Competition Policy Review
Response to the Draft Report

November 2014

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1 EXECUTIVE SUMMARY

Previous reforms to regulation and competition arising from the 1993 Hilmer Report contributed significantly to Australian productivity growth in the 1990s and early 2000s. We see the Harper Review as having the potential to similarly contribute to Australian productivity growth by improving regulation and contributing to increased efficiency in the operation of, and investment in, infrastructure.

Asciano commends the Committee on a thorough and thought provoking Competition Policy Review Draft Report (the "Report"). We have restricted our comments to areas where we believe our views can add to the debate.

Asciano concurs with the Report's view that some gaps and overlaps arise because activities that can be regulated nationally are still regulated at a State and Territory level. Asciano believes that there would be significant economic benefits to having a single rail regulator and we recommend that the Panel advocate the introduction of a single national rail access regulator.

Asciano welcomes the Report's conclusion that the reform of road pricing should be a priority and concurs with the Report's view that effectively implemented reform can deliver significant economic benefits.

The Report's brief discussion on rail freight oversimplifies the market dynamics. It is true that for intermodal freight, rail is competitively constrained by road however this is not true of other traffic such as networks predominantly carrying coal. These networks, for example in the Hunter Valley and Central Queensland, are not competitively constrained by road and the track providers' monopoly powers are unconstrained by the market.

The Report recognises the significant issues surrounding port privatisations and highlights the issues of pricing and extraction of monopoly rents. Asciano welcomes the Report's conclusions but believes they need to go further and agrees with the ACCC that there should be no artificial restrictions on port competition and where appropriate an access regime should be in place prior to any sale. Asciano believes that the Report should also address vertical integration concerns and recommends a solution of introducing regulation of these privatised ports such that any expansion

(via whatever means) into competitive stevedoring or other port services by the Port Operator requires prior clearance from the ACCC in a process equivalent to the informal merger review process. In effect, this is what was done by way of a s.87B undertaking when the Victorian Government privatised the port of Geelong in 1996.

On secondary boycotts Asciano accepts the view of the Report that there is not a compelling case for legislative change and rejects the ATCU's argument that the employment exemption provisions should be broadened.

Asciano supports the recommendation that sections 45E and 45EA be amended to expressly include Enterprise Agreements and Awards. For the provisions to have any meaningful effect they must have operation in respect of Enterprise Agreements.

Asciano does not support amendments that would exempt workplace or enterprise agreements approved under the Fair Work Act. Enterprise bargaining under the Fair Work Act is the key mechanism through which arrangements between employees and their representatives (trade unions) bargain and reach agreements and arrangements which often go beyond the confines of strictly the relationship between the employer and its employees, and the terms and conditions that pertain to that relationship

The Report's view that the ACCC should have a responsibility to frame s155 notices in the narrowest form possible to achieve their objectives is supported by Asciano. We also support that the recipient of the s155 notice should be required to undertake a reasonable search only to avoid penalty.

Asciano agrees with the Report's conclusion that the ACCC is performing well but it could benefit from improved governance. Asciano strongly supports the board model with the introduction of non executive members. Constituting the non executive input as advice only and not part of a formal board process will only diminish the influence of these external views.

As the Report notes, Australia is out of step internationally with third-line forcing being a per se prohibition. There is no economic justification for a per se prohibition and Asciano strongly supports the Report's conclusion that third line forcing should be brought into line with the rest of Section 47 and only be prohibited where there is a substantial lessening of competition.

2 PRODUCTIVITY AND IMPROVED REGULATION

Australia has been enjoying one of the highest living standards in the world, but this has been matched by a relatively high cost of living.

The high cost of living has been sustainable while our national income was being supported by strong commodity prices and volumes, but economic conditions are now changing. The prices which Australia receives for our resources have been falling, meaning our national income can no longer support our high cost of labour. Australia is becoming uncompetitive in a very competitive world. For example:

- it is significantly more costly to unload and service a ship in Australia than in New Zealand;
- unskilled labour in Australia is three times more expensive than it is in the United States; and
- it costs three times as much to build an oil rig in Australia as it does in the Gulf of Mexico in the United States.

These are significant cost differences and something has to change to avoid falling Australian living standards.

Often the debate around productivity has been too narrowly focussed on reducing wages. However, if Australia can produce more for the same level of wages and other costs, then our productivity, our competitiveness and our relative standard of living will all rise.

There are a number of elements which will contribute to Australia being able to be able to achieve greater production at the same level of wages. These elements include:

- more flexible working arrangements;
- lower and less distortionary taxation;
- more efficient infrastructure; and
- improved regulation.

Successful efforts to address each of these factors will enable Australia to increase its productivity.

Previous reforms to regulation and competition arising from the 1993 Hilmer Report contributed significantly to Australian productivity growth in the 1990s and early 2000s. We see the Harper Review as having the potential to similarly contribute to Australian productivity growth by improving regulation and contributing to increased efficiency in the operation of, and investment in, infrastructure. For Asciano, improving overall productivity through the right public policy reform helps drive our growth.

Asciano commends the Committee on a thorough and detailed draft report. We have restricted our comments to areas where we believe our views can add to the debate.

This response can be considered a public document.

3 ACCESS AND PRICING REGULATION

Asciano supports the Report's recommendation of the creation of a national access regulator and the appropriate importance that this places on effective access regulation. However, Asciano is less firm than the Report that this regulator needs to be separate from the ACCC. Asciano sees no evidence that conflicts or lack of focus have affected the ACCC's access regulation work. The key for success is that the national access regulator should be well resourced, have the appropriate powers and be staffed by appropriately qualified people. These criteria can be met whether the national access regulator is separate or a part of the ACCC.

It will be important for the States to commit to the approach of having a national access regulator. To the extent that a co-operative State/Federal structure along the lines of the Australian Energy Markets Commission is considered more likely to achieve that buy-in, then Asciano would have no objection to that approach.

Asciano notes the Report's comments on state versus national regulation and concurs with the view that some gaps and overlaps arise because of activities that can be regulated nationally are still regulated at a State and Territory level. The Report notes that a national approach to regulation should be adapted in these

cases and nominates water as an industry which could benefit from this. Asciano along with other industry participants sees rail as an industry which could significantly benefit from national access regulation. Many rail freight activities involve interstate haulage, but much of the rail infrastructure continues to be regulated by state regulator.

For example, Asciano operates its above rail operations under six different access regimes with multiple access providers and multiple access regulators. This multiplicity of regimes adds costs and complexity to rail access for no benefit, particularly as many of the access regulation functions are duplicated across states. Given this Asciano strongly supports a national rail access regulator, which sits within the broader national access regulator, whether that be the ACCC or another body.

Asciano does not advocate a one size fits all approach to rail regulation. For example, you would not expect that the appropriate access regime in a government owned and operated regional grain network would be the same regime required to regulate a vertically integrated monopolist track provider such as Aurizon in Queensland. However, having a single national regulator would have a number of advantages:

- *Reduced duplication of effort* – even with a number of tailored regimes (for example a regional network regime plus an interstate network regime) the number of regimes in operation would be significantly less than the current situation. In addition with one regulator making decision some key features of the regime would be common across networks. For example, the approach to calculating the cost of capital or the approach to liabilities and indemnities which can currently vary significantly via jurisdiction, would be common. Having a single regulator would significantly reduce the regulatory resources required, saving both industry and Government significant resources. This proposal is consistent with the current Government's priority to reduce unnecessary red tape and cost.
- *Increased specialisation* – some regulators only deal with rail access issues intermittently, usually at the time an access undertaking comes up for renewal. Access undertakings are typically reviewed on a 5 or 10 year cycle. Thus it is difficult for these regulators to retain in house knowledge on rail issues. A national regulator with dedicated specialised rail staff would more

likely to have the appropriate expertise and as such be more likely to come to efficient decisions.

- *Regulatory capture and independence* – the potential for regulatory capture will be reduced with a national regulator. Where a state based regulator, part of the state government bureaucracy, regulates a private company which is a significant contributor to state finances or even a state government owned entity, the commitment to independence and efficient regulatory decision making may be tested. These close relationships would be more arms length with a national regulator.
- *Improved regulatory certainty* – having a single regulator which as noted above would allow specialisation and also would implement decision consistently across networks would increase regulatory certainty compared with the status quo of multiple regulators and multiple access undertaking. The increase in regulatory certainly would reduce investment risk and all other things being equal expect to encourage more efficient investment decisions.
- *Co-ordination benefits* – having a single regulator approve technical rail documents such as network rules will increase consistently between network owners thereby reducing operators' costs. For example, rules regarding rolling stock approval or track possession planning (i.e. maintenance planning) would likely become more consistent thereby reducing co-ordination and regulatory compliance costs of dealing with multiple regimes.

Asciano believes that there would be significant benefits to having a single rail regulator and we recommend that the Panel advocate the introduction of a single national rail access regulator, which sits within the broader national access regulator, whether that be the ACCC or another body.

Establishing and implementing the correct regulatory and access frameworks and access and regulatory bodies is a necessary step, this step is not sufficient in itself. Once the frameworks and bodies have been established the details of access and regulatory processes need to be determined in order to have a regulatory system which leads to efficient outcomes. These processes must facilitate regulatory bodies making the best possible regulatory decisions using all available information within timeframes acceptable to access users and access providers and allow for the audit

and enforcement of these decisions. For example regulatory processes must include:

- Strong powers to collect information from monopoly access providers (this addresses issues of information asymmetry);
- Strong powers to audit and enforce regulatory decisions when they have been made; and
- Allowance for sufficient resources to assess all relevant information in a timely manner in order to arrive at the best possible outcome within a given time constraint.

This final point is important as in Asciano's experience many regulatory decisions relating to rail access extend over unnecessarily long time frames. These extended timeframes can add to uncertainty and hence impact on both access user and access provider investment and operations. For example;

- under the 2011 Hunter Valley Access Undertaking which governs access to coal rail lines in the Hunter Valley the issue of the "efficient train" to be used as the basis of access charging was to be determined in 2014 following a three year process. However, this issue has not been resolved and is now unlikely to be resolved before mid 2016. This long time period for resolution of a single regulatory issue creates ongoing regulatory uncertainty which impacts on both rolling stock investment and track investment;
- under the 2010 Aurizon Network Access Undertaking which governs access to coal rail lines in central Queensland the issue of user funding of infrastructure investment was to be determined following approval of the 2010 access undertaking. Following numerous iterations this process is likely to be determined in 2015 at the earliest.

While some of these delays may be attributable to stakeholders in the process, rather than the regulatory body, the fact remains that extended regulatory processes create uncertainty, particularly as the cross from one regulatory period into another.

4 INFRASTRUCTURE MARKETS

4.1 Rail Freight

The Report's brief discussion on rail freight[1] oversimplifies the market. It is true that for intermodal freight and some short haul bulk freight, rail is competitively constrained by road however this is not necessarily true of other traffics. Rail networks predominantly carrying coal, for example in the Hunter Valley and Central Queensland, are not competitively constrained by road. The nature of the product (i.e. volume and weight) mean that the freight task can not be met by road. In this situation the track providers have significant unconstrained monopoly power.

In rail, as in most industries, there are trade offs between vertical integration and separation. Vertical separation can impact efficiency by increasing costs for example co-ordination and contracting. While on the other hand separation can also deliver significant improvements in cost efficiency, system throughput, innovation and service quality. The success of vertical separation in rail in Australia demonstrates that co-ordination problems can largely be overcome and the benefits of above rail competition in terms of efficiency are large.

As a result the Report's statements that

> '*Regulators and policy makers should be pragmatic about structural separations of railways, recognising on some low-volume rail routes vertical integration may be preferable"* [2]

must be heavily scrutinised.

The Report's logic may hold in extreme cases but the efficiency improvements delivered in Australia to date due to separation mean that the Report's position will not hold in most cases. It is important to be aware who is expounding support for these views, likely to be vertically integrated players. In Asciano's view support for vertical integration risks forsaking efficiency and innovation opportunities.

Asciano accepts that some rail freight tasks face significant economic challenges – for example freight rail in some regional agricultural networks faces challenges from

[1] Report p134

[2] Report p134

aging rail infrastructure, road competition and unequal treatment of road and rail pricing by policy makers. However, these challenges will not be overcome by vertical integration and indeed may be hindered as vertical integration will impede efficiency improvements and innovation.

Where vertical integration is present the consequent exacerbation of access, competition and productivity issues needs to be recognised. This is clearly demonstrated in the case of Aurizon which is both the track provider and the main above rail operator in Central Queensland.[3] As reflected above, Asciano considers that the case for the vertical separation of a large track operator such as Aurizon is strong. The experience to date with Aurizon also demonstrates the need for tailored regulation where track operators remain vertically integrated.

Rail in Queensland is regulated by the Queensland Competition Authority (the "QCA") and the QCA is currently reviewing Aurizon Network's proposal for its fourth access undertaking. Asciano has been very active in the current and in previous regulatory review processes. As noted in our previous submission[4] a constant concern is the lack of constraint upon the vertically integrated monopolist's ability to anti–competitively discriminate against its above rail competitors such as Asciano.

Aurizon operates a business model whereby significant services, including, notably, strategy development, are undertaken at the centre for all of Aurizon including both the above rail (competitive and contestable) and below rail (monopoly) operations. Aurizon have stated that they are modelling themselves on US Class 1 Railroads which are vertically integrated operations.[5]

Asciano's view is that without appropriate regulation there is the potential to lose the economic benefits that competition in above rail haulage has produced. This benefit includes demonstrated improvements in productive efficiency (i.e. reduced costs), system volumes, innovation and service quality improvements. In the situation in Queensland where there is a private vertically integrated monopolist an effective regime must include at a minimum:

- effective ring fencing;
- strong non discrimination provisions;

[3] Note that there are other vertically integrated track providers in Australia besides Aurizon.

[4] Asciano Submission to the Competition Policy Review Issues Paper June 2014 pp 18-24.

[5] See for example Aurizon Investor Briefing 18 July 2013 p 21.

- effective regulatory enforcement powers including audit powers and information gathering powers;
- penalty regime ensuring consequences for breach; and
- strong compliance programme.

By over simplifying its review of rail the Report has missed an opportunity for regulatory improvement in the specific case of vertically integrated monopolist.

4.2 Road Transport

The Report[6] has identified that reform of road pricing can deliver significant economic benefits.

The current road charging regime is based on two charges, namely a registration charge which State Governments collect and a road user charge which the Commonwealth Government collects through a fuel levy and then redistributes to the States. The problems of this system are that it is:

- not cost reflective;
- revenue can be misallocated between states; and
- revenue is not linked to a specific and relevant road investment.

These problems identified above in turn cause various market distortions in relation to road investment, road freight operations and the mode of transport used for freight transport (i.e. road or rail).

The road charging system does not reflect the true underlying costs as it does not take into account the mass of the heavy vehicle (heavier vehicles do disproportionately more damage to roads and so incur more costs); and the location of the heavy vehicle (the location may result in congestion costs). Given that heavy vehicle road pricing levels and structures are not reflective of costs, this pricing sends incorrect price signals and is inefficient. Although total revenue from the current system is intended to cover total costs (under one measure) there are cross subsidies between different types of commercial road users. In particular, the heaviest vehicles travelling long distances on the national highways are subsidised at the expense of lighter trucks and those on urban and rural roads. A truly cost

[6] Report p134

reflective pricing regime would address this issue and remove the inefficiencies created by this incorrect price signalling.

Heavy vehicle revenue may be misallocated between states as vehicles may be registered in one state but operated in another state. Thus one state receives revenue but another state incurs the road costs. This is inefficient. The state which provides the road and incurs the costs should be the state that receives the revenue.

Heavy vehicle revenue is not linked with investment. There is no pricing and investment methodology to link where road usage occurs and where investment is made. Investment is efficient when it is made in response to market demand but road investment is not made in relation to market demand. A system of cost reflective road pricing will at the least signal what road sections are responsible for generating revenue thus signalling where investment is most likely to be needed and where it is most likely to generate a return.

There is a lack of clarity as to whether current road charging revenues are necessarily returned to road projects. Moving road pricing to a more economic basis (perhaps similar to the infrastructure pricing for other regulated infrastructure such as rail, electricity networks, gas networks etc) will produce economic benefits and will allow more direct linkages between road charging and road investment. Similar to the pricing approaches for other regulated infrastructure road pricing reform should return all revenue received to a properly constituted road owner which then reinvests the revenue in the asset as appropriate. This would require a road infrastructure to be subject to corporate governance regimes and remove the potential for road investment to be used for political rather than economic purposes. It would ensure that road owners become more responsive to the requirements of heavy vehicle users and are held accountable for the delivery of infrastructure and service standards.

In addition, by moving road pricing to a more economic basis both road and rail access would be subject to equivalent pricing frameworks, thus removing any distortion from the fact that currently these two transport modes are priced using very different regulatory approaches.

These road pricing reforms have the potential to deliver large economic benefits to Australia. By enabling a shift to an approach which is more closely focussed on

economically efficient use and provision of roads, benefits are estimated to be in the upwards of $3.5 billion for Victoria, $4 billion for NSW and $4.9 billion for Queensland over 20 years.[7]

Asciano welcomes the Report's conclusion[8] that the reform of road pricing should be a priority and concurs with the Report's view that effectively implemented reform can deliver significant economic benefits.

Asciano believes that the reforms should incorporate the following principles:

- It should be a mass-distance-location (MDL) pricing regime – heavy vehicles would pay little or no registration but would pay according to how much weight they are carrying, where they are and how far they travel.
- Prices for access to the road freight network should be based on a building block regulatory model and subject to approval by the national access regulator advocated elsewhere in the report, consistent with pricing for other major infrastructure assets.
- The reforms should include both pricing reform and investment reform where state road agencies road infrastructure plans and service standards are transparent, consistent with commercial principles, and responsive to the current and future requirements of heavy vehicle users.
- All revenue from access charges should go to relevant road agencies, with the road agencies required, as infrastructure providers, to use the revenue to efficiently invest in road infrastructure. Road agencies should be accountable for their performance.
- Implementation should commence as a matter of urgency for heavy vehicles on national highways and other major roads including links to significant freight infrastructure.

[7] Deloitte Access Economics *Heavy Vehicle Charging and Investment Reform: Cost Benefit Analysis and Impact Analysis* (2013)

[8] Report p 134

4.3 Ports

In Asciano's earlier submission to the Harper Committee, we raised our concerns around the port privatisation process.[9] We briefly recap our key concerns below.

There have been a number of capital city container port privatisations in the recent past where it has seemed that sale profit maximization has been prioritised over long term competitive effects.

There are two key issues arising from the creation of these private port operator monopolies namely, vertical integration and monopoly pricing. These issues in some circumstances could be partially mitigated if there was competition between ports. However, in the recent sales there has been restrictions placed on competition between ports.

The first key issue is vertical integration. Any degree of vertical integration will provide the privatised monopolist port operator with the ability to leverage its power in the markets in which it has a monopoly (port access and port services) into vertically related competitive markets such as stevedoring, terminal operation, rail operations and rail haulage.[10] Whether it has the incentive to leverage this power will depend on the degree of integration and relevant competitive dynamics. A port operator with no downstream stevedore operations would have no commercial incentive to engage in non-price discriminatory practices.

There has been regulatory focus, including from the ACCC, at the time of the port privatisations in an attempt to address vertical integration issues. This interest has often been piqued by comments and interventions from interested parties. With the exception of Flinders Ports which commenced stevedoring post-privatisation, there are currently no capital city container terminal operators who are vertically integrated. However, the concerns regarding vertical integration do not end at privatisation.

Issues can occur post privatisation through the Port Operator subsequently:

- acquiring an established stevedoring or downstream business;

[9] Asciano Submission to the Competition Policy Review Issues Paper June 2014 pp 12-15

[10] We will use stevedoring as the most relevant port user service to Asciano. The arguments we make are equally valid for other port uses which are delivered competitively.

- entering into a joint venture with an existing stevedore business or other downstream business; or
- commencing its own stevedoring or downstream operation.

Although these subsequent actions may give the ACCC an opportunity to review transactions (e.g. the acquisition of an established stevedoring business) this is not true of them all. In particular, the organic expansion into stevedoring would not be subject to ACCC scrutiny. For example, the decision by Flinders Ports to commence stevedoring noted above would not be subject to ACCC scrutiny. As we note below, the ACCC has reservations about the effectiveness of its section 50 powers to effectively deal with port privatisations.

The likelihood of a port owner organically growing into stevedoring operations is increased when the owner already operates stevedoring operations elsewhere.

As noted above in this submission in section 3.1, vertical integration involving a monopoly reduces opportunities for competition and hence reduces opportunities for productivity improvement and cost reduction. Separation delivers improvements in cost efficiency, innovation and service quality.

The second key issue is monopoly pricing. Given the monopoly position which the port operator enjoys, Asciano anticipates that the port operator will seek both to increase rentals and to introduce additional charges on port users such as Asciano. A monopoly provider of port services has an incentive to charge monopoly prices for its services, and this incentive is strengthened with a privatised leaseholder seeking to maximise its profits for shareholders.

Rental charges have been significantly increased in the years prior to privatisation, thus maximising the sale price. For example in the three years prior to privatisations rents increased at the Brisbane Container terminal by 128%. Further charging increases post port privatisation have occurred.

More charging increases are likely given the high prices paid for the ports and the return on investment requirements of the port operators. For example, the successful bidders for Port Botany and Port Kembla paid 25 times EBITDA for these Ports. This implies a return with current profitability of 4% which is significantly below the required rate of return of the owners. Thus profitability will need to

increase and one of the key levers to influence profitability for a monopolist is to raise existing prices or commence charging new prices.

It is clear that there is both ability and an incentive for the privatised capital city container port operator to engage in monopoly pricing as the lessee of an essential facility, in the event that sufficient pricing controls are not imposed on the port operator.

Declaration is not an option to combat monopoly pricing as the criteria requiring an increase in competition in a relevant market is unlikely to be satisfied as the issue is likely to be considered distributional. Section 46 of the CCA is not an adequate remedy in these circumstances as it requires, as one of its essential elements, the port operator to have an anti-competitive purpose for engaging in monopoly pricing in order for a misuse of market power to have occurred. In these circumstances, the privatised port operator may simply be seeking to maximise returns for its shareholders by charging monopoly prices to port users, rather than doing so with the specific intention of damaging a competitor or preventing other companies from providing port services. As a result, it is possible for the port operator to engage in monopoly pricing without having a subjective anti-competitive purpose for doing so,[11] thereby preventing s 46 from being used as a remedy.

Thus a regulatory solution is required.

Our concerns are also shared by other market participants such as Qube and the ACCC. The ACCC notes:

> ".. there are concerning signs that, increasingly, Australian Governments are privatising assets with a view to maximising the proceeds of sale at the expense of competition'[12]

They go onto say that:

> "The ACCC considers that, if monopoly port related infrastructure is privatised without appropriate regulatory mechanisms in place, this could impede competition in

[11] See *Queensland Wire Industries Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 214.

[12] Container Stevedoring Monitoring Report October 2014 p 19

container stevedoring and /or related markets, and/or lead to greater costs for containers stevedores and other port users"[13]

The ACCC advocates two principles to ensure competition and efficiency are promoted through privatisation. The first of these principles is that the structure and conditions of sale should promote competition. In effect the ACCC is arguing against artificial restrictions put on competition at the time of sale. For example as well as bundling the sale of Port Kembla and Port Botany together, it has been reported that the NSW Government has included a clause in the Newcastle Port lease that in some way hindering it from competing on container stevedoring.[14] A similar situation could arise in Victoria if bundling or constraints were placed on the operations of the second port, be it either Hastings or Bay West.

The second principle is that the governments must consider the need for up-front economic regulation of the privatised ports.

The ACCC recognises the importance of appropriate regulation being determined in advance of the sale to increase certainty for all participants. Whilst price monitoring seems to be the regulation of choice for State governments seeking to maximize profit sales the ACCC believes that price monitoring alone will not be an effective constraint on monopoly power.

The ACCC goes onto detail the issues it sees in using section 50 to address these competition concerns and strongly advocates for an effective access regime based on Part IIIA.

Asciano welcome the comments of the Report which recognise the issues surrounding port privatisations and highlights the issues of pricing and extraction of monopoly rents. Asciano believes the Report's conclusions need to go further and agrees with the ACCC that there should be no artificial restrictions on port competition and an appropriate access regime should be in place prior to the sale Asciano also believes that the Report should also address vertical integration concerns raised by Asciano in this and previous submissions.

[13] Container Stevedoring Monitoring Report October 2014 p 20

[14] Newcastle herald, 'Interesting times for container terminal plans" May 11 2014

One option open to the stevedores to deal with vertical integration would be to seek declaration either under state (if available for example in Queensland) or under the declaration provisions of the CCA. However, as discussed in our previous submission,[15] at best even if the declaration is a valid option for stevedores then the process is drawn out and may take years to conclude by which time the damage to competitors is done.

Similarly Section 46 may be an option for the stevedores to deal with vertical integration issues. However, there is significant uncertainty about successful prosecution of a s46 case and as with declaration this is an ex-post solution and significant competitive damage could have be done before remedies are implemented. In addition if there are no regulatory information gathering powers or regulated KPIs (as is likely the case here) detection of discriminatory behavior is hard and it is even more difficult to gather proof to support a s46 case.

Asciano's recommended solution is to introduce regulation of these privatised ports such that any expansion (via whatever means) into competitive stevedoring or other port services by the Port Operator requires prior notification to the ACCC and, if required, prior ACCC approval. The ACCC would assess whether there would likely be a reduction in competition as a result of the expansion. The Port Operator would be unable to proceed until ACCC approval had been obtained.

5 EMPLOYMENT RELATED MATTERS

Asciano notes that the Panel was assisted in the preparation of its draft report by detailed submissions on employment related matters by such organisations as the Australian Council of Trade Unions (ACTU), the Australian Industry Group (AiGroup) and the Australian Chamber of Commerce and Industry (ACCI). Given the extensive submissions already made, we have limited our comments to the specific findings and proposals of the Panel.

[15] Asciano Submission to the Competition Policy Review Issues Paper June 2014 pp 12-15

5.1 Secondary Boycott Provisions

Asciano agrees with the submissions of the AiGroup and the ACCI, and the findings set out in the Report, to the effect that secondary boycotts are harmful to trading freedom, and that the secondary boycott provisions have played an important role in deterring behaviour that has the potential to inflict significant harm on Australian business.

5.1.1 Terms of the Secondary Boycott Provisions

Asciano notes and accept the view of the Panel that there is not a compelling case for legislative change and reject the ATCU's argument that the employment exemption provisions should be broadened.

However, we agree with the submission of the ACCI that the provisions are complex, and do not lend themselves to easy comprehension. We note the submission by the ACCC that in the period 1 July 2012 to 30 July 2014 it was contacted only 9 times about Secondary Boycott concerns.[16] It is unclear whether this minimal rate of contact represents a rarity in the behaviour or a lack of understanding of the protections offered by the legislation. In the absence of legislative change, we submit that the ACCC must play a stronger role in education and investigation, as a means of ensuring that these provisions continue to have efficacy as a deterrent to secondary boycotts.

5.1.2 Protocols for enforcement and investigation

Asciano strongly supports the development of protocols for enforcement and investigation. Such information will serve both an educative and deterrent function. It will also have the effect of addressing concerns about the perceived under-activity of the ACCC in this area.

Further, with respect to draft recommendation 31, we recommend that, in addition to publishing the number of matters investigated and resolved each year, the Panel should consider recommending that some further information (presented in such a way as to retain confidentiality) should also be provided. The method adopted by the Australian Human Rights Commission reporting on conciliated matters could be

[16] Report, p. 243

considered as a model. This would provide an important educative function in respect of the operation and effect of these important legislative provisions.

5.2 Trading Restrictions in Industrial Agreements

Asciano agrees with the view expressed that there is a conflict between the legislative purpose of the CCA and the FWA. As outlined by the Report, through the provisions of 51(2), 45E and 45EA, the purpose of the CCA is to exempt from the CCA contracts governing the conditions of employment of employees, while prohibiting contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors).[17] By contrast, the Fair Work Act plainly allows employers and employees, through Enterprise Bargaining, to enter into arrangements that place restrictions on the freedom of the employer to contractors or source certain goods or non-labour services.

The effect of the decision of the Full Federal Court in Australian Industry Group and Fair Work Australia has rendered the provisions of the CCA all but irrelevant. This is because it effectively excludes from the provisions' the operation of Enterprise Agreements made under the Fair Work Act, which is the key vehicle through which collective bargaining between employers and employees is undertaken.

5.2.1 The Report's Proposed solutions

A procedural right for the ACCC to be notified by the Fair Work Commission of proceedings of Enterprise Agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and intervene and make submissions would serve a valuable purpose in highlighting and gaining a better understanding of the extent of the apparent conflict between the purposes of the CCA and the operation of the FWA. However, Asciano is concerned that, without legislative change, this requirement would not in fact address or resolve the conflict. Further, Asciano would also be concerned if such a process caused delay to the approval process undertaken by the Fair Work Commission of Enterprise Agreements due to the additional administration and procedural steps involved.

[17] Report, p.246.

Asciano supports the recommendation that sections 45E and 45EA be amended to expressly include Enterprise Agreements and Awards. For the reasons set out below, for the provisions to have any meaningful effect they must have operation in respect of Enterprise Agreements made under the Fair Work Act. Asciano considers the inclusion of Awards as a less critical issue..

Asciano does not agree to amendments that would exempt Enterprise Agreements approved under the Fair Work Act. Enterprise bargaining under the Fair Work Act is the key mechanism through which arrangements between employees and their representatives (trade unions) bargain with employers and reach agreements and arrangements. These arrangements often go beyond the confines of strictly the relationship between the employer and its employees. This is particularly the case since the introduction of the Fair Work Act, which broadened the matters which could be addressed in Enterprise Agreements. This is particularly the case in respect of terms of Enterprise Agreements that go to the ability of an employer to engage with contractors or other providers of labor. If the provisions of s.45E and s.45EA are to have relevance and force, they must be able to operate with respect to Enterprise Agreements made under the Fair Work Act.

6 OTHER ISSUES

6.1 ACCC's investigative Powers

Asciano recognises the importance of the ACCC's investigative powers in meeting its objectives. However, Asciano agrees with the Report's view that a balance needs to be struck. Asciano, who has been a recipient of section 155 notices, is well aware of the significant compliance costs that can result.

Asciano fully supports the Report's view that the ACCC should have a responsibility to frame s155 notices in the narrowest form possible to achieve their objectives in the matter under investigation. We also support that the recipient of the s155 notice should be required to undertake a reasonable search only to avoid penalty.

6.2 ACCC Governance

Asciano agrees with the Report's conclusion that the ACCC is performing well but it could benefit from improved governance. Including non executive views from business, consumer and academic fields can only improve outcomes.

Of the two options put forward by the Report, Asciano strongly supports the board model with non executive members. Constituting the non executive input as advice only and not part of a formal board process will only diminish the influence of these external views. This will not lead to the improvement in decision making that the Report seeks.

6.3 Third Line Forcing

As the Report notes, Australia is out of step internationally with third-line forcing being a per se prohibition. There is no economic justification for a per se prohibition and this has been noted by both the Hilmer and Dawson enquiries. This viewpoint is supported by the ACCC's submission which argues that in the majority of third line cases it looks at there are no anti competitive findings.

Asciano strongly supports the Report's conclusion that third line forcing should be brought into line with the rest of Section 47 and be only prohibited where there is a substantial lessening of competition. This reform is long overdue.