Asciano Submission

ACCC Issues Paper:
ARTC Rail Access Undertaking

February 2008

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1 Introduction

This is the fourth submission by Asciano/Pacific National (PN) commenting on ARTC's Undertaking in its various forms. A number of other stakeholders have committed a similar level of resources to this process. In one sense, this demonstrates the strength of a process that allows for significant stakeholder input. However, it also shows the ineffectiveness and inefficiency of the process, given the number of issues raised by stakeholders that have not been dealt with by the ARTC. We do not contend that ARTC has any obligation to accept a stakeholder's views; but for the process to be effective, we do expect that ARTC should not only consider concerns raised by stakeholders, but should demonstrate that it has considered them and where it decides not to address the concern raised, explain why it has adopted that position.

Asciano is a member of the Freight Rail Operators Group (FROG) and fully supports FROG's submission to the ACCC. That submission not only deals with the questions contained in the ACCC Issues Paper in detail but also provides a comprehensive table illustrating the extent of issues that have been previously been raised with the ARTC but not addressed.

This submission does not cover the arguments contained in FROG's submission but instead highlights the key areas, amongst the many outstanding issues, which must be resolved before ARTC's undertaking should be approved. These areas are:

- Service Scope;
- Geographic Scope;
- Price escalation provision; and
- investment consultation process.

2 Service Scope

In essence there is insufficient information in the Undertaking on how non-indicative services would be treated particularly regarding price. If the Undertaking is accepted in its present form, there will be no regulatory scrutiny and as a result no price certainty. This applies to a minimum of 40% of the ARTC business and therefore represents a substantial lacuna in the regulatory scheme for rail access. This creates significant uncertainty for operators.

Non indicative services are a significant proportion of ARTC's business and are long standing services that do not change their characteristics. They include PN's steel services, industrial products such as limestone, clinker and cement, and our Intermodal Express service which is designed to provide a fast efficient service comparable to road. All these services are covered by one of the six charging categories already published by the ARTC.

Thus the usual reasons for having an indicative service/reference train approach, namely that "other" services are numerous, complex and constantly changing do not apply.

This is no academic concern. The current ARTC pricing proposal for NSW minerals has extreme impacts on access rates and for certain traffics on the viability for rail as a modal choice. The impact on access costs for a number of PN services under the ARTC pricing proposal (not accepted by PN) is contained in the confidential annex to the submission. In the December Undertaking these service would be classified as non-indicative services and thus there would be no regulatory oversight and nothing to prevent ARTC making step changes in rates similar to those they are currently proposing.

It should also be recognised that the failure to cover many traffics in the Undertaking also removes them from the proposed escalation provisions. While Asciano has significant concerns regarding these provisions within the Undertaking, they at least provide some guidance to operators as to future prices. Non-indicative services do not have even this rudimentary safeguard.

The Indicative Access Agreement (IAA) is drafted as being specific to "Indicative Services".[1] This unnecessarily restricts the utility of the standard agreement. In fact it is likely that this restriction would reduce the use of the indicative agreement to almost nothing as most operators are likely to have a mix of traffics, and under the December Undertaking that would take them out from under a pure "indicative service" model.

Had the IAA been crafted as a general platform for negotiation, it would have provided a reasonable basis for negotiation. As an alternative to the IAA, ARTC intends to offer "market terms and conditions". However, there is no regulatory scrutiny of what these are. The whole premise of an Undertaking under Part IIIA of the *Trade Practices Act 1975* is that the market has failed and requires regulatory intervention. ARTC's proposition flies in the face of this premise and assumes that a market based solution is readily available. A simple and significantly better outcome would be to make the IAA applicable as the basis for negotiation of all access agreements, not just the Indicative Service. This would bring all traffics within the ambit of the Undertaking and would remove the need to create a spurious reference to "market terms and conditions" where such a market is not freely operating.

To do this, some, but not a significant number of, amendments to the IAA would be required. For example the current use it or lose it provisions in the IAA are not appropriate for the campaign running required by many mineral traffics, nor is the emphasis on a fixed point-to-point static timetabled train path allocation.

The ARTC approach is to exclude a significant amount of its output from regulatory scrutiny thereby affording itself discretion in pricing and non price terms and conditions. This is inconsistent with accepted regulatory practice. For example, it would be analogous to Telstra to proposing a PSTN undertaking that only provided prices and regulatory oversight for say basic access and excluded regulatory oversight over the local call charges. It would be inconceivable that the ACCC would accept such a selective undertaking and Telstra has never suggested such an approach.

Telecommunications provides another useful analogy with the recent draft decision by ACCC to reject FANOC's 15 year access undertaking to its broadband network. One of the reasons for the rejection was that the access undertaking "*gives FANOC too much discretion to determine access prices over the 15 year undertaking period without sufficient regulatory audit and review … FANOC has too much unconstrained discretion in relation to determining non-price terms and conditions of access, including in relation to introducing or withdrawing BAS products …".*[2]

Asciano contends that given non-indicative services are excluded from the undertaking, the current ARTC access undertaking, mirroring the ACCC's views of FANOC's undertaking, gives the ARTC too much discretion to determine access prices over the life of the undertaking and too much unconstrained discretion in relation to non prices terms and conditions.

3 Geographic Scope

Asciano has three major remaining concerns on the geographic scope of the undertaking namely, Hunter Valley, additions to the ARTC network and yards and sidings.

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1 See front cover of the Indicative Access Agreement.

2 http://www.accc.gov.au/content/item.phtml?itemId=809822&nodeId=0ded9bb9aeeca3b6a1c74374fe074e91&fn=Telstra%20response%20to%20ACCC%20draft%20decision%20on%20FANOC%20SAU%20(4%20Feb%2008).pdf p6

3.1 Hunter Valley

Currently in NSW, PN operates under the NSW Rail Access Undertaking and has a single access contract with each of its three access providers, RIC, RailCorp and ARTC. After the introduction of the new ARTC Undertaking, PN will be operating under two access undertakings in NSW and have four access contracts, two of which will be with ARTC, ie for the Hunter Valley and non Hunter Valley access. This is an extremely complex situation. After the introduction of the proposed ARTC Hunter Valley access undertaking we would expect to continue to have two access undertakings and two access agreements with the ARTC.

Much of this complexity cannot be avoided and Asciano is supportive of the ARTC having a separate undertaking for the Hunter Valley. However, a number of traffics[3] need access to both areas and so to complete one journey will need to have two separate access contracts with the ARTC under two separate access undertakings. This would be avoided if Asciano's proposal for a region and traffic specific Undertaking was adopted. In this there would be a separate undertaking to cover the Hunter Valley region coal; the broader undertaking would cover all other traffic for the entire ARTC network, both on and off the Hunter Valley portion of the network.

The ARTC's approach adds complexity and contradicts the spirit of the COAG's stated intention to simplify and streamline rail access regulation. Even if Asciano's views are ignored and ARTC continues with its current approach it is vital that the interaction between the Hunter Valley Undertakings and the December Undertaking are understood prior to the approval of the December Undertaking. A number of significant questions about the interaction between the undertakings remain at large.[4] Ideally the two undertaking would have been considered concurrently but this would seem to be no longer an option.

3.2 Network Additions

Asciano welcomes the specific requirement to seek ACCC approval for new indicative access charges for the Southern Sydney Freight Line (SSFL) included in the December Undertaking. However, the December Undertaking expressly excludes any other inclusion within its scope. ARTC has already indicated that two other sections of the New South Wales rail network are likely to be acquired by ARTC in the near future:

- the RailCorp 'Metropolitan Freight Network' once the SSFL is commissioned; and
- the track from Werris Creek to Narrabri.

In addition, the adoption of a 10 year term increases rather than diminishes the need to recognise that other significant changes to the network may occur during the life of the December Undertaking.

The lack of clarity around network additions creates unnecessary uncertainty for operators and it is unclear to Asciano why the SSFL should be treated differently to other addition to the network. The benefit of having a 10 year term for the Undertaking will be significantly reduced if it is necessary to periodically amend the document to allow for changes to the network definition.

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[3] See PN's Submission to the ACCC July 2007, p 45

[4] For a list of questions please see PN's Submission to the ACCC July 2007, p 46

3.3 Siding and Yards

If yards and sidings are excluded from the ARTC undertaking they will remain under the NSW Rail Access Undertaking. Thus access seekers would have rights to access these facilities but under a separate access undertaking. This would create unnecessary complexity and PN would need to have three access agreements under three access undertakings, all with ARTC, just for accessing track in NSW (not to mention access agreements with the other NSW track providers, RailCorp and RIC). This would seem to be a nonsensical situation and would be contrary to COAG's stated intention to simplify and streamline rail access regulation.[5]

4 Price Escalation provisions

Asciano has three key concerns with the price escalation provision in the Undertakings. These are:

- ARTC is allowed to maintain real access prices thereby reducing its incentive to improve productivity;
- The Excess Network Occupancy Charge (ENOC) charge introduces significant uncertainty into access charges payable and delivers no efficiency benefits; and
- Access prices for indicative services can be varied more than once in a year.

4.1 Real price maintenance

Contrary to standard regulatory practice, ARTC places very little weight on the importance of a strong price cap to drive productivity improvements. It is vital that ARTC has the incentive to improve productivity even though we accept that ARTC does not receive its full regulated economic cost recovery. Asciano believes that maintenance of real prices as proposed by ARTC does not provide enough incentive for productivity improvements. In the recent past, no transport related business has been able to maintain anything near real price parity and this situation is expected to continue over time.

4.2 Uncertainty surrounding ENOC

The December Undertaking and its accompanying documents provide improved clarity on the operation of ARTC's proposed ENOC. Asciano still has 'in principle' concerns with ENOC; most notably, because it introduces additional complexity into the charging mechanism without delivering any discernable benefit. In addition, the ENOC, despite ARTC basing the charge on flagfall, still introduces significant uncertainty via its impact on operators' access costs over time given. This is because the ARTC can unilaterally alter the key parameters (eg the indicative section run times, allowances for crosses etc.) at any time. For example, if the ARTC was to decrease the sectional run time then the ENOC charge per hour would increase as would the number of minutes an operator used above the nominal section run time. This could result in a significant increase in the ENOC.

4.3 Multiple Escalations

In the December Undertaking price rises are not restricted to once a year. Currently industry, both the rail operators and their customers, are geared to a single access price change. In this way rail operators can manage their customer contracts appropriately and customers are able to make modal decisions for the year based on known costs. The additional uncertainty of price rises occurring at any time of the year, and potentially on several occasions throughout the year, will create unnecessary additional contractual complexity and uncertainty making rail a less attractive modal option.

[5] February 2006 COAG Communiqué Attachment B Appendix E

5 Investment

The December Undertaking contains no clear indication of the process to determine the ARTC investment program and no formal mechanism to allow operators input into investment decisions. Asciano has previously suggested that, rather than putting forward a 'locked down' capital expenditure program, a better way to manage the network is for ARTC to include in the Undertaking a process for working with network users to determine an annual program. An investment process was described in Asciano's response to ARTC's June Undertaking along with detailed drafting suggestions.

Instead of embracing an inclusive process that provides both flexibility and the opportunity for network users to input into the investment process, ARTC has adopted an approach based on ARTC alone determining what investments should go into the rail network. Asciano does not believe that this approach will bring about the best outcomes for the rail industry. Above rail operators will be the parties that will be utilising the investment and in any normal industry a supplier would consult with its customers before major investment was undertaken to ensure that the investment would deliver outcomes desired by the customers.

Confidential Annex: Impact of ARTC price proposal on Non-Indicative services