

Submission to the ACCC

**ARTC Revised Draft Hunter Valley
Access Undertaking Submitted to
the ACCC in April 2011**

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1 EXECUTIVE SUMMARY

Asciano welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (ACCC) on the Australian Rail Track Corporation (ARTC) revised Hunter Valley Access Undertaking (HVAU), which was submitted by ARTC to the ACCC in April 2011.

Throughout the HVAU submission and revision process Asciano has made numerous submissions to the ACCC. Despite this Asciano continues to have significant concerns in relation to the timing and process of the determination of the efficient train configuration and efficient pricing structures as these matters have not been adequately addressed by the ARTC in the current revised HVAU. In addition, once the efficient train configuration and efficient pricing structures have been determined Asciano has strong concerns regarding the timetable for their implementation and the limited opportunity some access holders may have to utilise this train configuration and pricing structure.

Asciano also continues to hold the positions it has previously put forward on numerous issues related to the HVAU and to the extent they are not included in this submission this should not be taken as an indication Asciano has changed its position on issues previously raised. In particular, Asciano continues to maintain that the HVAU requires improved transitional provisions, a reconsideration of the informational and contractual relationships between the ARTC, access holders and operators and continuing scrutiny of pricing structures and the process to develop the efficient train configuration.

This submission is public.

2 ASCIANO'S POSITION ON THE GENERAL HVAU REVISION PROCESS

Throughout the HVAU submission and revision process Asciano has made numerous submissions to the ACCC. As requested by the ACCC in its Consultation Paper, this current submission will address the changes in drafting in the HVAU and associated indicative agreements.

However, Asciano notes that many of the issues that Asciano has raised throughout this process have not been addressed by the ARTC in the changes in drafting in the HVAU and associated indicative agreements. Asciano continues to hold the positions it has previously put forward on these issues and to the extent that those positions are not included in this submission this should not be taken as an indication Asciano has changed its position on the issues previously raised. This submission builds on arguments and positions put forward in Asciano's previous submissions.

In particular, Asciano continues to maintain that the HVAU and associated indicative agreements require:

- improved transitional provisions;
- reconsideration by the ACCC and ARTC of the nature of obligations placed on the operator by the access holder agreement, given that the operator is not a party to this agreement, or alternatively, make the operator a party to the access holder agreement;
- reconsideration by the ACCC and ARTC of contractual issues; and
- reconsideration by the ACCC and ARTC of pricing structures and the process to develop the efficient train configuration.

Asciano believes that these major concerns which have been previously raised have not been adequately addressed, and given the importance of these concerns, several of these issues are re-addressed in this submission.

More generally Asciano is concerned that the HVAU includes critical areas, such as the determination of the efficient train configuration, where, as currently drafted, major work remains to be completed by the ARTC following this HVAU review. Asciano considers that the Final Decision on the HVAU should address all

outstanding issues in order to ensure that the access and pricing approach decided upon is internally consistent Asciano has a general concern that by deferring resolution of the various outstanding matters, and potentially making decisions on these matters in isolation, the single and integrated nature of decision making in relation to the HVAU has the potential to be diluted. Asciano has a preference that in future reviews of the HVAU, decision-making in relation to specific undertaking components not be deferred or otherwise separated.

Throughout this HVAU consultation process Asciano has strongly and consistently raised concerns regarding the both the process for determining the efficient train configuration and the characteristics of the proposed pricing structure. As currently proposed both of these issues provide very strong incentives for inefficient train operation in the Hunter Valley. These issues are addressed in some detail in the section below.

3 EFFICIENT TRAIN CONFIGURATION & PRICING

Asciano continues to be very concerned with the inefficiency of the ARTC's pricing proposal and the resulting capacity impacts.

3.1 Efficient Train Configuration and Pricing

Throughout the HVAU process Asciano has raised strong concerns with the process and time frames relating to the determination of the efficient train configuration and pricing.

Asciano understands from the current HVAU review process that the ARTC has not defined an efficient train configuration and therefore is unable to implement efficient pricing. Given this approach, it could be assumed that the ARTC believes that the efficient train configuration and pricing has a minimal impact on capacity. ARTC's belief must be based on the fact that implementing this inefficient price structure will not lead to a change in behaviour of market participants. Asciano strongly disputes this and believes that the determination of the efficient train configuration and pricing is the key component in determining track capacity and coal chain capacity. It is unarguable that an increase in the number of smaller trains operating in the chain (by choice rather than to due to infrastructure limitations) will materially reduce coal chain capacity.

The HVAU is essentially a document relating to the contracting of track capacity and thus the issue of the efficient train configuration and prices must be resolved prior to the finalisation of the HVAU. To finalise the HVAU prior to determining the potential level of track capacity to be contracted is a fundamental flaw that must be addressed.

Not determining the efficient train configuration prior to the finalisation of the HVAU will create significant coal chain uncertainty and disruption as the total track capacity to be contracted is unknown. Given the rapid growth in the coal export industry and the current congestion and capacity constraints in the coal chain, it is imperative that train capacities are maximised to match infrastructure capabilities through the determination of the efficient train configuration and implementation of efficient prices as soon as possible.

3.2 Carve-Out Clause

We discuss below the flaws in how the HVAU deals with calculating and implementing an efficient train and pricing configuration. This process is however completely undermined by the carve-out contained in 4.15 a) vii). This clause in effect guarantees the continuation of the current inefficient pricing until 2014 regardless of the outcome of the efficient train configuration analysis. This undermines actions aimed at implementing efficient pricing as soon as practicable, the intention of which is to in turn ensure pricing signals which will then drive optimised operating and investment activity, thus optimising coal chain capacity.

The carve-out clause in effect guarantees the continuation of ARTC's inefficient pricing proposals for four years. Asciano's concerns around ARTC's pricing proposal have been raised on a number of previous submissions but can be summarised as:

- Gross tonne kilometre (GTK) is not the major driver of costs: costs are largely driven by the number of train journeys. Thus the pricing structure proposed is not cost reflective;
- The pricing structure incentivises the use of shorter trains which will in turn significantly impact on the capacity of the network. It needs to be recognised that an operator of longer trains will have less paths per million tonnes of throughput than other above rail operators who run shorter trains. Thus the operator of longer trains will have:
 - less pathing flexibility to deal with coal system variability and unplanned failures; and

- less available paths per million tonnes of throughput to manage performance-based above rail contracts in a competitive market; and
- The pricing structure provides inefficient investment signals over a period (to 2014) when significant above rail and below rail investment is needed.

The argument put in favour of the four year carve-out as avoiding price shock is flawed. Moving from inefficient pricing to efficient pricing necessitates a change of prices. ARTC's approach is to put off that price shock for four years. A more appropriate response to the issue would be to determine efficient pricing now and provide details of a transition to these new efficient prices over time. This avoids price shock and facilitates efficient pricing being used in investment decisions that will need to be made in the next few years.

If the draft HVAU is implemented as is, Asciano believes that no above rail operator in this market should be criticised from responding to the market and the regulatory environment by reducing their operating risk (even at the cost of coal chain capacity) by running shorter trains.

3.3 Implementing the Efficient Train Configuration

Section 4.17 b) of the draft HVAU regarding the determination of efficient train configuration has removed the previously identified time frames (which were unacceptably long) and replaced them with a comment "to be determined"¹. Asciano is very disappointed that section 4.17 b) contains no firm time frames. Asciano welcomes any move to reduce these time frames such that the efficient train configuration is determined prior to the commencement of the HVAU, and remains strongly concerned that delays to this process will exacerbate congestion in the Hunter Valley.

In addition to the points above Asciano is particularly concerned that the HVAU section 4.17 b) as currently drafted does not even meet the requirements of the ACCC Position Paper released on 21 December 2010. Asciano views the fact that the HVAU does not reflect the Position Paper as further evidence of the ARTC's reluctance to engage with the issue of determining the efficient train configuration.

¹ Similarly the ARTC paper "Explanatory Guide - ARTC Response to ACCC HVAU Position Paper" identifies the timing of the efficient train configuration as issue number nineteen, the ARTC response to this issue is "to be determined".

3.4 Potential for Delays and Limitation in the Implementation of the Efficient Train Configuration and Efficient Pricing

In addition to the carve-out clause discussed above, Asciano has previously raised concerns with the potential for delay in implementing changes in the efficient train configuration and efficient pricing. Asciano's position is that once the efficient train configuration has been determined there should be an explicit requirement for ARTC to adjust pricing to reflect this configuration as soon as possible and to implement this pricing for both existing access holders and new access seekers.

Asciano remains very concerned about the time frames required to implement the potential changes in the efficient train configuration and efficient pricing.

Section 4.17 e) ii) of the draft HVAU states that following acceptance of the indicative service and charges the ARTC will then offer this service and charges to applicants and existing access holders (who seek to vary their agreements so as to be operating indicative services). This offer will apply in the year following the date of the change. Asciano believes that this approach is unacceptable and that efficient train configurations and efficient pricing should be implemented for all existing access holders and new access seekers as soon as possible after a decision has been made. Any delays to the process or limitations on who is offered the train configuration and pricing will delay the move towards efficient operation and exacerbate congestion in the Hunter Valley.

In addition to the delays addressed above Asciano is concerned that the efficient train and efficient pricing concepts are not addressed in the HVAU with respect to Gunnedah Basin operations. Asciano does not believe a differential regulatory approach can be applied for the Gunnedah Basin and is concerned that the HVAU is silent in this regard despite many parties being actively engaged regarding this issue.

Overall, Asciano believes that once the efficient train configuration has been determined there should be an explicit requirement for the ARTC to adjust pricing to reflect this configuration as soon as possible and implement this pricing for both existing access holders and access seekers.

4 ISSUES PREVIOUSLY RAISED

4.1 Transitional Issues

Asciano has previously raised concerns regarding issues of transition between the current and proposed regulatory and commercial arrangements. Asciano appreciates that the ARTC has provided a guide relating to the transition of regulatory arrangements in Appendix 5 of the Explanatory Guide released in September 2010 and has written to stakeholders in December 2010 further outlining details regarding transition.

However, Asciano continues to have concerns with transitional issues and processes including:

- *Impacts on Track Capacity* – ARTC modelling and forecasting is currently overestimating Hunter Valley system capacity and does not seem to fully consider the impact of system congestion on system capacity. A transition to a new regulatory and contracting system in this environment of inaccurate modelling and system congestion is likely to further exacerbate system congestion in the short term. Asciano believes the ARTC needs to take into account the impact that transition will have on system capacity and congestion in its forecasting and operational activities.
- *Operations Under Two Contracting Models* – during the transitional period rail operators will be operating trains under two contracting models. This raises concerns relating to whether trains under one model receive preference (Asciano understands the new model will receive preference) and whether an operator using paths contracted under both contracting models can use paths obtained under one model to serve mines who may be contracted under the other model. More generally Asciano believes that pathing, scheduling, regulatory transition and commercial transition will all be significantly more complex and problematic than has been admitted by the ARTC to date. Consequently the transition planning that has been provided for does not adequately deal with this complexity.

These issues were separately raised in 29 December 2010 correspondence from Asciano to the ARTC. Asciano believes that further discussion of transitional arrangements is required to reduce uncertainty and the potential for delays and

misalignment. These discussions should take place before the execution of an access holder agreement and/or an operator agreement with any parties

4.2 Operator Review of the Access Holder Agreement

Asciano has previously raised a concern about the contracting model and the fact that whilst the access holder agreement contains obligations that impact upon operators, operators are not parties to such agreements and indeed the operator does not even have a right to view the access holder agreement. This is problematic as the operator's agreement effectively requires the operator to comply with the terms and conditions of the access holder agreement, but the operator is not necessarily permitted to view the access holder agreement. Asciano believes that the operator must have a right to view the access holder agreement as agreed between the ARTC and the access holder prior to the operator agreeing the operator agreement.

Asciano believes that it is reasonable that the operator have a right to view the access holder agreement so that the operator can fully understand all of the obligations the operator has under the both the operator and access holder agreements. This is particularly important as Asciano needs to be able to determine the nature of what the access holder is proposing to contract over time, in terms of both tonnes and paths. This then allows Asciano to determine the rail haulage task, the risks associated with this task and the alignment of the access holder agreement with Asciano's commercial agreement with the access holder.

4.3 Contractual Issues

In previous submissions Asciano has raised concerns in relation to:

- access holder agreement clauses relating to limited agency and the introduction of new clauses and obligations into access holder agreements; and
- operator agreement clauses relating to complexity and uncertainty in liability and indemnity clause, the introduction of new clauses and obligations into operator agreements, in particular clauses which allow agreed contracts to be varied by regulatory instrument after the fact of the contract, which in turn has the potential to impact on the commercial viability of the agreed contract.

Asciano believes that these issues should be reconsidered by the ARTC and ACCC to ensure equitable treatment of operators.

4.4 Other Issues Arising from the Amended HVAU, IAHA and OSA

Asciano has some concerns about some of the new or amended wording including those sections outlined below.

4.4.1 Review of the Undertaking

HVAU section 2.3 now requires a review of the HVAU after five years. The review is conducted by ARTC and at the completion of the review the ARTC publishes a report on the review, and then may submit variations to the HVAU to the ACCC.

Asciano has concerns that this process may not be independent in that the ARTC is effectively conducting a review of a process in which it is the major participant. The review process should seek input from all market participants.

4.4.2 Confidentiality

HVAU section 3.5² has been amended to clarify that the parties to the confidentiality requirements and obligations in the HVAU apply to the ARTC and the access holder. Asciano believes that there may be instances where it is appropriate that other parties, particularly operators, may be required to meet confidentiality obligations and benefit from confidentiality protections. As such Asciano believes that this section should provide some scope for broader application of confidentiality requirements and protections.

On a separate issue related to confidentiality the Indicative Access Holder Agreement in section 15.3 states that the

ARTC and the Access Holder may disclose confidential information ... to an Operator to the extent it is to an Operator to the extent that it is necessary or desirable for the parties to do so for the purpose of complying with this agreement

Asciano believes that the current drafting provides no obligation on the ARTC and the access holder to provide necessary information to the operator. Asciano believes that there should be an absolute requirement on the ARTC and access holders to disclose confidential information to the operator when that information has an impact on either operation or safety.

² A similar amendment also occurs in section 15.1 of the Indicative Access Holder Agreement.

4.4.3 Unders and Overs Accounting

HVAU section 4.9 has been clarified and in certain instances where the ARTC waives take or pay charges the ARTC is now allowed to recover these waived charges via the “unders and overs” accounting adjustment process. While Asciano is not opposed to this amendment Asciano has some concerns that waiving charges for some users and requiring them to be carried by other users may result in a perception of inequitable treatment of users. To address this issue Asciano seeks that the adjustment process be subject to a high degree of transparency and provide an opportunity for consultation.

4.4.4 Network Connections

HVAU section 6 a) addresses network connections. Asciano believes the following minor changes should be included:

- in section 6 a) iv) the word “reasonable” should be inserted before the word “directions”; and
- in section 6a) vi) the words “as determined by the ARTC should be deleted or otherwise clarified.

4.4.5 ARTC Performance Incentives and KPIs

HVAU sections 13.3, 13.4 and 13.5 have been substantially amended and outline new systems and processes for developing both “true-up test” performance incentives and “non-true-up test” performance incentives and a process for reviewing the system wide “true up test”.

Asciano’s concerns about these proposals are:

- the lengthy twelve month time frame required to finalise the “non-true-up test” proposed performance incentives scheme as outlined in HVAU 3.13 b); and
- the potential for operators to be marginalised in any true up test review. The true-up test is largely concerned with determining and resolving issues relating to system availability shortfalls. However, as currently drafted there is no explicit mention of consultation with operators being required in these processes. Given that operators (rather than access holders) are physically operating on the Hunter Valley rail system the requirement to consult with operators in reviews and consultation should be recognised more explicitly.

Asciano believes that the time frames in section 3.13 and the role of operators generally should be reconsidered by the ARTC and ACCC.

4.4.6 Definitional Issues

The HVAU now includes a definition of the term “project” however the term project appears throughout the HVAU in both capitalised and uncapitalised forms. In final drafting of the HVAU Asciano believes that some consideration should be given to addressing this issue as it has some potential to cause unnecessary confusion. This may be done by replacing the defined term “Project” with the term “Additional Capacity Project”.

The HVAU now includes a definition for Track Related System Assumptions. Asciano notes that in early May 2011 the ARTC via the ACCC provided an example of the Track Related System Assumptions. The assumptions provided are essentially a set of axle loads, train lengths and sectional run times. Asciano believes that the assumptions provided were not sufficiently comprehensive and would expect more information about system paths (eg the number of paths per hour) and system operations in a set of Track Related System Assumptions.

The HVAU now includes two definitions of the term “Segment Specific Assets” which refer to different concepts. This should be addressed.

5 CONCLUSION

Throughout the HVAU submission and revision process Asciano has made numerous submissions to the ACCC. Asciano continues to have concerns regarding the timing and process regarding the determination of the efficient train configuration and efficient pricing structures. In addition, once the efficient train configuration and efficient pricing structures have been determined Asciano has concerns regarding the timetable for their implementation and the limited opportunity some access holders may have to utilise this train configuration and pricing structure.

In addition Asciano continues to hold the positions it has previously put forward on numerous issues related to the HVAU and to the extent they are not included in this submission this should not be taken as an indication Asciano has changed its position on issues previously raised. In particular Asciano continues to maintain that

the HVAU requires improved transitional provision, a reconsideration of the informational and contractual relationships between the ARTC, access holder and operator and continuing scrutiny of pricing structures and the process to develop the efficient train configuration.