Submission to Independent Pricing & Regulatory Tribunal:

ARTC Unders & Overs Policy

December 2007

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ARTC Hunter Valley Unders & Overs Policy

Asciano Submission To IPART

1 Background

Asciano welcomes this opportunity to provide this submission to the Independent Pricing And Regulatory Tribunal (IPART) regarding the Australian Rail Track Corporation (ARTC) draft Unders & Overs Policy (Policy).

Asciano, through its brand Pacific National, operates coal trains in the NSW Hunter Valley and has a significant interest in ensuring that the Policy meets the needs of all parties both from a regulatory and practical perspective.

ARTC has consulted widely with stakeholders regarding the Policy. Asciano identified two major areas of concern:

- the methodology for allocation of unders and overs; and
- the intention of ARTC to disseminate confidential information to parties not otherwise entitled to receive this information without permission.

In the most recent round of consultation, Asciano conceded that, while it still has reservations regarding the proposed methodology, it would accept the methodology if it was acceptable to all other stakeholders. It is Asciano's understanding that this is the case and therefore that issue is not discussed further in this submission.

It is noted that, in calling for submissions, IPART requested commentary be directed specifically to the matter of dissemination of information. The remainder of this submission is directed to that issue.

2 Provision Of Information To Third Parties

Asciano has previously objected strongly to ARTC's proposal to provide information to "mines" regarding estimates of access charges under- or over-recovered by ARTC from parties who actually paid the access charges. The draft Policy retains the intention to provide this information and Asciano continues to be strongly opposed to this part of the Policy. The key reasons are that the:

- New South Wales Rail Access Undertaking (NSWRAU) does not require ARTC to supply information on access charges paid by Asciano to any third party;
- the information ARTC intends to provide to mines is not relevant to the consultation process;
- ARTC has failed to demonstrate any benefit of providing the information to mines;
- provision of this information is contrary to existing commercial relationships; and
- the information will likely be inaccurate and thus cause confusion.

These are detailed in turn below.

2.1 The NSWRAU does not require ARTC to supply information on access charges paid by Asciano to any third party.

Under the NSWRAU, ARTC is required to submit an unders and overs policy to IPART for approval after consultation with Access Seekers.[1]

Asciano views the purpose of such a policy as providing a description of the process for dealing with under- or over-recovery of access charges for those line sectors owned by a track provider that are expected to deliver the maximum revenue permitted by the regulator (IPART).[2] The actual calculation is provided by ARTC to IPART for audit but not to access contract holders and the Policy provides confidence to all parties that there is in fact a defined methodology underpinning the process. Once IPART has approved the Policy, ARTC can expect IPART to approve any outcome that is in compliance with the Policy.

The NSWRAU is poorly drafted and no doubt is a source of confusion for all parties, but there can be no doubt that the purpose of the unders and overs policy as described in Schedule 3 para 4 does **not** include providing the dissemination of access charge information to parties that are not directly associated with paying those charges. This is demonstrated by reviewing each of the relevant sub-clauses in turn. In each case the track provider is required to:

4(a) "establish an Unders and Overs Account to manage average deviations around the maximum rate of return"

Clearly the purpose of the account is to manage the receipt of access charges as it is only by the receipt of access charges that the "maximum rate of return" is achieved. The only parties that pay access charges are those with access contracts.

4(b) "keep an account for Access Seekers and groups of Access Seekers who could potentially breach the Ceiling Test"

Only Access Seekers (no matter how widely defined that term might be) that actually pay access charges could conceivably "breach the ceiling test" [3] as the ceiling test is based on access revenue received by the track owner. While some parties may believe that they 'pay' access charges due to their commercial arrangements with an access contract holder such as a train operator, this is not the same as revenue received by the track owner (which is the basis of the test). At no stage does a party that did not pay access charges to the track provider become a party for which an account is kept. It would be absurd to require the track provider to keep a potentially infinite number of 'accounts' (or sub-accounts) with a zero balance and it would serve no purpose if it did so. This is recognised in the Policy at paragraph 3.2 where ARTC proposes to only establish an account for parties that actually pay access charges for hauling coal in the Hunter Valley network.

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1 NSWRAU Schedule 3 para 4(f)

2 In practice, only line sectors in the Hunter Valley region (and potentially line sectors in the Gunnedah Basin in the medium term future) will meet the revenue criterion.

3 Note that Schedule 3 para 4(b) uses Ceiling Test in capitalised form but this is in error as the definition of the term in Schedule 3 para 1(b) uses a lower case term.

4(c) "provide an annual reconciliation of each account to the applicable Access Seekers"

As only actual paying parties can have an account, this reporting obligation can only apply to those parties. It cannot apply to a party that has received a service from a party that paid access charges (ie a third party to the track provider).

The remaining parts of clause 4 are not relevant to this discussion as they relate to other matters.

On the basis of these obligations, there is nothing in the NSWRAU that requires ARTC to supply information regarding access charges paid by an access contract holder to any third party. Therefore, Asciano's view is that ARTC's proposal to provide confidential information to third parties regarding access charges paid by access contract holders to ARTC, without permission, is neither justified by, nor required by, the NSWRAU.

2.2 The information ARTC intends to provide to mines is not relevant to the consultation process

IPART has asked submissions to specifically address the intention in the Policy to provide information to third parties in the context of the consultation process within the NSWRAU.

The word "consultation" appears 6 times in the NSWRAU. With one exception, its use is with reference to, or part of, the Capital Expenditure Consultation Process set out in Schedule 3 clause 3.4. The one exception is a requirement for ARTC to consult with regard to the preparation of an unders and overs policy in Schedule 3 clause 4(f).

It is clear that ARTC has met its obligations to consult with regard to clause 4(f).

As the name suggests, the Capital Expenditure Consultation Process is directed towards a process for the consideration of capital expenditures in the Hunter Valley. The NSWRAU sets out a variety of obligations, and Asciano accepts that some parties have concerns with regard to the application of the process given the ambiguity of the term "Access Seeker" as it is used within clause 3.4 (and indeed the whole of Schedule 3). Regardless of who may participate in that consultation process, what cannot be disputed is that the whole process is designed to deal with future capital expenditure on new projects. Ultimately the effect of that process is to provide ARTC with a protection against regulatory intervention with regard to amounts allowed to be included in the regulated asset base. It is not open to construe that process as requiring or authorising consultation between parties regarding the unders and overs account, any other matter to do with the actual payment of past access charges, or any matter that is solely between ARTC and an access contract holder.

It is respectfully suggested that if the author of the NSWRAU intended for matters relating to the unders and overs process to be subject to a consultation process, or to authorise the dissemination of information relating directly to the operation of access contracts, such a matter would have been addressed explicitly, and the matter would have been included in clause 4 of Schedule 3, the part containing all matters dealing specifically with unders and overs, or possibly clause 5 dealing with compliance.

Given that clause 4 expressly requires consultation regarding the preparation of an unders and overs policy, but is silent with regard to the operation of the account once the policy is approved, one would conclude that there was no intention for the consultation in clause 4 to extend to the operation of the unders and overs account once the policy was published.

There is a reference to the consultation process in clause 5(c). This clause is dealing with whether ARTC has complied with the "Asset Valuation Roll Forward Principles", and authorises IPART to have regard to the submissions of users to the consultation process in clause 3.4. The submissions referred to are in the context of clause 3.4 and therefore clearly associated with the capital expenditure process and inclusion of amounts into the regulatory asset base. It is not open to suggest that this would extend the clause 3.4 process to consultation regarding payments of access charges or amounts in the unders and overs account. Ironically, ARTC has made it clear to Asciano that it is not prepared to make the detailed calculation of the unders and overs allocations available to Asciano (or any other party paying access charges) and that it is up to IPART alone to perform the detailed review necessary to confirm that the Policy has been complied with. If clause 5 was to allow for "consultation" regarding unders and overs allocations, Asciano suggests that those parties actually paying access charges would have a higher claim on having access to the unders and overs information.

From the foregoing, it is Asciano's view that the dissemination of unders and overs information to parties who have not made payments of access charges directly to ARTC is not part of, nor in any way related to, the consultation processes described in the NSWRAU.

Further, it is Asciano's view that unders and overs allocation information could not assist a party in considering matters relating to the approval or otherwise of future capital expenditure processes.

2.3 ARTC has failed to demonstrate any benefit in providing the information to mines

Given that the dissemination of unders and overs allocation information to third parties is not in any way required, or even contemplated, by the NSWRAU, it is up to ARTC to provide a comprehensive justification for providing this information, noting that it involves breaching the confidentiality of its access agreements – certainly that is the case with respect to ARTC's contract with Pacific National.

ARTC has failed to make any real case as to why "mine" related access charge information should be disseminated to coal producers who are not access holders other than via a reference to transparency. However, the advantages of "transparency" in this particular instance are not explained, and Asciano suggests that, in this instance, no transparency actually arises in any useful sense of that term. Pacific National is supportive of access prices being public. This support is based on a view that access prices ought to be the same for the same haul, irrespective of the party that holds an access contract and therefore there is no interest to be protected by the publication of this information. Clearly a wide range of people can be Access Seekers, not just existing train operators and coal producers, and freely available information regarding access prices assists any party contemplating entering the

market to provide train operations by allowing that party to understand, simply and openly, what the access charges will be. As access charges are a significant cost element of any potential service, this has significant practical value to a new entrant as well as an existing market participant or other stakeholder.

By contrast, the actual access charges paid by a party to ARTC are related to the specific business of that party. It is past information about business already conducted. As such, it contains information that is potentially commercially sensitive, is a matter solely between ARTC and the party that paid the charges, and would normally be considered confidential. It is very difficult to see how "transparency" of this information assists any other party. For example, whereas it is easy to see that a knowledge of access rates would assist a prospective access seeker to understand the quantum of charges to expect for any given level of business, the information about past transactions does not provide this form of information but merely divulges information regarding the business of a particular operator. Interestingly, ARTC is not offering to provide this information to competing train operators or to other mines, only to the train operator's customer for a specific location. It seems transparency is only selectively applied. If transparency was genuinely being sought, then why not make all access charge information public? If confidential information is to be given to one group that has no right to it, what justification is there for not disseminating the information to all? Pacific National is not suggesting such an approach, but it would seem to be the logical extension of ARTC's proposal. One might ask whether the mines would be willing to allow all other mines to see their unders and overs allocations in the name of transparency?

ARTC rightly acknowledges that it has no commercial relationship with end customers, and by implication has no knowledge of the arrangements between end customers and rail hauliers (or any other potential holder of an access contract).[4] It also points out that the advice that it provides will be indicative only.[5]

2.4 Information provision is contrary to existing commercial relationships

While it is understood that coal producers have an interest in understanding the cost elements of their business, it must also be recognised that any coal producer has the opportunity to be the access holder for its own business and manage its own access requirements directly. If a producer takes the decision not to avail itself of this opportunity, there appears to be little logic that the producer is then entitled to detailed information regarding the input costs of its service provider, apart from any information flow that it has negotiated with that service provider. An argument that there should be provision of detailed actual cost/reconciliation by a third party seems to contrary to the commercial model that is in place.

2.5 Information will likely be inaccurate and thus cause confusion

Pacific National also questions what value the proposed information might have to a 'mine' and how the provision of this information by ARTC might work in practice. In

[4] Policy Annexure A, paragraph 10

[5] Policy Annexure A, paragraph 9

particular, Asciano has the following concerns with respect to the dissemination of such information:

- The information will be based on details provided by the producer. This may, or may not, reconcile with information on which access charges are paid.

  For example, instances occur where Producer (A) purchases coal from another Producer (B). (B) will pay usually the freight charges to the train operator (which include a component for access charges) and (A) would pay (B) for the coal including the freight cost. One can see the potential for both producers to provide tonnage information regarding the same tonnage; or worse, (A) provides information as though the tonnage came from its own mine (depending on the sophistication of the database from which (A) draws its information, it is easy to imagine circumstances in which it might consider all tonnes as originating from a single source).

  ARTC is proposing to provide the information without first making any reference back to the service provider. There is a high probability that the information will be confusing to the recipient and potentially at odds with any transaction that arises through the commercial relationship with the service provider. It is acknowledged that the Policy does now at least provide for the mine information to be provided to the relevant service provider, this does not mitigate the problem.

- ARTC itself recognises that the information may not be an accurate reflection of any amount that is due to or owing by a particular mine,[6] noting of course, that as far as ARTC is concerned, no mine would owe it anything unless it is the holder of an access contract. Asciano agrees with ARTC that there is a significant likelihood that the information will not coincide with the actual financial outcome (ie that the information received by the producer from ARTC will not reflect the actual refund or additional charge that arises (if any) through the commercial relationship with the access holder). It must be stressed that this is not because of any misinformation or lack of good faith by any party (producer, ARTC or access holder) but will arise through the 'blind' application of the allocation methodology without an understanding of any specific issues that may impact on the actual situation.

  One might use as an analogy Telstra sending an advice to all telephone users of the cost of telephone calls through its network, regardless of the fact that many telephone customers (while having used the Telstra network) have different agreements with their non-Telstra service provider. Such information would serve no value and could be potentially misleading.

- Pacific National is particularly concerned that the provision of the proposed information will give rise to expectations that will be at odds with reality and will cause unnecessary distrust and ambiguity in the relationships between coal producers and their service providers.

In light of these concerns whatever benefit there might be in providing this information in this manner is significantly outweighed by the harm that might be caused.

[6] Policy Annexure A, paragraph 9