

**Submission to the Productivity  
Commission**

**Asciano Submission to the  
Productivity Commission Issues  
Paper on the National Access  
Regime**

**February 2013**

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# Table of Contents

1	Executive Summary and Background.....	4
2	Asciano's Involvement in Third party Access Regimes.....	5
2.1	General Overview .....	5
2.2	Outline of Rail Access Regimes and Providers Utilised by Asciano.....	5
2.3	Outline of Port Access Regimes and Providers Utilised by Asciano .....	6
2.4	Summary of Asciano's Experience of Third Party Access Regimes .....	6
3	Overview of The Asciano Position on the State of the National Access Regime and the CIRA .....	7
3.1	Asciano's Position on Australian Third Party Access Regimes.....	7
3.2	Areas of Improvement for Australian Third Party Access Regimes.....	9
3.2.1	General Areas of Improvement for Australian Third Party Access Regimes .....	9
3.2.2	Specific Areas of Improvement for Australian Third Party Access Regimes .....	10
4	Asciano Specific Comments on Issues Raised in the PC Issues Paper.....	12
4.1	Ongoing Need for a National Access Regime .....	12
4.2	National Industry Specific Regimes vs Broader National Access Regimes and State Based Access Regimes vs National Access Regime .....	13
4.3	Pathways to Access .....	14
5	Conclusion .....	14
	Attachment 1- Major Rail Access Providers.....	16
	Attachment 2 – Asciano Responses to Questions Raised in the PC Issues Paper .....	18

## **1 EXECUTIVE SUMMARY AND BACKGROUND**

Asciano welcomes the opportunity to respond to the Productivity Commission (PC) Issues Paper relating to the PC review of the National Access Regime (Part IIIA of the Competition and Consumer Act and Clause 6 of the Competition principles Agreement), and the Competition and Infrastructure Reform Agreement (CIRA). Asciano strongly supports the continuation and strengthening of third party access regimes across Australia. In particular Asciano strongly supports the retention of the National Access Regime is essential as the regime acts as a both a direct pathway to access for infrastructure used by Asciano and as a common reference point for other access regimes (and thus assists in achieving consistency across jurisdictions).

Moving forwards Asciano believes that the current National Access Regime (and state based regimes) can be further improved by strengthening provisions relating to:

- transparency of information relating to infrastructure providers;
- vertical separation, ring-fencing and anti-competitive discrimination. In particular any dealings between an infrastructure access provider and any related parties must be at arms length on conditions which are no more favourable than the conditions offered to unrelated third parties; and
- increased powers for regulators to monitor, audit and enforce access provisions.

Asciano also broadly supports moves towards rationalising or otherwise streamlining access regimes within an industry, while recognising there may a legitimate need for differences. As such Asciano supports any further moves towards consistency between state and Commonwealth access regimes and would not in principle oppose a single rail access regime or a single rail regulator, provided the regime implemented was effective and was not based on a “lowest common denominator” of current rail access approaches.

Asciano responses to some of the specific questions raised by the PC Issues Paper are contained in Attachment 2 of this submission.

This submission is public.

## **2 ASCIANO'S INVOLVEMENT IN THIRD PARTY ACCESS REGIMES**

### **2.1 General Overview**

Asciano is Australia's largest national above rail freight operator (through its Pacific National subsidiaries) and Australia's largest ports operator (through its Patrick subsidiaries).

Through these rail and port operations Asciano is a major user of infrastructure which is subject to coverage under the various third party infrastructure access regimes applying in Australia. In particular all of Asciano's above rail operations rely on third party access to below rail infrastructure owned by third parties, where this access is provided under various state and Commonwealth access regimes. The ongoing operational efficiency and regulatory certainty of these various rail access regimes is of critical importance to both Asciano, and to Australian supply chains more generally.

### **2.2 Outline of Rail Access Regimes and Providers Utilised by Asciano**

Asciano's above rail operations rely on third party access to below rail infrastructure owned by over ten third parties<sup>1</sup>. Access to these below rail infrastructure assets is regulated by six access regulators acting under five state based access regimes and the Commonwealth access regime. The existence of multiple access regimes with multiple access regulators has the potential to add costs and complexity to issues of rail access for little, if any, benefit. Asciano recognises that there may be benefits in having different approaches to rail access for different users and applications (for example coal railways and intermodal railways may legitimately have different access requirements) but in these instances it would be preferable to have access regimes explicitly based on these factors rather than be based on jurisdictional borders.

These below rail infrastructure providers and the nature of the access regimes are identified in the table in Attachment 1 to this submission. (Note that minor access providers are not identified in the table in Attachment 1).

Some of the below rail infrastructure providers also operate above rail services in competition with Asciano; notably Aurizon (which owns and operates rail

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<sup>1</sup> It should be noted that Asciano is also a below rail infrastructure provider subject to a third party access regime. Asciano operates an intermodal terminal at South Dynon in Melbourne which is subject to third party access under the Victorian rail access regime.

infrastructure in Queensland) and GWA (which owns and operates rail infrastructure in South Australia). This ownership raises concerns regarding ring fencing, vertical separation and anti-competitive discrimination. Asciano strongly believes that third party access is only viable when the infrastructure access provider deals with all parties, including its related parties, equally.

Ideally this can be best achieved by a complete separation between infrastructure provider and users and potential users of the infrastructure. Asciano recognises that such complete separation is not necessarily achievable in all circumstances, but, at a minimum, Asciano believes any dealings between the infrastructure provider and related parties using this infrastructure must be at genuine arms length on conditions which are no more favourable than the conditions offered to unrelated third parties.

### **2.3 Outline of Port Access Regimes and Providers Utilised by Asciano**

Asciano's stevedoring operations rely on access to port land and infrastructure. Access to port land and infrastructure on non discriminatory and efficient terms is essential to ensuring effective competition between stevedores.

This is particularly the case where there is vertical integration such as in South Australia where the ports are subject to a regime overseen by ESCOSA. The current port provider in South Australia has a monopoly infrastructure position and is also vertically integrated, offering port logistic operations and stevedoring in competitions with others. Without strong structural separation and proscribed price determination (neither of which the current regime provides) effective competition is not possible.

The existence of vertical integration necessitates vertical separation and ring-fencing as an ongoing deterrent to the potential misuse of market power. As noted above, third party access is only viable when the monopoly providing access deals with all parties, including related parties, equally. Any dealings between related parties must be at arms length on conditions which are no more favourable than the conditions offered to unrelated third parties.

### **2.4 Summary of Asciano's Experience of Third Party Access Regimes**

Asciano has had extensive experience of numerous access regimes throughout Australia. Based on this experience Asciano supports:

- moves towards rationalising or otherwise streamlining access regimes within an industry, while recognising there may a legitimate need for differences; and
- the absolute need for all access regimes to strengthen provisions relating to vertical separation, ring-fencing and anti-competitive discrimination as an ongoing deterrent to the potential misuse of market power. In particular any dealings between an infrastructure access provider and any related parties must be at arms length on conditions which are no more favourable than the conditions offered to unrelated third parties. Of particular interest to Asciano is strengthening provisions regarding vertically integrated parties using discriminatory operational processes, discriminatory pricing (including cost shifting and cross subsidies) and discriminatory information provision to benefit their related parties.

### **3 OVERVIEW OF THE ASCIANO POSITION ON THE STATE OF THE NATIONAL ACCESS REGIME AND THE CIRA**

#### **3.1 Asciano's Position on Australian Third Party Access Regimes**

Asciano strongly supports the continuation and strengthening of third party access regimes across Australia. In particular Asciano supports regimes which result in increased certainty of access and access pricing outcomes and consistency of access and operational processes and outcomes.

Asciano supports strengthening the National Access Regime by increasing levels of transparency for infrastructure access providers and strengthening separation of vertically integrated infrastructure access providers such that any potential for anti-competitive discrimination by the provider is minimised.

Asciano believes that the retention of a National Access Regime is essential, and ideally, the National Access Regime should be strengthened. In particular Asciano continues to support the existence of access under Part IIIA of the Competition and Consumer Act. Part IIIA acts as a both a direct pathway to access for infrastructure used by Asciano and as a common reference point for other access regimes; assisting in ensuring access regimes remain broadly consistent across jurisdictions and assisting in ensuring that state based regimes provide for access in a manner that meets the standards of the Competition and Consumer Act.

Part IIIA is a direct pathway to access for infrastructure used by Asciano. In particular the main rail infrastructure provider used by Asciano's above rail operations is the Australian Rail Track Corporation (ARTC). The ARTC provides access to its rail infrastructure via two Part IIIA undertakings. Undertakings are currently in place for the national interstate rail network and one for the Hunter Valley rail network. These undertakings are regulated by the ACCC.

If the National Access Regime was removed then there would be uncertainty as to the framework used to provide access to this ARTC infrastructure. It is possible that state based rail access regimes could be used to provide access to the national interstate rail network, but such an approach may be problematic if the timing and content of regulatory determinations was not aligned. Alternatively it is possible that a new national rail specific access regime and regulator may need to be introduced to solely meet the need for access to ARTC infrastructure. Both of these approaches to enable continued access for ARTC infrastructure seem less effective than the current approach under Part IIIA.

Part IIIA also acts as a common reference point for other access regimes, assisting in ensuring access regimes remain broadly consistent. For example in 2010 Asciano had concerns in regard to the then uncertified state based access regime which was to apply to the then QR Network (now Aurizon network). These concerns centred on board structures, incentives for discrimination and incentives for anti competitive behaviour. Thus in 2010 Asciano applied to the NCC to declare this network under Part IIIA to ensure that an appropriate access regime applied to this infrastructure. The Queensland Government then applied for certification of the state based access regime in June 2010, where the regime submitted included some amendments to the previously uncertified state based access regime. The NCC certified the amended state based regime.

Asciano believes that the availability of the declaration pathway to access under Part IIIA contributed to the amendment of this access regime to ensure it was more consistent with the national regime, even though the approved pathway to access was ultimately via a state based regime rather than the National Access Regime.

The existence of the declaration option under Part IIIA ensured that the state based regime was improved and moved towards the national regime. Thus Part IIIA acts as a reference point for alternate access regimes and assists in ensuring access

regimes remain broadly consistent and provide for access in a manner that broadly meets the standards of the Competition and Consumer Act.

### **3.2 Areas of Improvement for Australian Third Party Access Regimes**

#### **3.2.1 General Areas of Improvement for Australian Third Party Access Regimes**

In assessing the National Access Regime (and other access regimes, including state regimes) Asciano believes that the relevant legislation and regulations alone do not provide a complete picture of the regime and that the legislation and regulation must be considered in the context of the relevant market. Markets which include a degree of common ownership, control and operation of both natural monopoly infrastructure and competitive usage of this infrastructure raise concerns with regard to anti-competitive discrimination by the infrastructure access provider.

Given the potential for such anti-competitive discrimination the National Access Regime and other access regimes, including state regimes, should be strengthened in regard to:

- ring fencing<sup>2</sup> of vertical integrated owners of infrastructure subject to access;
- transparency of both infrastructure costing and operational information, which will in turn facilitate confidence in the regime and consequently facilitate third party access:
  - where infrastructure is not vertically integrated transparency should include provision of detailed cost information by infrastructure owners in order to facilitate evenly balanced price negotiations between access seekers and access providers;
  - where infrastructure is vertically integrated transparency should also include a clear process which results in strong direct regulation of access price;

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<sup>2</sup> As a minimum ring fencing should include

- arms-length negotiations between related parties;
- separate accounts and management of related parties;
- restrictions on transfer of information between related entities
- the prevention of cost shifting, cross subsidisation and margin squeezing;
- equal commercial and operational treatment of all parties wishing to use the infrastructure;
- auditing and reporting of compliance; and
- independence of directors of the regulated entity.

- non-discrimination provisions which ensure that infrastructure providers treat similar access seekers and access users in a similar manner regardless of their relationship to the infrastructure provider;
- increased powers for regulators to monitor and audit:
  - financial statements of infrastructure providers;
  - ring fencing systems and processes of infrastructure providers (including vertical separation and related party transactions); and
  - market behaviours of infrastructure providers;
- increased power for regulators to enforce appropriate penalties for any non-compliance. Any non-compliance should be made public.

In Asciano's experience the access regimes most effective in facilitating competitive markets are those which are transparent and non-discriminatory and where there is strong separation of regulated open access natural monopoly infrastructure and competitive functions.

### **3.2.2 Specific Areas of Improvement for Australian Third Party Access Regimes**

In addition to the general areas for improvement identified above there are several specific areas where Asciano believes that improvements can be made to both the National Access Regime and other access regimes, including state regimes.

#### **Lack of Transparency of Cost Information**

The National Access Regime (and many other access regimes, including state regimes) places a primacy on commercial price negotiation rather than price determination by regulators. This approach is generally consistent with the Competition Principles Agreement; however Asciano has concerns with this approach as it favours the infrastructure provider as they have more detailed information on their cost structures. This cost information imbalance places access seekers at a disadvantage in negotiating access prices with the access provider, as only the access provider has detailed knowledge of their costs. Asciano believes that this imbalance in cost information should be addressed in any revised National Access Regime, such that there is a requirement that infrastructure owners provide cost information to facilitate evenly balanced price negotiations between themselves and access seekers.

### **Certainty and Consistency of Access Regimes**

Asciano operates its above rail operations under five state based access regimes and the National Access Regime. These multiple access regimes with multiple access regulators have the potential to add costs and complexity to issues of rail access for little, if any, benefit, particularly as many of the access regulation functions are duplicated across states. In addition, while rail access regimes are currently separate but broadly consistent, the multiplicity of these regimes creates a potential for inconsistency which would not exist if a single regime applied to the rail network.

Asciano strongly believes that as a minimum all Australian access regimes which allow third party access to vertically integrated monopoly infrastructure must have strong and consistent anti-competitive discrimination provisions, separation provisions and price regulation provisions. If the regime does not have these elements Asciano doubts that the regime would meet the criteria relating to promotion of economic efficiency and provision of a robust framework for negotiating agreements. In addition consistency is required in both monitoring, reporting and enforcement regimes and powers. In the absence of a National Access Regime and Part IIIA this consistency is unlikely to be achieved.

Asciano recognises that there may be benefits in having different detailed access and pricing approaches to rail access for different users and applications. For example coal rail networks may be able to price access to fully meet their costs whereas some grain rail networks may only price on marginal costs (although in such circumstances there may be substantial external benefits for maintaining access to these networks).

In instances where different access and pricing approaches are required it would be preferable to have the access regimes explicitly based on these factors rather than be based on jurisdictional borders.

Asciano supports further moves towards consistency between state and Commonwealth access regimes. Asciano does not in principle oppose a single rail access regime or a single rail regulator, but could not currently commit to supporting such a proposal without seeing further details of such a proposal. However Asciano strongly believes that any such regime should not be based on a “lowest common denominator” of current rail access approaches. That is a single rail access regime should not simply be based on a regime which is based on a minimum set of access

principles, but rather the regime should be developed to ensure that genuinely non-discriminatory access is available such that it facilitates genuine competition and efficiency in above rail markets. Such a regime would require non discriminatory access, ring fencing and regulators with sufficient monitoring, auditing and enforcement powers.

#### **4 ASCIANO SPECIFIC COMMENTS ON ISSUES RAISED IN THE PC ISSUES PAPER**

The PC Issues Paper raises numerous issues on which it seeks comment. This section makes comments on the issues identified by the PC which Asciano believes are most important. Attachment 2 of this submission provides further comment on some of the issues identified by the PC.

##### **4.1 Ongoing Need for a National Access Regime**

Asciano strongly believes that there is an ongoing need for Australia to have a strong National Access Regime which facilitates third party access to natural monopoly infrastructure at efficient prices. Such a regime will encourage competition in many critical sectors of the Australian economy and so contribute to increasing economic efficiency in Australia. As such the object of the National Access Regime should remain and should be “promoting economic efficiency by facilitating competition”.

In particular Asciano continues to support the existence of a National Access Regime under Part IIIA of the Competition and Consumer Act as:

- the regime under the Act acts as a common reference point for other access regimes and thus assists in ensuring access regimes remain broadly consistent across jurisdictions; and
- the regime acts to ensure that state based regimes provide for access in a manner that meets the standards of the Competition and Consumer Act. This was the case in the example relating to the Queensland Rail network outlined in section 3.1 above.

Asciano believes that the benefits of third party access outweigh the costs of implementing such access. Asciano recognises that access regimes are not costless and believes that further consideration of moves towards consistency between state and Commonwealth access regimes could reduce these costs. (As noted above Asciano does not oppose a single rail access regime or a single rail regulator, but

could not currently commit to supporting such a proposal without seeing further details of such a proposal, and any such regime should not be based on a “lowest common denominator” of current rail access approaches – as outlined above in section 3.2).

If the National Access Regime were removed and not replaced with an alternative regime then many economic activities currently undertaken, including above rail activities, would become problematic at best. If the National Access Regime did not exist it is likely that where rail access was obtained it would be following protracted and costly commercial negotiations with monopoly infrastructure providers. The existence of the National Access Regime substantially reduces negotiating costs and ensures that access is effectively guaranteed, thus facilitating longer term planning and capital investment.

Overall, the benefits of access in the rail industry outweigh the cost of access although Asciano believes that the costs of access could be further reduced by a streamlining of access regimes.

The PC Issues Paper (page 7) queries the scope of the National Access Regime. Asciano believes that the National Access Regime should, at a minimum, apply to natural monopoly infrastructure industries, with stronger regulation for any entities which are vertically integrated with a major natural monopoly infrastructure component such that any potential for anti-competitive discrimination by the access provider is minimised.

#### **4.2 National Industry Specific Regimes vs Broader National Access Regimes and State Based Access Regimes vs National Access Regime**

Many large natural monopoly infrastructure industries have access determined by a national industry specific access regime (for example the National Electricity Law). This is not the case for either rail or ports, which are subject to the more general access provisions of either the National Access Regime or state based regimes.

As noted above multiple state based access regimes with multiple access regulators have the potential to add costs and complexity to issues of rail access for little benefit, particularly as many of the access regulation functions are duplicated across states. Given this Asciano believes that there is merit for the concept of an industry specific national rail or transport infrastructure regime (or regimes) to be further

considered. Obviously issues as to the scope of the regime and the identity of any access regulator (such as the ACCC) are details which would have to be worked through.

### 4.3 Pathways to Access

There are currently numerous pathways to access under the Australian infrastructure access framework, notably commercial negotiation, state regimes, Competition and Consumer Act Part IIIA certified state regimes, undertakings and declaration.

In particular Asciano believes that there should be a consistency of eligibility criteria between pathways to access. That is if infrastructure is eligible under one pathway to access then it should be eligible under all pathways to access. Similarly there should be consistency between pathways to access with regard to consistency of anti-competitive discrimination principles, transparency principles, pricing principles and monitoring, reporting and enforcement regimes.

Asciano believes that the existence of the multiple pathways to access ensures that an access framework that can be tolerated by all parties can ultimately be reached. In the Queensland rail network example outlined in section 3.1 the existence of multiple pathways to access ensured that processes existed whereby concerns with the access regime could be raised in a formal framework and the access regime could ultimately be amended and improved.

## 5 CONCLUSION

Asciano strongly supports the continuation and strengthening of third party access regimes across Australia. In particular the retention of the National Access Regime is essential as the regime acts as a both a direct pathway to access for infrastructure and is a common reference point for other access regimes (and thus assists in ensuring access regimes remain broadly consistent across jurisdictions).

Moving forwards Asciano believes that the current National Access Regime (and state based regimes) can be further improved by strengthening provisions relating to:

- transparency of information relating to infrastructure providers;
- vertical separation, ring-fencing and anti-competitive discrimination. In particular any dealings between an infrastructure access provider and any

- related parties must be at arms length on conditions which are no more favourable than the conditions offered to unrelated third parties; and
- increased powers for regulators to monitor, audit and enforce access provisions.

Asciano also broadly supports moves towards rationalising or otherwise streamlining access regimes within an industry, while recognising there may a legitimate need for differences. As such Asciano supports any further moves towards consistency between state and Commonwealth access regimes and would not in principle oppose a single rail access regime or a single rail regulator, provided it was an effective regime that was not a “lowest common denominator” of current rail access approaches.

## ATTACHMENT 1- MAJOR RAIL ACCESS PROVIDERS

The table below identifies major rail access providers. It does not identify access providers who control small sections of track.

Service Provider	Access Regime	Comment
Australian Rail Track Corporation (ARTC)	Commonwealth Regime (Undertakings under Part IIIA)	Provides access to the national standard gauge network which links state capital cities and the standard gauge Hunter Valley coal network.
	Regulated by the ACCC	ARTC has no above rail operations.
Queensland Rail Limited (QRL)	State based regime	Provides access to narrow gauge network in Queensland (excluding Central Queensland Coal Railways) and standard gauge network in Brisbane.
	Regulated by QCA	QRL above rail operations are limited to passenger rail operations.
Aurizon Network	State based regime	Provides access to narrow gauge Central Queensland Coal Railways.
	Regulated by QCA	Aurizon above rail operations are substantial and operate on the network owned and operated by Aurizon.
Railcorp	State based regime	Provides access to standard gauge network in Sydney and surrounding regions.
	Regulated by IPART	Railcorp above rail operations are limited to passenger rail operations.
Country Rail Network (CRN)	State based regime	Provides access to standard gauge network in rural and regional New South Wales excluding the Hunter Valley).
	Regulated by IPART	CRN has no above rail operations.
Metro Trains Melbourne (MTM)	State based regime	Provides access to broad gauge network in Melbourne.
	Regulated by ESCV	MTM above rail operations are limited to passenger rail operations.
VLine	State based regime	Provides access to broad gauge network in regional Victoria.
	Regulated by ESCV	VLine above rail operations are limited to passenger rail operations.
VicTrack	State based regime	Provides access to some broad gauge track and sidings in Victoria.
	Regulated by ESCV	VicTrack has no above rail operations.
Genessee and Wyoming Australia (GWA)	State based regime	Provides access to some track and sidings in South Australia.
	Regulated by ESCOSA	GWA above rail operations are substantial and operate on the network owned and operated by GWA.

<b>Service Provider</b>	<b>Access Regime</b>	<b>Comment</b>
Australasian Railways	State based regime	Provides access to standard gauge network from Tarcoola to Darwin.
	Regulated by ESCOSA	Controlled by GWA. GWA above rail operations are substantial and operate on this network.
Brookfield Rail	State based regime	Provides access to standard gauge and narrow gauge network in south west Western Australia.
	Regulated by ERA	Brookfield Rail has no above rail operations.

## ATTACHMENT 2 – ASCIANO RESPONSES TO QUESTIONS RAISED IN THE PC ISSUES PAPER

This attachment provides further responses to some of the explicit questions raised by the PC Issues Paper.

- *What is the problem that the National Access Regime should address? How is this different to the problem being addressed by the state and territory access regimes? Can you give examples?*

The National Access Regime should seek to improve efficiency by facilitating competition in markets where access to significant natural monopoly infrastructure is required.

More specifically the National Access Regime should particularly address access to infrastructure, such as rail infrastructure, which crosses state borders.

In addition the National Access Regime can act as a common reference point for other access regimes including state based regimes, and thus can assist in ensuring state based access regimes remain broadly consistent across jurisdictions.

- *Is this problem more or less important now compared with when the National Access Regime was introduced and the Competition Principles Agreement was agreed in 1995?*

Improving efficiency by facilitating competition in markets where access to significant natural monopoly infrastructure is required remains an important issue in the rail industry. It is no more or less important now than it was in 1995.

However the development of numerous state based rail access regimes since 1995 means that there now is a requirement for access regimes to be broadly consistent. Thus the need for such consistency has increased since 1995.

- *What principles should determine those facilities that should fall under the National Access Regime, and those that should be governed by industry-specific access regimes?*

- *What principles should determine when access should fall directly under the National Access Regime or a state or territory access regime, or when other regulatory measures such as planning processes or leasing arrangements may be more appropriate?*

Asciano believes that industry specific regimes are most appropriate when:

- the regulated infrastructure has a specific requirement for detailed regulator knowledge to be applied consistently across access providers and across time; and / or
- there a set of industry specific challenges which require a specialised and co-ordinated approach (such as co-ordinating capital investment, managing industry demand etc); and / or
- there is a well defined, sufficient and constant regulatory workload such that a dedicated agency may be the most efficient means of meeting this workload.

Asciano believes that economic activities which cross state borders should logically be subject to national regimes rather than multiple state based regimes. Economic activities that occur within a state should have the option of being subject to an appropriate state based regime unless no such regime exists.

- *How significant is the problem the National Access Regime seeks to address? How significant is it outside industries that have their own access regimes (such as electricity, gas, telecommunications and postal services)? Does the problem warrant government intervention, and if so, at what jurisdictional level is this intervention best assigned?*

The issue of non-discriminatory access to infrastructure at a fair price remains a significant issue in industries, such as the rail industry, which do not have industry specific access regimes.

The issue has previously been addressed via Government intervention via the development of both the National Access Regime and various state based access regimes.

*Is the scope of the National Access Regime commensurate with the problem? In terms of coverage, which of the following should the Regime include:*

- natural monopoly industries only, or should other sources of market power be considered?*
- only infrastructure service providers that are vertically integrated?*
- only service providers that have sufficient market power in dependent markets to affect prices paid by consumers?*

Asciano strongly believes that natural monopoly infrastructure should be covered by the National Access Regime (unless another approved regime applies). Vertically integrated natural monopolies with the potential for anti-competitive behaviour or discrimination should have a stronger coverage regime applied.

- Have any disadvantages emerged from having an objects clause?*
- Should economic efficiency remain the primary objective of Part IIIA? Should there be other objectives? What is gained or lost by having multiple objectives, and what guidance, if any, should be given to the weightings of multiple objectives if they arise? How would this work in practice?*
- Is the distinction between economic efficiency and the long-term interests of consumers important? If so, should Part IIIA and industry-specific regimes focus on economic efficiency or on the long-term interests of consumers?*
- What would be gained or lost from greater consistency between the object clauses of Acts for different access regimes?*

The main object of Part IIIA should be to facilitate competition and so lead to economic efficiency. All access regimes should have as their primary objective an increase in economic efficiency.

The existence of multiple objectives in Part IIIA may result in inconsistency and the potential for confusion and should be avoided.

- When taken together, how effective are the declaration criteria in reflecting the economic problem that the National Access Regime is seeking to address?*
- How effectively are the criteria drafted in ensuring the economic efficiency objective of the Regime is met?*

- *What makes the criteria successful in promoting efficient investment in, and ensure efficient operation and use of, infrastructure facilities? What improvements could be made to streamline the process?*

The declaration criteria are effective in reflecting the need to access to infrastructure and are broadly effective in ensuring the economic efficiency objective is met. However, there could be an additional focus on the issue of vertically integrated access providers and the potential for such providers to engage in anti-competitive behaviour. This additional focus would further ensure the efficient use of infrastructure by third parties.

- *How effective is certification in delivering benefits from greater consistency between access regimes? What should ‘consistency’ mean in the context of industry-specific access regimes?*

Certification ensures a minimum level of consistency between state based access regimes, however the certification test is relatively broad and as such there remains substantial potential for inconsistencies between these state based regimes.

In regard to industry specific regimes, such as the rail industry, further consistency could be obtained by using the outcomes of a given regime as the “benchmark” and seeking consistency with that regime.

Given the national nature of rail infrastructure the outcomes of the National Access Regime may be an appropriate regime to use as a template. For example the terms and conditions of an ARTC access contract approved by the ACCC under the National Access Regime could be used as a template for other access regimes to ensure a level of commercial and operational consistency.

- *What has certification delivered in terms of providing for more efficient and effective industry-specific access regimes?*

Certification has ensured that all state based rail access regimes have met a minimum standard; however this does not necessarily mean that all of these certified regimes are regarded as efficient and effective.

- *Why do some state and territory access regimes remain uncertified? Is this a problem? How should requirements for state and territory governments to certify access regimes be pursued, if desirable?*

Despite the shortcomings of certification identified above Asciano believes that certification is a necessary first step in ensuring an access regime meets a minimum set of criteria. Asciano supports any moves by state governments to move towards certifying any state based rail access regimes not currently certified.

- *What evidence is there that the negotiate–arbitrate framework has proven successful at resolving access disputes?*

The negotiate -arbitrate framework may be successful in resolving broad access disputes when both parties are negotiating in good faith. However, the negotiate –arbitrate framework can be enhanced by having a regulator approved standard access agreement for a standard service, this provides a framework for the negotiations even if the service being negotiated is non-standard. The existence of a regulator approved standard access agreement requires a level of prescriptive regulation.

However, even if there is a regulator approved standard access agreement there remains an issue that under the negotiate – arbitrate framework there remains an imbalance in the information held by both parties. This information imbalance provides the infrastructure provider with an advantage in more detailed price negotiations. As such the framework could be further improved by requirements for infrastructure providers to supply a certain level of cost information to facilitate even handed price negotiations.

- *What evidence is there that a lack of information is impeding the ability of parties to successfully negotiate access arrangements? Are further measures needed to address information imbalances between parties?*

As noted above a lack of cost information often results in costly and protracted access negotiations which could be circumvented by the provision of such information.

- *Looking across Australia's access regimes, what lessons have emerged from the experience with the negotiate–arbitrate model?*

The negotiate -arbitrate model is a useful first step which minimises the costs of regulation but it needs to be supported by both strong requirements on the infrastructure provider for information provision and recourse to an arbitrator if access cannot be negotiated.

- *How appropriate are the pricing principles for regulating access prices under Part IIIA? How much certainty do they provide for access seekers and service providers? When is price discrimination appropriate?*

The pricing principles in Part IIIA remain central to ensuring a minimum level of pricing certainty for access seekers.

Asciano believes that in regard to regulated infrastructure, price discrimination is only appropriate where it is consistent with principles of economic efficiency and reflects costs (for example if price is set a marginal cost to allow marginal utilisation by a user). However Asciano has strong concerns where a vertically integrated access provider price discriminates in favour of a related party. In such circumstances any price discrimination should be approved by an independent regulator to ensure that there is a genuine economic basis for the discrimination. If there is an economic basis for the discrimination then any access user or seeker who seeks an access service similar to the one sought by the related party should receive the same price from the access provider.

- *How adaptable are the principles to differences between industries and sectors that could be covered under the National Access Regime?*

Asciano believes that the pricing principles should be consistent across industries but recognises that industry specific regimes or state based regimes may accord different principles a different priority or interpret different principles differently. Asciano believes that such action is appropriate if it is done to take account of industry differences or regional differences, but it should not be done to advantage one party over another.

Asciano believes that a consistent and broad pricing framework based on theory is needed but there should be some scope for industry differentiation.

- *What would happen in the absence of the National Access Regime, without each of the*
  - (a) declaration*
  - (b) certification*
  - (c) undertaking pathways?**Would governments expand the use of other policy measures or implement new ones? What are the costs and benefits of these alternatives?*

An access regime of some type is needed to ensure efficiency and competition in industries which rely on access to infrastructure, as the access regime effectively addresses the market failure issue created by the case of a natural monopoly.

The pathway to access is a second order issue and if one or more of these pathways did not exist then it is likely that access would have been sought via an alternate access option. The existence of these multiple pathways to access means that there is a trade-off between the flexibility of these multiple pathways and the consistency of a single pathway. Asciano has no issues with the existence of these multiple pathways to access.

- *Is the National Access Regime an efficient means of promoting effective competition where access to infrastructure facilities is required to participate in dependent markets?*

Third party access generally, and the National Access Regime in particular, is an efficient means of promoting competition. The absence of any access regime would result in reduced competition in contestable markets, particularly markets with a degree of vertical integration, and protracted and costly commercial negotiations related to access. Overall third party access regimes, including the National Access Regime increase productive, allocative and dynamic efficiency.

- *What are the benefits and costs of the National Access Regime relative to other regulatory options, including the risk of regulatory failure?*

The benefits of the National Access Regime are shown the long term gains in efficiency over numerous critical infrastructure industries where access has been introduced.

Asciano recognises that regulation is not costless; and in particular the introduction of access regulation may increase contracting costs, co-ordination costs and regulatory costs. However, Asciano believes that the counterfactual of no access regimes would result in deadweight efficiency losses which are much greater than these costs. The introduction of above rail competition in the Queensland coal chain is a good example with investment and innovation by Asciano increasing the throughput of the coal systems and providing coal producers with a competitive alternative to the previous sole supplier of these services.

- *Has the Regime supplanted less effective access regimes?*

Prior to the introduction of the National Access Regime there were some state based regimes (which were often industry specific) along with some industry initiated access approaches. Given the increase in competition in industries which have been subject to more formalised and wide ranging access regimes it seems self evident that the National Access Regime and other industry specific regimes based on the National Access Regime have supplanted less effective regimes.

- *Can you quantify any of the costs and benefits? What are the relative magnitudes of each of the identified costs and benefits of the National Access Regime relative to the alternative of not having an overarching National Access Regime?*

Quantification of the costs and benefits of access regulation is problematic for Asciano but Asciano believes that the costs are largely costs of contracting, co-ordination and regulation, and as such are relatively small when compared to the improved efficiency emerging from increased competition in numerous industries subject to either the National Access Regime and other industry specific or state based regimes based on the National Access Regime.

- *What is the overall impact of the Regime on Australia's economic growth and productivity?*

Quantification of the impact of access regulation on Australia's economic growth is complex however Asciano believes that qualitatively access regulation and the National Access Regime has had a positive impact on the Australian economy as it increase competition and efficiency in numerous industries.

- *Do all of the institutions involved in Part IIIA contribute to effective and efficient decision-making? If so, how? If not, how could their roles, or the interaction between them, be improved?*
- *How well do the Part IIIA institutional arrangements balance the need for sound, transparent and accountable decision-making against the cost of seeking (or denying) third party access?*

Overall the roles of institutions involved in Part IIIA are clear. Asciano believes that it is appropriate for some of these roles to be separated into different institutions such as the NCC and ACCC. Overall the current structure results in clear and accountable decision making.

Asciano notes that this clarity does not necessarily extend to all state based regimes or institutions.

- *Do current institutional arrangements provide a sufficient level of transparency and accountability for recommendations and decisions?*

Asciano believes that the current institutional arrangements for the National Access Regime are reasonably transparent and accountable.

- *Are there other institutional structures or decision-making arrangements (for example, arrangements for regulating access in the telecommunications or electricity sector) that work better than those currently in place for Part IIIA?*

Asciano believes that Part IIIA institutional structures and decision making arrangements adequately meet the needs of the rail industry. There may be potential for these structures and arrangements to be improved by moving

towards more industry specific regulation but the benefits and disadvantages of such a move can only be assessed if a detailed proposal for an industry specific regulator is put forward.

Asciano has no view on whether industry specific regimes in other industries operate more effectively than Part IIIA.

- *Are there measures that could improve the flexibility and reduce complexity, costs and time for all parties involved in facilitating access to essential infrastructure?*

Asciano believes that there will always be room for improvement in the various access regimes applying to Australian infrastructure. Asciano believes that areas for improvement include improving consistency between state based regimes and reducing duplication across state based regimes.

- *Looking ahead, and in light of the High Court decision and the legislative amendments to merits reviews, will review arrangements under Part IIIA be appropriate, cost-effective, timely, fair and transparent? If so, why? If not, how could this be remedied?*
- *What is the rationale for merits reviews under Part IIIA? Could judicial review suffice?*
- *Are merits reviews of ministerial and ACCC decisions appropriate in the context of Part IIIA? Why or why not?*

Asciano is a user of infrastructure services but has not particular issue with all parties, including infrastructure providers, having access to merits review. Merits review provides a limit on the regulator's power and should act as an incentive for the regulator to make the correct decision.

- *What evidence is there that governments have considered the use of price monitoring as an alternative to access regulation? In what circumstances should governments consider price monitoring as more effective than access regulation in promoting economic efficiency?*

Asciano does not believe that use of price monitoring is an alternative to access regulation.

Access regulation ensures access at a price which is either commercially negotiated or, preferably, based on cost information, such that the price charged is non-discriminatory and efficient. Access regulation should also include an element of ring fencing and proscription of anti-competitive behaviour. Access regulation allows for access which in turn promotes competition and economic efficiency.

Price monitoring does not necessarily guarantee access and is effectively ensuring that prices (which may or may not be efficient) meet a certain set of criteria. In itself price monitoring does not promote competition and economic efficiency.

Price monitoring does not result in efficiency, third party access at an efficient price adds to efficiency.

Asciano's experience of price monitoring regimes in South Australian ports is that it does little to prevent the potential for vertically integrated access providers to benefit related parties and as such it does not facilitate competition.

- *Is there an ongoing need for a National Access Regime? If so, what role should it play?*

Asciano believes that there is an absolute need to maintain a National Access Regime if Australian efficiency and productivity are to be improved.

The National Access Regime acts as a common reference point for other access regimes and thus assists in ensuring access regimes remain broadly consistent across jurisdictions and acts to ensure that state based regimes provide for access in a manner that meets the standards of the Competition and Consumer Act.

More generally the National Access Regime acts as a "safety net" to cover access to infrastructure not subject to state based or industry specific regimes but which still may meet the relevant criteria for access.

- *What alternative policy measures to the National Access Regime could be used to promote effective competition in upstream and downstream markets?*
- *What alternative policy measures could be used to facilitate access to services provided by nationally significant infrastructure?*
- *What are the relative costs and benefits of alternative policy measures (compared with Part IIIA)?*

The continuation and strengthening of the National Access Regime will continue to promote competition and efficiency in markets upstream and downstream of significant infrastructure. In particular strengthening anti competitive provisions and ring fencing provisions in markets where infrastructure providers are vertically integrated will further promote effective competition.

Other policy measures can be used to promote competition in these markets but they should be additional to the National Access Regime rather than being alternatives to the National Access Regime.

Alternative approaches to a National Access Regime include state based regimes or industry specific regimes. Such access regimes are likely to result in regulatory functions being duplicated and as such these approaches will increase costs. Such access regimes may also increase benefits if they better meet the needs of the industries and the markets involved but detailed proposals would need to be put forward to allow such benefits to be considered.