

Submission to the NCC

**Certification of the Western
Australian Rail Access Regime**

**Response to the WA Government
Submission to the NCC**

June 2010

Table of Contents

1	Executive Summary.....	4
2	Background.....	5
	2.1 Asciano’s Activities in Western Australia.....	5
	2.2 Asciano’s General Views on the Characteristics of an Effective Access Regime.....	5
3	The Western Australian Government Application.....	7
	3.1 Ownership Structures and Certification.....	7
	3.2 Improvements With Regard to Regulatory Reviews and Processes.....	8
	3.3 Need to Ensure Rail Access Regimes are Consistent.....	10
4	Conclusion.....	11

1 EXECUTIVE SUMMARY

1. Asciano welcomes the opportunity to respond to the Government of Western Australia's application to National Competition Council (NCC) seeking certification of the Western Australian Rail Access regime (WARAR) as an effective regime.
2. In broad terms the Western Australian rail access regime generally meets the Trade Practices Act s44AA objectives and the clause 6 principles of the Competition Principles Agreement when these are considered in the context of the particular conditions which exist for rail infrastructure services subject to the Western Australian rail access regime, notably the full separation of the ownership and operation of above rail and below rail activities.
3. However, Asciano believes the regime could be further strengthened by increasing the levels of regulatory monitoring, levels of information provision and levels of regulatory review of access agreements with the below rail service provider.
4. The application by the Western Australian Government to seek a recommendation from the National Competition Council that the Western Australian rail access regime be recognised as effective should be granted, but in making such a recommendation the National Competition Council should seek to implement a mechanism which allows the re-assessment of the regimes effectiveness if there are any future changes in ownership or operating structures which result in the relevant above rail and below rail assets being owned and / or operated by associated entities.
5. This submission is public.

2 BACKGROUND

2.1 Asciano's Activities in Western Australia

6. Asciano's primary rail activity in the region covered by the Western Australian rail access regime is above rail freight transport on the standard gauge line from Kalgoorlie to Perth¹. Asciano operates twenty one weekly services to Perth and twenty one weekly services from Perth along this standard gauge line. In addition to these activities Asciano also has a high level of interest in expanding its operations in the Western Australian above rail freight transport market, and is currently examining numerous expansion opportunities.
7. Asciano also undertakes stevedoring activities at the Port of Fremantle, although these activities are not particularly relevant to this current review.

2.2 Asciano's General Views on the Characteristics of an Effective Access Regime

8. While the term 'effective access regime' is not defined, s44AA of Part IIIA of the Trade Practices Act outlines the objectives of access regulation which may be used to broadly assess the effectiveness of a regime along with the relevant clause 6 principles of the Competition Principles Agreement. These s44AA objectives are:
 - o promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - o providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
9. Clause 6 of the Competition Principles Agreement contains a series of principles which are used to assess the effectiveness of an access regime.
10. Asciano believes that these objectives mean that in order for a rail access regime to be effective it must:

¹ The line from the Western Australian border to Kalgoorlie is not covered by the Western Australian rail access regime. This line is operated by the Australian Rail Track Corporation (ARTC).

- contain obligations to promote the economic operation of, and investment in, rail infrastructure, including an effective obligations to maintain and invest in the rail infrastructure
- contain obligations to encourage third party above rail access via the effective separation of the competitive above rail and non-competitive below rail operations and include effective prohibitions on preferential treatment; and
- seek to be generally consistent with access regimes which apply to connecting rail infrastructure.

11. As a consequence an effective rail access regime also requires:

- a high level of transparency, which will in turn facilitate confidence in the regime and consequently facilitate third party access;
- a high degree of certainty related to regulatory processes and outcomes, which will facilitate
 - economic operation and investment by the below rail asset owner; and
 - economic operation and investment by the above rail asset owner; which in turn will facilitate third party access;
- an appropriate monitoring regime to ensure all of the asset's regulatory obligations are met; and
- an appropriate enforcement regime to ensure appropriate penalties for any non-compliance.

12. In assessing the effectiveness of a regime Asciano believes that the relevant legislation and regulations alone do not provide a full picture of the regime and that the legislation and regulation must be considered in the context of the relevant market, in this case the market for Western Australian rail infrastructure services.

13. The particular conditions which exist for rail infrastructure services subject to the Western Australian regime are the full ownership and operating separation of rail infrastructure provider and rail infrastructure users and a privately owned rail infrastructure provider.

3 THE WESTERN AUSTRALIAN GOVERNMENT APPLICATION

3.1 Ownership Structures and Certification

14. Overall Asciano believes that Western Australian rail access regime generally meets the Trade Practices Act s44AA objectives and the clause 6 principles of the Competition Principles Agreement, but only when these are considered in the context of the particular market and industry structures and conditions which currently exist for rail infrastructure services subject to the Western Australian regime.
15. In particular, the separation of below rail and above rail ownership and operation in Western Australia strongly contributes to the regime generally meeting the principles and objectives.
16. Given the current Western Australian rail infrastructure ownership structures and operating environment the current separation arrangements are adequate. (These arrangements include the ring fencing and segregation requirements in the Act and the WestNet Rail segregation arrangements recently approved by the Economic Regulation Authority). However, these arrangements are unlikely to be adequate in any future environment where below rail and above rail ownership or operation are more closely aligned². In particular the current monitoring and enforcement powers would need to be substantially strengthened if there are any future changes in ownership which result in the relevant above rail and below rail assets being owned and / or operated by associated entities.
17. Asciano believes that if in the future full ownership separation and operating separation of below rail and above rail assets no longer existed then the

² A comprehensive description of the minimum requirements needed for an access regime to be effective in instances where the below rail asset owner and / or operator also has ownership or operating interests in above rail assets can be found in the Pacific National application to the National Competition Council for Declaration of Queensland Rail's Queensland Coal Rail Network, which is available on the National Competition Council website http://www.ncc.gov.au/index.php/application/application_for_declaration_of_queensland_rails_queensland_coal_rail_network

question of whether the Western Australian rail access regime generally met the relevant principles and objectives would need to be reassessed.

18. Asciano is concerned that such a reassessment is problematic, as once certification is granted it cannot be revoked during the period for which it is in force, even if there has been a change in circumstances.

19. In order to address this concern Asciano suggests that several options are available. The first option is to sufficiently strengthen the regime so that the regime would be effective regardless of industry ownership structures. Asciano acknowledges that such an approach may require a review of the legislative and regulatory instruments underpinning the regime and as such the option is unlikely to be preferred.

20. Assuming the first option above is not accepted, Asciano proposes a second option that, rather than establish a set a time period for the certification, the National Competition Council consider specifying that the certification period ends upon the occurrence of a specified event, such as the common ownership and / or operation of above and below rail operations. Vertical integration of the above and below rail operations would have an adverse impact on the operation of the access regime and would cause the regime to cease being effective. If the National Competition Council were concerned that the above approach could lead to an indefinite period of certification, the period could be specified as ending on the occurrence of the specified event or a specific date, whichever comes first.

21. If the two options above are not adopted then Asciano believes that a relatively short certification period is preferable, say five years or less, on the basis that there is the potential for uncertainty surrounding the ownership structure of the relevant service provider.

3.2 Improvements With Regard to Regulatory Reviews and Processes

22. An effective rail access regime requires a high level of transparency, a high degree of certainty and a strong monitoring and enforcement regime.

23. Transparency is improved by the regulator having strong monitoring and information gathering powers. Asciano believes the current powers monitoring

and information gathering powers in the Act and the Code could be strengthened to align more closely with ACCC powers and to include a regulatory auditing process.

24. Asciano believes that an audit of the service provider's compliance with its regulatory obligations should be undertaken annually by an independent external auditor. The audit should be wide ranging and cover financial, investment, access and operational issues, and that the audit reports should be made publicly available in an aggregated form. The service provider should then be required to undertake any actions recommended by the auditor to ensure it remains compliant or becomes compliant.
25. The current Western Australian rail access regime appears to be intended as a "safety net" regime when commercial agreement is not able to be negotiated, and in particular the Western Australian Railways Access Code appears to encourage access via commercial negotiation. While Asciano acknowledges that this approach is generally consistent with the Competition Principles Agreement clause 6 principles Asciano has several concerns with an approach which places a primacy on commercial negotiations.
26. Firstly, Asciano is concerned that information asymmetry exists between the service provider and the access seeker. The commercial negotiation approach requires an increase in the availability of service provider information to address this asymmetry. Information is needed to allow negotiations to be appropriately conducted between the two parties. To this end information gathering powers in the Act and the Code should be strengthened and the information gathered should be made publicly available to ensure that commercial negotiations result in efficient outcomes.
27. Secondly, Asciano is concerned that there is limited regulatory scrutiny of the details of access arrangements. The commercial negotiation approach results in the Western Australian rail access regime having less regulatory scrutiny of agreements than some other rail access regimes which are based on a more prescriptive regulatory framework. For example the ARTC Interstate Access Undertaking which was reviewed by the ACCC in 2008 includes an indicative access holder agreement. In comparison the current Western Australian rail access regime does not include such detailed documentation.

28. Asciano's view is that commercial negotiation with a natural monopolist on the details of an agreement is unlikely to be productive unless the commercial negotiation is guided by the existence of, at the least, an indicative access agreement which has been reviewed in a regulatory process. Asciano's view is that the acceptability and workability of terms and conditions contained in access agreements ultimately determine whether competitive above rail access occurs. As such these terms and conditions should be subject to at least some level of review by the relevant regulator.

29. An effective rail access regime requires a high level of transparency and certainty. A regime which requires the strengthening of information gathering and powers and the review of indicative access agreements is more likely to provide this high level of transparency and certainty.

3.3 Need to Ensure Rail Access Regimes are Consistent

30. Asciano is a major user of interstate rail infrastructure, and while the ARTC undertaking gives some regulatory consistency across interstate rail infrastructure, on some sections of standard gauge interstate track, notably the Kalgoorlie to Perth, are not covered by the ARTC undertaking. Thus in seeking to operate interstate services to Perth Asciano has to manage rail access across at least two access regimes. Multiple access regimes result in duplication and provide the potential for a lack of consistency between regimes which would be both inefficient and counter to the s44AA objective of regulatory consistency. However, if the regimes were separate, but consistent, then these concerns would be minimised.

31. Asciano recognises that the issue of access regime consistency is being addressed in other policy forums, as noted by the Western Australian Government in its application³

32. While Asciano does not believe that this potential lack of consistency across access regimes is in itself a reason to reject the current application, particularly given current policy recognition of the existence of different

³ Government of Western Australia Certification of the Western Australian Rail Access Regime Submission to the National Competition Council May 2010 page 11

regimes is an issue that should be monitored, if not necessarily immediately addressed⁴, Asciano believes this lack of consistency will continue to be a concern until it is addressed. Asciano would strongly encourage all relevant parties, including regulators and governments to seek to more closely align rail access regimes. In more closely aligning rail access regimes Asciano would seek that the best characteristics of each regime be used in any single regime or aligned regime.

4 CONCLUSION

33. In broad terms the Western Australian rail access regime generally meets the Trade Practices Act s44AA objectives and the clause 6 principles of the Competition Principles Agreement when these are considered in the context of the particular market and industry conditions which exist for rail infrastructure services subject to the Western Australian rail access regime. However, Asciano believes the regime could be substantially improved by strengthening information gathering powers and increasing the level of regulatory review of access agreements and by acting to improve the consistency of the regime with other regimes over time.

34. Overall Asciano believes the application by the Western Australian Government to seek a recommendation from the National Competition Council that the Western Australian rail access regime be recognised as effective should be granted, but in making such a recommendation the National Competition Council should seek to implement a mechanism, as described in section 3.1 above, which allows the re-assessment of the regimes effectiveness if there are any future changes in ownership or operating structures which result in the relevant above rail and below rail assets being owned and / or operated by associated entities.

⁴ For example 2009 COAG Reform Council Report: Report to the Council of Australian Governments on Implementation of the National Reform Agenda May 2009 pp58-59 identifies the Western Australian Rail regime as a potential issue