



**Submission to the ACCC**

**2016 ARTC Hunter Valley Coal  
Network Access Undertaking**

**March 2016**

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## **1 INTRODUCTION**

Asciano welcomes the opportunity to respond to the Australian Rail Track Corporation (ARTC) proposed 2016 Hunter Valley Access Undertaking (proposed 2016 HVAU).

Asciano is a major operator of coal trains in the Hunter Valley coal rail via its Pacific National subsidiary. Asciano does not currently hold rail access rights<sup>1</sup> or pay access charges in the Hunter Valley coal rail network, however Asciano recognises that rail access regulation and rail access pricing provide strong incentives to access holders (and hence to operators) as to how train operations should be managed on the Hunter Valley coal rail network. Thus Asciano has a strong interest in ensuring efficient and effective access regulation and access pricing in order to ensure efficient and effective train operations in the Hunter Valley coal rail network. In particular Asciano strongly supports access regulation and pricing which encourages more efficient consumption of capacity in the Hunter Valley coal rail network. Efficient consumption of capacity allows more coal to be moved through this network.

In making this submission Asciano recognises that the ARTC Hunter Valley coal rail network differs from many other rail networks in Australia as it supports a relatively contained group of coal mining customers and it fully recovers its costs. The characteristics of the network have resulted in different regulatory arrangements for this network when compared to many other Australian rail networks. The only comparable rail network in Australia is the Aurizon central Queensland coal rail network.

This Asciano submission is in three main parts, namely:

- general comment on the proposed 2016 HVAU including broad areas that the proposed 2016 HVAU should address;
- specific comment on the issues raised in the ACCC's January 2016 Consultation Paper; and
- specific comment on the drafting of the access undertaking, Indicative Access Holder Agreement (IAHA) and Indicative Operator Sub Agreement.

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<sup>1</sup> Pacific National holds access rights through the Hunter Valley rail system for non-coal trains and access rights for ancillary train services (for example wagon movements) which serve the coal industry but which do not haul coal.

This submission is public.

## **2 ASCIANO'S GENERAL COMMENT ON THE 2016 HVAU**

The 2011 HVAU had a strong focus on establishing a framework for capital investment, capital expansions and capital approvals. This focus was appropriate given the conditions in the Hunter Valley coal market at that time. Asciano believes that given current coal market conditions the 2016 HVAU should have a strong focus on providing incentives for increased operating efficiency and increased asset utilisation in order to increase the Hunter Valley coal rail network's capacity and operating efficiency. Asciano supports proposals which provide incentives for increased efficiency, such as sections 9.3 and 14 of the proposed 2016 HVAU.

Asciano believes that the broad matters outlined below need to be addressed by the ACCC when considering the proposed 2016 HVAU.

ARTC Ownership – the ACCC Consultation Paper (page 15) recognises a change in ARTC ownership as a potential issue for the proposed 2016 HVAU. This Asciano submission is based on an assumption of a Commonwealth Government controlled ARTC being subject to a Commonwealth third party access regime. If a change in ARTC ownership occurs during the term of the approved 2016 HVAU then Asciano believes that a review of the approved 2016 HVAU is needed. In particular the identity of any new owner (or owners) of the ARTC will be relevant to such a review.

Section 3 of this submission includes further discussion of this matter.

Access Contracting Approach – the manner in which the 2011 HVAU was applied by ARTC did not allow above rail operators, such as Asciano, to hold coal access rights. Under the approach used by ARTC access rights were to be held by coal miners or end users (for example, power generators). The access rights contracting approach proposed by ARTC does not appear to have changed from the approach used for the 2011 HVAU.

Asciano believes that the ARTC approach to access rights contracting in the Hunter Valley coal rail network unnecessarily constrains the access rights contracting options available for users of the network. Asciano believes that train operators

should be permitted to hold access rights on behalf of end users and miners if these parties do not wish to hold the access rights. For end users and smaller mine operators rail access is often viewed as a matter requiring specialised management which these parties do not have. These parties should be able to contract with train operators, allowing the operators to hold access on their behalf. (Operators hold access on other rail networks and non-coal access on the Hunter Valley network, thus access management for the Hunter Valley coal rail network is incremental for above rail operators).

Asciano supports an access rights contracting model which provides for a range of access contracting approaches being available for users such that users can choose an approach to rail access management that best meets their needs. Asciano believes that the contracting approach used by ARTC should be altered to allow above rail operators to hold access for miners and end users who do not wish to hold access in their own right.

Non-coal access – Asciano notes that non-coal trains use the Hunter Valley rail infrastructure. Asciano seeks that the approved 2016 HVAU will continue to facilitate and allow these non-coal operations and welcomes the fact that proposed 2016 HVAU continues to include (without change) section 1.1 g) of the Preamble which recognises non-coal access and Schedule A: 2 Elements of Non-Coal access Agreements.

Asciano is concerned that section 2.4 b) of the 2011 HVAU has been deleted from the proposed 2016 HVAU. Asciano recognises that this section reserved existing non-coal train paths explicitly for the circumstances surrounding the introduction of the 2011 HVAU. However, Asciano believes that the proposed 2016 HVAU should preserve existing non-coal train paths through the Hunter Valley coal rail network.

Asciano seeks that the pricing for non-coal access rights should remain consistent with the pricing structure and levels which apply for the broader ARTC interstate network (as broadly implied section 1.1 g) of the proposed 2016 HVAU. Such an approach ensures pricing consistency and removes the potential for pricing anomalies.

### **3 ASCIANO SPECIFIC COMMENT ON THE ISSUES RAISED IN THE ACCC 2016 HVAU CONSULTATION PAPER**

This section addresses the explicit questions which were contained in the ACCC's 2016 Consultation Paper. Note that not all of the explicit questions contained in the paper are addressed below<sup>2</sup>; however Asciano reserves the right to make future comment on these subject matter areas following release of further documentation.

#### 1. Is the initial 10.5 year undertaking term an appropriate duration

Asciano recognises that the proposed term of ten years reduces the regulatory burden on all parties and provides for a degree of regulatory certainty. Consequently Asciano supports the ten year access undertaking term on the conditions that:

- a review occurs in the event of a change of ARTC ownership<sup>3</sup>; and
- the scope of the approved 2016 HVAU "mid-term" periodic review is broadened.

Asciano supports the mid-term review as proposed in section 2.3 of the draft 2016 Access Undertaking but believes that further items could be added to the scope of the review as outlined in the response to the ACCC Question 3 below.

#### 2. Is the alignment of the 2016 HVAU to calendar years appropriate?

Asciano has no concerns with the term of the proposed HVAU being aligned to either financial years or calendar years.

#### 3. Is a periodic review of elements of the undertaking six years prior to the termination of the HVAU appropriate? Are there concerns with the proposed process for ARTC's completion of the periodic review? Is the process sufficiently robust to take into account and if required implement any stakeholder concerns?

Asciano supports the mid-term review as proposed in section 2.3 of the proposed 2016 HVAU but believes that further items should be added to the scope of the

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<sup>2</sup> As Asciano is not currently an access holder on the Hunter Valley coal rail network Asciano has elected not to answer questions 8, 9, 10, 16, 17, 20, 26, 27, 46 and 47.

<sup>3</sup> Note that Asciano has addressed issues relating to a likely change in ARTC ownership in more detail in answering questions 42, 43 and 44 in this submission.

review. These items primarily relate to areas where changes are proposed to be made between the 2011 HVAU and 2016 HVAU. Asciano believes that new concepts added to the 2016 HVAU should be subject to the periodic review to ensure that these concepts are functioning as intended. Including these concepts in the periodic review will enable the concepts to be amended if issues in the operation of these concepts are identified. Asciano believes that the additional concepts to be reviewed should include (but not necessarily be limited to):

- Variation of the costing manual and the HVAU administrative provisions by ARTC and the RCG (Rail Capacity Group) as outlined in the proposed 2016 HVAU section 2.4;
- Service Envelope characteristics and pricing structure (in particular the path based pricing model) as outlined in the proposed 2016 HVAU section 4.15;
- Efficiency Incentive Proposal as outlined in the proposed 2016 HVAU section 9.3;
- Innovation Incentive Mechanism as outlined in the proposed 2016 HVAU section 14; and
- Schedule D: Network Key Result Areas.

In addition, Asciano believes that major quantitative inputs into the regulatory and access pricing processes (such as volume forecasts and operating costs) not currently addressed in the proposed 2016 HVAU section 2.3 should be included in the review. Any material change in these quantitative inputs in the period between the commencement date and the review date should be taken into account in access pricing beyond the review date.

In relation to the ACCC's query regarding time frames Asciano has a concern that the proposed review process time frames may not be sufficient. Asciano's experience of rail access regulation in various jurisdictions is that time frames for regulatory processes are often insufficient to fully address issues raised. This is particularly the case if the issues being considered, such as the rate of return and cost allocations, are contentious. Given this, Asciano believes that the time frames for the periodic review could be extended in the approved HVAU.

In relation to the ACCC's query as to whether the process is sufficiently robust to take into account stakeholder concerns Asciano believes that the approved 2016

HVAU should explicitly require that in the periodic review ARTC must take into account stakeholders comments and if these comments are not reflected in 2016 HVAU following the periodic review the ARTC should provide written explanation as to why the comments are not reflected in 2016 HVAU.

*4. Is the reoccurring option to extend the 2016 HVAU for an additional five year term appropriate?*

Asciano believes that this question will be more relevant at the period of the first review date (particularly if ARTC ownership changes in the interim), but at this time Asciano believes that the option to extend the undertaking for a further five years is only appropriate if the broader review scope (as outlined above in the response to ACCC Question 3) is adopted. Asciano has concerns that if the broader review scope is not accepted then the option to extend the proposed 2016 HVAU for a further five years would mean that access regulation and access pricing which applies to the Hunter Valley coal rail network would be unable to fully take into account changes in the market, technology and legislation which will occur over this fifteen year period.

Asciano does not support the inclusion of a mechanism which allows the expiry date of the 2016 HVAU being rolling forward beyond a single five year term extension as an access undertaking with a term beyond 15 years being extended by a re-occurring roll-forward mechanism raises concerns as to whether:

- the undertaking has an expiry date (as required in the Competition and Consumer Act); and
- the undertaking is able to fully respond to changes in markets, market participants, legislation and technology for a period beyond fifteen years.

*5. Is a mechanism which allows for RCG endorsement of minor variations of certain provisions of the 2016 HVAU appropriate?*

Asciano has strong concerns with the proposed 2016 HVAU process which allows ARTC to vary provisions of the access undertaking following endorsement from the RCG, with this endorsement requiring the support of access holders controlling 70 per cent of the contracted train kilometres. The Asciano concerns include:

- parties impacted by the changes may not be permitted to vote on the changes. In particular, it should be recognised that train operators in the Hunter Valley coal rail network do not have RCG voting rights. Asciano's concern is that the RCG could amend sections of the access undertaking which directly impact train operations (such as the characteristics of the service envelope in section 4.15). Asciano believes that where changes to the access undertaking via the RCG process impact on train operations and / or train operators then as a minimum the support of the train operators should also be required, This is particularly the case if train operators are required to invest capital or incur operating costs in order to meet the changed requirements of the access undertaking. Failing this any changes to the undertaking which impact on train operations and / or train operators should be subject to an ACCC regulatory process; and
- parties impacted by the changes may not have sufficient voting power to oppose the changes despite the fact that the changes may be discriminatory or otherwise unfair. For example, the proposed process will allow the RCG to vary the costing manual. While Asciano does not have access agreements or pay access charges Asciano has concerns that this may be open to manipulation if members of the RCG controlling 70 per cent of the contracted train kilometres vary the costing manual to favour themselves to the detriment of the remaining 30 per cent (this is particularly relevant as voting is not specific to a pricing zone). Asciano believes that any variations to costing and pricing rules should be subject to an ACCC regulatory process rather than be varied by the RCG with minimal regulatory oversight.

In addition to the above concerns Asciano has a broader concern that the ability of the ARTC and RCG to amend the access undertaking has the potential to be abused if there is a change of ownership of ARTC resulting in ARTC having a degree of common ownership with members of the RCG. Asciano believes that if a change in ownership of ARTC results in ARTC having a degree of common ownership with members of the RCG then the access undertaking must be reviewed by the ACCC and the process outlined in section 2.4 of the proposed 2016 HVAU must be suspended until the review is finalised.

Overall Asciano does not support the mechanism which allows for RCG endorsement of access undertaking variations as it is currently drafted.

6. Do stakeholders have any concerns about the scope of the matters that may be varied under this process without ACCC consent?

As noted above in the response to ACCC Question 5 Asciano has concerns that the RCG variation process could be used to vary elements of the access undertaking which:

- impact on the train operators (such as s 4.15) without the consent of the train operators and / or the ACCC;
- impact on access pricing (such as the costing manual or the extension of the network via Schedule B) without the consent of the ACCC; and
- would potentially impede the development of a consistent time series of measures of the ARTC's Hunter Valley coal rail network performance (such as section 13.1 and Schedule D) without the consent of the ACCC.

Asciano believes that matters which materially impact on operators, pricing and network performance should be subject to ACCC regulatory processes and oversight.

7. Do stakeholders have any concerns with the RCG endorsement threshold for minor variations?

Asciano believes that the RCG variation process can be used to vary:

- the proposed 2016 HVAU section 2.6 but only to the extent that the insurance floor can be amended upwards;
- the proposed 2016 HVAU section 2.7 a); and
- the proposed 2016 HVAU Schedule D but only to add new KPIs to schedule D. it should not be used to amend either existing KPIs or existing KPI definitions or remove existing KPIs all together.

11. Is ARTC's proposed Costing Manual an appropriate replacement for existing provisions under the 2011 HVAU?

12. Are the cost allocation provisions included in the Costing Manual an appropriate replacement for existing provisions on the allocation of Non-Segment Specific Costs?

13. Is it appropriate that the RCG be tasked with approving ARTC's changes to the Costing Manual rather than the ACCC?

14. Does ARTC's proposed Costing Manual address transparency concerns?

Asciano has elected to answer questions 11, 12, 13 and 14 together.

Asciano supports the principle of increased regulatory transparency and thus supports, in principle, the provision of increased information relating to cost allocation approaches via a Costing Manual.

Asciano believes that costs should be allocated in a consistent and transparent manner. In particular the costs should be treated consistently over time and consistently between ARTC owned infrastructure. (For example ARTC corporate costs allocated between the Hunter Valley coal rail network and the ARTC interstate network should not be recovered more than once).

In relation to the broad approach to the Costing Manual Asciano supports the ARTC decision to not adopt the stand-alone cost approach<sup>4</sup> and Asciano recognises that the general cost allocation approach is broadly consistent with approaches used for other regulated infrastructure. However, as Asciano is not currently an access holder on the Hunter Valley coal rail network Asciano has no detailed comment on whether the allocation methodology in the Costing Manual attached to the proposed 2016 HVAU is appropriate.

Asciano's main concern with the Costing Manual is that once approved by the ACCC the Costing Manual may then be amended by the ARTC under section 2.4 of the proposed 2016 HVAU. This removes the Costing Manual from ACCC regulatory oversight. Section 2.4 allows the Costing Manual to be amended with the endorsement of RCG members who hold 70 per cent of the contracted train kilometres. Asciano has concerns with this approach as outlined above in responses to ACCC Questions 5 and 6. In particular members of the RCG controlling 70 per cent of the contracted train kilometres may be in a position to vary the Costing Manual to favour themselves to the detriment of the remaining 30 per cent.

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<sup>4</sup> Attachment 8 of ARTC Application to ACCC regarding 2016 HVAU – Costing Manual July 2016 page 3

An approach which allows the ARTC and RCG to vary the Costing Manual may result in the Costing Manual substantially diverging from the manual approved by the ACCC. Asciano believes that all non-administrative changes to the Costing Manual should be subject to an ACCC regulatory process rather than be varied by the RCG with minimal regulatory oversight.

Overall while Asciano supports the concept of a Costing Manual approved by the ACCC in the 2016 HVAU, any non-administrative changes to the Costing Manual over the term of the access undertaking should be subject to an ACCC regulatory process.

15. Are there any other comments on ARTC's proposed changes to the Access Pricing Principles?

Asciano notes that the Access Pricing Principles have been amended to:

- remove the concept of the Indicative Service and replace this with the concept of the Services Envelope; and
- shift the access pricing basis from the Indicative Service to path based pricing.

Asciano has concerns with both of these changes; these concerns are discussed below in responses to ACCC Questions 18 and 19.

More broadly Asciano believes that the Access Pricing Principles should include a principle which states that in determining access price levels and structures ARTC should have regard to the impact of the access price levels and structures on Hunter Valley coal rail network capacity utilisation (with the aim being that access price levels and structures should provide incentives for increased capacity utilisation). Such a principle could be included in section 4.14 b) of the access undertaking.

Asciano notes that some of the access pricing principles<sup>5</sup> have been amended by removing the allocation principles from the access pricing principles in the access undertaking and shifting these principles to the Costing Manual. As outlined above in

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<sup>5</sup> For example principles relating to allocation of depreciation on non-segment specific assets and allocation of return on non-segment specific assets

response to ACCC Question 14 Asciano has a concern that shifting these principles to the Costing Manual may remove these principles from ACCC scrutiny. As outlined elsewhere in this submission Asciano believes that material changes to the Costing Manual should be approved by the ACCC. Failing this, the access pricing principles shifted from the access undertaking to the Costing Manual in the proposed 2016 HVAU should be reinstated to the access undertaking.

Asciano welcomes the new section 4.16 b) which allows ARTC to consider the characteristics of other networks when pricing the access rights for trains which use these other networks. Asciano does not believe that access holders should be disadvantaged if infrastructure constraints on other networks are a major determinant in the access holder's train characteristics.

Asciano is seeking confirmation as to whether this clause 4.16 b) applies to coal trains which use the ARTC's Interstate Network's north coast line. This network is defined as an "Other Network" in the proposed 2016 HVAU but these north coast line hauls are often treated as part of the Hunter Valley coal supply chain in other processes.

*18. Is the move to path based pricing in the 2016 HVAU appropriate? How will this change affect users?*

Asciano supports access pricing which encourages efficient consumption of capacity in the Hunter Valley coal rail network, which in turn allows more coal to be moved through the network.

Under the proposed 2016 HVAU ARTC is moving from an indicative service pricing model towards a path based pricing model. This indicative service model has been subject to extensive consultation and analysis since 2011 but issues relating to the model have remained unresolved due to diverging industry views. Throughout the 2011 to 2014 consultation process Asciano consistently put forward the position that longer and higher payload trains configured with sufficient power to operate within system assumptions are the most efficient trains for the Hunter Valley coal supply chain<sup>6</sup>. Asciano continues to hold this view and believes that the Hunter Valley coal

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<sup>6</sup> Asciano submissions on the matter of the indicative service included:

- Asciano, November 2011, Submission to the ARTC: 2011 Hunter Valley Access Undertaking – Response to the Initial Indicative Service Proposal

supply chain is best served by providing access pricing incentives for longer and higher payload trains (as smaller trains utilise capacity inefficiently).

The path based pricing model now proposed in the 2016 HVAU is independent of the train specification (provided that the train specification fits into the service envelope). In particular ARTC is moving from a pricing regime where both TOP and non-TOP access charges were charged in dollars per GTK for a defined train specification to a pricing regime where TOP (the bulk of the charge for TOP trains) is charged in dollars per kilometre and non-TOP is charged in dollars per GTK. This approach can act to incentivise larger trains as the dollar per kilometre pricing unit is essentially fixed and so if this fixed charge can be spread over a larger tonnage of coal then the access holder has a financial incentive to move to a higher payload train (as the access cost per tonne will decrease).

Asciano believes this approach to access pricing has the potential to encourage more efficient utilisation of capacity in the Hunter Valley coal rail network; however Asciano believes that the proposed pricing structure should be subject to review under section 2.3 of the proposed 2016 HVAU (as outlined in the response to ACCC Question 3 of this submission) in order to assess whether the pricing structure actually provides the incentives for the efficient consumption of capacity which are expected.

Asciano believes that, as proposed in the draft 2016 HVAU, GTK is an appropriate pricing unit for the non TOP component of access pricing.

19. Are the train specifications in ARTC's 'Services Envelope' characteristics appropriate?

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- Asciano, January 2012, Submission to the ACCC in relation to the ACCC Consultation Paper on the ARTC Hunter Valley Access Undertaking Variation
  - Asciano, May 2012, Submission to the ACCC in relation to the ACCC Position Paper on the ARTC Hunter Valley Access Undertaking Variation
  - Asciano, August 2012, Asciano Submission to ACCC Further Consultation on the ARTC Proposal to Defer Implementation of Initial Indicative Access Charges
  - Asciano, September 2012, Asciano Submission to ACCC Consultation on the ARTC Revised Application to vary the Hunter Valley Access Undertaking
  - Asciano, March 2014, Submission to the ACCC: Response to ACCC Consultation Paper Regarding the Proposed Final Indicative Service Variation to the ARTC Hunter Valley Access Undertaking
  - Asciano, September 2014, Submission to the ACCC: Response to the ACCC Position Paper Regarding the Final Indicative Service Variation to the ARTC Hunter Valley Access Undertaking

Asciano has strong concerns with the detail of the Services Envelope approach. In particular:

- the Services Envelope as outlined in the proposed 2016 HVAU section 4.15 contains maximum restrictions with no apparent minimum restrictions. Asciano believes that some minimum restrictions for coal trains should be included to remove the potential for any grossly inefficient usage of paths;
- the Services Envelope includes maximum speeds but these speeds are technical and engineering matters and not primarily a commercial matter. These speeds could be removed;
- the Services Envelope includes sectional run times but these are not contained in the proposed 2016 HVAU as they are published on the ARTC website. Asciano is concerned that changes to the sectional run times may impact the Services Envelope yet not be subject to the same level of scrutiny as the Services Envelope parameters in the 2016 HVAU. Asciano believes that if the sectional run times are to be materially changed there should be consultation with stakeholders on this issue and the ACCC should be informed. Failing this the sectional run times should be included in the 2016 HVAU as a schedule;
- the 2016 HVAU Services Envelope should require that adequate banking capacity is to be provided when needed; and
- assuming the proposed 2016 HVAU has a term of at least ten years it is likely the Services Envelope will change in that time. Asciano believes that ARTC should clarify what processes it will use to change the Services Envelope when infrastructure and rolling stock change over the next ten years. Asciano believes that it should be addressed in the periodic review as outlined in Asciano's response to ACCC Question 3.

Asciano does not support the Services Envelope as outlined and believes that it could be improved by considering the points above.

21. Are the additional obligations regarding consultation with the HVCCC appropriate?

Asciano believes that where any ARTC - HVCCC consultation directly and primarily relates to train operations then train operators should be consulted. While Asciano

recognises that this consultation with train operators could be implied in the proposed 2016 HVAU section 1.1 h) Asciano believes that such an obligation should be more explicitly recognised in Schedule G.

22. Is the removal of the capacity losses provision appropriate?

Asciano has no major concern with the removal of the capacity loss incentive mechanism provisions if it is replaced with new provisions which provide alternate incentive mechanisms for achieving efficiency (such as those in proposed 2016 HVAU section 9.3 and section 14).

23. Is the extension of RCG membership to all Access Holders with coal access rights appropriate?

Asciano believes that extending the RCG membership is appropriate and believes that voting membership should be extended further. Rail operators can currently be members of the RCG but they cannot vote. Asciano believes that above rail operators should have greater input into the capacity investment process as train operators travel on the network and consequently have an understanding of areas where additional capital spending could increase network capacity and enhance operations.

In addition section 9.2 of the proposed 2016 HVAU provides for the RCG to take a more active role in consultation with regard to ARTC's maintenance plans and operational outcomes. These are matters of direct interest to train operators (as they directly impact train operations rather than access rights) and as such Asciano believes that any consultation between the RCG and ARTC in relation to ARTC's maintenance plans and operational outcomes must include train operators. Asciano's concern is that a certain level of maintenance is required for efficient train operations and reduction in maintenance is likely to initially impact on train operator's rather than access holders.

24. Will the consultation on maintenance plans, forecast operating costs and reporting of actual costs and operational outcomes through the RCG provide sufficient transparency and understanding of ARTC's costs and performance? If not, are there any actions ARTC could take, or further information that could be provided by ARTC, that may provide sufficient transparency and understanding?

As noted above, Asciano believes train operators as members of the RCG should be directly involved in consultations on maintenance plans, operating costs and operational outcomes and that there should be increased clarity around these consultation processes and maintenance planning more generally.

Asciano has a concern that in recent years ARTC maintenance costs have been lower than forecast due to a deferral of maintenance activities. While Asciano recognises the access price benefits of this reduced expenditure, Asciano is concerned that a continued deferral of planned maintenance activities will ultimately reduce track quality resulting in unplanned delays and increasing costs to both operators and access holders. Asciano has a concern that consultation with access holders only on maintenance issues may result in cost reductions which impact more directly on train operators rather than access holders. Asciano believes that in the event that ARTC substantially defers or reduces planned maintenance relative to a previous time period then ARTC should provide a statement to stakeholders justifying the deferral or reduction of this maintenance.

In addition Asciano believes that the maintenance planning time frames should be set for a period of at least 18 months to take account of financial year and calendar year planning cycles. The proposed 2016 Access Holder Agreement (section 3.2) uses a 12 month time frame; Asciano believes this should be extended to 18 months.

*25. What would be the effect of adjusting weighting for voting at the RCG from GTK to contracted Train Km?*

Asciano has no detailed information on this matter but it would seem that this approach would increase the relative voting power of access holders which have smaller tonnages and / or are further away from the port and decrease the voting power of access holders with larger tonnages and / or are closer to the port.

*28. Are the proposed set of Network Key Result Areas appropriate?*

Asciano believes that Network Key Result Areas (i.e. KPIs) must be linked to ARTC controllable behaviours and drive ARTC to become more efficient while not having a negative impact on other sections of the supply chain. Asciano believes that the

Network Key Result Areas as contained in Schedule D are broadly appropriate but additional KPIs could be included.

Asciano believes that in considering ARTC Hunter Valley Network Key Result Areas the KPI reporting by other parties such as KPIs proposed for Aurizon Network should be taken into account. Asciano notes that the Aurizon central Queensland coal network also has a performance reporting regime. The following performance measures<sup>7</sup> are expected to be reported by Aurizon Network quarterly on a per month basis<sup>8</sup> (following finalisation of the Aurizon Network's current draft access undertaking in mid 2016):

- the total number of train services;
- the number and percentage of train services that reached their destination within a given time;
- the number and percentage of train services that did not reach their destination within a given time where the delays are allocated to network issues, operator issues or other issues;
- information on transit times including above network delays, operator delays and unallocated delays;
- number and percentage of train services cancelled where the cancellations are allocated to network issues, operator issues or other issues;
- Information on the safety of train services including the number of major reportable incidents, as reported to the safety regulator;
- information on network service quality including speed restrictions and the track quality (as measured by a track quality index);
- information on aggregate GTK, NTK, net tonnes, train paths available, train paths used, train paths contracted and average transit time; and
- information on aggregate train paths scheduled, aggregate train paths used for planned and unplanned maintenance and the percentage of paths available but not used.

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<sup>7</sup> Note that this listing is not exhaustive but includes proposed Aurizon Network performance indicators most relevant to the ARTC Hunter Valley Network

<sup>8</sup> This listing is based on section 10.3.4 of the draft Aurizon Network Access Undertaking as attached to the Queensland Competition Authority's Consolidated Draft Decision on the Aurizon Network Access Undertaking released in December 2015.

Given the desirability of regulatory consistency across jurisdictions and the commonality of train operators, miners and access holders between the Hunter Valley coal rail network and the Aurizon central Queensland coal network, Asciano believes that similar performance indicators should be used in both networks.

Asciano recognises that some of the Aurizon performance indicators and ARTC performance indicators can be matched in broad terms but Asciano believes that some of the measures relating to safety, network quality, paths used for maintenance and tonnage measures should be included in the ARTC's performance indicators. In addition Asciano believes that reporting quarterly on a per month basis allows greater transparency.

Ideally Asciano believes that a more consistent set of performance indicators could be developed over time to allow a level of comparison between the two networks.

Asciano understands that one of the main roles for the Network Key Result Areas in the access process is that (as per section 13.2) the key performance measures in the AHA negotiated between the access holder and ARTC include a subset of the Network Key Result Areas in Schedule D. Given this Asciano believes that a broader scope of performance measures is more likely to allow measures relevant to both parties.

29. Is it appropriate to remove, add or modify KPIs throughout the life of the undertaking?

30. Is the minor variation process the appropriate mechanism to make changes to the KPIs?

Asciano is answering question 29 and 30 together.

Asciano believes that KPIs and KPI definitions should be held constant through the term of the Access Undertaking to allow a consistent time series of KPIs to be developed.

As noted in the response to ACCC Question 7 Asciano believes that KPIs should be able to be added to the 2016 Access Undertaking using the provisions in section 2.4 of the proposed 2016 HVAU in order to reflect any changes in markets and industry operation. However, Asciano does not support modifying or removing KPIs in the

Access Undertaking using the provisions in section 2.4. If KPIs are to be modified or removed then this process should be overseen by the ACCC rather than be managed by the RCG with minimal regulatory oversight. (As outlined in the response to ACCC Question 5 Asciano has concerns with the proposed 2016 HVAU process which allows ARTC to vary provisions of the access undertaking (including KPIs) with endorsement from the RCG).

31. Is the proposed structure for developing the Efficiency Incentive Proposal appropriate?

The structure for developing the efficiency incentive proposal is largely based on the ARTC and access holders developing a proposal and then, following consultation, endorsing the proposal. Asciano's concern with this structure is that parties not involved in developing and endorsing the efficiency incentive proposal (such as train operators) may still be impacted; in particular incentives to reduce operating costs may impact on train operations rather than access rights.

Asciano strongly supports the requirement in 9.3 b) that other stakeholders be consulted and seeks that train operators explicitly be included as a stakeholder.

32. Is the proposed frequency for Efficiency Studies in section 9.3(vii) appropriate?

Asciano believes that using the Review Date as the trigger for the review of operating cost efficiency is appropriate.

33. Is the proposed structure for the Innovation Incentive Mechanism appropriate?

Asciano believes that the structure is appropriate but the structure could allow for other parties to develop an innovation proposal (either singly or jointly with ARTC) for submission.

Asciano has concerns similar to the concerns outlined in the response to Question 31; that is parties not involved in developing and endorsing the innovation incentive proposal (such as train operators) may still be impacted; for example a proposal relating to train operations (for example in-cab signalling) may require train operators to invest additional capital. Asciano believes that train operators should be involved

in any process where the innovation proposal will result in the train operators having to invest material levels of capital or incur material levels of operating cost.

Asciano strongly believes that as part of the RCG endorsement process in section 14.6 other stakeholders (for example non-voting members of the RCG) should be consulted.

34. Is the proposed exclusion of incentive payments from the Ceiling Revenue Limit in section 4.3 appropriate? Are there alternative mechanisms that could achieve the outcomes sought by ARTC through this exclusion?

Incentive payments should be excluded from the revenue cap, otherwise there is no actual incentive provided.

35. Has the TUT process proven effective as a liability regime? Why / why not?

36. Is the structure of the auditing mechanism appropriate?

37. Is a TUT review mechanism required?

38. Are the transitional arrangements, as they apply to the TUT, appropriate?

39. Is the relationship between the TUT and the financial model transparent?

Asciano is not an access holder on the Hunter Valley coal rail network and does not directly benefit from the TUT. Asciano has elected to briefly address questions 35, 36, 37, 38 and 39 together. Asciano believes that:

- the TUT is generally effective as a liability regime; however Asciano believes that the TUT does not necessarily provide strong incentives for ARTC to address capacity availability; and
- a TUT review mechanism is not needed if the access undertaking term is five years but a review may be required if the access undertaking term was ten years, (particularly if the Periodic Review altered any parameters which impact on TUT).

40. Are the amendments to the Access Holder agreement appropriate? Are any further amendments to the IAHA necessary?

Asciano's main concern with the access holder agreements (not outlined elsewhere in this submission) is the deletion of section 11.5 d) from the previous access holder

agreement. Section 11.5 c) of the access holder agreement allows for a change in train services if it does not lead to a change in TOP charges, however previously section 11.5 d) allowed for a change in train services even if TOP was reduced if the change in train services resulted in a more efficient use of coal chain capacity. Asciano is concerned as this deletion appears to act against network efficiency and operators using trains with a larger coal carrying capacity. Previously an access holder and an operator could use a larger payload train (with a subsequent reduction in paths and reduction in TOP) if this made network capacity available. Asciano is concerned that this deletion appears to act counter to incentives to increase the capacity of the Hunter Valley coal rail network

Asciano understands that some access holders, particularly non-export access holders, are seeking to purchase coal on spot markets for terms of 30 days to 365 days where the quantity of coal is not necessarily known in advance. These purchases require alignment of agreements for coal, access and haulage, and historically these spot purchases lacked certainty in relation to the purchase of future volumes. The access holder agreement does not facilitate these short term spot purchasing agreements (the access holder agreement is based on a long term TOP approach). Asciano believes that there is scope for ARTC to develop a simple agreement which allows for the purchase of paths on a spot basis if capacity is available. Asciano recognises that capacity trading may be a potential solution to this issue but Asciano understands that there can be issues relating to trading approvals and certainty.

Several Asciano comments on the detailed drafting of the OSA are contained in section 4 of this submission.

41. Are any amendments to the OSA necessary?

Asciano comments on the drafting of the OSA are contained in section 4 of this submission.

42. Under the current terms of the 2016 HVAU, in what circumstances would a change in ARTC's ownership cause concerns? What are the specific issues that are likely to arise?

If a change in ARTC ownership occurs during the term of the 2016 HVAU then Asciano believes that a review of the 2016 HVAU is needed as outlined in response to ACCC Question 1. In particular the identity of any new owner or owners of the ARTC will be relevant to such a review as a new owner with interests in other sections of the Hunter Valley coal supply chain (such as mining or train operation) would likely raise regulatory and competition concerns regarding vertical integration, ring fencing and separation of staff, accounts and information<sup>9</sup>. The 2016 HVAU and the supporting regulatory and legislative framework will need to be considered and tested against potential new owners and the potential new ownership structure.

Ultimately, until the identity of a new owner and new ownership structure of the ARTC in Hunter Valley is known it is difficult to outline detailed concerns or prescribe a detailed process to address a potential change in ARTC ownership. . A general review trigger upon a change of ARTC ownership will allow any concerns to be addressed once these details are known.

*43. Should the 2016 HVAU be amended to deal with these matters? What could these provisions look like?*

The 2016 HVAU must include provisions that are triggered by a change of ARTC ownership. These provisions should allow the ACCC to review the 2016 HVAU in light of the new ownership and provide a consultation process to allow industry participants to raise concerns specifically relating to the 2016 HVAU and the Hunter Valley coal rail network more generally.

Such a review would be separate to the periodic review envisaged in section 2.3 and any other reviews which may be undertaken by the ACCC or other Commonwealth or state bodies in order to consider broader issues associated with a change of ARTC ownership. The 2016 HVAU wording which requires such a review can address how the HVAU review would interface with any broader reviews.

*44. Are there other legislative or regulatory mechanisms that would alleviate these concerns (for example, section 50 of the Act)? Please give reasons why or why not.*

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<sup>9</sup> Many of these issues have been raised in other regulatory processes applying to regulated infrastructure where vertical integration is an issue. Perhaps the example most relevant to the Hunter Valley coal rail network are the ring fencing provisions and separation provision which apply to the Aurizon owned Central Queensland coal network. Aurizon are both the network owner and a train operator on this network.

Whether or not a merger review under section 50 is undertaken by the ACCC will depend upon the approach taken by the relevant parties at the time of the proposed ownership change and also the view of the ACCC and its approach to the proposed ownership change. For these reasons, a section 50 merger review may not necessarily be undertaken and even if one is it may not deal with all current and future regulatory issues appropriately. For example a company may acquire ARTC and have no interest in above rail operations. However, they may subsequently organically (i.e. not by acquisition) start above rail operations. In these circumstances Section 50 would not apply. Additionally section 50 is also limited in its ability to deal with monopoly pricing issues which are more suited to a regulatory access and pricing regime. For these reasons Asciano believes that the 2016 HVAU should include a review of the 2016 HVAU if there is a change of ownership of ARTC.

Asciano's experience with other rail assets where the owner of the regulated infrastructure has interests in other sections of the supply chain is that often detailed drafting is required to address specific concerns. It should be noted that in most industries where vertical integration is (or was) an issue explicit legislation or regulation has been introduced which requires ring fencing or other forms of separation and these regulations often include substantial sections relating to non-discrimination, separation and ring fencing in access undertakings and similar instruments.

*45. Should the term of the 2011 HVAU be extended until the 2016 HVAU is accepted by the ACCC? Are there alternative approaches that would provide sufficient certainty for industry?*

Asciano supports the extension of the term of the 2011 HVAU until the 2016 HVAU is finalised.

## **4 DETAILED COMMENT ON THE DRAFTING OF THE ACCESS UNDERTAKING, IAHA AND IOSA**

### **4.1 Comments on the IAHA**

Limited Agency - Clause 4.6 c) of the IAHA continues to include "Limited Agency" which states that the access holder does not incur liability for incidents caused by acts or omissions of the train operator as a result of the operation of the AHA.

Asciano believes that this wording is inappropriate in an AHA to which the train operator is not a party. Asciano believes that this clause may have the effect of encouraging the parties to the AHA to assign fault to the train operator, even in the event where the causes are more complex. Asciano believes that this clause should be removed.

New and Varied Access Undertakings and AHAs - Clause 19.1 of the IAHA continues to require that:

- changes to mandatory provisions in a new or amended access undertaking will be uplifted to the AHA, and
- changes to non-mandatory provisions in a new or amended access undertaking will be subject to negotiation with a view to modifying the AHA to amend the agreements.

Asciano is concerned that in these instances clauses which may directly impact on train operators are being uplifted into the AHA, while the operators have no explicit right to comment on these clauses which may directly impact on the train operators. Asciano seeks that:

- where any material changes are to be made to an AHA, which may reasonably be expected to impact on train operators, the train operators are consulted prior to the changes being made; and
- that the relevant train operator is notified of all changes to the AHA so that the train operator is aware of all of its obligations under the OSA.

#### **4.2 Issues with Amended OSA**

New and Varied Access Undertaking – clause 22.1 of the OSA states that any changes in the standard OSA which are accepted by the ACCC as part of a revised access undertaking will be automatically incorporated into OSAs unless the clauses are specifically negotiated. In the event of a dispute the dispute is resolved via the OSA dispute resolution clauses. Asciano has a practical concern that in the event the amendment in question is an amendment to the dispute resolution clause then this process may become unworkable. It may be more practical that in the event of a dispute the dispute be resolved by either ACCC arbitration under the access undertaking or the dispute resolution clause in the OSA, as agreed by the parties. If

there is no agreement ACCC arbitration should be the default dispute resolution mechanism.

## **5 CONCLUSION**

Overall Asciano seeks that the ACCC not approve the proposed 2016 HVAU in its current form. Major issues that need to be addressed before the proposed 2016 HVAU can be approved include:

- a requirement for a 2016 HVAU review if ARTC changes ownership to be included in the 2016 HVAU drafting;
- a requirement for the scope of the 2016 HVAU “mid-term” periodic review to be broadened to include the items identified in this submissions response to ACCC Question 3;
- a requirement to restrict the RCG variation mechanism to those items identified in this submissions response to ACCC Question 7;
- a requirement for the service envelope to be amended as identified in this submissions response to ACCC Question 19;
- a requirement to explicitly include train operators in consultations regarding, maintenance, operating costs,
- a requirement to expand the Network Key Result Areas as identified in this submissions response to ACCC Question 28;
- a requirement to reinstate clause 11.5 c) of the AHA;
- ARTC to preserve non-coal paths through the Hunter Valley coal rail network; and
- ARTC to change its contracting approach in order to allow train operator’s to hold access if end users or miners request their operator to hold access.

Asciano believes the 2016 HVAU should have a strong focus on providing incentives for increased operating efficiency and increased asset utilisation in order to increase the Hunter Valley coal rail network’s capacity and operating efficiency and supports proposals in the proposed 2016 HVAU which provide incentives for increased efficiency, such as the proposals in sections 9.3 and 14 of the proposed 2016 HVAU. Asciano believes that train operators should be included in consultations related to proposals under in sections 9.3 and 14.