

**Submission to the Productivity
Commission Draft Report relating
to the National Access Regime**

July 2013

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1 INTRODUCTION AND BACKGROUND

Asciano welcomes the opportunity to make a submission to the Productivity Commission (PC) in response to the PC Draft Report relating to its 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 has previously made a submission to the PC on this issue in February 2013.

In this February 2013 submission Asciano supported:

- continuing third party access regimes in Australia, particularly the continuation of the National Access Regime as this regime acts as both a direct pathway to access and as a common reference point for other access regimes;
- strengthening access regimes by strengthening provisions relating to information provision, vertical separation, ring fencing and anti-competitive discrimination; and
- moving towards rationalising access regimes, while recognising there may a legitimate need for differences. In particular Asciano supports moves towards consistency between state and Commonwealth access regimes.

To the extent that any issues raised in this Asciano submission have not been addressed in the Draft Report Asciano is seeking that they be considered by the PC in its Final Report.

Asciano is one of Australia's largest national above rail freight operator (through its Pacific National subsidiaries) and one of Australia's largest port operators (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. 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.

Overall Asciano welcomes the Draft Report's position that the National Access Regime be retained but has some concerns regarding the Draft Report's position on:

- the retention of the negotiate arbitrate framework without a requirement for access providers to provide cost information to facilitate balanced negotiations;
- a single approach to national rail access; and
- road access.

Asciano generally supports the proposed changes to the declaration test in section 44G and 44H of the Competition and Consumer Act but is seeking some clarity on issues which may arise in transition, particularly where they may be inconsistency between national and state regimes.

This submission is public.

2 BRIEF OVERVIEW OF PC DRAFT REPORT

Asciano notes that the Draft Report recommends retention of the National Access Regime and the retention of the negotiate-arbitrate framework but that it should be amended to address the following issues:

- the test for access should be based on a natural monopoly test rather than an “uneconomic to duplicate” test;
- the exercise of Australian Competition and Consumer Commission (ACCC) power to direct extensions to infrastructure facilities should be more transparent;
- the certification process should be refined to improve transparency and certainty; and
- any additional industry specific access regimes must be based on a clear problem that is best addressed by industry access regulation.

3 ASCIANO’S COMMENTS ON THE PC DRAFT REPORT

Overall Asciano welcomes the Draft Report’s position that the National Access Regime be retained. Asciano believes that a number of important issues, which would improve and strengthen the National Access Regime, have not been adequately addressed in the Draft Report.

These issues were addressed in Asciano's February 2013 submission and include:

- strengthening requirements for access providers to provide cost information;
- strengthening requirements for access provider vertical separation and ring-fencing; and
- increasing powers for regulators to monitor, audit and enforce access regime conditions.

Asciano seeks that these issues are further addressed in the Final Report.

Asciano's comments on the more detailed findings and recommendations of the Draft Report are outlined in the sections below.

3.1 Retention of the Negotiate-Arbitrate Framework

The Draft Report (pages 131-132) finds that the existing negotiate-arbitrate framework is appropriate and should be retained.

Asciano believes that the negotiate-arbitrate framework is a useful base line form of access regulation which minimises the costs of regulation. However, the negotiate-arbitrate framework should be enhanced by having a regulator approved standard access agreement for a standard service as this provides a framework for the negotiations even if the service being negotiated is non-standard.

However, it should be recognised that even if there is a standard access agreement in place, under the negotiate – arbitrate framework there remains an imbalance in the information held by both parties. Significantly, this information imbalance provides the infrastructure provider with an advantage in price negotiations and often results in costly and protracted access negotiations.

As such, Asciano believes that the access framework and access outcomes should be improved by requirements for infrastructure providers to supply a reasonable level of cost information to facilitate even handed price negotiations. Asciano recognises that the Draft Report (page 130) discusses this issue and concludes that there is no compelling evidence that poor information disclosure is a weakness in the access regime. Asciano seeks that the Final Report reconsiders this position. Asciano believes that information asymmetry between parties remains a weakness in the negotiate arbitrate framework.

A price based on transparent cost information available to both negotiating parties is more likely to be both efficient and non-discriminatory than a price negotiated when one party has incomplete information. (A negotiation where both parties have information is more likely to result in a price outcome which approximates the outcome that could be expected in a competitive market).

Asciano is seeking that the Final Report extends the existing negotiate-arbitrate framework to provide for a negotiation based on the principle that both parties have complete or, at a minimum, balanced information.

3.2 Changes to the Test for Access and the Associated Recommendations

Overall, Asciano broadly supports the Draft Report's position in relation to access declaration criteria.

Asciano notes the Draft Report's position that the test for access be based on the former natural monopoly test rather than the "uneconomical to duplicate" test arising in the High Court's Pilbara decision. This Draft Report position effectively returns to the position prior to the High Court decision. Asciano broadly supports the Draft Report's position as it addresses uncertainty created by the High Court's Pilbara decision.

Asciano notes that the Draft Report makes numerous recommendations (Recommendations 8.3, 8.4 and 8.5) resulting in amendments to sections 44G and 44H of the Competition and Consumer Act 2010, where these sections relate to the criteria for declaration. While Asciano does not oppose the recommendations in principle, Asciano believes that there may be some potential transitional issues as to how such recommendations, if adopted, may impact on the operation of the Competition Principles Agreement and various current state based access regimes¹.

Asciano believes that for the sake of regulatory consistency the Competition Principles Agreement and state access regime documentation should be amended where appropriate to ensure consistency with any recommended changes to the National Access Regime which are implemented.

¹ The Draft Report Information Request 10.2 (page 237) seeks input on potential transitional issues relating to changes recommended in the Draft Report. This section seeks to address this information request.

If recommended changes to the National Access Regime which are implemented are not adopted by state based regimes then inconsistencies may arise in declaration and coverage criteria which may result in potential for:

- infrastructure owners to engage in “jurisdiction shopping” if their assets may be covered under one regime but not by another regime²; and
- uncertainty regarding certification of state based access regimes; in particular if these regimes adopted the declaration criteria at a point in time and the criteria subsequently changed, the status of the certified regimes should be clarified³.

3.3 National Approach to Rail Access

The Draft Report generally supports the current mix of jurisdictional access regimes, and while supporting current industry specific regimes, the Draft Report does not necessarily support the development of additional industry specific regimes stating that (Draft Report p38):

Before any additional industry-specific regimes are introduced, it would need to be clearly demonstrated that there is a policy problem that is best addressed by access regulation, and that regulation would be best implemented at the industry level.

In its February 2013 submission Asciano raised concerns that it operates its above rail operations under six different access regimes with multiple access regulators, and that this multiplicity of regimes adds costs and complexity to rail access for little no benefit, particularly as many of the access regulation functions and costs are duplicated across states. Given this Asciano indicated that the concept of an industry specific national rail or transport infrastructure regime should be further considered.

² Asciano recognises that the great bulk of infrastructure assets would either be covered or uncovered under both tests but there may be a sub class of assets which would meet one test but not the other test.

³ Asciano recognises that the certification of an access regime is for a set period of time but differences in a fundamental set of criteria such as the declaration criteria may raise concerns as to the long term status of the certified access regime particularly where long term investments are required to be made by both access providers and access users and these investments are based on an assumption of ongoing access regulation.

Asciano recognises that there may be benefits in having different detailed access and pricing approaches to rail access for different users and applications. However, if different access and pricing approaches are required due to market, user or operational factors then these access regimes should be explicitly based on the access needs arising from these factors rather than be based on jurisdictional borders.

The Draft Report (page 264) recognises that a nationally consistent approach to rail regulation would have a number of benefits but argues that these benefits would be offset by costs associated with a reduction in regulatory flexibility and the costs of negotiating and developing a national approach to rail access. Thus the Draft Report (page 264) concludes that:

Developing a national approach to rail access would involve time and costs that, in the Commission's view, would likely outweigh any benefits arising from greater consistency.

Asciano queries this Draft Report position. Asciano believes that the move from six access regulators to one access regulator would result in ongoing cost savings to regulators, access providers and access seekers and holders. Asciano recognises that establishment and implementation of such a regime would not be costless but believes that the benefits of a single national rail access regime and regulator should be re-considered.

3.4 Road Infrastructure and Access

The Draft Report (page 264) explicitly poses the question whether road infrastructure should be subject to access regulation.

The Draft Report (page 265) takes a position that that heavy vehicle access to road infrastructure should not be addressed by the National Access Regime. The basis for this Draft Report (page 265) position seems to be that where access seekers need access to compete in dependent markets the road owners do not deny access and / or do not set access prices at monopoly price levels.

Asciano believes that the Draft Report position that that heavy vehicle access to road infrastructure should not be addressed by the National Access Regime should be more properly tested against each of the declaration criteria before this position is

confirmed. The decision for coverage of road networks under the National Access Regime should ultimately be a question for the National Competition Council (NCC) and the relevant Minister (and / or any relevant state access regime).

In taking the position that heavy vehicle access to road infrastructure should not be addressed by the National Access Regime the Draft Report (page 265) seems to partially base the position on the fact that road owners are not vertically integrated⁴.

Asciano believes that an absence of vertical integration is not central to any decision as to whether an asset should be covered by an access regime. Asciano believes that monopoly infrastructure owners which are not vertically integrated should be subject to access regulation. Even if there is no evidence of monopoly pricing such monopoly infrastructure owners have the potential to engage in monopoly prices and so should be subject to access regulation. This position appears to be supported by the Draft Report Draft Finding 3.2 (page 34) which states:

Both vertically integrated and vertically separated infrastructure service providers can, under some circumstances, have an ability and incentive to engage in monopoly pricing of access. ... Accordingly, access regulation can provide benefits by covering both vertically integrated and vertically separated service providers.

Asciano believes that the PC should clarify its position in relation to the regulation of vertically integrated and vertically separated service providers and in particular clarify whether roads are a special case of vertically separated infrastructure provider where the Draft Report general conclusion does not hold.

The Draft Report (page 265) notes that there are currently separate road access and pricing policy processes being developed under the COAG Heavy Vehicle Charging and Investment Reform process. Asciano is involved in these processes and believes that these policy processes should be worked through before issues of road access and road pricing are finalised.

⁴ The Draft Report quotes the Department of Infrastructure and Transport which notes that roads are not vertically integrated and thus have no incentive to deny access to road users.

3.5 Other Issues – Merits Review, Certification and Extensions

Asciano notes the Draft Report's position that merits review of access declaration decisions should be retained. Asciano supports this position as merits review provides a limit on the regulator's power and should act as an incentive for the regulator to make a thorough decision.

The Draft Report proposes that the National Access Regime be amended such that an infrastructure service cannot be declared if it is subject to a certified access regime. Asciano generally agrees with this proposal if the certification process ensures that the certified regime is consistent with the National Access Regime which would apply under declaration, which would include the ability to apply for revocation of the certification as proposed in the Draft Report.

Asciano understands that in the event of changes to the National Access Regime or the Competition Principles Agreement then currently certified regimes will remain certified; however Asciano believes that this issue should be clarified in the Final Report.

Asciano notes that under Information Request 6.1 the Draft Report asks for views on the costs and benefits of certifying industry specific regimes, particularly the electricity and gas access regimes. Asciano has no particular view on the electricity and gas regimes but believes that as a general rule industry specific access regimes should be certified to ensure a degree of regulatory consistency across access regimes.

The Draft Report (Draft Recommendations 8.7 and 8.8) (page 37) recommends that the Competition and Consumer Act 2010 be amended to confirm the prevailing interpretation that the ACCC can require a service provider to extend and expand its facility, and that the ACCC should publish guidelines as to how this would be exercised in practice.

Asciano supports both of these recommendations insofar as they reduce the level of regulatory uncertainty.

4 CONCLUSION

Asciano welcomes the Draft Report's position that the National Access Regime be retained. Asciano generally supports the proposed changes to the declaration test in section 44G and 44H of the Competition and Consumer Act 2010 but is seeking some clarity on transitional issues, particularly where they may be inconsistency between national and state regimes.

Asciano has some concerns regarding the following positions in the Draft Report.

- the retention of the negotiate arbitrate framework with no strengthening of the requirements on access providers to provide cost information to access seekers and access holders;
- the Draft Report position opposing a single approach to national rail access. Asciano believes that the potential for a single national rail regime should be further considered given the duplication inherent in the six existing access regimes applying to rail: and
- the Draft Report position on access to roads not being covered by the National Access Regime. Asciano believes that this issue is a decision for the NCC, the relevant Minister and, potentially the HVCI process.

Asciano previously sought that the National Access Regime be improved by strengthening requirements for access providers to provide cost information, strengthening requirements for access providers to be vertically separated and ring-fenced and increasing powers for regulators to monitor, audit and enforce access regime conditions. Asciano does not believe that these issues have been adequately addressed in the Draft Report and is seeking that they be further addressed in the Final Report