



30 March 2009

Mr Peter Lim
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Essential Services Commission of SA
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By email: Peter.Lim@escosa.sa.gov.au

Dear Peter,

2009 Rail Access Regime Inquiry: Issues Paper

Asciano welcomes the opportunity to provide comments on the 2009 Rail Access Regime Inquiry: Issues Paper. This letter contains our initial comments and we look forward to being further involved as the review progresses.

Through Pacific National, Asciano operates on the intrastate network providing haulage services from Leigh Creek to Port Augusta for NRG Flinders Power and through the use of yards controlled by Genesee and Wyoming Australia Pty Ltd (GWA).

Asciano is currently negotiating an access agreement with GWA for access to a number of rail yards under their control. GWA has engaged in good faith negotiations and Asciano is happy with the information sharing between the parties. However, our recent experience has led us to the conclusion that a number of changes to the South Australian regime (SA Regime) could improve the outcomes of commercial negotiations between the monopoly access provider and access seeker. We detail these proposed changes below.

Regulatory Approval of Standard Terms and Conditions

GWA publishes its information brochure in accordance with the regulatory regime, which includes standard terms of access. However, Asciano's understanding is that these terms and conditions, including price limits, are not scrutinised or approved by the regulator. This is a key difference with other major regulatory regimes, the ARTC undertaking approved by the ACCC includes attached a standard access contract and reference prices. The ACCC spent a significant amount of time scrutinising the access agreement. Similarly in Queensland the QCA approves an undertaking which has a standard access agreement and reference tariffs attached.

The lack of regulatory scrutiny is obvious when some GWA's terms and conditions are compared with other track providers. For example, GWA's Information Brochure notes on page 13, that "Access to GWA facilities and movement of an Operator's Rollingstock and Cargo made over GWA trackage, will be done so by the Operator "at owners risk"". This is in sharp contrast to the commitments made by other track providers such as the ARTC and QR Network who have to provide a safe network able to meet the path requirements contained in the access seekers contract.



The floor and ceiling prices published by GWA provide a wide range in which access prices could be set. Thus Asciano believes reference prices should be published covering the major tasks on the network – similar to the ARTC's access undertaking. These reference prices should detail how access on a particular network segment is priced. Reference tariffs as suggested provide an important source of information to access seekers about the likely cost of providing a specific train service. They provide operators with greater certainty about the cost of business as well as transparency of cost components.

Asciano urges an amendment of the SA Regime to allow regulatory scrutiny of standard terms and conditions including reference prices.

Non Discrimination

Although the unfair discrimination provision in section 23 of the ROA Act exists there is a lack of transparency in the operation of this part of the regime.

Asciano is unaware of any statement from the Commission noting each year that GWA has complied with its audit and/or if any non-compliance had been found. This information, along with details of how any non-compliances were being addressed would provide access seekers with greater comfort that the regime is operating effectively.

Level of Regulatory Intervention

With the exception of the improvement discussed above, Asciano believes there is no need at this stage for the implementation of a more heavy handed form of regulation for the SA Regime, especially given the Commission under Part 7 of the ROA Act has the power to require an access provider to submit information on the cost of rail services it provides. This in effect is a form of price monitoring, which the Commission could strategically use to monitor prices.

Coverage of the SA Regime

One of the issues raised by the Commission is the extension of the access regime. On the Leigh Creek line, we do not believe there is sufficient existing or potential traffic to warrant inclusion in the access regime. The limited use of the line would result in the costs of regulation outweighing the benefits. Access is not the key challenge facing Asciano on this line, but rather the higher than normal track failures.

Other Improvements

A number of additional minor improvements could also be made to the SA Regime. These include:

- The inclusion of a mediation process into Part 6 of the ROA Act to allow a dispute to be referred to the chief executive officers of both parties in an attempt to resolve a dispute prior to going to arbitration;
- A new confidentiality provision to impose conditions limiting access to, or disclosure of, the information or documentary material provided by an access seeker to another party including associated companies without prior written consent. This would bring the SA Regime in line with current practices under the ARTC undertaking and the QR Network undertaking; and
- Specifying a timeframe for arbitration proceedings. The timeframe of six months proposed in the Issues Paper would be sufficient.

The SA Regime seems to be operating effectively, however it could be improved through the publication of references prices by access providers for major tasks on the network, through increasing transparency regarding compliance with the unfair discrimination provisions in the



ROA Act, and by having the Commission approve the terms and conditions contained in an access providers information brochure to ensure they are fair and reasonable.

Asciano has been an access seeker in South Australia, Queensland, New South Wales, Victoria and Western Australia and to the interstate track owned by the ARTC. In Asciano's experience the most effective access regimes are those which are transparent and non-discriminatory. Such regimes maximise the scope for commercial negotiations and deliver dispute resolution in a timely and effective manner.

Should you have any questions in relation to this submission please contact me on (02) 8484 8043, or alternatively Philip Dixon-Flint, Manager Access and Regulation on (02) 8484 8066.

Yours sincerely,

A handwritten signature in blue ink that reads "Tim Kuypers".

Dr Tim Kuypers
Group General Manager
Access & Regulation