



Initial Submission to the Productivity Commission Review into the Workplace Relations Framework

13 March 2015



TOP **100**
ASX LISTED COMPANY

OVER **8,500**
PEOPLE ACROSS AUSTRALIA
AND NEW ZEALAND

\$3.99
BILLION REVENUE
AS AT 30 JUNE 2014

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Background

About Asciano

Asciano Limited (**Asciano**) is a top 100 ASX listed company that is a leader in the provision of critical logistics services in infrastructure based supply chains. It operates three divisions, as described below:

- **Pacific National:** Pacific National operates intermodal, bulk and coal rail services throughout Australia. It is the second largest coal rail haulage provider in Australia. The intermodal business includes interstate container freight, interstate break bulk freight (steel), regional freight rail services in Queensland and hook and pull services for passenger trains.
- **Patrick – Terminals and Logistics.** This business is one of two major competitors in the Australian market providing container stevedoring services in the four largest container ports in Australia; East Swanson Dock in Melbourne, Port Botany in Sydney, Fisherman Islands in Brisbane and Fremantle in Western Australia. The division also provides an integrated logistics service establishing the interface between the shipping lines and the beneficial freight owner.
- **Patrick – Bulk and Automotive Port Services.** The Bulk and Automotive Port Services specializes in the management of bulk ports and supporting infrastructure and the provision of port related logistics at over 40 sites across Australia and New Zealand. It also operates an integrated service for the transportation, processing and storage of motor vehicles from the port to the beneficial freight owner.

Asciano employs around 8,500 employees and operates in over 50 locations throughout Australia and New Zealand. Its annual revenue in the financial year ended 30 June 2014 was \$3,994.6m.¹

Industrial regulation at Asciano

Of Asciano's 8,500 employees, over 75% are covered by a federally registered Enterprise Agreement. Asciano has approximately 60 collective enterprise agreements operating across Australia.

Asciano's employees are members of various unions including the Maritime Union of Australia, the Rail, Tram and Bus Union and the Transport Workers Union.

These submissions

Asciano acknowledges that the Productivity Commission's scope is broad and commends this approach as being essential to fully understand the interdependencies within the system. However, these submissions are focused on those areas in which Asciano has particular experience and

¹ Asciano 2014 Annual Report.

interest, acknowledging that many other interested parties will undoubtedly lodge submissions and seek to be heard on the broader range of issues in their areas of expertise.

On that basis, these submissions focus on the enterprise bargaining framework as set out in the Fair Work Act 2009 (**FW Act**). In particular, these submissions make comment on:

- The efficiency or otherwise of the bargaining framework set up by the FW Act;
- The content of enterprise agreements;
- The options available to parties within the framework of the FW Act; and
- Industrial action, specifically in the context of enterprise bargaining.

In these submissions, Asciano will specifically reference the Issues Paper published by the Productivity Commission on 22 January 2015² (**Issues Paper**), as well as the Expert Panel's review into the Fair Work Act published on 2 August 2012³.

We will also briefly address on the transfer of business provisions in the FW Act.

Enterprise Bargaining at Asciano

General

As noted above, Asciano has in place approximately 60 Enterprise Agreements made and approved under the FW Act or its predecessor, the Workplace Relations Act 1996 (Cth) (**WR Act**).

The significant union membership amongst employees of Asciano means that Asciano primarily negotiates collective enterprise agreements with the union or unions that are entitled to represent the industrial interests of the relevant employees. Negotiations within Asciano run the full gamut from being fairly amicable, productive processes to being highly disputed and confrontational processes. Separate from any changes to the legislative regime, and recognizing the critical role our people play in the success of our business, Asciano is working to build more productive and constructive relationships with our employees and their representatives in order to deliver better outcomes to our people, customers, shareholders and the broader economy.

Asciano supports a robust and efficient system which provides for employers and employees to enter into arrangements that best meet the needs of the business and the employees. We also recognize that such a system relies upon the maturity and sophistication of the parties that operate within it, to work effectively and in a manner that seeks to create sustainable value for employees and the business. Notwithstanding this, Asciano believes that there are some changes that could be made to the current framework that would assist in facilitating this approach.

² Productivity Commission, Workplace Relations Framework, Issues Paper 3, January 2015.

³ Australian Government, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, 15 June 2012.

Case study – Patrick Container Terminals Enterprise Agreement

Whilst it should not be considered the norm for enterprise negotiations at Asciano, the negotiation of the Patrick Terminals Enterprise Agreement provides some insight into some of the ways in which the FW Act could be improved in order to support better outcomes.

The enterprise agreement that applies to Asciano's Patrick container terminal business is the Patrick Terminals Enterprise Agreement 2012. This agreement replaced previous enterprise agreement that reached its nominal expiry date in October 2010. The 2012 Enterprise Agreement was finally agreed in April 2012, following around 20 months of negotiations.

Both protected and unprotected industrial action was taken by employees (and organized by the Maritime Union of Australia).⁴

Many hours were spent by Fair Work Australia (as it was then called) by way of assisting the parties with conciliation.

The direct costs associated with the negotiation of the 2012 Enterprise Agreement were \$21 million.⁵ This is only cost to Asciano. It does not include costs suffered by customers of Asciano's container terminals business or downstream supply chain participants.

Submissions

Requirement to consider productivity improvements

In the Issues Paper (p.6), the Commission posed the following question:

- *The Commission seeks feedback on practical options in this area, and why they are needed within the current bargaining process. In particular, why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of the enterprise?*

Productivity is key to facilitating improvements in business performance and employee terms and conditions. Asciano notes that productivity already has a prominent place in the objects of the FW Act.⁶ It is noted that Asciano does have some productivity provisions in place in its enterprise agreements.⁷

The Commission has already pointed out that attempting to legislate for productivity in Enterprise Agreements is a potentially vexed issue. It runs the risk of becoming a 'tick box' procedural process rather than ensuring that parties genuinely seek to deliver productivity gains through

⁴ See orders made by Fair Work Australia C2011/4240, 13 May 2011.

⁵ 2012 Asciano Annual Report.

⁶ FW Act, s.3(a), s.3(f).

⁷ See, for example, schedule 5, 'At Risk Superannuation Scheme' of the Patrick Terminals Enterprise Agreement 2012.

enterprise negotiations. In this regard, Asciano submits that any attempt to legislate regarding productivity gains in enterprise bargaining should be approached with caution. That being said:

- Asciano supports the legislation currently before parliament that will require the Fair Work Commission, when approving enterprise agreements, to be satisfied that improvements to productivity were discussed during bargaining for the agreement;
- We also support the recommendation in the Expert Panel Report that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces, including (as set out below) both in respect of the content of Enterprise Agreements and the process of negotiating enterprise agreements (which can, in themselves, impact workplace productivity). We note in this regard that the Fair Work Commission has commenced work in this area; and
- Finally, Asciano notes that there are aspects of the enterprise bargaining framework that relate to both in process and content of enterprise agreements which have the potential to hamper productivity (both at the macro and micro level) more broadly. Issues that fall within this category include terms that limit the introduction of technology, the use of contractors or imposing restrictions on employers to manage the business flexibly and productively. Some of these issues are discussed further below.

Enterprise Bargaining – Process and efficiency

General

Asciano recognises that the efficiency and quality of enterprise agreement negotiations to a large extent is in the hands of the parties negotiating agreements. Having said that, there are aspects of the bargaining framework as set out in the FW Act which hamper efficient and equitable negotiations. There is opportunity for the FW Act to better facilitate the objects of the FW Act, as well as better agreement making more generally.

Process issues

The issues for comments raised by the Productivity Commission relating to process, and on which Asciano seeks to make a submission are set out below:

- *Clearly, some processes are important to enable efficient bargaining, but it is an open question whether there should be changes to processes to meet the objectives set out in the first Issues Paper. The Commission seeks stakeholders' views.*

Asciano submits that the processes currently in place meet the need to ensure that genuine agreement is reached between an employer and employees, and, whilst somewhat bureaucratic, are not unduly onerous. Asciano also recognizes that the processes in place within the Fair Work Commission means that enterprise agreements are managed with reasonable efficiency.

However, we also submit that there could be more done to facilitate negotiation processes in respect of enterprise negotiations in order to meet the objects of the FW Act. In this regard,

Asciano would support a shift from a large focus on a dispute resolution towards agreement facilitation.

In this regard, it is important to recognize that many enterprise agreement negotiations are complex, and involve high stakes for both employers and employees. Frequently, workplace participants in these processes may not undertake such negotiations frequently. Reasons for complexities include:

- many negotiations involve complex trade offs between (say) rostering, wage increases and other flexibilities. This may also involve complex financial and other implications. Further, this complexity is additionally overlaid by the impact of other regulatory frameworks including tax and competition law requirements;
- many negotiations involve multiple stakeholders including, for example, multiple categories of employees, broad geographic spread and multiple bargaining representatives (unions). Negotiators may have to manage multiple (and potentially competing) interests;
- almost invariably, these negotiations require the maintenance of a constructive relationship, both between employers and their employees, as well as between employers and their representatives;
- negotiations can involve very high stakes and significant costs for both employers and employees.

Having regard to these complexities, Asciano submits that consideration of a greater role for the Fair Work Commission (or other Fair Work institution) that is squarely aimed at supporting negotiations beyond an approval and dispute resolution role. These include:

- A more proactive role for the Fair Work Commission (or other institution), including:
 - Ability to require parties to engage in conciliation on the Commission's own motion (for example, in circumstances where an application has been made for a protected action ballot or scope order).
- A negotiation advisory role for the Fair Work Commission, which may include:
 - Training on negotiation processes and skills (we note in this regard that the Commission is currently undertaking some trials of interest based negotiation training;
 - Development of pro-forma negotiation plans, processes or recommended memoranda of understanding relating to negotiations of enterprise agreements;
 - Provision of a list of recommended facilitators / mediators who may be able to assist parties to negotiate through otherwise intractable issues;
 - Appropriate publishing of case studies of successful enterprise agreement negotiations.

Asciano makes some further submissions below relating to process and timing regarding the taking of protected industrial action.

Enterprise Bargaining – content

In the Issues Paper, the Commission seeks the following views:

- *The Commission seeks views from stakeholders about what aspects of the employee/union-employer relationship should be permitted matters under enterprise agreements, and how it would be practically possible to address in legislation any deficiencies from either the employer, employee or union perspective.*

Asciano agrees with the Productivity Commission's comment that it would be hard to set out a "white or black list" of all permitted matters⁸ and would not support such an approach. However, it must be clear that the purpose and content of enterprise agreements should be to govern the terms and conditions of employees that are to be employed under the applicable agreement. They should not be a vehicle for other purposes.

Asciano submits that the following amendments should be made:

- Permitted matters should be expressly defined in the legislation to properly follow the High Court's decision in the Electrolux case.⁹ The legislation should make it clear that only matters pertaining to the employment relationship between the employer and the employees to be covered by the enterprise agreement. This creates uncertainty and weakens the utility of provisions relating to permitted matters.
- It should be an approval requirement that enterprise agreements only contain permitted matters. Enterprise Agreements should not be able to contain matters which are not permitted matters. Currently, it is not an approval requirement that an enterprise agreement only contain permitted matters.
- Unlawful terms (as provided for in s194 of the FW Act) should include:
 - Terms that impose restrictions on outsourcing or the engagement of independent contractors;
 - Terms relating to right of entry (whilst there are current FW Act provisions rendering right of entry terms unlawful these are problematic and therefore the provision should be tightened; and
 - A term that provides a party to the agreement or a bargaining representative a collateral benefit. Or failing that, such a term to be unlawful unless the parties demonstrate compliance with a disclosure regime, such that employees covered by the agreement are fully informed about such collateral benefits and any potential conflict of interest.

Enterprise Bargaining – options (including individual agreements)

General

Asciano collectively bargains with the majority of its workforce. It has done so for many years and will continue to do so. Notwithstanding this, Asciano submits that statutory individual agreements are a legitimate method by which an employer and employee can set the terms and conditions of

⁸ Productivity Commission Issue Paper 3, p.4.

⁹ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40.

employment relating to that employee. Statutory individual agreements should be given a role within the workplace relations framework that is equivalent to collective agreements. Whilst statutory individual agreements became 'tainted' by the Work Choices legislation, it is important to note that they were introduced in 1996 and operated effectively for around 10 years. Asciano notes that a difficulty with Australian Workplace Agreements under Work Choices was that they were not subject to the same safety net as collective agreements. Asciano submits that any individual agreement should be subject to the same safety net protections as a collective agreement. Where such agreements are subject to the same safety net, the only objection to statutory individual agreements can be an ideological one. This is not a valid basis for objection.

Further, statutory individual agreements allow an employer and employee to address such issues as workplace flexibility. Individual agreements allow for workplace flexibility to be implemented on an individual basis to meet the needs (either temporary or permanent) of employees on an individual basis. Some of the restrictive provisions in our enterprise agreements act as a barrier to flexibility for our employees and, indirectly, to encouraging diversity within our workforce.

Individual agreements can also account for the fact that some entitlements are worth more to an employee than others. These different perspectives cannot necessary be accommodated in a collective agreement, or with the overall Better Off Overall Test. For example, a fixed roster may be of significant benefit to a particular employee with caring responsibilities, and that employee might therefore be prepared to trade off other benefits, that would be unacceptable to other employees.

On the basis that individual agreements are a legitimate form of agreement making, Asciano submits that the objects of the FW Act should be removed so that the collective bargaining is no longer given primacy.¹⁰ Asciano submits that the privilege position of collective bargaining is purely ideological.

Individual flexibility agreements (IFAs) – an unsuccessful replacement to statutory individual agreements

The FW Act removed statutory individual agreements (called Australian Workplace Agreements under the Workplace Relations Act 1996). As a replacement of sorts, a requirement that enterprise agreements must contain a flexibility clause that gives employees and employers the capacity to enter into IFAs was included in the FW Act. Asciano submits that IFAs have not been successful. As noted in the Issues Paper, around 90% of employers do not have any IFA in place in their workplaces for even a single employee. Asciano does not make any significant use of IFAs within any of its business. Among other issues, most of our employees want to collectively bargain, many of our enterprise agreements limit the scope of what IFAs can cover, and the ability for the employee to unilaterally terminate the IFA means that they are not a stable arrangement.

In order to make individual agreements a realistic option for employers and employees, the following changes should be made:

¹⁰ Object of Part 2-4 of FW Act.

- Individual agreements should be provided for in the FW Act as a stand alone agreement making option.
- The scope of what may be dealt with in such an instrument (whether an IFA or other instrument) should not be able to be limited by the terms of an enterprise agreement. Many enterprise agreements limit the scope of what an IFA may cover (including agreements in operation at Asciano). Statutory individual agreements should have the same potential scope as collective enterprise agreements.
- Individual agreements should be subject to the same termination provisions as collective agreements. The ability for either party to unilaterally terminate an IFA on no more than 28 days' notice should be removed. Frequently significant system, administrative and resources changes need to be implemented in order to accommodate provisions in an individual agreement (eg changes to pay roll, implementation of job sharing or additional resources to accommodate part time employment). The short term focus mandated by the ability to cancel an IFA acts as a disincentive to enter into these arrangements.
- Any individual agreement should be subject to the same safety net considerations (currently the BOOT, as compared to the relevant Award) as collective agreements.

Industrial action

General

Industrial action is a key area of interest and concern to Asciano.

As noted in the Issues Paper (p.11) work stoppages are not the only type of industrial action. We submit that there is a broad suite of industrial action that is available to employees. In recent times industrial action organised by relevant unions within Asciano's businesses include:

- Productivity caps;
- Stoppages of work (including up to 24 hour stoppages);
- Bans on work transfers (between work locations);
- Bans on working extended shifts;
- Excessive absenteeism.

By contrast, an employer only has one form of protected industrial action available to it – lock out.

Further, Asciano has experienced circumstances, as referenced in the report, where industrial action is called but then cancelled. In circumstances where industrial action is notified, Asciano must communicate with its customers, enact any contingencies that may be available and take all other steps necessary to minimise the impact of industrial action. Asciano notes that, in some circumstances, industrial action may be cancelled by a union as a sign of good faith and as part of pursuing further discussions. However, it is also sometimes used as a tactic to maximise disruption to a business whilst minimising cost to the employee.

Having regard to the above, Asciano submits that figure 3.1, which measures working days lost to industrial action is a misleading indicator of industrial dispute / strike action.

Asciano submits that better records of industrial disputation should be kept, given the importance of this measure as an indicator of the operation of relevant workplace relations frameworks. Data gathered could include:

- Protected industrial action that has been notified;
- Unprotected industrial action subject to stop orders by the Fair Work Commission;
- Days that are subject to bans or other limitations; and
- Days lost.

Obviously, the manner in which this data may be available and collected would have to be considered.

The severe impacts of industrial action

Asciano accepts the notion, as set out in the Issues Paper, that disputes (or industrial action) are a bargaining tool that may reduce power imbalances between parties. However, Asciano also notes that this is a highly traditional, somewhat Marxist approach to the relationship between employers and employees.

In balancing any rights to take industrial action with what appropriate limitations on this right might be, Asciano submits that regard must be had to the following issues:

- Notwithstanding the data in figure 3.1 indicating a significant decline in industrial action, industrial action remains extremely costly. By way of example, revenue growth within Asciano's Terminals and Logistics business for the financial year ended 30 June 2012 was impacted by the cost of industrial disputes at the revenue line of \$11.3m.¹¹ Note that this is just cost to Asciano's revenue, and does not include:
 - The financial impact to our employees;
 - The financial impacts on our customers; and
 - The broader financial impact to other supply chain participants and the economy more broadly.
- The taking of industrial action can be enormously damaging to the employer / employee relationship, significantly impacting on employee engagement.
- The costs both to employees and employers of industrial action can often have an effect that is the opposite of forcing progress in negotiations, and can operate as a wedge driving parties further apart. This can occur by damaging the relationships between the negotiation parties, and/or making parties' positions more deeply intractable, given the financial and emotional investment that has been made in taking industrial action to advance those positions.
- Industrial action can have markedly different impacts dependent upon the nature of the industry (including the availability of contingencies, the size and financial position of the business, the economic position of employees and the strength and financial resources of the relevant union. This means that the potential impact that this 'bargaining tool' varies widely from negotiation to negotiation.

¹¹ Asciano 2012 Financial Results.

Ability to take protected industrial action

Asciano submits that industrial action should be considered a 'last resort' tool. In order to facilitate this, Asciano submits that:

- Provisions relating to secret ballots should be maintained. Employees must be given a genuine and confidential opportunity to have a say on whether industrial action should be engaged in.
- Proposed legislation currently before the parliament going to the requirement that a party be genuinely trying to reach agreement, should be adopted without delay. This includes:
 - Setting out a non-exhaustive list of what must be taken into account in determining whether a party (union) is genuinely trying to reach agreement (a pre-requisite to getting a Protected Action Ballot order).
 - Limiting the orders for protected action ballots such that the FWC must not make a protected action ballot order where a union's claims are manifestly excessive, or would have a significant adverse impact on productivity at the workplace.
- A requirement that a union seeking a protected action ballot be required to provide detailed substantiation for a claim it has been genuinely trying to reach agreement should be considered.
- If a bargaining representative has failed to meet the good faith bargaining requirements, this should prima facie act as evidence that the representative is not genuinely trying to reach agreement, and therefore a protected action ballot order should not be made.
- There should be some discretion afforded to the Commission as to whether a protected action ballot order should be made, in which the Commission should take into account issues including the stage of negotiations, the efforts the parties have made to reach agreement and the likely impact on the bargaining parties and other affected parties of industrial action.
- A mandatory cooling off period before the commencement of industrial action should be introduced, during which time the parties would be required to engage in conciliation and/or mediation.
- A mandatory cooling off period should presumptively apply during periods of protracted industrial action. This period should be supported by conciliation and/or mediation.
- An employer should have an option to deduct employees' pay where industrial action is notified and then withdrawn within a defined period prior to the industrial action commencing. If required, an employer should be able to provide evidence of damage caused by the industrial action, to justify the deduction.

Suspension or termination of protected industrial action.

One of the questions raised by the Issues Paper concerns the role of the Fair Work Commission in relation to disputes, especially in relation to cooling off periods and the test that determines whether such a period is justified. In our submission above, we have flagged a role for the Fair Work Commission that is more focussed on assisting the parties to negotiate Enterprise Agreements, as a means to avoiding negotiations to deteriorate into almost intractable disputes.

Asciano supports a continued role for the Fair Work Commission to suspend and/or terminate industrial action. We also believe that there are amendments that should be made to the FW Act power that would further enhance agreement making. In particular:

- Section 424 of the FW Act plays a critical role in protecting the community from damaging industrial action, in circumstances where that industrial action potentially damages the life, health, safety or welfare of the population, or the economy. In these rare circumstances, the interests of the community must continue to outweigh the interests of the bargaining parties.
- Section 425, which provides the Commission with the power to order a suspension of industrial action, provides a potentially valuable circuit breaker in respect of industrial action.

Asciano submits that:

- The provision should be amended such that there is a greater presumption towards the granting of a suspension of industrial action, recognising the fact that industrial action that has been taken has the capacity to shift the negotiations in unexpected ways. For example, parties may endeavour to recover losses suffered by them as a result of industrial action taken, and therefore the range of potential outcomes may be altered, leading to intractable positions.
- The availability of orders should not be limited to circumstances where industrial action is 'being engaged in', but should also be available where industrial action has been notified, or is otherwise 'threatened, impending or probable'.¹²
- In consequence with the ability to suspend industrial action, the Commission should also be empowered to require compulsory conciliation / mediation of matters in dispute to ensure that parties take full advantage of any cooling off period

Transfer of Business

Asciano has a number of employing entities within its group of companies. This is a result of the development of the group over a lengthy period of time, and is not unusual within large employers. The transfer of business provisions cause considerable complexity when our employees seek to access opportunities within other employer members of the Asciano group, and therefore have the potential to restrict career progression and redeployment opportunities within the group. We submit that section 311(6) of the FW Act, which deals with associated entities, should be deleted.

Conclusion

We trust that the Commission finds this submission to be of some assistance, and we appreciate the opportunity to provide our view. We would be happy to provide further information if required.

¹² This suggestion was made by the Australian Industry Group in its submission to the Fair Work Act Review, February 2012, p.26

