26 May 2008

Ms Margaret Arblaster
General Manager – Transport & Prices Oversight
Regulatory Affairs
ACCC
GPO Box 520
MELBOURNE VIC 3001

Dear Ms Arblaster

Submission Re: ACCC Draft Decision - ARTC Interstate Access Undertaking

Asciano's submission to the ACCC with regard to the draft decision (DD) on the ARTC Interstate Access Undertaking (IAU) is attached. This letter and the submission contain no confidential information and may be published in their entirety at the ACCC's discretion.

Asciano and other stakeholders have participated in the debate regarding the IAU since December 2006 through the making of a number of submissions both to ARTC and the ACCC. The DD represents the penultimate stage in the approval process and sets out in full the ACCC's consideration of the wide range of issues raised. Asciano recognises that the ACCC has taken considerable care to address issues raised by stakeholders and to provide an analysis of each issue as well as a decision. This is most helpful and the ACCC is to be commended for the rigor of its analysis.

Notwithstanding this, there are a number of issues remaining where Asciano is of the view that the DD is either unclear with regard to the reason for a particular decision or alternatively, the discussion suggests that the underlying issue may not have not been clearly understood. Asciano recognises the role of the ACCC in the IAU approval process as a decision maker, and does not wish to rehearse arguments previously raised merely to reopen the debate on a matter where the ACCC has arrived at a decision that is clearly grounded in reasoned analysis. Rather, Asciano's submission is directed to those areas where it believes that further discussion of the issue may assist in arriving at a more informed decision or in identifying areas where the Final Decision might need to provide greater clarity.

Should you have any questions with regard to Asciano's submission, please do not hesitate to call.

Yours sincerely

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Asciano:
Submission To ACCC Re Draft Decision ARTC Interstate Access Undertaking

May 2008

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1. EXECUTIVE SUMMARY

Asciano agrees with the recommended changes suggested by the Australian Competition & Consumer Commission (ACCC) in the Draft Decision (DD) on the Australian Rail Track Corporation (ARTC) Interstate Access Undertaking (IAU).

In addition to those recommended changes, Asciano believes that there are a number of issues within the DD that require further review. This submission does not attempt to revisit arguments previously made, nor does it seek to reopen decisions that, while Asciano may not agree with the decision, are ones that are based on a clear rationale and do not have a substantial impact on the workability of the IAU.

The key issues that Asciano believes should be revisited in the DD are set out below:

The IAU As A Model Undertaking

As the IAU is intended to be a model undertaking for other rail access regulation around Australia, it bears a higher burden than an undertaking being considered only within the context of the service to which it refers.

There are a number of areas within the IAU where it fails to comprehend its model status and it is therefore deficient in that role. Asciano suggests that for the ACCC to accept an undertaking that fails to discharge this higher burden will result in a significant detriment to the aims of COAG and the regulation of access to rail infrastructure in Australia.

Asciano is of the view that it is open to the ACCC under the *Trade Practices Act 1974* s 44ZZA(3)(b) and(e) to take into account the model role of the IAU in its consideration of whether to approve it or not. There is significant public interest in having effective access regulation in Australia and hence that the chosen model (the IAU) should be assessed on its ability to perform that role.

Scope

The DD recognises several issues of scope raised by stakeholders but does not adequately identify how those issues are properly addressed by the IAU. These issues are:

- Provision for inclusion of the SSFL, but exclusion of the MFN. As the MFN represents an integral part of the Sydney freight access strategy, along with the SSFL, it is incomprehensible why one should be included but the other ignored.
- The failure to explain how the IAU will interact with other parts of ARTC's network operating under a different undertaking ie the NSW Access Undertaking or the forthcoming Hunter Valley access undertaking..
- The failure to include sidings, particularly where there is a potential requirement for access to privately owned terminals.

The absence of a reasonable explanation from ARTC for these omissions raises stakeholder concerns that the omissions are deliberate and for reasons that are detrimental to access seekers.

Exclusion Of Non-Indicative Services

The DD provides a number of reasons to justify accepting the exclusion of non-indicative services. Upon examination, these reasons do not appear to provide this justification. In particular the reliance on IAU clause 4.2(b) which purports to link non-indicative prices to indicative prices has in practice been illusory. ARTC has never explained any such link and experience suggests that there is no such link. Without this link, the chain of reasoning in the DD fails completely and it is imperative that the ACCC review this issue.

Further, Asciano believes the view expressed in the DD that the ACCC has broad discretion in determining prices in an arbitration is not justified. The reality is that the ACCC would require a compelling reason to deny ARTC the exercise of any discretion that is properly exercised in accordance with the IAU and that such reason would involve circumstances that vitiated the initial approval of the IAU. Asciano's understanding of Court decisions with regard to this matter would make it unlikely that the ACCC would be able to rely on the obligation on ARTC to have regard to indicative prices in order to overturn ARTC's pricing discretion.

Consistency Across Undertakings

The DD addresses the issue of consistency across different networks but suggests that it is not appropriate for the IAU to deal with this issue and that it should be left to some other process.

To Asciano's knowledge, the most tangible mechanism currently available to promote this outcome is the access undertakings of the relevant track owners. To the extent that the IAU is supposed to be the national model, this places a special obligation on it to address this issue. Asciano requests the ACCC to reconsider its view that it is appropriate to rely on as yet unseen mechanisms to address what the ACCC itself recognises as a significant issue.

Removal Of Flexible Pathing

Asciano is sceptical that ad hoc paths present a viable alternative to the current flexible arrangements. The approach suggested by ARTC is impractical, unaffordable and introduces unnecessary barriers to competition. Asciano requests the ACCC to undertake a more detailed study of this issue as it threatens the viability of long standing rail based traffics. This is the reverse of government policy, the stated aims of ARTC and in particular the NSW Lease.

Use It Or Lose Rule

The DD suggests that it is open to access seekers to negotiate away the perceived faults with the "use it or lose it" mechanism. It is Asciano's experience that once an indicative access agreement has been approved by the regulator, there is effectively no meaningful negotiation possible. To rely on the dispute resolution process, as suggested by the DD, appears inappropriate – the ACCC is the body that will resolve the dispute but the ACCC instead of determining the matter now is suggesting that the parties go through a negotiation process only to come back to it at a later date after expenditure of significant time and effort for the ACCC to resolve the matter. Asciano suggests that it is far more preferable to resolve the matter in the IAU approval process.

Indicative Access Agreement

The DD appears to suggest that there is no need to resolve issues raised with regard to the Indicative Access Agreement (IAA) and instead that access seekers rely on negotiation at a later date. Asciano believes that this is an ineffective way of resolving the issues given the imbalance in bargaining power of the parties. Asciano believes that it is essential that the issues raised be considered in detail and resolved during the approval process. Again, this is particularly pertinent given the model nature of the IAU.

2. ABBREVIATIONS USED

ACCC	Australian Competition & Consumer Commission
ARTC	Australian Rail Track Corporation
DD	*ACCC Draft Decision Access Undertaking – Interstate Rail Network Australian Rail Track Corporation*, April 2008
IAU	*ARTC Interstate Access Undertaking*, 19 December, 2007
MFN	Metropolitan Freight Network (Sydney)
NSW Lease	*Memorandum between The Commonwealth of Australia & The State of New South Wales & Australian Rail Track Corporation Ltd In relation to the Lease of the NSW Interstate and Hunter Valley rail assets to Australian Rail Track Corporation Ltd and associated arrangements*, 4 June 2004 – available from the ARTC website: http://www.artc.com.au/library/Final_Tripartite_Agreement.pdf
SSFL	Southern Sydney Freight Line
TPA	*Trade Practices Act 1974*

3. IAU AS A MODEL UNDERTAKING

COAG has clearly formed the intention that the IAU form a model for rail access regulation for all nationally significant rail lines in Australia.[1] Asciano is concerned that the IAU has been considered by the ACCC as a "stand-alone" voluntary undertaking [2] and that this approach seriously undermines COAG's intention.

A consequence of the ACCC approach is that the DD at various points expresses a lack of complete satisfaction with the IAU but accepts it on the basis that it is not within the ACCC's remit to reject a voluntary undertaking that meets the legislative criteria when viewed on a stand-alone basis.[3]

It is appropriate that the ACCC assess an undertaking on the basis of the legislative criteria. However, Asciano believes that the combined Commonwealth and State Governments (through COAG) have placed the ARTC IAU in a different category to a normal undertaking by clearly identifying it as a model for all future rail regulatory arrangements. Asciano argues that this necessarily places a burden on the IAU that other undertakings do not have to carry, it must be sufficiently complete that it is able to fulfil its model role. A document that 'merely' meets the criteria such that the ACCC grudgingly concedes that it must accept it fails to meet this higher test.

Similarly, the DD adopts the position that the IAU is a voluntary document. While it meets this criteria in the sense that ARTC was not legally compelled to submit it, it clearly is not voluntary

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1 "Timetable for Implementation of the Competition and Infrastructure Reform Agreement", COAG National Reform Agenda, Competition Reform, Competition and Infrastructure Reform Agreement — Implementation Plan February 2006, p34

"3.1 The Parties agree to implement a simpler and consistent national system of rail access regulation, using the Australian Rail Track Corporation access undertaking to the Australian Competition and Consumer Commission as a model, to apply to the following agreed nationally significant railways:

a. interstate rail track from Perth to Brisbane, currently managed by the Australian Rail Track Corporation and other parties, subject to the outcome of commercial negotiations; and

b. major intra-state freight corridors on an agreed case by case basis depending on the costs and benefits of inclusion under a national regime."

2 Eg DD p 48

3 Eg DD p 48,

in the sense that ARTC is free to not submit an undertaking for regulatory scrutiny. This compulsion arises through at least two circumstances:

- It is plain that COAG expects ARTC to have an approved undertaking, and one that is acceptable to the ACCC (otherwise the COAG agreement would make no sense). As ARTC is owned by one of the members of COAG, this amounts to the imposition of an obligation on ARTC by its owner to submit an undertaking – for ARTC to do otherwise would involve the Commonwealth engineering the frustration of its own agreement, an intention that one would not readily ascribe to the Commonwealth.[4]
- ARTC has an obligation under the NSW Lease with the NSW Government to submit an undertaking to the ACCC.[5] Again this militates against a claim that the IAU is "voluntary" in the normal sense that ARTC has complete freedom not to submit an undertaking.

The commentary throughout the DD makes no reference to the IAU being a suitable document to perform the role as a model undertaking that it is clearly intended to play. Neither does the IAU itself (eg in the objectives section) make any pretence that it is contemplated it would fulfil this role – ARTC has deliberately crafted the IAU as a minimalist document that reduces, as much as possible, the regulatory oversight of its operation in both the product and geographic dimensions.

Asciano suggests that for the ACCC to accept an undertaking that fails to discharge the higher burden of being an appropriate model for access regulation in Australia would result in a significant detriment to the aims of COAG and the regulation of access to rail infrastructure in Australia.

Asciano is also of the view that it is open to the ACCC under the *Trade Practices Act 1974* s 44ZZA(3)(b) and(e)[6] to take into account the model role of the IAU in its consideration of whether to approve the document or not. There is significant public interest in having effective access regulation in Australia and hence that the chosen model (the IAU) should be assessed on its ability to perform that role.

4. SCOPE

Asciano supports the DD recommendation D2[7] that the IAU should provide greater detail as to the extent of the network covered and also that network maps should form part of the IAU.

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4 While ARTC is a Corporations Law company, and legally independent from its shareholder, the Commonwealth's agreement with the other members of COAG to use the ARTC undertaking clearly implies an expectation on the part of the Commonwealth that it is able to cause ARTC to submit a suitable undertaking for approval.

5 NSW Lease paragraph 12.

"12. ARTC ACCESS UNDERTAKING

(a) ARTC will lodge an Access Undertaking with the Australian Competition and Consumer Commission (ACCC) pursuant to Part IIIA of the *Trade Practices Act 1974* as soon as practicable after commencement of and in accordance with the Lease and will seek to have it approved by the ACCC. The Access Undertaking will include passenger priority principles referred to in clause 13 of this Memorandum.

(b) ARTC will abide by the Rail Infrastructure Corporation's existing access undertakings in accordance with the Lease pending the approval of the ARTC access undertaking to be obtained in accordance with clause 12(a) of this Memorandum."

6 TPA s44ZZA (3) "The Commission may accept the undertaking, if it thinks it appropriate to do so having regard to the following matters:

…

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

…

(e) any other matters that the Commission thinks are relevant."

7 DD p 241

However, Asciano believes that the DD, while recognising several other issues of scope raised by stakeholders, fails to adequately identify how those issues are properly addressed by the IAU. These issues are:

- Provision for inclusion of the SSFL, but exclusion of the MFN. As the MFN represents an integral part of the Sydney freight access strategy, along with the SSFL, it is incomprehensible why one should be included but the other ignored.
- The failure to explain how the IAU will interact with its own network under a different undertaking.
- The failure to include sidings, particularly where there is a potential requirement for access to privately owned terminals.

The DD decision to accept the scope is likely to lead to a number of problems that have previously been highlighted in a number of submissions. In Asciano's view this is likely to introduce a number of significant problems with the administration of access and will leave access seekers very much in the hands of ARTC for a number of services.

It is particularly disappointing that instead of addressing these exclusions in any detail, the DD relies on the fact that ARTC does not have to include these parts of the network and therefore the issues do not need to be addressed.

Notwithstanding anything else, if the ACCC remains of the view that the IAU is acceptable, then it is essential that the DD provide guidance as to how the ACCC believes that access arrangements between the IAU and the non-existent Hunter Valley undertaking will work. For example does the ACCC expect that a single access contract could operate under two separate undertakings such that an access seeker wishing to move on both the interstate and Hunter parts of the network did not have to negotiate two separate access contracts with ARTC? If such a thing is possible, the DD should explain the mechanics of this. Asciano's understanding of an access undertaking is that it is intended to cover the negotiation process leading to an access contract and so the concept of a single access contract dealing with infrastructure services covered under two separate undertakings would represent a rather novel arrangement that appears contrary to the undertaking concept.

Similarly, it would assist if the ACCC could explain why running a train to the end of the SSFL but then requiring a separate access contract with ARTC under the NSW Rail Access Undertaking (for the same train) to access the MFN to reach Port Botany (also owned by ARTC) would not result in significant inefficiency. The NSW Lease clearly intends the SSFL to have the same status as the MFN as the following extract demonstrates:

"4. METROPOLITAN FREIGHT LINES LICENCE

(a) ARTC and RailCorp propose to enter into a lease and licence agreement for the Metropolitan Freight Network ("the Metropolitan Freight Network Lease and Licence") in accordance with the Metropolitan Freight Network MOU.

(b) On completion of the construction, the Southern Sydney Freight Line will be subject to the Metropolitan Freight Network Lease and Licence or a document in similar terms."[8]

As has been previously stated, Asciano is of the view that the exclusion of sidings and yards leaves these under the NSW Rail Access Undertaking. If this is correct, then any contract to access these sidings presumably would have to conform to that undertaking rather than be capable of being handled under the IAU. Again this is administratively inefficient and could not possibly be considered as the type of arrangement that a model regulation would adopt.

[8] NSW Lease paragraph 4.

If this is not the case, then the exclusion of sidings removes them effectively from any regulatory protection and hence introduces a large potential problem for any future terminal builder that wishes to access the network through a siding or yard rather than connecting directly to the mainline. Again this fails any reasonable expectation of a model undertaking.

It is of particular concern with regard to each of the above exclusions that ARTC has offered no cogent explanation in the face of substantial access seeker concern in a number of submissions both directly to ARTC and the ACCC. The absence of a reasonable explanation for these omissions merely raises stakeholder concerns that the omissions are deliberate and for reasons that are detrimental to access seekers.

5. EXCLUSION OF NON-INDICATIVE SERVICES

5.1 The Primary Issue - Exclusion of non-indicative services

The DD places non-indicative services outside of many of the protections expressly contained within the IAU (eg specific prices, escalation provisions). This was a matter that raised considerable access seeker concerns during the approval process and Asciano believes that the DD has either failed to adequately explain the reasons for the ACCC's decision or alternatively the issue has not been fully understood. The DD identifies that the focus of ACCC's decision on this issue is encapsulated in the two questions:

"Does the December Undertaking strike the appropriate balance between certainty for access seekers and flexibility for ARTC to negotiate prices?

If it is appropriate to constrain ARTC's flexibility are the constraints in the December Undertaking appropriate?"[9]

The DD arrives at the conclusion that there is benefit in constraining ARTC's flexibility in prices [10] and therefore the main focus of the argument rests in answering the second question.

With regard to constraints on ARTC's non-indicative pricing, Asciano is concerned that the discussion in the DD does not properly take into consideration the relevant facts and therefore arrives at an inappropriate conclusion. Each of the main arguments in the DD is addressed below.

Connection To Indicative Prices

The DD places substantial reliance on the premise that "the Undertaking commits ARTC to setting access prices for non-indicative services having regard to indicative prices charged for indicative services".[11]

The commitment by ARTC to a link between non-indicative and indicative prices is contained in clause 4.2(b) of the IAU. This is reproduced below for ease of reference:

"In formulating its Charges, ARTC will have regard to a range of factors which impact on its business including, but not limited to, the following:

…

(b) the Indicative Access Charges for Indicative Services set out in clause 4.6;

…"

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9 DD p 98

10 DD p 100

11 DD p 100

This sub-clause is part of a much wider clause that details many factors that ARTC will take into account when setting prices. The breadth of the clause would make any reliance on sub-clause (b) as a curb on pricing precarious at best, noting, not the least, the phrase in the head-statement "ARTC will have regard to a range of factors … including, but not limited to" that effectively allows ARTC to have regard to any factor it considers relevant.

With the exception of the addition of the explanatory paragraph at the bottom of clause 4.2, the clause is the same as the corresponding clause in the 2002 Undertaking. The purpose of the new explanatory paragraph is to relate capacity consumption back to the indicative train service (see further discussion regarding this below). It is therefore reasonable to suppose that ARTC intends for the clause to operate (apart from the additional paragraph) on the same basis as it has operated since 2002.

The DD goes so far as to suggest that "ARTC should be able to explain the relationship between the two sets of prices".[12] Since 2002, ARTC has not, on any occasion, indicated to Asciano that non-indicative prices have had any link to indicative prices, nor demonstrated in any fashion what such a linkage might be. Given that Asciano would have the widest variety of traffics operating on the ARTC network, it is inconceivable that this lack of linkage was merely due to lack of relevance to Asciano.

On the basis of ARTC's practice over the 6 years since the 2002 Undertaking was accepted, one must conclude:

- that there is, in fact, no linkage between indicative and non-indicative prices, or alternatively,
- if such a linkage does exist, it is so tenuous as to lack any practical effect and provides no real protection to access seekers.

It is therefore unfortunate that the ACCC has seen this paragraph as providing a substantial protection to access seekers. Asciano strongly urges the ACCC to reconsider its decision in the light of the failure of clause 4.2(b) to provide the protection that the DD suggests is present.

The ACCC should also be aware that ARTC has substantially modified prices in the interregnum between undertakings, introducing massive price variations for non-indicative services (both increases and decreases) in its attempt to bring these into its preferred new pricing structure. Again, no link has been explained, or even attempted between prices for indicative services and non-indicative services.[13] While this has occurred outside of an approved undertaking, this is demonstrative of ARTC's use of discretion and cavalier approach to its own pricing principles.

If the ACCC is of the view that Asciano is mistaken with regard to the missing link to indicative prices, it would assist access seekers if the Final Decision was to include a detailed explanation of the linkage. Perhaps ARTC would be willing to provide an explanatory document on the subject.

'Like For Like' Pricing Provisions

Asciano agrees with the DD that the 'like for like' pricing provisions in the IAU prevent price discrimination within a class of traffic. While this is helpful and appropriate to prevent discrimination between operators, it does nothing to alleviate the concerns that the setting of prices for non-indicative traffics is effectively unconstrained within the floor and ceiling once

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12 DD p 101

13 The lack of a link was further demonstrated by the attempt by ARTC to limit the overall impact of the pricing restructure, when spread over all of the relevant traffics, to an increase that was at or around CPI, even though some prices increased by around 200% whilst others reduced to 25% of the previous price. This was obviously an attempt to manipulate prices to achieve a particular outcome that had nothing at all to do with any link to indicative prices.

one accepts that clause 4.2(b) has no practical effect. The like for like provisions deal with a different pricing dimension ie price relativity between operators, not between traffics, and therefore do not provide a reason for exclusion of non-indicative prices from explicit coverage in the IAU.

Protection Through Dispute Resolution

It is accepted that an access seeker could use the dispute resolution process to challenge a non-indicative price. However, Asciano believes that dispute resolution will not be an effective tool to achieve reasonable outcomes. Dispute resolution requires the parties to negotiate the dispute and ultimately to go through arbitration with the ACCC as arbitrator. It is therefore appropriate to consider what power the ACCC has to resolve a dispute in a manner that is contrary to the IAU that it has previously approved (eg as suggested in the DD at page xi).

"… the ACCC believes compliance with s.44ZZA(6) involves more than simply examining ARTC's compliance with its obligations in its Undertaking. Rather, the Undertaking provides for the ACCC to consider a range of factors in deciding a dispute. These include the objects of Part IIIA and the economically efficient operation of the network. Therefore, in arbitrating a dispute, the ACCC is not obliged to conclude that a disputed price is acceptable just because it complies with the Undertaking and is below the ceiling."

The IAU gives ARTC many discretions. In its role as arbitrator in a dispute, the ACCC does not have a mandate to substitute its own discretion for a discretion granted to ARTC, by the ACCC in the IAU.

Taking the pricing of non-indicative services as an example, the IAU Part 4 (Pricing Principles) gives ARTC a wide discretion to set charges within a set of boundaries that include:

- the floor and ceiling limits;
- other prohibitions such as non discrimination between access seekers;
- provided that ARTC has regard to a non-exhaustive list of factors in IAU clause 4.2 which include subjective matters such commercial business impacts on ARTC.

Whilst a non-indicative price could be disputed under the IAU, the fact that IAU clause 3.12.4(b)(vii)(A) permits the arbitrator to deal with any of the matters referred to in TPA s 44V (a statutory provision dealing with the powers of the ACCC in an arbitration) does not give the ACCC power to override an ARTC discretion properly exercised in accordance with an approved undertaking. It is Asciano's understanding that the courts would require ARTC to be acting outside the proper scope of a discretion given to it in the IAU before the ACCC could exercise its arbitral powers to set a different price, eg, if the ARTC price exceeded the ceiling limit. If this is correct, then the reference in the IAU to the TPA factors in s 44V would not allow the ACCC to supplant ARTC's pricing discretion within the floor to ceiling permissible range.

Therefore, Asciano is sceptical that the ACCC has the breadth of discretion in determining an arbitration as the DD suggests. If this is correct, then it would be folly to place any reliance on "clawing back" any matter that has not been adequately dealt with in the IAU, including the exclusion of non-indicative services from the majority of protections in the IAU.

Notwithstanding any argument as to whether or not the ACCC has the relevant power to resolve the issue in arbitration, this does not answer the question - why not include the non-indicative prices and remove the uncertainty? If a significant purpose of the IAU is to promote certainty, then suggesting that access seekers can rely on a very expensive, uncertain and time consuming dispute resolution process would seem to fall well short of the mark. The DD[14] has

[14] DD p 100

concluded that there are benefits from certainty. Reliance on dispute resolution detracts from that aim, particularly where there are no obvious reasons for not including non-indicative prices.

Publication Of Non-Indicative Prices

As the DD points out, ARTC is now obligated to publish non-indicative prices by IAU clause 2.7(b)(iv). This merely adds emphasis to the question as to why ARTC would seek to exclude non-indicative traffics from the protections given to indicative traffics and why the ACCC would countenance that exclusion. If ARTC has to publish the prices and description of the service what reason can be advanced that this in some way constrains or is otherwise contrary to ARTC's interests to provide the same protections for nearly half of ARTC's business.

It is not possible to argue that the inclusion of non-indicative services in some way adds an untenable administrative burden to ARTC – the DD itself contains a full price schedule including both indicative and non-indicative prices in Table D.4.2 DD on page 96. ARTC has also published this page on its website. In order to provide the advantages and protections of the IAU to non-indicative traffics and therefore substantially increase the IAU's coverage merely requires ARTC to remove the offending restrictions from the IAU. Giving these traffics the genuine and substantial protections that are currently restricted to indicative traffics would obviate the need to rely on the tenuous (and in Asciano's opinion chimerical) connection to indicative traffics nominally provided by clause 4.2(b)(iv).

As far as Asciano is aware, no access seeker was suggesting that every price, under all circumstances, must be included on the same basis as indicative services. It is understood that there may well be new traffics that arise during the term of the IAU that might not fit within the current categories published by ARTC and it is legitimate that these not be covered under the IAU. What access seekers were asking for was the inclusion of existing non-indicative traffics. As these are existing, there can be no question as to this being a complex or difficult exercise. While stakeholders would prefer greater clarity on the parameters by which ARTC would actually derive new prices, that is a different matter.

Given the foregoing, not one of the reasons contained in the DD provides a robust rationale for excluding non-indicative traffics from the protections afforded to indicative traffics. Asciano is therefore at a loss to understand the ACCC's decision on this matter and strongly urges the ACCC to review this decision.

5.2 Consequential Issue – Second Class Status Of Non-Indicative Traffics

As a consequence of the ACCC decision, Asciano is also particularly concerned with the preferential status accorded to indicative services in the IAU. This has not been the focus of previous comment on the basis that Asciano has held the view that the exclusion of "non-indicative" services was not a tenable position and therefore the flow-on consequences were not overly emphasised. However, it is a quite extraordinary position to suggest that the network is predominantly for intermodal services. Use of a term "predominant" when at most the traffic forms just over half of the volume on the network is most unfortunate as it tends to legitimate a position that is highly questionable. For example, a different view of the ARTC network, say looking at a few key line sectors in NSW might yield a significantly different view as to the "predominant traffic on the network".

Referring to the objectives of the IAU, stated in clause 1.2, on no occasion is there a reference to favouring or in any way promoting the interests of intermodal traffics over and above the interest (including the significant public interest) in having non-intermodal traffics conveyed by rail.

It is also instructive to consider the commitment made by ARTC in the NSW Lease. Part B, under the heading "Background" and part of the recitals, is extracted in part below:

"B. The Commonwealth, NSW and ARTC are committed to working towards:

(a) a competitive and efficient national rail system to transport the ever increasing tonnage of freight goods for domestic consumption and export;

(b) maximisation of the environmental benefits of rail transport and alleviation of road congestion;

(c) ensuring long term investment in rail to maintain and improve country rail infrastructure;

(d) integration of the NSW interstate rail lines and the Hunter Valley network into the national rail freight network infrastructure;

(e) creation of a "one-stop-shop" for freight movement across Australia;

(f) a national open access regime for rail; …"

In none of these aspirations is there any mention of favouring one type of freight over another, nor is there even any special mention of interstate intermodal freight. To the contrary, paragraph (a) is clearly directed to all freight without distinction (domestic and export freight comprising the whole set of freight). For ARTC to state a preferential status for intermodal services therefore appears to be contrary to the intentions of the parties to the NSW Lease (including ARTC).

Therefore, if the ACCC is of a mind to retain the decision to give non-indicative services a second rate status in the IAU, then Asciano suggests that at the very least it will be necessary to remove the paragraph at the foot of clause 4.2 to avoid condoning ARTC abrogating the intentions of the NSW Lease. However, Asciano suggests that a preferable approach is to remove altogether the unacceptable bias towards one particular class of freight and instead adopt a recognition that ARTC's role is to provide the rail network for all freight equally.

These comments would apply equally to the need to accommodate passenger traffics on the network. Presumably the NSW Lease does not mention passengers in the same context as freight because the NSW Lease otherwise recognises the legislated priority (both in planning and operation) in NSW that is accorded to passengers and therefore it was not necessary to expressly reference that traffic.

6. CONSISTENCY ACROSS UNDERTAKINGS

The DD addresses the issue of consistency across different networks but suggests that it is not appropriate for the IAU to deal with this issue:

"The ACCC recognises that coordination of train paths between networks is complex but it is imperative that there is comparability between network transit management and capacity management rules to facilitate the operation of train paths that cross between networks. This is an issue that could be effectively managed through the national processes that are currently looking at rail access issues." [15]

Asciano is very disappointed that the DD takes this view. As discussed earlier, the IAU is being put forward as a model undertaking. If the model doesn't deal with this issue, how are other undertakings to deal with it? Asciano is not privy to discussions within government regarding

[15] DD p 226

the outcomes of the CIRA process, and therefore is not able to comment on the effectiveness or otherwise of that process in dealing with the problem of consistency between networks.

It is notable that the IAU does not even deal with the connection to other parts of ARTC's own network. Regardless of what happens between different network owners, it is surely within ARTC's power to specify arrangements for its own network under different regulatory structures.

The NSW Lease is again referred to, to demonstrate that there was a clear intention that ARTC (and other track owners) were committed to working together to resolve this issue – at least in NSW.

"7. PATHING OF RAIL SERVICES

NSW (through its rail entities) and ARTC undertake to work cooperatively to facilitate the efficient pathing of rail services subject to passenger priority between the leased, Country Regional and metropolitan networks and ARTC network." [16]

The most tangible mechanism currently available to promote this outcome is the access undertakings of the relevant parties. To the extent that the IAU is supposed to be the national model, surely this places a special obligation on it to address this issue. Asciano requests the ACCC to reconsider its view that it is appropriate to rely on as yet unseen mechanisms to address what the ACCC itself recognises as a significant issue.

7. REMOVAL OF FLEXIBLE PATHING

Asciano is very concerned at the decision to accept ARTC's proposition that paths should move to either fixed or ad hoc paths with the consequential removal of existing flexible pathing.[17]

The ACCC argues that the removal of flexible pathing arrangements promotes efficiency in freeing up additional train paths that would otherwise be quarantined for use on a flexible basis. This argument is based on an implication that the network is really in place to provide for fixed train services such as intermodal trains, a view that is heavily promoted by ARTC (eg see the final paragraph in IAU clause 4.2). But, as noted earlier, this denies the fact that a large proportion of the business is in fact based on other types of trains that cannot run to the preferred ARTC model. For example some mineral traffics will vary week to week based on production at the mines and grain will vary based on the harvest size and shipping schedules. Losing these traffics to road will have significant public detriments though increased road use and the associated congestion, pollution and negative impacts on the environment.

ARTC chooses to ignore this and proposes the ad hoc model will provide a suitable alternative for that annoying part of the business that fails to meet ARTC's preconceptions of what traffic ought to be on the network.

ARTC suggests that an ad hoc path will always be readily available with months of notice when it is likely disappear (because another customer has contracted the path on for a fixed train) and a viable alternative will be available anyway. At best, this is a naive claim. An ad hoc path comes with no guarantees at all that capacity will continue to be available and train operators will be placed in an impossible position. For example, how can a train operator guarantee to convey grain to port if there is no certainty regarding the continued availability of paths in the future (say next year or the year after).

16 NSW Lease

17 DD p 191

The alternative to ad hoc paths is impractical, unaffordable for some traffics and unnecessarily introduces barriers to competition:

- These traffics are predominantly variable in frequency and not suited to the regular use of fixed timetabled paths in the same way as multi-customer intermodal trains. The IAU contains "use it or lose it" provisions that are designed to deal with the failure to make regular use of the fixed path to prevent anti-hoarding. However, the way in which these provisions have been formulated does not make any allowance for an irregularly operating traffic. Thus, though they are well suited to the intermodal trains to perform the intended role, they effectively remove the certainty that holding a fixed (but not fully utilised) path would otherwise provide in the context of an irregular service. Therefore the use of a fixed path does not solve the problem.
- The price of the fixed path is significantly above the current prices paid by some (though not all) traffics currently using flexible paths. In addition, the imposition of a fixed flagfall type charge rather than current output based pricing mechanisms increases the relative cost of these traffics even if the nominal price remained constant through the requirement to pay for capacity not used. In turn this is likely to take marginal traffics, such as grain, increasingly onto road.
- Traffics that are moved in train-loads for a single customer are typically amenable to competition between operators (eg grain, minerals). These traffics are often associated with delivery to a constrained facility (eg a port storage terminal) that must coordinate between deliveries.[18] Forcing an operator to contract for a fixed path has two negative effects from a logistics and competition perspective:
  - Assuming that the contracted paths are the ones that reflect the most efficient delivery available to the receival terminal (and potentially the loading facility – though this may depend on the specific circumstances), quarantining these to a single operator makes them unavailable to any other operator so that to attract another operator to that traffic will require the facility owners (and the new train operator) to adopt less efficient outcomes.
  - The quarantining of the most efficient paths to a single operator reduces the flexibility of an end customer to contract with multiple operators and easily switch between them. This is likely to increase the end customer's costs thus increasing the barriers to competition between operators.
- While the "use it or lose it" provisions in the IAU would ultimately allow for the reassignment of relevant paths from one operator to another operator, this is a process designed as a permanent removal of paths from the operator's access contract and does not support a concept of flexible allocation of paths between operators moving the same traffic.
- The Hunter Valley coal traffic represents an example of the flexible assignment of industry paths between train operators. Operators are assigned paths on a daily basis to meet the needs of the logistics chain taking into account a variety of factors. To introduce fixed pathing in that environment would significantly reduce the capacity of the system and increase the cost of delivery of coal to port. While the scale of grain traffic is different, the concepts remain the same.

Asciano has previously suggested a mechanism for having " traffic specific capacity" ie paths that are reserved for a particular industry (eg export grain) that could be made available to any operator; these have also at various times been described as "industry paths". While this has been raised with both ARTC and the ACCC, no mention of such a concept has been made in the DD, nor by ARTC in its Explanatory Document.

[18] This applies whether or not there is more than one operator. So for example, the same coordination is required regardless of whether Operator A has 2 trains one carrying grain of quality X and one of quality Y, or Operators A and B have one train each with the different grain types. The port terminal will need to manage the receival process in order to efficiently discharge the cargoes of each train.

For ARTC to insist on adopting its current proposal will introduce significant uncertainty for the traffics affected and is likely to discourage investment in above rail assets as well as put at risk the ability for rail to retain these traffics on rail. The NSW Government has only recently announced a restructure of grain transport, specifically targeted at ensuring that rail remains viable to continue provide services. ARTC's proposal undercuts this package, firstly by removing certainty that grain paths will remain, secondly through above CPI price increases and thirdly through the creation of barriers to competition.

Asciano remains sceptical that ad hoc paths present a viable alternative to the current flexible arrangements and requests the ACCC to undertake a more detailed study of this issue as it threatens the viability of long standing rail based traffics that is the reverse of government policy, the stated aims of ARTC and in particular the NSW Lease (see p 10 above).

8. USE IT OR LOSE RULE

The DD appears to make an unexplained assumption that ARTC will only apply the use it or lose it rule when there is alternative demand and the criteria has been triggered:

"In the circumstance where there is no alterative demand for the train path, the use it or lose it rule is not applied by ARTC …"[19]

There is no explanation for such an assumption and the drafting of the provision does not warrant this assumption. In fact the application of the use provision is totally discretionary to ARTC once the provision is triggered. Asciano suggests that if the qualification assumed by the ACCC is intended to be applied then the drafting should be modified to reflect this.

The DD also appears to dismiss concerns that the provision could be triggered by late running trains in the following passage:

"However, since the ACCC has no evidence that ARTC has enforced the capacity resumption clause 5.4(a), the impact of resuming train paths due to late running of trains on operational efficiency is a matter of conjecture." [20]

With respect, Asciano believes that where there is a concern raised by stakeholders, it is appropriate for the IAU to address the matter if it is justified. The DD does not suggest the concern is unjustified, merely that there has not been a use of the provision previously. However, this seems to deny the benefit of clarifying the provision is not intended to apply to late running trains. Alternatively, if the provision is intended to apply to late running trains, then this is a matter that should be expressly addressed by ARTC in its Explanatory Document. To Asciano's knowledge most, if not all rail access undertakings in Australia contain an anti-hoarding provision, but not one to date has been designed to address late running trains. As the DD itself points out there is another provision designed to address consistent poor performance (IAU Schedule D clause 9.6).

Regardless of whether the matter is one where a discretion has previously been available but not used, Asciano is of the view that where stakeholders have raised a concern, it is not appropriate to leave the matter at large.

Asciano is also concerned that the DD suggests the operation of the "use it or lose it provision" is something that can be negotiated at a later date.

"Clause 5.4(a) is reasonably clear and the details of the associated resumption policy are best left to the access agreement to provide ARTC and operators with greater flexibility in negotiations. It is

[19] DD p 194

[20] DD p 194

emphasised in the clause that any capacity resumption decision by ARTC is subject to the dispute resolution provisions of the relevant access agreement." [21]

Clearly, if negotiation was a meaningful option then the need for an undertaking must be questioned. It is Asciano's experience that once an indicative access agreement has been approved by the regulator, there is effectively no meaningful negotiation possible. ARTC has already told Asciano that it is not willing to move form the standard access agreement unless it is clearly in ARTC' interests to do so. To rely on the dispute resolution process appears inappropriate – the ACCC is the body that will resolve the dispute but here is the ACCC suggesting that the parties go through a fruitless process only to come back to it at a later date after expenditure of significant time and effort. Asciano suggests that it is far more preferable to resolve the matter in the IAU approval process.

9. INDICATIVE ACCESS AGREEMENT

The DD has clearly identified that the Indicative Access Agreement (IAA) applies only to indicative services and that the parties are free to negotiate terms and conditions outside of the IAA for non-indicative services. Asciano believes that this effectively places a large proportion of access agreements beyond the scope of most of the protections in the IAU. While ARTC may choose to use the IAA as a basis for negotiation for non-indicative services, this is discretionary to ARTC. The ACCC is correct in saying that dispute resolution is open to an access seeker, but this is an extremely unpalatable process and in practice places the access seeker in the position of accepting whatever form of access contract ARTC chooses to adopt or to walk away from using the network.

Once again access seekers are being placed in an inferior position on the basis of what appears to be an arbitrary decision by ARTC to quarantine the standard agreement. No explanation has been provided. It is of no comfort that ARTC may choose to continue to use the standard agreement as the basis for negotiation as access seekers are now on notice that ARTC has unilaterally changed the designation of the IAA to one that only applies to indicative services – why and to what consequence we do not know.

Similarly, the DD suggests that it is not for the ACCC to determine many of the issues that have been raised by stakeholders throughout the consultation and approval process but that these should be resolved through negotiation. Again, one must have regard to the reality that this inevitably advantages ARTC – as a monopoly service provider it is able to dictate terms. It is especially egregious where this results in a multiplicity of issues that, while individually would not be worthwhile formally disputing, in aggregate represent a significantly unbalanced outcome in favour of ARTC.

It is unfortunate that the ACCC has taken this approach. It appears that this view is based on a belief that there is actually real negotiation between the parties, as the following quote shows:

"In assessing whether the IAA is appropriate the ACCC has considered whether it balances certainty for access seekers with sufficient flexibility so access seekers can negotiate the terms and conditions that would best meet their needs. While some submissions argued that the IAA should set standard terms and conditions for all services, not just indicative services, the ACCC considers that this is not necessary to ensure effective negotiation and recognises that there are benefits in access seekers having the capacity to negotiate outside the IAA." [22]

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21 DD p 195

22 DD p 237

This quote suggests that the ACCC believes that negotiation is:

- Between two parties that wish to do business with each other in a competitive market where each has viable alternatives; and
- The parties each have sufficient bargaining power such that an acceptable outcome is likely to eventuate.

One expects to have flexibility in negotiating terms and conditions where there are a number of alternatives available to both parties in terms of customers and suppliers. ARTC is a monopoly, no other party is able to provide access to the relevant portion of the network and there is no substitute available if one is committed to providing a rail service. Access seekers do not approach ARTC in the expectation that they have any flexibility at all with respect to the terms and conditions on which they will be required to accept access. ARTC will dictate the terms and it is not a question as to whether the parties wish to do business together at all. The DD comment therefore is unrealistic in suggesting that it is open to access seekers to negotiate terms and conditions outside of the IAA.

With regard to the expectation that the parties are able to bargain with relatively balanced bargaining power, this is a particularly optimistic view. It is clear from experience that ARTC will not be willing to negotiate away from its preferred view. While it is possible to use dispute resolution, as noted above, this is not a process one would willingly undertake except in extreme circumstances. Asciano suggests that for a small operator or one contemplating entering the market, this would be sufficiently unattractive to cause the prospective operator to abandon the attempt if dispute resolution (as currently constituted) is the only way to achieve a potentially reasonable outcome.[23] Once the ACCC has approved the IAU (which includes the IAA), ARTC has no incentive to negotiate away from that document to its disadvantage. If the matter is subsequently brought to arbitration, ARTC will have a substantial advantage where it relies on the approved access agreement, noting that the regulator is also the arbitrator. Regardless of the argument in the DD, it is not realistic to suggest that the ACCC could rule in an arbitration contrary to a matter that it has previously approved as a regulator, without some other factor intervening to vitiate the previous approval. Hence there is no real possibility of negotiation away from the IAA as it is approved, at least with regard to the standard terms and conditions.

In addition to the problem of negotiating with ARTC, it is again pointed out that this undertaking is supposed to represent the model for all Australian track owners. As such, it is not appropriate to leave a substantial number of matters to "the market" when the market clearly has failed.[24]

The DD[25] suggests that many of the issues raised with regard to the IAA have been dealt with in considering the relevant section of the IAU. With respect, Asciano suggests that such consideration has not been documented in other parts of the DD such that one might have confidence that the issues have genuinely been considered on their merits. Rather, the comments in Section 9.3 of the DD have the appearance of dismissing many of these detailed concerns as lacking sufficient substance or relevance that they need to be individually considered.

Below lists some of Asciano's concerns surrounding the IAA that do not appear to have been individually considered.[26] In addition there is no clear requirement that the IAA reflect

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23 It must always be remembered that not only is dispute resolution costly and time consuming, it is also uncertain as to result until finalised. As arbitrations in the rail industry in the last decade have typically taken 12 – 18 months to reach a conclusion, (notwithstanding any subsequent appeals that might occur), this places an intolerable difficulty for any "start-up" operator.

24 If the market had not failed, there would be no need for an undertaking in the first place.

25 DD p 239

26 A longer list of concerns with regard to drafting issues in the IAA is contained in Asciano's July 2007 submission.

consequential amendments from recommended changes to the IAU (eg the escalation changes). It is unclear to Asciano what incentive ARTC would have to move from these unfairly advantageous positions especially given the asymmetrical bargaining power it enjoys:

- 21 days invoice settlement despite standard industry terms for rail customers being 30 days.
- An operator has to pay the flagfall charge even though ARTC has failed to provide the path in some circumstances. It has not been explained why this is reasonable.
- The escalation clause (clause 4.5) does not reflect the recommended amendment to the IAU escalation clause and still allows for price changes at any time.
- The ability in clause 9.9 for ARTC to withhold take or pay payments from an operator not using a path even when it has been able to sell the capacity to another operator.
- Inclusion of the new "betterment" clause (clause 15.7(b)).
- Clause 19 allowing for the transfer of capacity rights contains a number of carve-outs and discretions in ARTC's favour that would not be acceptable where the parties had more equal bargaining power (eg an obligation to give ARTC power of attorney).
- There is nothing in the IAA Schedule 3 (or anywhere else in the IAA) that defines the Excess Network Occupancy Charge even though this is clearly required – as this is defined in the IAU, the exclusion begs the question as to why it has not been included.

Asciano urges the ACCC to deal with these issues at the time of the undertaking review as in reality given ARTC's monopoly position it will not negotiate away from these positions.

10. OTHER ISSUES

10.1 Insurance

The ACCC decision to impose the $250m public liability insurance limit on all operators is justified in the DD merely on basis of consistency so that all operators have to pay a rate designed initially to cover anticipated greater risks of an incident occurring in Sydney. The decision also suggests that it would be administratively difficult for ARTC to assess the risk imposed by each operator if a variable insurance cover was allowed.[27]

The logic of this reasoning is elusive and the ARTC approach has the appearance of simply adopting the highest common denominator because its easy to do so – in this case this means the insurance requirements sought by RIC when they operated all of the NSW network. In turn the RIC approach had been one based on an assumption that all operators would operate, at least to some extent, within the greater Sydney metropolitan area between Newcastle and Port Kembla.[28] ARTC under the 2002 Undertaking did not see the need to impose a higher insurance obligation for trains passing through metropolitan Melbourne and Adelaide, though undoubtedly the urban nature of those cities would introduce a risk profile not distinctly different to that which applies to Sydney. Thus stakeholders are faced with an arbitrarily imposed outcome without any logical explanation.

With regards to the administrative difficulty of assessing individual operators for the risks they impose, Asciano notes the following:

- Part of the process of gaining access requires that each proposed operation is subject to a risk assessment process and an accreditation process (that also entails a risk

[27] DD p 60

[28] Note that the NSW Rail Access Undertaking does not impose any specific obligation with regard to insurance on either party. Therefore it was always open to an access seeker to negotiate a different insurance outcome under the NSW Rail Access Undertaking, for example if it could demonstrate that it had a lower risk profile. Therefore, the RIC requirement was merely a starting point, not necessarily an absolute amount.

assessment). This applies regardless of an operator's insurance position. Therefore to claim that it would be a significant additional burden to consider each operator's insurance risk position is in fact incorrect.

- Stakeholders were not seeking variable insurance provisions, merely the retention of the current $200m obligation unless the operator was in fact operating through the greater Sydney metropolitan region. This could not possibly be considered an administratively complex matter for ARTC to deal with as ARTC would have complete knowledge of where the operator intended to operate as part of the access negotiation process.

10.2 No Return On Gifted Assets

Asciano welcomes the news contained in the DD that ARTC is not seeking a return on assets purchased from the current government grants. This comes as some surprise as ARTC has not mentioned this in any previous documents available to Asciano. For example, one would have expected that, given previous stakeholder comments on gifted assets, ARTC would have seen fit to mention its approach in the Explanatory Document. So while Asciano congratulates ARTC on this decision, once again the failure to communicate it to stakeholders is of significant concern – what normal business (even a monopoly one) would hide such good news from its customers and why? Once again this highlights the fact that, far from being excused from regulation as ARTC often argues, its own behaviour reinforces the need for close regulatory scrutiny.

10.3 Floor Limit

Inconsistent Approach

The DD accepts ARTC's floor limit on the basis that it is appropriate to set this limit on long run avoidable costs.[29] While Asciano would argue a different view, if this was applied consistently across the IAU, then Asciano could accept that the decision reflects a reasonable economic viewpoint albeit that another approach would be equally valid.

However, the DD then argues that it is appropriate for ARTC to price below the floor and above short run marginal cost.[30] Asciano agrees that this is appropriate and in fact argued for it in previous submissions. But this is inconsistent with the concept of a floor (ie a minimum price) and also with the floor being long run avoidable costs. As Asciano has previously pointed out, a floor that allows ARTC to abrogate the floor by agreement is no floor at all!

As previously discussed, the IAU is being proposed as a model undertaking to which all other undertakings are supposed to conform. The adoption of a questionable floor is of significant concern in this context as well.

Asciano has previously argued that the NSW Rail Access Undertaking provides an appropriate floor mechanism that in fact contains two levels, both the short run and long run avoidable costs of train services. This appears to meet the arguments of the DD in a manner that is both conceptually superior to the floor proposed by ARTC and also correctly places the two levels in context without debasing the concept of a floor.

[29] DD p 139

[30] DD p 140

Inclusion Of Non-Segment Specific Costs

The DD argues that it is appropriate to include non-segment specific costs:

"While ARTC included some non-segment specific costs in the calculation of segment specific avoidable costs, these costs were estimated on the basis of costs that would actually be avoided if the segment was closed." [31]

This statement requires clarification. Asciano's understanding of avoidable costs are those that are avoided under the relevant condition (eg line closure). If a cost can be identified as being avoidable due to a line closure, then by definition it should be identified as specific to that line – this is a basic tenet of activity based costing. Therefore it would be incorrect to identify such costs as non-segment specific – either they can be identified as being avoidable or they can't, they cannot be both.

[31] DD p 139