



21 November 2008

Mr David Salisbury
A/g General Manager – Transport
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Dear Mr Salisbury,

Application for variation of ARTC Interstate Access Undertaking – Clause 15

Asciano welcomes the opportunity to comment on ARTC's application to vary clause 15 of the Indicative Access Agreement (IAA) contained in Schedule D to the ARTC Interstate Access Undertaking (Undertaking).

1 SUMMARY

Asciano generally accepts the principle underlying the proposed variation, that where a party is unable to manage a risk of exposure to a third party, it is not appropriate for it to accept liability for that risk. However, the drafting proposed by ARTC does not accurately implement this principle. Contrary to ARTC's submission, the effect of the proposed variation is that it prevents Party A from recovering loss from Party B where the loss results from a contract between Party A and a third party, notwithstanding that Party B may have breached a general law or statutory obligation. This will be the case where a train operator has agreed, as is standard industry practice, to indemnify a customer for a loss that would otherwise be claimable under general law or statute.

Accordingly, Asciano does not support the variation in its current form.

In keeping with support for the general principle, Asciano would support an amendment to clause 15 that recognises that Party A can claim loss or damage from Party B where a third party suffers loss as a result of a general law or statutory breach by Party B (as ARTC claims it intends), irrespective of whether the operator has agreed to indemnify the customer in respect of that loss.

Asciano disputes ARTC's claims that ARTC:

- is facing changed circumstances, as articulated in section 3 of ARTC's submission, in any material way; and
- has fulfilled the requirement of clause 2.4(d) of the Undertaking to consult with operators, at least with respect to Asciano, prior to seeking the variation from the ACCC.

Asciano is of the view that ARTC has failed to conform with its own Undertaking in bringing this amendment to the ACCC.

In a related matter, Asciano's experience to date in attempting to negotiate amendments to provisions concerning, inter alia, the allocation of risk in the IAA with ARTC indicate that it is not a practical solution to suggest that an operator can simply agree alternative mutually acceptable provisions directly with ARTC.

2 CHANGE IN CIRCUMSTANCE

ARTC claims that its application for amendment is grounded in clause 2.4(a) of the Undertaking.¹ This provides:

"If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC or becomes inconsistent with the objectives prescribed at clause 1.2, ARTC may seek the approval of the ACCC to vary this Undertaking."

ARTC claims that it has suffered a change in circumstance since the July 2008 approval of its Undertaking such that the Undertaking:

- is no longer commercially viable; and
- has become inconsistent with the objectives of the Undertaking,

due to a fundamental change in industry practice.

2.1 Commercial Viability

ARTC has not identified the train operator who has entered into the arrangements that ARTC is concerned about, nor whether this applies to one particular customer contract or a number of that train operator's customer contracts. Therefore the current extent of the problem is far from clear.

Asciano can confirm that none of the Asciano group companies has entered into such an arrangement with its customers. While Asciano is not aware of the commercial arrangements of other train operators, it would be surprising if the practice complained of was followed by any of the larger operators and Asciano doubts that the problem impacts a substantial proportion of the traffic on ARTC's interstate network.

At the very least, the ACCC would want to assure itself as to how broadly the undesired practice has spread. The tenor of ARTC's claim is that the complained of practice will inevitably spread through the action of competition:

"Further, given competition between operators in above rail services it is quite possible that such provisions could become industry standard for large Consignors."²

The assertion of such a possibility is of little value and yet this appears to be the foundation of ARTC's case. Asciano believes that the onus lies with ARTC to present evidence to the ACCC

¹ ARTC, "Application by ARTC to vary the ARTC Interstate Access Undertaking", 9 October 2008, p 1

² Ibid, p 4

either that the practice is currently wide-spread amongst train operators or that it is probable that it will spread widely. Such evidence needs to be more than assertion and anecdote.

ARTC has produced no convincing evidence to suggest that circumstances have changed to the extent that conformance with the Undertaking will make it commercially unviable.

2.2 Inconsistent with the objectives of the Undertaking

ARTC's submission identifies the objectives that it claims are now inconsistent with the Undertaking as:

"The Access Undertaking objectives, prescribed at clause 1.2, include reaching an appropriate balance between:

- (a) the legitimate business interest of ARTC, including a fair and reasonable return on ARTC's investment in the network and associated facilities commensurate with its commercial risk; and
- (b) the interests of applicants wanting access to the network, including providing access to the network on fair and reasonable terms.

The rate of return approved by the ACCC under the undertaking did not envisage ARTC taking on the risk exposures arising from the change in circumstances above."³

Asciano suggests that it is not open to ARTC to claim that the new situation makes these objectives inconsistent with the Undertaking on the basis that the rate of return is no longer sufficient.

As noted above, the operator/customer contract that ARTC is concerned about is not industry standard and thus Asciano would expect the impact on ARTC's actual return to be insignificant.

In any event, the documentation provided by ARTC to the ACCC during consideration of the Undertaking earlier in 2008 showed that ARTC will earn substantially below the allowed rate of return on every line sector covered by the Undertaking. The ACCC acknowledged this in its Final Decision on the Undertaking.⁴

It is, therefore, very difficult to understand an argument based on ARTC's allowed rate of return, a rate that both ARTC and the regulator agreed it would never achieve. ARTC's argument appears to be that, had it been aware of the undesired practice at the time of the approval, then ARTC would have asked for a higher rate of return and the ACCC would have granted it. There is no way of knowing whether this would have been the case. However, it is irrelevant. It cannot affect the objective identified by ARTC above – ARTC was never going to earn the rate it was granted, let alone a higher rate.

2.3 Conclusion

ARTC has failed to demonstrate a case under either limb of clause 2.4(a) of the Undertaking, therefore, the application to amend the Undertaking is not being pursued in accordance with the Undertaking itself.

³ Ibid, p 5

⁴ ACCC, "Final Decision Australian Rail Track Corporation Access Undertaking - Interstate Rail Network", July 2008, p 39

3 OPERATOR CONSULTATION PROCESS

Clause 2.4(d) of the Undertaking states:

“Prior to seeking the approval of the ACCC under clause 2.4(a), ARTC will first consult with Operators regarding the proposed variation.”

Asciano, a train operator and major access customer of ARTC, has not been consulted about the proposed variation prior to the ACCC consultation process. ARTC advised Asciano of the proposed variation by letter dated 3 October 2008 but subsequently advised Asciano that the letter was sent in error (the letter did not reflect the negotiations currently underway between Asciano and ARTC) and should be disregarded. ARTC did not provide Asciano with any further correspondence about the proposed variation prior to ARTC’s letter to the ACCC of 9 October 2008.

Even if the letter could be construed as “advice” of ARTC’s intention, it could not be stretched to mean “consultation”. Asciano would, at best, have had 3 business days to respond to the matter prior to the submission being made to the ACCC. In no way could this be considered a reasonable opportunity to respond even had ARTC indicated an intention to consider comments from Asciano.

Asciano is of the view that this does not constitute consultation as contemplated in Undertaking clause 2.4(d) and that therefore ARTC’s application is in breach of its own Undertaking.

4 PROPOSED AMENDMENTS TO IAA CLAUSE 15

4.1 Unintended effect of proposed variation

Under IAA clause 15, ARTC and the train operator agree a risk allocation regime pursuant to which they indemnify and/or release each other in respect of “loss or damage”, using an allocation that varies depending on the cause of the incident that results in the loss or damage.

ARTC seeks to amend the meaning of “loss or damage” to exclude from the definition liability of either ARTC or the operator to a third party which arises solely under an agreement to accept liability, or a breach of an agreement with that third party. In other words, ARTC proposes that claimable liability for third party loss be limited to statutory or general law liabilities.

Asciano generally accepts ARTC’s position that in circumstances where a party is unable to manage a risk of exposure to a third party, it is not appropriate for it to accept liability for that risk. It is clear from the following quote from ARTC’s submission that ARTC does not intend to prevent claims for negligence or breach of statutory duty:

“If either ARTC or an operator are liable to a third party for negligence or breach of statutory duty arising from an Incident and the other party has contributed to that Incident, then that liability is still potentially subject to allocation between ARTC and the operator in accordance with clause 15”⁵

⁵ ARTC, p 5

However, contrary to ARTC's intention, the proposed variation, as drafted, will exclude all third party losses arising via a contract between Party B and the third party, including those that it is in fact appropriate for Party A that has caused, or contributed to, an incident to be responsible for.

It is market practice for operators to enter into contracts with their customers that include an indemnity in respect of losses that would otherwise be claimable under statute or general law. If the proposed variation is accepted, losses arising from such indemnities would not be recoverable from ARTC notwithstanding the fact that ARTC has breached its statutory or general law obligations. The effect of the proposed variation would therefore be to significantly alter the risk profile of train operators' existing customer contracts and, for future customer contracts, require a substantial change to standard industry practice. Asciano submits that the industry-wide impact the variation would trigger is substantially more significant than the purported change in circumstances that it seeks to address.

4.2 Other drafting issues

In addition to Asciano's concerns about the impact of the proposed variation, there are a number of drafting issues:

- a) The references in clause 15.1 to "loss or damage" should not refer to the defined term loss or damage and should instead refer to the general, undefined concept of loss or damage. This may be overcome by capitalising "Loss or Damage" when it is used as a defined term, or by clarifying that the definition of "loss or damage" applies only to clauses 15.2 to 15.9.
- b) ARTC's justification for the proposed variation focuses on excluding contractually assumed risk. Asciano therefore considers it appropriate that any references in clause 15 to liability arising under an agreement or a breach of an agreement are preceded by the word "solely".
- c) The reference in clause 15.5(b)(ii) to "Agreement" should be replaced with the word "agreement", as it refers to an agreement between a party to the Access Agreement and a third party, not to the Access Agreement itself.

5 CRITERIA FOR DECISION

As correctly identified in the ARTC submission, the ACCC may consent to ARTC's proposed variation if it thinks it appropriate to do so having regard to the matters outlined in subsection 44ZZA(3) of the *Trade Practices Act 1974* (by reference from subsection 44ZZA(7)).

These matters include, inter alia:

- the legitimate business interests of the provider;
- the interests of persons who might want access to the service; and
- the public interest

5.1 Legitimate Business Interests Of ARTC

ARTC has failed to present evidence that its business interests are substantially impacted by the changed contractual arrangements. Its case relies on the assertion that the detection of one

instance from an unnamed operator is sufficient to warrant changes to the IAA that will have a significant industry-wide impact.

Asciano suggests that ARTC has not demonstrated that it is necessary to make the proposed change in order to further its legitimate business interests.

5.2 Interests Of Access Seekers

In this submission Asciano has argued that ARTC has failed to follow the appropriate requirements under its own Undertaking. This is contrary to the interests of access seekers. If access seekers cannot rely on ARTC observing its own Undertaking, they are in a most difficult position, and it would not be appropriate for the ACCC to countenance a failure to observe the Undertaking.

Apart from the procedural issues, Asciano believes that the drafting of the proposed amendment has consequences over and above those argued by ARTC as necessary so that the risk relationship between ARTC and train operators is altered in favour of ARTC. Whether intended or not, this is contrary to the interests of access seekers and goes beyond the principle ARTC claims it is applying.

5.3 Public Interest

It is not in the public interest to have an inappropriate allocation of risk. It is efficient for the party that can control the risk to be liable for the risk. ARTC's proposal results, albeit unintentionally, in an inappropriate allocation of risk namely that ARTC does not bear the risk of an ARTC breach of a general law or statute.

6 NEGOTIATE AWAY FROM IAA

In its Draft Decision and again in its Final Decision on the Undertaking, the ACCC determined that remaining train operator concerns about the IAA could be dealt with as part of the access negotiation process between ARTC and each operator.⁶

In Asciano's experience, the ACCC's suggestion that outstanding matters can be agreed during negotiations between ARTC and a train operator overestimates a train operator's ability to negotiate departures from the IAA, particularly with respect to risk allocation. To exemplify this, Asciano takes this opportunity to update the ACCC on the negotiation process currently underway between Asciano and ARTC.

During negotiations, Asciano has provided to ARTC a list of proposed amendments and the supporting commercial and/or operational rationale of the changes. In response to issues concerning risk allocation, ARTC has failed to provide rationale for its rejection of Asciano's requested amendments. ARTC's approach evinces an unwillingness to genuinely negotiate material departures from the IAA.

While it is recognised that dispute resolution is open to an access seeker under the Undertaking, this is inevitably a last resort given the effort and expense involved. Further, once

⁶ ACCC, Final Decision, p 74 and Appendix B – Incorporating the Draft Decision, pp 237-40

an IAA is approved by the ACCC, it is Asciano's view that an arbitrator is unlikely to approve a move away from the previously approved terms except where circumstances are demonstrably different from the circumstances that applied when the IAA was approved, or alternatively the nature of the proposed activities make the IAA inappropriate (eg a substantially different form of access than a normal train operation). Notwithstanding the ACCC's view that it is able to take matters other than the Undertaking into account in an arbitration,⁷ Asciano does not accept that it is open to the ACCC, as arbitrator, to decide against a previously approved term under normal circumstances.

If you require any additional information about the matters raised in this letter, please contact me.

Yours sincerely

A handwritten signature in blue ink that reads "Tim Kuypers". The signature is fluid and includes a long, sweeping underline that extends to the right.

Dr Tim Kuypers
Group General Manager
Access & Regulation

⁷ ACCC, pp 33-34