3.4 Capacity Transfer

Asciano supports the intention to provide a revised capacity relinquishment mechanism within UT3 that now allows for a relatively simple transfer of access rights over the short term. Unfortunately the mechanism as contained within UT3 is obscure to say the least. It is unhelpful that key components are contained variously in cl 7.3.7, the definitions and purportedly in the as yet unwritten System Rules.

The issue of short term transfers is somewhat confused by the distinction made by QR Network between transfers within an access holder's train service entitlements and transfers between different train operators. The Principles Paper[26] discusses short term transfers in the context of within an operator's existing train service entitlements – as it terms an "aggregation" of an operator's access rights. Asciano understands that this is intended to be formalised through the as yet unwritten System Rules. Asciano supports this proposal, as far as it goes. In fact the strict interpretation of an operator's train service entitlements has always, in Asciano's opinion, been unnecessarily inflexible and has not been adhered to in practice, so the proposal is really a formalisation of an informal practice rather than something new. It is noted that the aggregation provisions will necessarily be of greater use to the predominant operator, however, this does not invalidate the utility of the concept and any operator that services more than one load-point – port combination will benefit from the increased flexibility.

However, this proposal does not address short term transfers between operators. Such transfers are covered under the more general transfer arrangements in cl 7.3.7. The drafting in UT3 cl 7.3.7 requires entry by the transferee into a new or varied access agreement, mirroring the capacity relinquished by the transferor. This appears cumbersome for a temporary transfer that might be for a relatively short period (perhaps a matter of days or weeks). In recent access agreement negotiations with QR Network, Asciano has sought such a mechanism as provided in cl 7.3.7 for short term transfers, and QR Network has provided assurance that the "negotiation" to vary an access agreement to incorporate the transferred capacity can be a swift and somewhat nominal process in circumstances where the transferee has an existing access agreement that already covers the requirements to operate the transferred service (ie everything required except the specific capacity being transferred). This is a much less onerous proposition than might be expected from the drafting – any operator able to accept a short term transfer will necessarily have such arrangements in place.

The removal of transfer fees for periods under two years is helpful and Asciano supports this. However, it is not helpful that this outcome is buried in the definition of Relinquishment Fee in

[26] QR Network Submission, Volume 1, Attachment B

cl 11.1. Such a detailed operative provision ought to be contained in the body of the document. While Asciano does not suggest that this is sufficient reason to reject UT3, it is unfortunate that, given QR Network claims that a fundamental principle for UT3 is that the processes should be "reasonably clear and avoid ambiguity",[27] it has chosen to draft the provision in this manner.

Comment 13 Capacity transfer

✓ Asciano supports the capacity transfer provisions in UT3.

? As the proposed short term "aggregation" process is to be contained in the System Rules and these have not yet been drafted, Asciano is unable to comment on the detail of that process.

3.3.5 Network Management Principles

QR Network has set out detailed reasons for the proposed changes to the Network Management Principles in its August 2008 Principles Paper.[28] The proposed changes are directed:

- to reflect the greater emphasis on a coordinated system approach to the coal systems and hence the role of system rules;
- the need to manage sequencing of train arrivals rather than the previous "on time" approach; and
- to allow an Access Holder to specify a preference in dealing with conflicts between its own trains.

In Asciano's view, the Principles Paper sets out the issues well and cogently argues the proposed changes. Asciano's experience in the NSW Hunter Valley suggests that the QR Network proposals are the most appropriate way in which to achieve the stated objectives.

Asciano supports the proposed changes to the Network Management Principles.

Comment 14 Network Management Principles

✓ Asciano supports the proposed changes to the Network Management Principles.

3.3.6 Declaration Of All Coal Traffic As Cyclic

The QCA Issues Paper raised a concern that UT3 was reinstating the requirement that all CQCR coal trains be treated as cyclic.[29] Asciano is confused at the QCA comment as it is unclear how this requirement has changed since UT2.

[27] QR Network Submission, Volume 1, p 79

[28] QR Network, "Principles Paper – Network Management Principles"

[29] QCA Issues Paper, p 10

In its Final Decision on the precursor to UT2 (the QR 2005 draft undertaking), the QCA required QR to remove cl 7.2(b) that deemed all coal trains in the CQCR to be cyclic.[30] In the subsequent UT2, QR conformed with this requirement, but Schedule F Part B cl 1.2(b) retained a proviso that effectively achieved the same outcome in that all reference coal trains would be deemed to be cyclic. This provision has been retained in UT3. Thus, in Asciano's understanding, there has been no change in the deeming of reference coal trains to be cyclic since the QCA approved UT2.

As a general proposition, Asciano supports the treatment of all coal traffic in the CQCR as cyclic. There are circumstances when the interaction of coal trains and other traffic is so closely constrained that it is appropriate to treat coal trains on a timetable basis. Examples of this would include the movement of coal trains through the Brisbane suburban network and the Sydney suburban network. In both cases there is an imperative to run all freight trains according to the dictates of the suburban passenger requirements. Asciano also operates a timetable coal train between Leigh Creek and Port Augusta. This is an exceptional circumstance where the Asciano train is the only one that runs on the line and delivers the daily requirement for the Port Augusta power station – were it to run any more frequently it would be unable to discharge at the power station so that the daily cycle is mandated by the discharge stockpile capacity. However, apart from these very specific exceptions, coal trains are usually more constrained by other coal system requirements eg access to the port unloading facilities and the imperative to maximise system throughput. This makes the adoption of a cyclic approach much more important.

It is noted that the QCA referred in its 2005 Decision to the opportunity for QR Network to price the increased consumption of capacity into the access price, thereby allowing the cost of a non-cyclic train to be incorporated into the access price.[31] Asciano suggests that this approach, while conceptually appealing at a high level, is unhelpful at best. It is impractical to have the two modes (ie cyclic and timetable) operating into the same discharge point (and also the same loading points) as this will inevitably lead to clashes between the two methods of scheduling. While conceptually it might be possible to run a timetable service into a permanent stockpile port (where all parties have stockpiles that are always sufficiently between the minimum and maximum)[32] this becomes increasingly complex and difficult to manage, the more stockpiles that need to be maintained at port and the number of load-points that need to be serviced. It becomes untenable to operate a timetable service to a cargo assembly port as a timetable service cannot adjust to provide peaking.

Apart from the practical difficulties of intermingling cyclic and timetabled traffics, a timetabled coal service imposes significant costs on the surrounding cyclic coal trains, reducing the overall system capacity. These impacts, though very real, are hard to measure conclusively and incorporate into a price.[33]

It is arguable that the point is actually moot in that UT3 only mandates that reference coal trains must be cyclic. It remains open for an access seeker to propose a non-reference timetabled coal service (indeed the very fact that it is timetabled would make it a non-reference service).

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30 QCA, "Decision QR's 2005 Draft Access Undertaking", December 2005, pp 172-173

31 QCA, "Decision QR's 2005 Draft Access Undertaking", December 2005, p 173

32 A stockpile would always need to have as a minimum at least the maximum cargo size to avoid the potential for a stock-out between trains, while it must always have at least the capacity to accept the number of train-loads arriving prior to the next ship arrival.

33 A similar issue arises between cyclic coal trains and timetabled passenger and general freight trains, though these generally do not generate the same practical problems of trying to access the same load and discharge locations as the cyclic coal trains. They do, however, create a "shadow" that consumes additional capacity.

Comment 15 All CQCR reference coal trains to be cyclic

✓ Asciano supports the mandating of reference coal trains in the CQCR as cyclic.

3.3.7 Other Capacity Management Provisions

Asciano supports the remaining capacity management provisions with the exception of the proposed threshold for the resumption process. The QR Network Principles Paper[34] describes the problem of managing demand in a cargo assembly environment, making it inappropriate to apply the "7 out of 12" timetabled path trigger. Asciano agrees with QR Network's analysis and conclusion. However, Asciano suggests that the evidence of variation provided in the Principles Paper does not support the proposed solution. The utilisation graph provided in the paper suggests that the proposed 90% utilisation would trip the trigger on numerous occasions. This appears contrary the description of the problem, which recognises that variation in utilisation is an attribute of the system.

Unfortunately, the paper only shows the utilisation of a particular mine and does not show the cumulative utilisation of all mines within the system. The cumulative utilisation is likely to be significantly smoother than that of any individual mine, particularly in a cargo assembly system. This means that while a particular mine may have substantial swings in network usage, the daily scheduling process can cope with smoothing these swings and the capacity is not actually lost, merely temporarily transferred to another party. If this is correct, then Asciano suggests that there is no need for the 90% trigger to preserve system capacity and a lower figure would be more appropriate.

Asciano does not have access to the current utilisation data for the various CQCR networks and is therefore not able to suggest a firm alternative based on sound analysis. However, given the nature of the coal systems Asciano would expect that a trigger around 75% on a quarterly basis would be appropriate.

In discussion with QR Network, it appears that the intention is that a 12 month moving average apply, not a quarterly moving average. Asciano's interpretation of UT3 cl 7.3.6(a)(i) is that, while it addresses 4 consecutive quarters, the trigger operates when any one quarter is below 90% effectively making it a quarterly test and therefore it suggests that the drafting does not match the intention. Asciano would support the 90% trigger if it was based on a 12 month moving average.

Comment 16 Capacity Management

✓ Asciano supports the adoption of a different trigger for the capacity resumption mechanism applicable to coal trains.

✗ Asciano does not support a 90% trigger on a quarterly basis.

? Asciano would support a 90% trigger based on a 12 month moving average. It is understood that this is QR Network's intention but the drafting does not reflect this.

✓ Asciano supports the remaining capacity management provisions.

[34] QR Network, "Principles Paper – Network Management Principles", Section 5 (no page nos.)

3.4 Separation Issues

"The Authority seeks comments on the reasonableness of QR Network's proposal to remove the decision-making audit and its associated responsibilities from the undertaking."

"The Authority seeks comments on whether:

- the structural separation of QR Network within QR Ltd is sufficient to justify QR Network's proposed changes to the ring-fencing arrangements; and
- the removal of the line diagrams and the confidentiality deed from the undertaking creates unnecessary uncertainty for stakeholders."

"The Authority seeks comments on the reasonableness of QR Network's proposed changes to its public reporting requirements."

3.4.1 Structural Separation & Ring-fencing

QR Network places substantial weight on the recent structural change to argue that it is now a separate entity to the above rail operating businesses of QR Limited. In turn, it is argued that this reduces or removes the conflict of interest that was manifest when QR Network was a division of QR Limited and as a consequence, much of the framework for ensuring that QR Network does not favour related entities over third party access seekers is no longer required.

Asciano agrees that the structural change, making QR Network a wholly owned subsidiary of QR Limited does make it a separate entity. However, that separation does not guarantee independence of decision making nor does it quarantine QR Network from the direct influence of QR Limited's Chief Executive and board of directors – indeed, the QR Network board of directors comprises two QR Limited executives (CEO and CFO) and the Executive General Manager of QR Network, a person whose remuneration is directly controlled by the QR board of directors.

Therefore, notwithstanding the legal separation of QR Network from QR Limited, Asciano does not accept that this guarantees any independence of decision making, separation of culture or a breaking of affinity between the employees of the various QR entities.

It is noted that QR Limited had initially announced a different structure whereby all of the operating divisions within QR were to become subsidiaries but chose not to pursue that structure. Thus the parent remains the incumbent train operator for all services except passenger services and also directly controls the network, albeit through a subsidiary.

Asciano therefore views the separation argument with caution. This is not to suggest that the intentions of either QR Limited of QR Network are not genuine, nor is it intended to impugn the honesty or integrity of any QR employee; however, the fact remains that the network has not been put at arm's length from QR's above rail activities. It is therefore appropriate that UT3 continue to contain measures to ensure the fair and equal treatment of non-QR parties. In this regard, Asciano believes that it would be preferable for UT3 include a general commitment by QR Network that, in performing its obligations and exercising its rights under the undertaking, it will not differentiate between QR access seekers and non-QR access seekers. While it could be argued that this is already covered in UT3 cl 2.2(a),[35] and to a lesser extent 2.2(b)(v)(C)(i),[36] it

[35] UT3 cl 2.2(a) is dependent on the definition of Access Seeker, Access Applicant and Access.

[36] UT3 cl 2.2(b)(v) is about balancing a variety of interests and therefore does not guarantee fair treatment, it merely recognises this as one of a variety of interests that need to be balanced.

would be preferable for the issue to be explicitly dealt with rather than through the operation of a definition.

Notwithstanding the above, Asciano does not disagree with the proposed changes to the ring-fencing provisions. Asciano does, however, disagree with the removal of the decision making principles – this is discussed in Section 3.4.3 of this paper.

Comment 17 Ring-fencing

? UT3 should include an explicit commitment that QR Network will not differentiate between QR access seekers and non-QR access seekers in its application of the various processes under UT3.

✓ Asciano generally supports the proposed changes to UT3 regarding ring-fencing.

3.4.2 Confidential Information

Separate Treatment Of Third Party Information

The confidentiality provisions are specifically directed towards the relationship between QR Network and non-QR access seekers. This appears inconsistent with the intent to treat QR-related access seekers in the same way as non-QR access seekers. As far as Asciano is able to determine, there is no provision for QR Network to keep QR Limited access seeker information confidential. This differential treatment suggests that QR Network sees no need to expressly provide for confidentiality for QR related entities and weakens the QR Network claim of independence.

Sharing Information With End-Customers

Asciano's experience is that when an application or negotiation for access is being made where the end customer has a specific interest in the outcome, most commonly in the case of coal haulage, that end customer is keen to receive detailed information regarding the content and progress of an access application and negotiation. Such advice would necessarily involve communicating information over which QR Network claims confidentiality.

UT3 clause 3.3(d) and 3.3.1(b) allow for the Access Seeker/Access Holder to provide the confidential information where the end customer has entered into a confidentiality arrangement.

Asciano is of the view that the requirements set out in 3.3.1(b) in connection with the sharing of information with an end customer are both onerous and unnecessary. As far as Asciano is aware, QR Network has never identified the commercial interest that it is trying to protect, nor what harm is contemplated that the requirements of clause 3.3.1(b) is designed to mitigate against with respect to sharing information with end customers.

Unless QR Network is able to demonstrate a legitimate reason for requiring the provision of such information to end customers to be subject to the onerous requirements of clause 3.3.1(b), Asciano suggests that:

- this requirement be removed from clause 3.3.1(b), and
- an additional exemption allowing the provision of confidential information regarding an application and negotiations to any end customer nominated in the related access application be added to 3.3(ii).

Asciano also notes that "Confidential Information" does not include information that relates to services other than access to the rail infrastructure. If information is provided in connection with negotiating an access agreement under the undertaking, irrespective of whether it relates solely to access (an example of non-access information might be general business information), the confidentiality obligations should extend to this information. This provision has been carried through from UT2, but Asciano has never been clear as to what the caveat in cl 3.3(b)(ii) is intended to achieve. QR Network should provide advice as to why non-access related information provided by an access seeker during a negotiation should not be confidential.

"Internal" Use Of Non-QR Information

Asciano recognises that the efficient provision of access necessarily requires the sharing of third party confidential information within the QR corporate group. Therefore Asciano accepts UT3 clause 3.3.2(h) that allows the sharing of information without specific consent with:

- Internal Audit;
- the Information Services Division; and
- Insurance Management

However, Asciano suggests that it is appropriate that any employees in these areas of QR Limited should be made aware of the particular sensitivity of the information given that it is information belonging to a direct competitor to QR Limited. For example, it makes sense for the Information Technology department to have access to an access seekers' details regarding a proposed operation without necessarily having to go through a specific registration process each time. However, it is quite likely that the information will appear otherwise routine except that the party to which it refers is a non-QR party. It would be very easy for a person within that department to mention an aspect of that information to another employee if (s)he is not aware of the sensitive nature of the information.

It is not suggested that an onerous regular briefing process is required, merely that employees are made aware that the information may be more sensitive than might otherwise appear and that it is therefore important to be more vigilant about the use and dissemination of that information.

Comment 18 Confidential Information

- ✘ It is unclear why the confidentiality arrangements do not apply to QR Network related access seekers. This omission undermines the perception of separation that QR Network is keen to generate.
- ✘ Asciano suggests the removal of the requirement to put in place special arrangements to allow sharing of information regarding the application and negotiation for access with end customers nominated in the access application.
- ✘ Although the same drafting has been carried over from previous undertakings, Asciano questions the reason for the carve-out in UT3 cl 3.3(b)(ii) that has the effect that non-access related information provided by an access seeker to QR Network is not confidential.
- ✘ Asciano is of the view that any QR Limited employee provided with confidential information under UT3 clause 3.3.2(h) should be made aware of the importance of maintaining the confidentiality of non-QR information.
- ✓ Asciano does not object to the removal of the confidentiality deed from UT3.

3.4.3 Removal Of Decision Making Principles

QR Network is seeking to remove the explicit obligation to comply with a set of decision making principles. Under UT2 these principles relate specifically to decisions that have a materially adverse impact on the access seeker or access holder and the annual audit includes a review of compliance with these principles.

QR Network's argument for the removal are:

- QR Network is now further separated from other QR related entities than under UT2;
- There have been no issues raised in previous audits with regard to decision making;
- Access holders are already protected through their access agreements; and
- Access seekers may use the dispute resolution process where a decision is disputed.

Asciano accepts that QR Network is now a separate entity. However, as discussed above, that separation does not guarantee independence of decision making nor does it prevent QR Limited exercising direct influence It is therefore appropriate that UT3 continue to contain a set of decision making principles and for compliance with those principles to be audited.

An argument for the removal of a control because the control has not been tested (in this case no audit issues identified) is a difficult argument to sustain by itself. Without evidence to the contrary, it is quite possible that the presence of the control serves to prevent the behaviour that the control is designed to detect (one deals not steal the cookie because there is a prohibition against stealing, even though one might otherwise be tempted to so do). Asciano suggests little weight can be attached to the fact that no previous audit has found a problem in this area.

Asciano accepts that an access agreement will determine many of the matters concerning the relationship between the access holder and QR Network. However, there remain some matters where the undertaking retains precedence (eg the standard access agreement requires acceptance of the reference tariff determined under the undertaking from time to time). Therefore the access agreement does not provide complete protection to an access holder.

Asciano accepts that an access seeker has recourse to the UT3 dispute resolution process, including where an adverse decision is made by QR Network. However, the dispute resolution process is an expensive and time consuming process that is not necessarily appropriate in all circumstances.

On the basis of the above, it is Asciano's view that there is insufficient certainty that decisions will be made independently of QR Limited's interest and influence and that therefore:

- the decision making principles ought to be expressly set out in UT3; and
- compliance with those principles form part of the annual audit.

Comment 19 Decision Making Principles

- It is Asciano's view that the decision making principles ought to be expressly set out in UT3 and that compliance with those principles form part of the annual audit.

3.4.4 Removal Of Network Diagrams

QR Network has proposed that UT3 not include the network line diagrams as a part of the undertaking itself, but that UT3 require the bi-annual publication of the diagrams on the QR website.[37]

In Asciano's view, the diagrams form two purposes:

a) to provide access seekers with a substantial body of information about the network in an easily comprehensible form; and

b) to identify those parts of the network that are covered by the undertaking.

Asciano has often complained to QR Network that the undertaking is unwieldy and unnecessarily burdened with detail. It is, therefore, difficult for Asciano to object to the removal of a significant part of the document!

Asciano is satisfied that purpose (a) is achieved through the proposal in UT3.

Purpose (b) is less easily satisfied. The definition of what is, and is not, covered by UT3 is complex.[38] It does not provide any real description of the network and an access seeker would be hard put to determine with any certainty whether any particular part of the network was available under UT3 through reliance on the definition of the network or scope within UT3 itself. Therefore, the Line Diagrams are an essential feature of UT3.

In its recent decision to approve the ARTC Interstate Undertaking,[39] the ACCC required the inclusion of network maps to assist access seekers in determining what was covered by the undertaking and also addressed the issue of avoiding frequent amendments to the undertaking due to changes in the network:

"… To avoid the problem that minor changes to the maps may constitute an amendment to the Undertaking and unnecessarily require ARTC to seek ACCC approval for such changes, the Undertaking includes the map as a visual guide to what the network covered at the time the Undertaking was submitted, but it would not be subsequently updated to reflect changes in the maps. The Undertaking commits that updated maps would be available on the ARTC's website. There are also consequential changes to the Undertaking to facilitate this approach, such as amending the definition of 'Network' to exclude the maps attached to Schedule."[40] [Footnotes omitted]

It should be noted that the ARTC Interstate Undertaking contains a textual description of the network covered as well as the diagrams.

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37 It is unclear from the QR Network Submission whether QR Network intends to move to a separate website or continue to present itself as part of the QR Limited group through continued use of the QR Limited website. Continued use of the group website again dilutes the impression of separation which QR Network is at such pains to emphasise.

38 See discussion in Section 3.1.1 of this paper on UT3's scope.

39 ARTC, "Access Undertaking", 15 July 2008 http://www.artc.com.au/library/2007%20ARTC%20Interstate%20Access%20Undertaking%20-%20clean.pdf

40 ACCC, "Final Decision Australian Rail Track Corporation Access Undertaking - Interstate Rail Network", July 2008 p 25 http://www.accc.gov.au/content/item.phtml?itemId=837579&nodeId=3f518aeaac1751aac80d538994c38a6c&fn=ACCC%20final%20decision%20on%20the%20ARTC%20Interstate%20Rail%20Access%20undertaking.pdf

Asciano is of the view that it is important to have a visual depiction of the coverage of UT3 as under UT2. Taking a lead from the ARTC Interstate Undertaking Asciano suggests that QR Network provide two sets of diagrams:

- one set to be "locked" to show the network as at the time of approval (a new locked set can be provided for any subsequent undertaking amendments); and
- a set showing the most recent track configuration.

This would satisfy the issue of avoiding frequent amendments to UT3 while providing certainty as to what network has been determined by the regulator as being covered by the undertaking.

Definition Of Line Diagrams

There appears to be a slight inconsistency between the definition of Line Diagrams and the claim made in UT3 clause 3.6(a). UT3 clause 3.6(a) states:

"The Line Diagrams indicate those parts of the Queensland rail network that are Rail Infrastructure."

However the definition of Line Diagrams is:

""**Line Diagrams**" means a diagrammatical representation of the rail network identifying:

(i) the configuration of the rail network; and

(ii) the parts of the rail network which are managed by QR Network, a Related Operator or a person other than QR Network;"

As drafted, the definition does not necessarily include identification of Rail Infrastructure, unless Rail Infrastructure coincides exactly with "the parts of the rail network which are managed by QR Network". While there may be a close correlation between the two, there may be parts of the Queensland rail network managed by QR Network that do not form part of the declared network and therefore would not be Rail Infrastructure. Presumably this inconsistency is unintended and the definition of Line Diagrams requires adjustment to reflect the claim in UT3 clause 3.6(a).

Comment 20 Removal Of Network Diagrams

✘ Asciano does not support the removal of the Line Diagrams from UT3 unless an alternative visual depiction of the network is provided.

? Asciano suggests that two sets of diagrams be provided on QR Network's website:

- one set "locked" to show the network as approved by the QCA; and
- one set updated bi-annually, to reflect the current network.

✘ The definition of Line Diagrams needs be amended to remove the inconsistency with UT3 clause 3.6(a).

3.4.5 Public Reporting Requirements

Apart from the issue of timing thresholds in the on-time reporting, Asciano supports the proposed amendments to the public reporting requirements contained in UT3.

With regard to the reporting of on-time arrival at destination, the thresholds proposed by QR Network (other than for coal) appear unduly broad and are inconsistent with such measures applied to other networks. A definition of passenger train on-time arrival allowing a tolerance of 60 minutes is counter-intuitive and does not accord with general public expectations of what on-time arrival might mean.

Asciano suggests that the thresholds should be as shown in Table 1.

Table 1: On-Time Thresholds

	UT3 Proposal (mins)	Asciano Proposal (mins)
Passenger Trains	60	15
Coal Trains	30	30
Bulk & General Freight Trains	60	30

Comment 21 Public Reporting Requirements

✓ Asciano supports the proposed changes to public reporting in UT3.

✗ Asciano suggests that the thresholds to define the on-time arrival of trains are inappropriate and alternative thresholds are suggested in Table 1.

4 Review Of Reference Tariffs

"The Authority seeks comments on whether:

- QR Network's proposed maintenance cost index is reasonable in principle and, if so, is QR Network's proposed index sufficiently transparent and robust to represent a reasonable estimate of future trends in maintenance costs;
- an endorsed variation event is the appropriate mechanism for handling changes in the scope of maintenance practices;
- annual resetting of prices unnecessarily adds uncertainty and complexity to the existing process; and
- the revenue cap should include maintenance costs for new spurs and connection fees for electricity feeder stations completed during the term of the access undertaking."

4.1 Whole Of Term vs Annual Price Setting

Similar to the approach taken in UT2, UT3 adopts a pretence of setting prices for the whole of the regulatory term. However, UT3 contains a considerable number of annual amendments to prices. The proposal might be described as a hybrid, however, it has the appearance of a process designed to provide a point estimate for future prices (at the start of the period) with a very significant annual adjustment process that almost certainly guarantees that prices will not conform to the point estimate.

During the consultation process with QR Network prior to the submission of UT3 for consideration by the QCA, Asciano advocated that the reference tariffs for coal traffic should be reset annually rather than continue the attempted multi-year approach used previously. While there may have been a reasonable expectation under UT1, with its price cap regulation, that a whole of term price would have some stability, any such hope his evaporated under the UT2 revenue cap reform.

In discussion with QR Network and other stakeholders, two main arguments were proposed in support of retaining the multi-year approach:

- it provides certainty to access seekers in comparison to an annual pricing process; and
- there is an expectation that an annual price setting process would be too complex, resource intensive and time-consuming to be effective.

Asciano's view is that the current multi-year mechanism does not deliver any significantly greater certainty than an annual process and that an effective annual pricing process can be achieved as has been experienced in the NSW Hunter Valley. These issues are discussed further below.

The adoption of a genuine annual pricing mechanism and abandonment of the fiction of "whole of term" prices would have the following benefits:

- Forecast traffic volumes and maintenance costs are significantly less contentious over a 12 month period than a 4 or 5 year horizon.
- Actual revenues and expenditures for the immediately preceding period will still have relevance and provide a sound basis for predicting future values.
- Depending on process timing, it may be possible to include actual budgets in cost and volume estimates.
- Price adjustments from year to year ought to be less volatile than those between longer term regulatory periods.
- Significant complexity can be removed from the undertaking as the annual adjustments and special event triggers can be at least reduced if not removed.
- There is less imperative to seek inter-period adjustments to prices if prices are adjustable within 12 months.
- A robust annual pricing mechanism would allow for the undertaking to have a longer term due to not being encumbered with the need to make long term volume and cost estimates.
- There is a far lower likelihood of price shocks both within the regulatory period and between undertakings as prices ought to be relatively "up to date" rather than suffering the legacy of past assumptions.

Asciano argues that this leads to less complexity and greater price stability than the pricing arrangements in UT3.

4.1.1 Price Certainty

Asciano is of the view that the proposed multi-year pricing provides little transparency or certainty beyond the first year. Significant parts of the reference tariff calculations are subject to either an annual adjustment or are triggered by the occurrence of a review event as noted below:

QR Network is seeking an annual resetting of:

- Coal volumes (Schedule F Part B cl 3.1.1(b)(iii))
- Electric traction energy costs (Schedule F Part B cl 3.1.1(b)(ii))
- Maintenance cost increases arising from new connections (Schedule F Part B cl 3.1.2(a)(ii))
- Electricity connection costs (Schedule F Part B cl 3.1.2(b))

Price reviews are triggered by any of the "endorsed variation events":[41]

- Changes to costs of more than 2.5% due to changes in maintenance scope;
- Changes in law or taxes;
- Changes in electricity charges (noting that this appears to cover at least some of the same ground covered under the annual review provision).

In addition other significant price variations may occur due to:

- The finalisation of the capital expenditure carryover account. Though this is not a price "resetting" per se, it does add to the unpredictability of prices (at least from an access seeker perspective) compared to the prices set at the time of approval of UT3.
- The annual "revenue adjustment" ie the unders/overs mechanism. Again this is not a "resetting" but clearly adds to the volatility of prices.

Additional to the price review mechanisms contained within UT3, there remains the option for QR Network to submit an amended undertaking at any time. As evidenced through the life of UT2, QR Network is not reluctant to seek to modify prices through this mechanism.

The multi-year process has a further effect in that it places an uncertain burden (potentially large given the cumulative nature of the mechanism) on prices beyond the current regulatory period through the capital expenditure rollover mechanism.

Given the annual resets already built into UT3 and the significant likelihood that other factors will modify prices through the life of UT3, there is no certainty achieved through having a "whole of term" price approach.

4.1.2 Can There Be An Effective Annual Process

It is recognised that having an annual pricing process may present challenges. However, given the intention in UT3 to reset certain components of prices annually, one must consider whether a complete review would place any significant additional burden on the relevant stakeholders.

Asciano has, for a number of years now, agreed prices with ARTC (and before that Rail Infrastructure Corporation) for the Hunter Valley coal operations on an annual basis. In more recent times this process has also included QRNational as the second operator in the Hunter Valley.

While the process has not always achieved price agreement by 1 July of the relevant financial year, prices have always been agreed by September at the latest and usually much earlier (with back-dating to 1 July).

[41] UT3 clause 11.1 "Endorsed Variation Event" p 91

The process involves a review of the elements of price for the forward 12 month period including:

- Volume forecast (aligned with the Hunter Valley Coal Chain Logistics Team)
- Asset base (based on the regulator approved valuation)
- Capital expenditure program (reflecting the program agreed through the Rail Infrastructure Group consultation process)
- Maintenance scope (including a review of infrastructure condition and explanation of the forward work program)
- Maintenance costs (aligned with the agreed track possessions program, which in turn is aligned with other system outages)
- Allowable return

Almost all of these elements are the subject of a related process, such as the alignment of system capacity or a previously approved capital expenditure program. Therefore, while there remain uncertainties it is usually too difficult to arrive at a consensus on:

- What the revenue cap should be; and
- What adjustments are required to prices to achieve the revenue cap.

Clearly, where there are quantum changes in price from year to year (as contemplated in UT3 in the change from UT2008) a much greater level of scrutiny and explanation will be required. In such a case it could be that the matter can only be resolved through the regulator. However, to date in the Hunter Valley, it has not been necessary to resort to this.[42]

On the basis of this experience, Asciano believes that it is not unrealistic to suggest that an annual pricing process is a practical possibility in the circumstances applying to QR Network. It is recognised that there are differences between the structures of the participants in NSW and Queensland, not the least the relationship between QR Network and its parent train operator. However, this does not, of itself, appear to make an annual effective pricing process unachievable.

Comment 22 Annual vs Whole Of Term Pricing

✘ Asciano believes that the whole of term pricing in UT3 coupled with significant annual revisions does not provide any certainty to access seekers while at the same time adding complexity to the undertaking. Any stability in pricing that arose under the price cap regulation with whole of term pricing has evaporated under revenue cap regulation.

In place of the pretence of whole of term pricing, Asciano strongly prefers a genuine annual price setting process.

[42] It should be noted that IPART conducts an annual audit to ensure compliance with the NSW Rail Access Undertaking, which includes calculation of the revenue ceiling and whether ARTC has complied with the ceiling and consultation requirements of the undertaking. This then gives rise to an "unders/overs" adjustment similar to that contemplated in UT3.

4.2 Maintenance Cost Index

QR Network is seeking to move to a specially constructed maintenance cost index (MCI) under UT3 for the annual escalation of network maintenance costs. The construction of the MCI is discussed in the QR Network submission at Volume 1 Attachment C pp 5-7.

The QR Network rationale for using a specially constructed MCI is provided in the QR Network Submission Volume 2, section 2.2.3. The argument presented relies heavily on the Rawlinson Index, suggested by QR Network as widely used in the construction industry. Unfortunately, the argument fails to provide any evidence of a close correlation between QR Network's maintenance costs and those covered by the Rawlinson Index. It is therefore difficult to comment on the relevance of the disparity between the Rawlinson Index and the Consumer Price Index (CPI) on much of QR Network's argument relies. To the outside observer, it is not immediately obvious that QR Network's maintenance task is closely analogous to the activities undertaken in the construction industry.

This apparent disconnect is further suggested by the fact that, having argued its case on the basis of the Rawlinson Index, QR Network has chosen to adopt its own index rather than argue the case to adopt the Rawlinson Index as an escalator.

As Asciano has discussed in previous papers both to the QCA and QR Network, the choice of an appropriate index for escalation inevitably raises difficulties. Asciano recognises that QR Network's cost base may not necessarily be reflective of the CPI at any particular time; however, the calculation of CPI does have many advantages that may not easily be replicated in a special purpose index. Therefore, in order for support to be given to the adoption of an alternative index, consideration would need to be given to a wide range of issues. Figure 1 sets out a number of issues that Asciano believes would need to be satisfactorily dealt with in order for the MCI to be acceptable. These issues have previously been raised with the QCA[43] and QR Network,[44] so one would expect that QR Network would have ready answers available.

Figure 1: How The MCI Covers Key Requirements

Asciano Issue	How Dealt With In QR Network MCI
The disparity over time between CPI and the true cost base. Clearly this needs to be substantial and sustained to justify the adoption of a special index. A particular difficulty arises in measuring the efficient cost base rather than the actual cost base as this will inevitably involve additional judgement.	QR Network has demonstrated the disparity between the Rawlinson Index and CPI, but has not provided a comparison of its proposed MCI to CPI, which presumably it could have done had it so wished to do – unless the MCI is overly complex to calculate from historical data.
How is the index constituted – what basket of goods and services should be included, who chooses this, what process will be used to determine the inclusions/exclusions and the weightings given to each component? How relevant is the index to QR's efficient cost of operation? How variable is QR's cost of operation across different parts of the network, eg do the coal lines have a different mix of costs compared to general freight lines and how is this factored into the measure?	QR has provided a series of activities and associated weights that will comprise the MCI. These are described as being taken from the "maintenance cost summary sheets". Asciano was not able to locate these sheets in the publicly available documents and so is unable to comment on the appropriateness or otherwise of the weighting proposed. For example is the weighting based on the coal lines only or the total maintenance task and how might this impact the results? The inclusion of CPI as a category of cost is confusing – presumably this is intended to cover the "other" category that is not included in the other 4 categories of activity. If it is not merely a mislabelling then it needs to be explained.

43 Asciano, "Submission To Queensland Competition Authority, QR Draft Amending Undertaking, October 2007, (Escalation)", October 2007 p 6

44 Asciano, "Comments On QR Network Principles Papers, QR Network Undertaking No.3", May 2008, p 12 and Appendix A

How frequently and over what scope will the measurement take place – eg is the index simply a measure of QR's input prices on a particular day, an average over a period or an average of prices for several track owners across Australia? Do such measurement choices introduce any bias into the measure? Will the cost of collection be sustainable?	It is assumed that calculation of the MCI is an annual exercise. QR Network has not explained how the MCI will reflect a maintenance scope that is likely to vary over time. How sensitive are the weightings to the likely variation in scope?
Who is to perform the measurement – what degree of independence, skill and experience will be required? Is there any concern regarding conflict of interest in the management of the index?	4 out of 5 of the measures are ABS series and this is most helpful in terms of independence, consistency and ease of calculation. Similarly the fuel price measure is sourced from an independent and reliable provider and the information is publicly available. It is unclear why the fuel measure would rely on 3 point estimates rather than 1. This implies that there is a further weighting for each location. Similarly, there must be additional weightings within the consumables category. The QR Network Submission does not discuss these but presumably the index will be sensitive to the choices made.
What impact do different commercial arrangements have? Will volume discounts apply or not? What is the impact of circumstance – eg the price of ballast might depend on the location for delivery compared to the source; the cost of concrete sleepers may well depend on whether they are part of a large order that has led to the setting up of a specific manufacturing plant in the region.	These questions again go to the scope of the maintenance task, which is not addressed by the MCI but also demonstrate the inter-relatedness of scope and input costs. QR Network has not demonstrated how well the MCI correlates to actual input cost variation experienced.
Is the proposed measure stable or is there significant risk that the components will exhibit volatility both absolutely and with respect to other components (eg the order of a large volume of rail compared to normal due to network extensions).	Related to the scope of the maintenance task, which is not addressed by the MCI.

Asciano's view is that the MCI has addressed some of the issues well, eg the sourcing of cost data from publicly available sources, but has failed to address many others. Asciano remains unable to comment on whether the MCI more accurately measures QR Network's input costs over the medium term compared to CPI as no comparative data has been provided.

In addition, Asciano believes that consideration of input costs without reference to the scope of the task being undertaken may result in changes to the index that do not reflect the prices being experienced by QR Network. For example, the task of ballast cleaning is one that was in some contention during the maintenance cost amendment to UT2 in 2007. The cost of this activity is significantly affected by the location of the ballast pit in relation to the track being restored. Unless this activity is some evenly spread across the network that the price will always move towards the average, a change in the MCI will not reflect the change in cost for this activity from year to year. The same applies to many of QR Network's maintenance tasks. To the extent that these tasks are varied by location from time to time, the cost is also likely to vary. Similarly the quantum of the various tasks in relation to other tasks is likely to cause the mix of costs to vary. The MCI is not able to deal with these variations in any respect.

In this context, QR Network appears to be proposing to have things both ways – reliance on an MCI for input costs, but also providing for a price review if costs exceed a variation of 2.5% due to scope change. In Asciano's view this almost completely loses the value of the mechanistic approach. Unfortunately, QR Network has not given any indication as to how frequently it anticipates that it will be necessary to invoke the change of scope provision, but Asciano would not be surprised to find that this required an annual review.

Asciano remains unconvinced that QR Network's pious hope that the escalation of maintenance costs will become "a mechanical and non-contentious process"[45] will be realised through the use of the MCI.

Yet again, Asciano finds that the avoidance of adopting a genuine annual resetting of prices results in the generation of further complication of uncertain benefit. Asciano's preferred solution would be to base maintenance costs on actual QR Network budget forecasts for the ensuing 12 months. While it is recognised that this may require a substantial level of effort in the first year or so, Asciano's experience suggests that once the parties have acquired the requisite level of experience and confidence, the task does not have to be overly burdensome and is likely to involve no more effort than that involved in managing the proposed mechanisms in UT3.

Comment 23 Escalation of maintenance costs by MCI

- Much of QR Network's justification for the use of the MCI is based on the difference between the Rawlinson Index and CPI, but QR Network has not provided any evidence to establish that the changes in its costs are represented by the Rawlinson Index.
- Asciano is not able to support the MCI as currently proposed. QR Network has not demonstrated that the MCI is a suitable alternative to CPI to reflect the changes to input costs for the maintenance task. Further, the simplistic escalation of input costs without regard to scope is inappropriate.
- QR Network has not indicated how frequently it expects to need to invoke the change of scope provision to review maintenance costs. Asciano would not be surprised if this was an annual event through the life of UT3.

5 Reference Tariffs

5.1 Capital Expenditure

"The Authority invites comments on the reasonableness of QR Network's proposed 2009 DAU capital indicator."

"The Authority seeks comments on:

- the reasonableness of QR Network's proposed annual update of the discount rate applicable to the capital expenditure carry-over account; and
- whether the cost of capital applied more generally should be subject to annual update based on interest rate changes."

"The Authority seeks comments on the reasonableness of QR Network's proposal in regard to the inclusion, and regulatory treatment, of allowances for major project feasibility studies."

Asciano believes QR Network's proposal to have an annual update of both the discount rate applicable to the capital expenditure carry over account and an annual update of the time variant parameters in the WACC has merit. Adoption of this proposal would reduce the concern around timing of regulatory resets. For example it could be argued that currently we are in unusual financial times and these conditions would be unlikely to remain over the regulatory

[45] QR Network Submission Volume 1, Attachment C, p 6

period. Thus, setting cost of capital based on the market today is unlikely to reflect market conditions over the next 4 years. QR Network's approach would reduce QR Network's risk profile and this change should be reflected in QR Network's allowable returns.

As discussed in Section 4.1 of this paper, the pretence of a "whole of term" price adds nothing given the need to make annual adjustments anyway. The "capital indicator" is just another example of this. Asciano is firmly of the view that the use of actual expenditure on assets commissioned in the prior year (provided that it is prudently incurred) to update the asset base obviates the need for later adjustments between the indicator used and the actual cost incurred and therefore is a preferable mechanism. If there must be a "capital indicator", then Asciano sees no merit in smoothing the expected capital expenditure over the term of UT3 and the values proposed by QR Network are appropriate.

Asciano understands QR Network's concern about recovering the cost of major feasibility studies which are a legitimate cost. These are likely to be material in times during network expansion phases. Asciano would support the QR Network proposal to recover the costs of feasibility studies on projects that don't progress through a capital charge depreciated over 5 years. However, it is important that feasibility studies for major projects, given the potential cost, are approved by customers in the same manner as other projects through the Master Planning process. In addition the QCA should scrutinise the allowance for feasibility studies in the system wide and regional costs to ensure that there is no double counting.

Comment 24 Capital Expenditure

✘ Asciano prefers the use of a genuine annual price setting mechanism and therefore there is no requirement for a "capital indicator".

If there has to be a "whole of term" pricing approach, then the "capital indicator" proposed in UT3 is appropriate.

✓ QR Network's proposal to update the discount rate and market parameters of the WACC annually has merit and will reduce QR Network's risk. Asciano supports this along with the associated reduction in QR Network's WACC.

✓ Asciano supports QR Network's proposal to capitalise major feasibility studies.

5.2 Treatment Of Assets

"The Authority seeks comments on the reasonableness of QR Network's proposed:

- depreciation rates, in particular the proposed reduction in asset lives; and
- the treatment of asset disposals and transfers."

5.2.1 Asset Lives

QR Network proposes a significant decrease in asset lives compared to the QCA's previously endorsed asset lives. Table 2 shows that the average lives across the three main categories decrease by between 7 and 14 years.

Table 2: Average Asset Life (Years)

	QCA	QR Network	Difference
Track	39	30	8
Structures & Ancillaries	43	29	14
Signals & Telco	30	23	7

Note: Simple average, not expenditure weighted

Little explanation is given for these significant asset changes in asset lives. For example 20 separate track asset life changes are purportedly justified in a four line paragraph of text.[46]

QR Network's justification seems to rely heavily on the Worley Parsons report.[47] However, this report is heavily caveated and indeed offers only limited support to QR Network's position. Worley Parsons admit that their methodological approach is not detailed enough to understand the differences between the QCA and QR Network's asset live assumptions. They note:

"Disparities between QR and QCA adjusted figures were generally minor, and in consideration of the range of asset life calculations where variables are used to assess residual life, **it is difficult to argue the differential without a more in depth analysis** of the asset geographical conditions and design criteria, current/historical/future usage and maintenance lag/history" (emphasis added)

Given the lack of justification of the asset life changes by either QR Network or its consultant, Asciano recommends retention of the QCA endorsed asset lives.

5.2.2 Asset Life Cap

QR Network is proposing to truncate its asset lives for investments during UT3 to 20 years to deal with perceived stranding risk. This is an extreme position and in effect QR Network is arguing that none of the infrastructure invested in over the next 4 years will be used for carrying coal in 20 years time.

Asciano recognises that the risks, both upside and downside, that QR Network discusses at length are real. These include the impact of environmental factors and both demand (the ending of the so called "super cycle") and supply (issues of mine life) risks. However, there is a legitimate debate to be had on the extent of these risks. For example, our customers tell us that the coal reserves extend well beyond the current deemed mine lives. The key issue is not if these risks are relevant, they are, but how and by how much QR Network should be compensated for these risks. QR Network has not attempted to quantify the stranding risk nor has it provided one sentence of justification as to why the 20 years asset life truncation is an appropriate reward for this risk. As a result Asciano does not support the movement away from the current 50 year asset life truncation.

[46] QR Network Submission, Volume 2 Attachment B, "QR Network UT3 Asset Lives"

[47] QR Network Submission, Volume 2, Attachment C, Worley Parsons, "Life Asset Register – National Comparison", p 14

5.2.3 Asset Disposals and Transfer

Asciano is comfortable with the proposed treatment of disposed assets, namely the assets are removed from the RAB at their depreciated value with an adjustment for any gains or losses on sale to be recognised in the Capital Expenditure Carryover Mechanism.

However Asciano is concerned with QR Network's intention to transfer assets required for the delivery of declared services to related QR bodies.[48] Asciano is unaware of a legitimate reason why these transfers may be effected. Indeed the concept of transferring assets required to provide declared services seems, prima facie, to be contrary to UT3 cl 3.6(c) that suggests QR Network would not make such a transfer. If this is not the case, then UT3 cl 3.6(c) needs to be amended to make it clear that QR Network will hold assets required to provide declared services apart from any clearly described exceptions.

QR Network's suggestion that a "commercial arms length rate" would be negotiated for these assets flies in the face of the incentives at play in this transaction. Indeed, this proposal could be viewed a potential means to avoid the regulated cost of capital. QR Network would include payment for the use of the assets to QR group through an operating costs charge. This charge would include a return on and for the assets to QR group. These returns would not be regulated.

The QCA should seek clarification from QR Network as to the justification for asset transfers and if there are legitimate reasons ensure that network users are in no way made worse off by the asset transfer.

Comment 25 Asset Lives

- ✗ Insufficient justification is given by QR Network to move away from the previously utilised QCA asset life assumptions. Asciano submits that the QCA should retain its asset lives unless a compelling case for change is made, noting that no such case has so far been presented by QR Network.
- ✗ Asciano does not support the introduction of a 20 year asset life cap. Whilst identifying broad risks, QR Network provides no justification for its 20 year cap.
- ✓ Asciano supports the proposed treatment of asset sales and disposals.
- ? Asciano is concerned that assets required to provide declared services might be transferred out of QR Network, seemingly in contravention to UT3 cl 3.6(c). If there is an acceptable reason for these transfers, QR Network needs to make the case.
- ? The possibility of asset transfers to other members of the QR group raises significant regulatory incentive problems. The QCA should seek clarification on QR's motives and ensure that network users are not disadvantaged as a result of any asset transfers.

5.3 Cost of Capital

"The Authority invites comments on:

- whether QR Network has sufficiently justified the proposed parameter ranges for its cost of capital parameters and, in particular, the range for the equity beta and market risk premium;
- whether the proposed WACC is reasonable taking into account all considerations; and

48 QR Network Submission, Volume 2, p 63.

- any other matter that stakeholders consider relevant to the Authority's assessment of QR Network's proposed cost of capital."

QR Network correctly suggests that key parameters comprising WACC should remain unchanged between regulatory periods unless:

"▪ The relevant risks of the business have changed and/or

- New information and /or empirical evidence emerge to question established regulatory precedent."[49]

QR Network claims that the key change since UT2 is the significant investment risk associated with the expansion programme,[50] and makes a great play as to why no changes should result from the reduction in risk from the introduction of a revenue cap.

QR Network is double dipping for this investment risk in the WACC calculation as it impacts both the calculation of the WACC range (for example in assessing an appropriate range for the debt, beta and gamma) and also in selecting the point in the overall WACC range ie the 75th percentile. In making these calls QR Network relies on the asymmetric consequences of error, in effect the chance QR Network will not invest due to returns not fully compensating for the asymmetric stranding risk.

QR Network is in fact "triple dipping" as the asymmetric investment risk (which is not quantified by QR Network anywhere in its submissions) is already compensated through the introduction of truncated asset lives and therefore accelerated depreciation.

Asciano would recommend that in addition to thoroughly reviewing all QR Network's proposed WACC parameters, the QCA should prevent the "triple dipping" for the proposed, but not quantified, stranding risk.

Comment 26 Cost of Capital

✘ QR Network doubles dips in its WACC calculation for the claimed impact of asymmetric investment risk. If the asset life truncation is allowed, this would amount to "triple dipping" as QR Network argues that the reason for the truncation is to offset the perceived risk in asset stranding.

5.4 Operating Costs

QR Network has once again claimed confidentiality over important aspects of its operating cost claims, with expert reports being withheld and key aspects of QR Network's submission being blacked out. As a result Asciano is only able to offer limited comments on QR Network's operating cost claims and has no choice but to rely on the QCA's oversight of the detail. As a result we welcome the QCA's engagement of GHD to review the operating expenditure and look forward to commenting on the consultant's findings.

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49 QR Network Submission, Volume 2 p 64

50 QR Network Submission, Volume 2 p 67

5.4.1 System Wide and Regional Costs

"The Authority seeks comments on whether:

- QR Network has sufficiently justified its cost increases on the basis of being a stand-alone rail infrastructure provider;
- benchmarking QR Network's system-wide and regional costs with reference to QR Network's actual costs is a reliable benchmark for efficient costs; and
- on balance, QR Network's proposed system-wide and regional costs are reasonable and appropriate."

QR Network is seeking a substantial increase in System Wide Costs. The 75% increase is justified by three key factors:

- Significant growth in network activity
- Pressures on input costs; and
- Continued evolution of QR Network's structure and reporting systems.

Of these factors, Asciano consider the first two to be reasonable but is concerned about how these factors have been translated into expenditure forecasts and looks to the QCA and GHD to verify these.

The third factor, QR's structure, is not a legitimate reason for a cost increase. In essence QR Network is asking to be compensated for having voluntarily chosen a less efficient structure – its claim is that costs have increased as a direct result of its structural changes. The QR Network Submission suggests that QR Network has suffered a loss of economies of scale in areas such as train control and operations management.[51] Without further detail, this seems an odd claim to make as QR Network has, for some years now, managed train control for the network, and in fact has increased its scope in this area through taking over train control of the Brisbane metropolitan network. Apart from this, Asciano is not aware of any significant shift in this area that has arisen through the creation of QR Network compared to the previous QR Network Access Group. If such changes have occurred, then QR Network would need to explain and justify the additional cost. Regardless of this, it is clearly inappropriate to require access seekers and end-users such as coal producers to pay increased prices to cover increased costs that have arisen through the claimant's own choice, unless it can be demonstrated that access seekers receive the benefits flowing from those increased costs. QR Network has not argued that the increased costs are to the benefit of access seekers and Asciano's view is that QR Network should not be compensated for incurring such costs.

Whilst Asciano accepts that over time QR Network has gained a better understanding of its actual costs, this no way suggests that these costs are efficient. Indeed QR Network's submission illustrates that structural decisions by QR can impact on QR Network's costs (eg the loss of economies of scope). Thus Asciano believes, consistent with accepted regulatory practice, that benchmarking is vital to identifying efficient costs. Ideally benchmarking would involve actual comparators but where limited or no appropriate comparators exist using a theoretical benchmark is appropriate. That is not to say that QR Network's actual costs should be ignored, but these should just be one data point used by the QCA to determine efficient costs. The determination of efficient costs is not an "either or" decision (ie actual vs theoretical) as suggested by QR Network' submission, appropriate regulatory oversight will take account of all available data points.

[51] QR Network Submission, Volume 2 pp 125-126

Asciano is not convinced by QR Network's arguments that a CPI escalator would include efficiency gains and is therefore an appropriate escalator. Asciano looks to GHD and the QCA to address this issue in its detailed review of costs.

5.4.2 Risk and Self Insurance

The Authority seeks comments on whether:

- QR's risk and insurance proposal has appropriately identified the specific risks and defined the specific events that it proposes to self-insure, and those that are not covered by self-insurance;
- QR has appropriately demonstrated that self-insurance is the most efficient and practical approach to addressing these risks;
- QR has proposed a structure for self-insurance which will allow it to demonstrate that the proposed premium is reasonable, and claims costs have been appropriately allocated; and
- QR has appropriately accounted for past self-insurance allowances, and established a suitable procedure for reporting self-insurance reserves, and the treatment of any claims against those reserves.

Asciano accepts that it is appropriate for QR Network to receive recompense for insurance against the risks identified. Given Asciano does not have access to the Finity report, Asciano must once again really on the QCA to ensure that QR Network's cost estimates reflect efficient costs. It is noted that QR Network seems to distance itself from the results of the Finity report possibly indicating some inconsistency with QR Network position.[52]

Of greater concern is QR Network's non compliance with the QCA's condition for allowing QR Network to include the costs of self insurance set out in the QCA's decision in December 2005. Indeed QR Network seems to be proposing continued non compliance.[53] Asciano believes that any continued material non-compliance would constitute a breach of the undertaking.

Comment 27 Operating Costs

- ✘ As a result of confidentially claims Asciano's ability to comment on QR Network operating costs is limited.
- ✘ Inefficient increases in operating costs due to QR Network's restructure should be excluded from the allowable operating costs.
- ✓ Asciano supports QR Network being reimbursed for its efficient insurance costs.
- ✘ Any continued material non-compliance by QR Network with conditions imposed by the QCA regarding self-insurance must be regarded as a serious matter.

5.4.3 Maintenance Costs

The Authority seeks comments on whether:

- QR Network has sufficiently justified its proposed maintenance costs;

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52 QR Network Submission, Volume 2, Appendix K, (pages unnumbered)

53 ibid

- in the event that stakeholders do not believe QR Network has sufficiently justified its proposed costs, it would be reasonable to approve that claim as long as QR Network was able to manage the network to the level required to deliver contract tonnages; and
  - in this regard, are the additional key service level measures sufficiently robust; or
  - if not, how should QR Network take into account user requirements in determining an appropriate trade-off between service levels and cost?

QR Network is seeking a substantial increase in maintenance costs by approximately 60% in the first year of UT3. This comes on top of the 24% increase allowed in 2007/08 by the amendment to UT2. The magnitude of this increase necessities a thorough and rigorous review to ensure that QR Network is allowed only efficient maintenance costs.

QR Network has provided a significant amount of description of its maintenance program but no publicly available costing information. The minimal amount of costing information included in the relevant attachments[54] has been blacked out making it impossible for Asciano to meaningfully comment. As a result, Asciano must again rely on a rigorous review by the QCA. We therefore welcome the QCA's engagement of GHD to review the maintenance cost claims and look forward to commenting on the consultant's findings.

As with much of QR Network's UT3 submission, the arguments have merit. For example, Asciano welcomes the focus QR Network has on utilising maintenance practices that minimise disruptions to services and accept that this may result in justifiably higher maintenance costs. However, as elsewhere in UT3 there is little or no publicly available justification of how these arguments have been translated into detailed cost forecasts.

We also note QR Network's own expert is rather lukewarm endorsement of its efficiency:

"The Consultant conducted an international benchmark of engineering maintenance costs and found that QR costs were neither the highest or the lowest" [55]

Asciano suggests that GHD should focus on benchmarking QR Network costs as part of its review especially given Worley Parsons' inability to verify the maintenance costs as efficient.

Whilst recognising that we are unable to fully review Worley Parsons report due to the blackout and lack of detail on some aspects (eg the approach to international benchmarking) we note that Worley Parsons identifies some potential inefficiencies:

"There comes a point in time when the benefits of sustainability are outweighed by the costs of inefficiency through the use of assets which are no longer suited to today's demands. The Consultant acknowledges that QR may be currently reviewing the situation in regards to some of its assets"[56]

"… it would be fair to say that there are some details of QR's maintenance that are not at the standard of world's best practice. Labour demarcation is one such issue"[57]

It is vital that GHD investigate these areas of inefficiency identified by QR Network's own consultants.

[54] QR Network Submission, Volume 2, Attachments G and H

[55] QR Network Submission, Volume 2, Attachment H, Worley Parsons, p iii

[56] ibid

[57] ibid, p 86

Comment 28 Maintenance Costs

- The increase in maintenance costs is substantial and requires a rigorous and thorough review by the QCA.
- Little publicly available justification is given for the increase in costs and as such the QCA should focus on benchmarking the costs and looking at the inefficiencies QR Network's own advisors identify.

5.5 Tariff Increases

The Authority seeks comments on whether:

- QR Network's proposed tariff increases are reasonable; and
- the proposed changes to the calculation of the reference tariffs (e.g. AT1, AT2) are reasonable.

"The Authority seeks comments on whether QR Network's proposed reference tariffs for the western system are reasonable, and whether the process QR Network has used for establishing these tariffs is appropriate."

5.5.1 CQCR Reference Tariffs

QR Network's tariff increases are significant. Whilst many of QR Network's arguments have merit, their translation into financial impacts is questionable. The size of the increases and the lack of publicly available cost information for justification necessitate that the QCA and its advisors thoroughly scrutinise each of QR Network's claim, something Asciano is constrained from doing by the amount of information over which confidentially claims have been made.

It is also worth reflecting on QR Network's incentives at a time when the first entry into the above rail Queensland coal haulage market is imminent. As an integrated operator with competitors downstream (above rail) the incentive is to move as many costs as possible to the monopoly part of the business (below rail) to ensure that costs are recovered as much as possible from the competitor. Also this would give QR Limited's above rail businesses a competitive advantage when competing for haulage contracts to the extent that the above rail costs are met through the below rail charges. In the face of QR Network's claim for independence, it is not necessary for QR Network to collude with a related above rail business group in order to achieve this result – it is merely sufficient for QR Network to maximise its recovery below rail in order for the returns required to be earned above rail by a related entity to diminish, a result that does not flow to a third party access seeker. These incentives, allied with the significant increases in costs, reinforce the need for rigorous regulatory oversight.

5.5.2 Western System Tariffs

The same comment must apply to any consideration of Western System tariffs as for the CQCR reference tariffs with the exception that this rate is a "negotiated" rate, ie it falls between the floor and the ceiling.

Asciano accepts QR Network's argument that the calculation of the ceiling for the Western System is difficult and likely to be controversial. Notwithstanding this, there are a number of identifiable factors that would lead to an expectation that the DORC value of the network required for coal services would be higher than that applicable to the CQCR on a kilometre for kilometre comparison. A number of these are alluded to in the QR Network Submission[58] and Asciano has no reason to argue that these factors are not relevant. Therefore, Asciano accepts that the current and proposed tariffs lie below the ceiling even though it may not be possible to calculate the ceiling with certainty.

Asciano is not in a position to comment on the capacity of Western System coal producers' ability to afford the proposed access charges, nor whether QR Network's claims for cost increases are justified or not.

5.5.3 Change To Calculation Of Tariff Components

AT_1 Component

QR Network is proposing substantially modified values to AT_1 in UT3. The only data provided for public comment with respect to these values is that which is contained in the QR Network Submission, Volume 2 Section 12.2.1.

The basic premise put forward by QR Network for the adjustment to AT_1 is that the volumes of traffic on each system have changed since the original setting of AT_1 in 2000 such that the incremental maintenance costs operate in a different range, notwithstanding that these costs are nominally variable and therefore would normally be expected to be invariant with changes in volume. The lack of detail makes it difficult to follow the discussion in the QR Network Submission, however, Asciano accepts the basic QR Network premise.

The QCA Issues Paper reports a decrease of 40% to 90% in $July 2009, (except for Goonyella that increases by 1%). This is confusing as, except for the Goonyella system, this appears to be at odds with the differences to current prices as shown in Table 3. This difference is presumably because the comparison relates to a different base.

Table 3: Comparison Of AT_1 Values

Coal System	UT2008 October 2008 #1	UT3 July 2009 #2	% Difference
Blackwater	0.76	0.54	-29%
Goonyella - South	0.53	0.54	2%
Goonyella - Central, West & North	0.53	0.54	2%
Moura	1.43	0.95	-34%
Newlands	1.48	0.78	-47%

#1 QR Network Reference Tariffs, 1 October 2008

#2 QR Network Submission Volume 2 p 145

Neither the QR Submission nor the QCA Issues Paper indicate whether the allocation of cost covered by AT_1 is:

a) determined in isolation from the total QR Network cost calculations (ie the variable costs are identified and excluded from the calculation of the other elements); or

b) the allocation of costs to AT_2-AT_4 is the residual after deducting the allowance for AT_1 from QR Network's total pool of maintenance costs.

[58] QR Network Submission, p 117-120

This may seem a moot point, but if it is the latter, the QR Network change is merely a rearrangement of costs into the fixed cost elements – ie a reduction in the variable rate for variable costs is offset by an increase in the costs allocated to the other elements of the access charge. Presumably this is not the intention, but the lack of any meaningful data makes it impossible to understand such details.

It is notable that one effect of the change to the relative proportion of cost assigned to AT_1 is that this reduces the component of revenue that is outside of the revenue cap and therefore reduces QR Network's exposure to volume risk. While this might well be an unintended by-product of the QR Network review, the QCA would need to recognise this effect in determining whether the reductions in this allocation of cost are appropriate.

AT_2 Component

Asciano acknowledges the conceptual difficulties raised by QR Network with regard to the calculation of an appropriate value for AT_2 in each system.[59] Ever since UT1, Asciano has found AT_2 to be problematic from a number of perspectives. In the past, Asciano has strongly supported the position adopted in the Hunter Valley where no attempt was made to differentiate the access charge based the characteristics of the coal train.[60] This had the twin benefits of:

- simplicity; and
- avoidance of any barriers to entry through the form of the access charge (eg by giving preference to the reference train that was, of necessity, the predominant train operated by the incumbent train operator).

In more recent times, Asciano has modified its view in light of the importance of maximising rail network capacity as coal volumes have increased to the point where networks are capacity constrained. At the same time, it is important to recognise that installed capacity in the form of rollingstock is of varying capabilities plays an important role in the haulage of coal. Thus, while it is important to recognise the relative consumption of capacity by different train types, this should not be taken to the point where otherwise useful equipment is withdrawn due to the quantum of the cost penalty involved in using it, if this results in an overall reduction in volumes delivered to port or power station. This appears to be the thrust of the QR Network submission.

Therefore Asciano supports the retention of the AT_2 component provided it operates to signal a modest preference for the most efficient use of capacity.

Unfortunately, it is less clear why QR Network has chosen to increment the previous AT_2 component using the Rawlinson Index. As noted elsewhere in this paper, QR Network has not established any clear link between the costs it has experienced and this construction index.

QR Network acknowledges that the values it has adopted for AT_2 are subjective.[61] In Asciano's view, with the exception of the Newlands value, the changes are not so radical as to be unreasonable. Again, the change reported in the QCA Issues Paper of 15% - 80%[62] is difficult to reconcile with a comparison to the current access charge as shown in Table 4 and therefore Asciano's view may be based on a misunderstanding. However, given the rationale provided by

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[59] QR Network Submission, Volume 2, pp 145-148

[60] Access charges for coal trains in the Hunter Valley have been set as a simple price per tonne of coal hauled differentiated by distance – effectively this is a rate per net tonne kilometre with a distance taper.

[61] QR Network Submission, Volume 2, pp 147-148

[62] QCA Issues Paper, p 34

QR Network, an increase of between 7% and 28% in this component does not appear excessive.

Again it is unclear if these changes in the value of AT_2 are merely redistributive. If access charges are increasing by between 14% and 64% (non-electric) as reported in the QCA Issues Paper,[63] the reported increases in AT_2 (excluding Newlands) in fact represent a reduction in the proportion of access charges assigned to this component (ie they are increasing less than the average overall increase) – a result that is counterintuitive given the discussion in the QR Network Submission.

Table 4: Comparison Of AT_2 Values

Coal System	UT2008 October 2008 #1	UT3 July 2009 #2	% Difference
Blackwater	1,568	1,832	17%
Goonyella – South	1,084	1,160	7%
Goonyella - Central, West & North	903	1,160	28%
Moura	470	549	17%
Newlands	210	1,160	452%

#1 QR Network Reference Tariffs, 1 October 2008

#2 QR Submission Volume 2 p 148

With regard to the adoption of the Goonyella value for the Newlands system, Asciano accepts that this might be arguable once the GAP has been constructed such that trains of the same operating capability are able to use the Newlands and Goonyella systems. However, this is not the case now and will not be for some considerable period of the term of UT3. In addition, QR Network has flagged that it intends to submit an amending undertaking once the GAP is commissioned. It would seem appropriate to adopt a Goonyella system AT_2 value at the same time that a Goonyella system reference train is able to use the Newlands system. Therefore, Asciano cannot support the adoption of the Goonyella AT_2 value for the Newlands at this time.

Comment 29 Tariff Increases

? The significant tariff increase allied with the incentives of an integrated operator competing with a non integrated competitor, necessitate a through and rigorous review of all QR Network claims. Asciano does not have access to data that would allow any comment to be made as to the appropriateness of the increases.

? With regard to the calculation of both the AT_1 and AT_2 values proposed in UT3, Asciano is concerned that there appear to be a number of unanswered questions and apparent differences in the reported outcomes that prevent any conclusion being formed.

[63] ibid

5.6 Pricing Principles

"The Authority seeks comments on whether:

- QR Network's proposed changes to the undertaking's pricing principles are reasonable; and
- it is reasonable for QR Network to impose access conditions in circumstances where it is constructing a major project, given it already receives a regulated return on the project commensurate with its risk and, if so, whether the return received should be lower than that which would apply if access conditions had not been imposed."

5.6.1 Pricing Principles

The pricing principles have been modified from UT2 to allow QR Network to apply to the QCA to breach the floor and ceiling limits. QR Network has justified this on the basis that there may be occasions when this derives a better overall result than would occur through strict adherence to the revenue limits.

Given that any breach of the limits must be sanctioned by the QCA, Asciano believes this gives sufficient protection of all stakeholders' interests that this change can be supported.

5.6.2 Access Conditions

UT3 cl 6.5.2(a) allows QR Network to require an access seeker to agree to additional funding conditions prior to granting access explicitly to offset QR Network's financial risk:

"QR Network may require an Access Seeker to agree to Access Conditions before being granted Access Rights, to the extent that this is reasonably required in order to mitigate QR Network's exposure to the financial risks associated with providing Access for the Access Seeker's proposed Train Service."

As drafted this allows QR Network significant discretion in determining what the condition should be and what risk is required to be mitigated. In Asciano's view this has the potential to double count the return that is incorporated in the allowed rate of return relating to financial risk. Asciano is of the view that it is not unreasonable for QR Network to be able to seek to mitigate its financial risk where such a risk is materially larger than the risk associated with other parts of the network. However, this should not extend to allowing QR Network to both mitigate the risk through a special arrangement and recover a return through the access charge for that same risk.

It is noted that an access seeker could challenge an access condition or the quantum of the condition through the dispute resolution process. However, as drafted, UT3 permits the potential double recovery and therefore a dispute may not remedy the matter. Asciano suggests that the provision of a requirement on QR Network to prove that the condition does not lead to an over-recovery compared to the risk included in cl 10.1.4, based on the model contained in cl 10.1.4(f), would provide a reasonable safeguard to an access seeker while allowing QR Network to legitimately offset a disproportionately large risk which might otherwise prevent the investment from proceeding.

Comment 30 Access Conditions

✓ Asciano supports the proposal to allow QR Network to price outside of the revenue limits where it has received specific QCA approval to do so.

✘ While it may be reasonable in some circumstances for QR Network to impose an "access condition", the provision as drafted in UT3 would allow QR Network to over-recover on its investment.

? Asciano suggests that the inclusion of a requirement on QR Network to prove that it is not over-recovering its investment through the imposition of the access condition would provide an appropriate safe-guard while allowing QR Network to legitimately offset a disproportionately large risk.

5.7 Changes To Schedule F

"The Authority seeks comments on whether:

- the proposed single tariff for the Goonyella and Blackwater systems is appropriate;
- QR Network's revised approach to minimum contribution to common cost is appropriate;
- QR Network's proposed system test is an appropriate replacement for the cluster entry test and adequately addresses any concerns of stakeholders; and
- QR Network's approach to dealing with cross-system tariffs is appropriate."

As a general comment, it would have been particularly helpful for a comparison to be provided for reference tariffs under the current structure and the proposed UT3 structure. In the same vein, it would have been of significant help had the QR Submission provided worked examples of the common cost contribution and system entry tests. That this has not been provided makes it particularly difficult to form a complete view of the proposed changes. Therefore, the comments in this paper regarding reference tariff structure must be considered as preliminary until such time as comparative data and illustration of the application of the new arrangements is made available.

Asciano supports the removal of the clusters from reference tariffs and the adoption of a specified premium or discount to deal with outlying movements as proposed in UT3. While the initial rationale for separating the larger systems into clusters may have been sound, the continual creation of clusters with new mines and the demonstrated difficulty of administering the cluster approach over the lives of UT1 and UT2 show that this concept is no longer helpful.

Asciano supports the concept of the system entry test and the associated common cost contribution but is has insufficient data to be able to comment on the appropriateness of the application of the proposal as contained in UT3.

Asciano supports the proposal for dealing with cross-system traffics. The arrangements appear both fair and administratively feasible.

Comment 31 Changes to Schedule F

? Comments in this submission must be considered preliminary in the absence of any data that would allow a fair comparison between the existing reference tariff structure and that which is being proposed in UT3. Similarly, the lack of illustrative examples for the application of the common cost contribution and system test prevents a firm view being formed.

✓ Asciano supports the adoption of single tariffs in each of the larger systems and the abandonment of the cluster system.

✓ Asciano supports the concept of common cost contribution and the system test. In principle, the premium and discounts derived appear sound but Asciano is unable to comment on the quantum derived in each case.

✓ Asciano supports the concept for determining cross-system charges.

5.8 Pricing For Electric Infrastructure

"The Authority seeks comments on whether adopting a single AT5 tariff for the Blackwater and Goonyella systems is a reasonable approach to improving the signals for the efficient use of the electric infrastructure in central Queensland."

QR Network has presented a the case in its Principles Paper that the current differential charge for electric traction infrastructure has the potential to influence the deployment of the electric locomotive fleet that, in turn, can have unwarranted impacts on both the operations and cost of the Blackwater and Goonyella systems.

This argument is based on the interchangeability of electric locomotives between the two systems. It is true that the older of QRNational fleet of electric locomotives are interchangeable between the two systems. However, the new generation locomotives that are being brought on stream now and over the next few years by both QRNational and Pacific National are not currently able to utilise the Blackwater system. Asciano is aware that QR Network is working towards resolving the technical issues that prevent the new generation locomotives using the Blackwater system. Asciano understands that the remedial work is currently being scoped but at this time completion is not expected until around 2012.

Asciano accepts the merit of QR Network's argument for a single AT_5 tariff to apply to the two systems (and presumably also to Newlands once the GAP is commissioned). To this extent, Asciano supports the proposal for a uniform AT_5 tariff in UT3. However, such support is conditional on being able to use electric locomotives interchangeably between the systems. As the current timing to achieve this is towards the end of UT3, it is appropriate to consider whether the unification of AT_5 would be better dealt with under UT4. Of course, if a genuine annual price reset was adopted, it would be a much simpler matter to incorporate the single tariff in the year that the uniform capability of the networks was achieved.

Comment 32 Pricing for electric infrastructure

✓ Asciano accepts the benefit of having a single AT_5 tariff where electric locomotives are able to be used interchangeably between systems.

✘ As interchangeability does not currently exist for the new generation electric locomotives, Asciano is unable to support the adoption of a single AT_5 at this time.

5.9 Revenue Cap

The Authority seeks comments on whether:

- QR Network's revenues should be 100% invariant to volumes on the central Queensland coal system; and
- QR Network should retain an exposure to revenue variability, in particular to create an incentive to improve the efficiency of the coal supply chain or where QR Network does not provide access due to its own breach and negligence.

The QCA Issues Paper expresses concern at the proposed removal of incentives on QR Network to perform.[64] Asciano understands this concern but suggests that the nature of a rail network is such that the availability of modest positive or negative incentives are unlikely to drive track owner behaviour and that to be effective, the incentives would need to be substantial larger than was provided for under UT2.

It is also clear that the disincentive to QR Network under UT2 was couched in such terms that it will be exceedingly difficult to invoke, and therefore it too is of dubious effectiveness. It was necessary to prove breach or negligence on the part of QR Network, a complex and difficult exercise at best. This was made all the more difficult given the current structure of access contracts and "pass-through" arrangements and the reality that the majority of coal access capacity is contracted through a QR Network related entity. Regardless of any separation argument, it would take a supreme optimist to expect that QRNational would have a significant incentive to pursue a difficult case through the QCA to prove QR Network negligence! For certain, an end customer could attempt to pursue the issue, but it would be even more difficult for a third party to make the case, not to mention possible issues of privity given that the provision is couched in terms of breach of an access agreement.[65]

As the QCA Issues Paper suggests the incentives are "muted". In Asciano's view they are muted to the point of irrelevance except to provide an opportunity for disagreement and confusion. Asciano does not support a view that some incentive, no matter how muted, is better than none.

The current arrangements in the NSW Hunter Valley, where prices are also constrained by a revenue cap, do not include an incentive regime to apply to ARTC for coal hauls.

Asciano agrees with the QCA's observation that retaining AT_1 outside of the revenue cap does not expose QR Network to volume risk, despite QR Network's assertion to the contrary. This would be even more the case if the reduction in the AT_1 component proposed by QR Network is accepted.

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[64] QCA Issues Paper, pp 17-18

[65] UT2008 Schedule F Part A cl 5.2 definition of "System Allowable Revenue" paragraph (iii) and also Part A cl 3.3.7A

Asciano suggests that the search for an effective revenue based incentive regime will be elusive. Therefore Asciano supports the removal of both of the UT2 incentive arrangements. Instead emphasis should be placed on the reporting of performance indicators such as those suggested in QR Network's "Service Level Specification for Rail Infrastructure Maintenance" Discussion Paper. This will provide objective measures on performance and empower access seekers and end customers to bring pressure on QR Network to perform if network performance declines. As noted by the ACCC in its recent decision on the ARTC Interstate Access Undertaking with regard to the issue of network performance:

"The ACCC notes, however, that track and service quality are essential to promoting efficient use of, and investment in, the network. While the ACCC is of view that key performance benchmarks are not required at this stage, evidence of sustained deterioration in track or service quality would warrant reassessment of this position in future undertakings. In this regard, the commitment by ARTC to report quarterly and annually on a number of key performance measures provides a transparent base on which to assess track and service quality over the term of the Undertaking."[66]

and also in the Draft Report:

"Regular public reporting and auditing of performance indicators makes network performance more transparent, assisting users of the network and the regulator to identify if service deterioration is a problem, and aiding potential access seekers in their negotiations with ARTC, by providing a means of gauging reasonable expectations of service standards, which can be weighed against proposed access charges."[67]

Comment 33 Removal of incentives from the revenue cap

✓ Asciano supports the removal of the incentives (positive and negative) from the revenue cap as these are ineffective to drive system performance.

5.10 Variation From Reference Train

"The Authority seeks comments on whether:

- the formula for calculating the reference train path (rtp) multiplier for non-standard trains is appropriate; and
- if not, how it should be amended."

Determining the reference train multiplier for non-standard trains has been a controversial issue since the initial draft of UT1. The quantification of the effect of a non-standard train on both the direct capacity consumed and also the impact on other trains (both standard and non-standard) is complex and beset by conceptual and practical difficulties, not the least of which relate to the impact that the multiplier will have on competition to above provide above rail services.

The formula proposed in UT3 is the same as used in UT2 and represents a compromise that seeks to:

- send a signal to train operators regarding the impact of their trains on network capacity

[66] ACCC, "Final Decision Australian Rail Track Corporation Access Undertaking - Interstate Rail Network", July 2008 p 69

[67] ibid, Appendix B (Draft Decision) p 230

- avoid unintended impacts on above rail competition; and
- allow repeatable computation and the avoidance of subjective judgement.

As the QCA Issues Paper rightly points out, this has the effect of discounting prices for faster trains as well as increasing the cost for slower trains.[68] Asciano agrees with the QCA that trains of differential speed can both consume more capacity the a standard train.

The impact of the faster train only arises if, along with the faster speed, it is given a higher priority than the standard train. A faster train than the standard without higher priority merely catches up to the train ahead of it and then progresses through the network at that speed unless it is able to pass without being given higher priority. Asciano notes the following practical issues apply to the CQCR:

- the current reference trains have a high power to weight ratio and are therefore "fast" compared to many heavy haul rail systems around the world. It is unlikely that coal trains in the CQCR would seek to be faster than the current reference train without a significant shift in other system or external factors.
- the faster trains that do operate in these systems are freight and passenger trains. These are unlikely to be paying access charges at the ceiling and are not subject to the same reference tariff structure that applies to coal trains. Therefore the AT_2 multiplier issue is unlikely to be relevant to them.

On the basis that the discount, while conceptually possible, is unlikely to arise, Asciano supports the current formula for the determination of the multiplier.

Comment 34 Calculation of the reference train path multiplier

✓ Asciano supports the current formula for the determination of the multiplier.

6 Other Matters

6.1 Liability & Indemnity Issues

As noted in the QCA Issues Paper,[69] the standard access agreements have not been provided in the documentation available from QR Network prior to the deadline for this submission. It is therefore not possible to comment on those documents. However, QR Network has flagged changes in the standard agreements through changes made to UT3 Schedule E. Schedule E covers principles for inclusion in an access agreement, and through UT3 clause 5.2(e)(i) any approved standard agreement would incorporate the principles set out in Schedule E.[70]

The changes of substance to Schedule E relate to:

- Indemnities and liabilities
- Limitation of liability

68 QCA Issues Paper p 18

69 QCA Issues Paper p 1

70 UT3 clause 5.2(e)(i) requires the QCA to be satisfied that a standard agreement is consistent with Schedule E before giving its approval for that standard agreement.

The changes proposed are different to the matters in this area that were of some contention during approval of UT2008.

Asciano accepts the proposed changes relating to limitation of liability (Schedule E clause 15) and the corresponding change to the definition of Consequential Loss (UT3 cl 11.1). These are of a drafting nature and do not change the basic intention of the principle. However, the definition of Consequential Loss should be modified so it is clear that all QR entities constitute "third parties" for the purposes of that definition. Without this clarification if, for example, QR Limited pursues QR Network for a claim, that claim will not constitute consequential loss for QR Network's purposes and the carve-outs that apply to prevent QR Network from claiming consequential losses from an access seeker will not apply.

With regard to Schedule E clause 14 relating to indemnities and liabilities, the changes are directed to imposing risk on the train operator for any incident relating to the carriage of dangerous goods. It is unfortunate that the QR Network Submission implies that this change is merely the documentation of a previously understood position.[71] Asciano is unaware of any previous regulatory discussion whereby it was considered reasonable and appropriate for QR Network to be absolved of its own negligence or wilful act.

To the contrary, the basic principle with regard to liabilities and indemnities since the first Schedule E in UT1 was that each party remained responsible for claims made against it except to the extent that the other party contributed to the cause (eg through wilful default or negligence).[72] The only exception has been that the train operator was responsible for claims generated by passengers on a train. Therefore the QR Network proposal actually represents a substantial change of policy from a position that has been applied consistently from 2000.

Asciano strongly objects to the proposed modification on a number of grounds:

- it represents a substantial change in the risk position of the parties.
- it requires the access holder to bear the consequences of QR Network's actions, including negligence and wilful default, matters over which the operator has no control.
- on the basis of the QR Network argument, in the case of coal traffic that is at the ceiling, the change in risk ought to be factored into the rate of return being sought by QR Network as a discount for a reduction in risk, but this is not mentioned in its submission on rate of return.
- in the case of non-coal traffic that is competing against road, this represents a risk and cost imposition that is not imposed on road vehicles and therefore is contrary to Queensland Government policy to prefer the movement of dangerous goods by rail.[73]

Comment 35 Liability & indemnity issues

✓ Asciano supports the change to Schedule E cl 15. However, the definition of Consequential Loss (UT3 cl 11.1) should be modified so it is clear that all QR entities constitute "third parties" for the purposes of that definition.

✗ Asciano strongly objects to the proposed imposition of liability for dangerous goods claims on the access holders regardless of cause or contribution.

[71] QR Network Submission Volume 1 p 68

[72] UT1 Schedule E clause 14, UT2 Schedule E clause 14, UT2008 Schedule E clause 14

[73] Queensland Transport does not impose any specific access charge for the movement of dangerous goods on road, nor is the road vehicle owner or operator required to indemnify Queensland Transport of the Department of Main Roads or any local road owner against claims with respect to dangerous goods.

6.2 "Split" Access Contracts

The QR Network Submission[74] acknowledges the intention to adopt a new form of access contract separating the holding of capacity from the operation of trains. This initiative is strongly supported by Asciano, its customers and the QRC.

It is understood that QR Network intends to produce standard agreements in this form prior to the approval of UT3. It is hoped that this is achieved. However, in the event that it isn't Asciano would prefer to see UT3 make specific acknowledgement of the intention to have such arrangements in place as soon as possible.

As drafted, Schedule E contemplates a "traditional" form of access contract that encompasses both train operations and the holding of capacity. Through cl 5.2, a standard access agreement must be consistent with Schedule E. It is therefore likely that changes would need to be made to both Schedule E and cl 5.2 (and possibly cl 5.1) to accommodate the split contract form.

Comment 36 Accommodation of split contracts

? It is likely that Schedule E and clauses 5.1 and 5.2 will require amendment to accommodate standard access agreements that no longer include all the elements currently contained in the standard contracts.

6.3 Negotiation Conditions

The QR Network Submission states that no substantive change has been made to UT3 cl 4.6 regarding negotiating conditions.[75] However, the previous provision under UT2 cl 4.6(a) providing expressly for an access seeker to withdraw from negotiations has been deleted in UT3. This might seem a pedantic point as it is presumably open to an access seeker to withdraw from the negotiation at any time, however it is a little concerning that no mention is made of this change in the submission. More to the point, presumably the former cl 4.6(a) provided a definitive notice of the abandonment of the access application such thus enabling QR Network to manage its queuing system (eg offer the access rights to another party in the queue).

It would be helpful for QR Network to explain its intentions with regard to the change and whether it sees this having any impact on its queuing arrangements.

6.4 Costing Manual

Asciano has previously argued that the Costing Manual does not add any value to the undertaking and is not suited to the task of ensuring that QR Network's costs and revenues are adequately measured and reported. This was amply demonstrated by the significant

74 QR Network Submission, Volume 1, p 20

75 QR Network Submission, Volume 1, p 60

understatement of QR Network maintenance costs in UT2 and subsequent need to amend the undertaking to take the error into account.[76]

The Costing Manual only features in UT3 in cl 3.2, dealing with the preparation of financial statements for QR Network. Asciano queries whether financial statements actually assist any party in determining any of the matters relevant to UT3 eg reference tariffs, the revenue floor or ceiling. In each case, these are constructed from a combination of both accounting and economic concepts and are not derivable directly from financial statements as such. For example, the DORC valuation of the CQCR may have no resemblance to the book value of the network used for financial statements. Similarly the estimates of costs and revenues and the various timing adjustments are likely to be treated quite differently for financial statements compared to their use for determining reference tariffs.

The preparation of financial statements in UT3 already refers to the use of Accounting Standards – expressly in the case of UT3 cl 3.2.1(a)(ii) and by implication in cl 3.2.1(a)(i). It is difficult to see what the Costing Manual adds to that requirement. Nor is it obvious what use those statements have in determining the key pricing issues under UT3.

If there is a valid role for the Costing Manual then this needs to be identified to justify the effort that is expended in its preparation, maintenance and approval.

6.5 Natural Justice Clause

The final form of UT2 included a "natural justice" clause. This clause repeated the causes of action open to a party under the *Judicial Review Act 1991* (Qld).[77] Due to the circumstances surrounding the approval of UT2, this was not a matter that received much stakeholder consideration.

However, the natural justice clause has again featured in UT3 and Asciano believes that it is appropriate to comment on this.

The clause repeats those matters that would allow a court to find that a decision-making entity had not accorded "procedural fairness", otherwise termed "natural justice", in making a decision under administrative law. The *Judicial Review Act 1991* (Qld) applies widely to administrative decisions and by s 4 applies to any decision made by the QCA under an act of the Queensland Parliament, eg the *Queensland Competition Authority Act 1997*. It is not open to either QR Network or the QCA to "opt out" of the natural justice provisions – the only exceptions to the application to Queensland administrative decisions are those expressly nominated in the *Judicial Review Act 1991* itself. Therefore it is completely unnecessary for these matters to be stated or even alluded to in UT3. In fact UT3 goes one step further and not only lists the causes of action available, but then compounds the matter by reserving those very same rights through direct reference to the *Judicial Review Act 1991*.[78]

Asciano is unable to find any logical reason for either:

- Listing the causes of action that are open to QR Network as a matter of inalienable right; or
- Referencing those rights explicitly.

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[76] See, for example, "QR Draft Amending Undertaking Revised Maintenance Cost Forecasts for 2005 Access Undertaking Submission to the QCA", May 2007 p 30 wherein QR explains that its forecast maintenance costs were "fundamentally flawed" even though the Costing Manual was in place at the relevant time.

[77] Compare *Judicial Review Act 1991* (Qld) ss 20(2), 21(2) and 23 with UT2 cl 5.2(m), 6.4.2(o)

[78] UT3 cl 10.2(d)

In the absence of any genuine necessity for the setting out of parts of the *Judicial Review Act 1991* within UT3, Asciano sees the inclusion of clause 10.2 as provocative, implying as it does that the QCA is not aware of its obligations to apply procedural fairness in all of its decisions.

Asciano is also concerned that the language proposed by QR Network may purport to restrict the QCA's statutory scope of involvement. UT3 cl 10.2(a)(iv) authorises the QCA to make a decision under if only if the undertaking expressly authorises the QCA to do so. This is a significantly narrower scope than the drafting in the *Judicial Review Act* which UT3 appears to be intending to incorporate as the *Judicial Review Act* refers to the Act empowering the decision, not the subordinate instrument – in this case UT3 itself.

Comment 37 Other matters

? It would be helpful for QR Network to explain its intentions with regard to the removal of cl 4.6(a) and whether it sees this having any impact on its queuing arrangements.

✘ Asciano is of the view that the Costing Manual serves no useful purpose and should be abandoned.

✘ Asciano is of the view that the inclusion of the "natural justice" provision, UT3 cl 10.2, is provocative and otiose. It should be deleted.