



20 July, 2012

Dr Paul Kerin
Chief Executive Officer
Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

Attention: Peter Lim

By email: escosa@escosa.sa.gov.au

Dear Sir

Submission to ESCOSA 2012 Ports Pricing and Access Review Draft Decision

Background

Asciano welcomes the opportunity to respond to the Essential Services Commission of South Australia (ESCOSA) Draft Decision on the port pricing regime and port access regime in South Australia. This response is public.

Patrick, a subsidiary of Asciano, operates in the following port related activities at proclaimed ports in South Australia:

- general stevedoring activities at Port Adelaide;
- bulk stevedoring at Port Adelaide;
- port logistics activities at Port Adelaide; and
- port related activities for the automotive supply chain activities at Port Adelaide.

In its submission to the ESCOSA Issues Paper on port pricing and access in South Australia Asciano submitted that some aspects of the current pricing and access regime should be strengthened and extended in scope. Asciano notes that the issues raised in its previous submission and in subsequent discussions with ESCOSA officers have been discussed in the Draft Decision but Asciano believes that these issues have not been fully addressed by the Draft Decision.

Asciano believes that there is a need to strengthen the current South Australian ports pricing and access regime. Flinders Ports has a monopoly position requiring the existence of an ongoing deterrent to the potential misuse of market power by Flinders Ports. The access regime should be strengthened and expanded in scope to provide this deterrent. In particular the following issues need to be addressed:

- access to land based facilities and rail sidings and services at a regulated prices should be addressed in the access regime; and
- regulatory provisions relating to ring fencing and vertical separation should be strengthened as Flinders Ports move into contestable activities and competes directly with users of Flinders Ports services.

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Asciano is currently seeking access to certain services provided by Flinders Ports so that Asciano can retain its key customer in South Australia. Patrick will not be in a position to provide these services at competitive rates if it cannot access certain services from Flinders Ports at a fair and reasonable price. Asciano does not have confidence at this stage that the regulatory regime is sufficiently strong to ensure that access to the services will be provided on fair and reasonable terms.

Asciano Position on the ESCOSA Draft Decision

Extension of the Access Regime Timeframe

The Draft Decision finds that the current South Australian ports price monitoring regime and third-party access regime should continue for at least another 5 years in its current form. Furthermore, the Draft Decision finds that there is not sufficient evidence to support additional access regulation of the type sought by Asciano, and that the current negotiation framework and current levels of ring fencing are sufficient.

While Asciano welcomes the Draft Decision position to extend the access regime for a further five years, Asciano remains strongly concerned that the Draft Decision does not seek to strengthen the regime to address ring fencing and access concerns.

Ring fencing and Separation

The Draft Decision (page 53-57) finds that in relation to ring fencing there is no evidence to suggest that Flinders Ports is disadvantaging competition and that there is no evidence that a more robust form of ring fencing regulation is required.

The South Australian ports access regime currently only applies accounting separation to Flinders Ports. Accounting separation is focussed on collecting data rather than preventing the misuse of monopoly power per se; it does not apply any structural separation or legal separation. Asciano continues to submit that this current ring fencing regime is inadequate and that it does not provide an adequate protection for users of Flinders Ports as the separation of accounts in itself does not directly prevent Flinders Ports from using its market power

As outlined in previous Asciano submissions Flinders Ports are now moving into contestable and competitive operational activities such as stevedoring and as such Flinders Ports are supplying monopoly services to stevedoring companies such as Asciano, while also competing with these companies for business. The Flinders Ports position as both a monopoly supplier to stevedoring companies and a competitor of stevedoring companies means that issues of ring fencing and vertical separation need to be re-examined.

Under the current industry structure and regulation Flinders Ports has the potential to gain an advantage over its competitors by using its position as a monopoly provider of services to its competitors. Typically where monopoly infrastructure is subject to third party access regulation and the owner of the infrastructure also competes with other users of the infrastructure then stronger ring fencing and separation regimes are in place.

The need to re-examine this Draft Decision position favouring minimal separation is

strengthened by the recent news that Flinders Ports is effectively taking control of the DP World container terminal at Port Adelaide.

The Draft Decision (pages 56 and 57) argues that as there is no identified instance of market power misuse then there is no need for stronger ring fencing provisions to be implemented. At least some of the evidence used by ESCOSA in forming this view was supplied by Flinders Ports (Draft Decision page 57).

Asciano believes that the current industry structure is, in itself, reason to warrant a stronger ring fencing regime. Asciano notes that strong ring fencing regimes have been implemented in electricity, gas and rail markets where monopoly infrastructure owners also compete with users of the monopoly infrastructure. These regimes are implemented not because there has been an identified misuse of market power but rather they are implemented to provide a level of confidence to users of the monopoly service that they can continue to operate in the market and make longer term investment decisions with a degree of confidence that they will not be disadvantaged by the actions of a monopoly supplier and competitor.

Strong ring fencing regimes with transparent pricing and decision making processes address concerns with the misuse of market power by monopoly infrastructure owners, and as such contribute to a sustainable competitive market in the contestable and competitive section of the industry.

Asciano submits that the regulatory regime should include explicit provisions that address;

- the potential for margin squeeze, cross subsidy and cost shifting by Flinders Ports;
- the need for stronger separation of functions including different Flinders Ports entities engaging in monopoly and contestable port services, where these entities operate on an arms length basis;
- the need for an explicit prohibition of preferential treatment or discrimination between operators in the contestable port services;
- the need for a strengthening of ESCOSA's ability and powers in regard to monitoring the regime and the detection of breaches and enforcement of remedies. As part of a strengthened regime an annual audit of regulatory compliance should be required.

Given the vertical expansion by Flinders Ports, Asciano continues to submit that the ring fencing regime should be strengthened. Third party access to natural monopoly infrastructure is only viable when the regulatory regime explicitly requires the monopoly providing access to deal with all parties, including related parties, equally.

The issue of the appropriate level of ring fencing to be applied to Flinders Ports should be based on principles of good economic regulatory practice rather than on a requirement for a party to produce evidence of misuse of market power before the regime is changed. In essence a well designed regulatory regime does not wait for misuse of market power to occur before being amended to address the issue, but instead is designed to establish processes that prevent market power misuse from occurring in the first place.

Access to Rail Sidings

In regard to issues explicitly raised by Asciano, the Draft Decision (page 45 and page 46) finds that in relation to access to rail sidings and price transparency at rail sidings;

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the rail siding at Inner Harbour Berth 29 is subject to access regulation under the South Australian rail access regime

and, furthermore

... access providers of railway infrastructure services are required to provide an Information Brochure which must contain, amongst other things, unbundled access charges and information on the level of service quality that is to be provided at that particular charge. Given this requirement, the Commission believes that there should be no impediments to Asciano gaining access to the cost component (separate above and below-rail charges) that relates to the rail siding access.

...the Commission believes that there are no impediments to ports users being provided with a breakdown of the individual cost components. Based on further discussions, Flinders Ports has commented to the Commission that such information will be provided if requested.

Asciano welcomes the Draft Decision's clarification of both the access status of the rail siding at Port Adelaide berth 29 and of the information to be provided in relation to this siding.

As previously advised to ESCOSA Flinders Ports have offered a rail unloading service to Asciano at the berth 29 siding at a price higher than the current price charged to Asciano at another, nearby, siding.

Asciano is continuing to negotiate with Flinders Ports regarding the process for seeking access to the rail siding and rail unloading facilities at Port Adelaide berth 29 and the expected access fees and terms and conditions.

Asciano is also considering options within the third part access regulatory process to place access to these rail sidings on a more formal basis.

In relation to loading and unloading at rail sidings the Draft Decision (page 47) finds that:

..., the potential for market power to be exercised by the entity which loads and unloads cargoes from the rail siding is constrained by the potential for third parties to utilise alternative rail facilities and options such as containers.

...

The Commission therefore does not consider that the provision of loading and unloading services at the intermodal rail facility at Berth 29 should be subject to access regulation

Asciano believes that the Draft Decision position regarding Flinders Ports' rail unloading activities is not correct as there are no close commercial alternatives to using this facility. The Flinders Ports rail siding is the only rail siding at berth 29 which allows trains to be unloaded within the berth 29 complex. Use of this facility eliminates the need to transport loads by truck from the rail siding to the port across public roads (which have strict weight limits) and thus reduces additional transport and handling requirements. For these reasons, it is Asciano's experience that customers have expressed a preference for the Flinders Ports rail unloading facilities to be used in the transport of product to berth 29. This puts Asciano

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in the position of negotiating access and pricing with Flinders Ports for the provision of unloading services at the rail siding whilst directly competing with Flinders Ports for the allocation of the work from the customer. As such, Flinders Ports have a substantial degree of market power in respect of the rail unloading facilities at berth 29 in an environment where it is directly competing with the users of that rail unloading facility.

As such Asciano continues to believe that there is scope for Flinders Ports to potentially use its market power in relation to these rail unloading activities in order to encourage any customers putting its port related functions to the market to accept any Flinders Ports offer rather than any competitors offer. Given the potential for Flinders Ports to use its market power the regulatory status of these rail unloading activities at Port Adelaide should be reconsidered.

Access to Land and Storage

In relation to access to land and storage the Draft Decision (page 48) also finds that:

... it is worth noting that access to land is [covered]. Therefore, it is possible for third parties to seek access to land within the port boundary from Flinders Ports, on fair commercial terms, and develop their own storage facilities should the need arise.

...

In the absence of any disputes over third-party access to land or attaining a lease agreement with Flinders Ports to utilise its at-ports storage services, the Commission does not consider that the provision of non-grain at-ports storage facilities should be subject to access regulation.

Asciano is reliant on Flinders Ports leasing land or storage facilities to Asciano and is continuing to negotiate with Flinders Ports in this regard. Asciano is currently seeking further information from Flinders Ports regarding:

- land and shed space available for lease at Port Adelaide berth 29 including the process for seeking access to this space and the expected rental fees and terms and conditions and technical requirements to be met by any lessee;
- the process for seeking access to the wharf for the use of mobile equipment, including cranes including the expected access fees and technical requirements to be met by any access seeker.

Asciano continues to submit that there are no viable alternatives to using the Flinders Ports storage facilities due to the distance of potential alternative sites to the port which creates issues in relation to additional costs and additional time delays. As such Asciano believes that there is scope for Flinders Ports to potentially use its market power relation to these storage services.

Asciano notes that the Draft Decision position is that in the absence of disputes over land and storage then access regulation is not needed. Asciano believes that that such a position is not good economic regulatory practice; the need for access should be decided on factors such as industry and market structures not on the basis of the existence or non-existence of commercial disputes.

Asciano notes that in the event a dispute does occur in the near future it is likely to be

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resolved after the ESCOSA Final Decision time frame and as such the current position will be locked in for the next five years in any event.

Conclusion

Asciano welcomes the decision to extend the regulatory regime for a further five years but remains concerned that the regime is not going to be strengthened to counter the growing potential for Flinders Ports to misuse its market power.

In particular Asciano is concerned that ESCOSA is focussing on the absence of reports to date of actual misuse of market power as evidence that the current access regime is sufficient. The timing of the current review is problematic for Asciano, as Asciano is only in early stage discussions with Flinders Ports about access to key services. To date these discussions have been difficult. Asciano hopes that the discussions will lead to the provision of services by Flinders Ports on fair and reasonable terms but is concerned that this may not occur as the current regulatory regime is not strong enough to provide for this to happen.

In any event, Asciano believes that the market and industry structure, rather than evidence of misuse of market power, should be the prime consideration when establishing an appropriate access regime. As the access regime currently stands there is little comfort for third party operators in the competitive stevedoring sector that there are adequate controls top prevent Flinders Ports from misusing its market power if it chooses to do so.

Asciano welcomes the Draft Decision's clarification of the access status of the rail siding at Port Adelaide berth 29, of the information to be provided in relation to this siding and of the access status of land and storage at Port Adelaide berth 29. Asciano is discussing these matters with Flinders Ports.

If you wish to discuss this submission feel free to contact me on 02 8484 8056.

A handwritten signature in black ink, appearing to read "Stuart Ronan", written over a light grey rectangular background.

Stuart Ronan
Manager, Access and Regulation

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