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Australian Competition and Consumer Commission
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Via Email: mergers@accc.gov.au
Attn: Stewart McKechnie and Daniel McCracken-Hewson

Re: Brookfield Proposed Acquisition of Asciano

Background

The Australian Rail, Tram and Bus Industry Union (RTBU) welcomes this opportunity to make a submission regarding the acquisition of Asciano by Brookfield Asset Management.

The RTBU is a Union of employees registered pursuant to the *Fair Work (Registered Organisations) Act* (Cth). The members of the RTBU, totaling some 35,000, are located throughout Australia and are employed by a large number of employers involved in the operation and/or maintenance of railways, tramways and public bus systems. RTBU members are employed in both the private and public sectors.

The RTBU has a major interest in the proposed acquisition on behalf of our members employed by Asciano (specifically, its rail haulage operator, Pacific National) which has operations in relevant jurisdictions (for the primary purposes of the ACCC's review) of Queensland and Western Australia.

The RTBU also has an on-going interest in the flow-on impacts post any acquisition for the remainder of our members in the rail freight sector, including in particular those employed by Aurizon Holdings Limited.

The ACCC has raised a range of relevant questions pertinent to an assessment of the likely impact on competition of the proposed acquisition (Attachments A and B refer).

The RTBU's main interests relate to the above rail freight services in Queensland's Bowen Basin operated by Pacific National and access to the below rail infrastructure network operated by Brookfield in Western Australia, utilised by Pacific National and other rail users.

With a significant projected increase in the national freight task expected in the next decade, the RTBU has been concerned with ensuring the rail freight industry remain competitive and productive with open and transparent access arrangements.

It is noted that Australia's rail freight market remains significantly concentrated with Aurizon and Pacific National the two dominant players on the east and west coasts of Australia. We also note the below rail infrastructure assets of Brookfield and Aurizon are natural monopoly assets.

There are significant barriers to entry in the rail freight sector due to the: investment required for rolling stock, track construction and maintenance; significant access fees for monopoly track assets; and the contracts and scale required to compete efficiently in the industry with large established companies.

In making its assessment, we draw the ACCC's attention to the current rail freight market structure which gives current operators and monopoly asset managers like Brookfield, Aurizon and Pacific National significant market power in the supply of rail freight services and as purchasers of labour.

Substantial Lessening of Competition

We refer to s50 of the Competition and Consumer Act regarding the 'substantial lessening of competition' as well as the ACCC's merger guidelines.

We note the ACCC's guidelines state that "in the majority of cases, vertical mergers will raise no competition concerns".

Given the localised nature of iron ore extraction and haulage in specific regions in Western Australia occupied by entrenched players with significant sunk costs, it would appear likely that Brookfield as a merged entity will be cautious in any rapid expansion of above rail capacity beyond Pacific National's current operations in Western Australia.

The RTBU does not have immediate concerns with a circumstance where the proposed acquisition is more likely to result in a larger focus on more contestable markets in both Western Australia and on the eastern seaboard including in particular expansion of intermodal services and containerised freight in locations where freight logistics synergies and demand would be forecast to be greatest, including in the South West region.

However, the RTBU highlights a number of other areas for the ACCC's specific attention - particularly given that the infrastructure which is the subject of this merger are significant economic assets.

Specifically, we refer to the scope of a vertically integrated Brookfield and Pacific National to engage in anti-competitive behaviour such as foreclosure.

Brookfield Rail manages access arrangements in Western Australia for above rail freight services including the regional freight transport network. In this respect, it mirrors in Western Australia the same type of access arrangements as Aurizon controls in Queensland on behalf of the Queensland Government.

The 2012 Western Australian Regional Freight Transport Network Plan[1] noted that the rail freight task on the State-owned rail network, managed by Brookfield Rail, will increase by up to 126 per cent to 2030 from 50+ million net tonnes per annum to more than 130 million net tonnes per annum.

The state's rail network, will, (according to the Government of Western Australia) play an increasingly important role in the movement of the freight task in the southern regions of Western Australia in the future. To meet potential demand, it is anticipated that Brookfield Rail will need to invest substantial capital in order to create the required capacity in the rail network.[2]

The RTBU acknowledges that, in this context, a vertically integrated Brookfield/Pacific National may seek internal efficiencies to recoup a more attractive return on investment.

However, we have some concern that the scale of the investment required for the freight task ahead may result in the new entity discriminating in favour of its own businesses and against those of its competitors.

We have reservations that the regulatory framework, as it currently exists, provides appropriate price settings and performance monitoring.

Access arrangements must enable competition in the provision of services balanced with the scale benefits of an integrated supply chain which the proposed acquisition potentially enables Pacific National to achieve.

In Western Australia, the rail access regime is regulated by the Economic Regulation Authority (ERA). In Queensland rail access is regulated by the Queensland Competition Authority (QCA).

The ACCC is directed to ERA's recent review of the rail access regime in Western Australia including asset valuation methodologies.

It will be important therefore in assessing the merits of the proposed acquisition to have a clear view on the applicable access arrangements pertaining in both Western Australia and Queensland for the integrated logistics services provided by both Aurizon and Pacific National with each possessing both below rail and above rail assets (post the acquisition by Brookfield).

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[1] Department of Transport (2012), Western Australian Regional Freight Transport Network Plan

[2] As above, including details on major network investment requirements to cater for expanding freight growth (p9)

In this regard, we are dissatisfied with the lack of an appropriate *national* regulatory framework dealing with access arrangements for economic infrastructure assets.

This concern is heightened with the federal government's mooted privatisation of the Australian Rail Track Corporation which could lead to even greater vertical consolidation of the freight sector beyond Western Australia and Queensland.

Current state based access arrangements - regulating vertically integrated operators managing economic infrastructure assets beyond state borders – are ad hoc; lack transparency; and are applied with varying degrees of enforcement.

We note, for example, well documented concerns that the Western Australian access regime contains flawed pricing methodologies; floor and ceiling prices that are so disparate as to be meaningless; no correlation between access prices and actual performance; little or no transparency and disclosure of information as they relates to price settings by the infrastructure manager.

Such a regulatory environment is inefficient, ineffective and subject to abuse by those seeking to distort competitive forces in the rail sector.

The RTBU has also experienced first hand the capacity of infrastructure managers to circumvent and distort the application of access arrangements in Queensland.

The operation by Aurizon of its below rail assets in the Central Queensland coal fields is subject to undertakings given under the *Queensland Competition Authority Act* 1997.

Those undertakings require Aurizon to grant access to other freight rail haulage operators to their below rail assets at a price approved by the Queensland Competition Authority (QCA).

The QCA utilises actual costs (including labour costs) in calculating the maximum allowable revenue by Aurizon.

The ACCC's attention is drawn to recent Fair Work Commission (FWC) evidence, findings and the FWC full bench decision in the matter of Aurizon and others (including the RTBU) regarding Aurizon's application to abolish a range of operative enterprise agreements in that state [2015] FWCFB 540.[3]

Aurizon's application was strongly opposed by the RTBU as opportunistic (and anti-competitive) in forcing reductions in Aurizon's applicable pay rates and conditions.

[3] FWC, 22 April 2015, Aurizon Operations Limited and others, https://www.fwc.gov.au/documents/decisionssigned/html/2015FWCFB540.htm

To force these reductions - without the QCA in turn immediately reassessing their assessment of 'actual costs' and 'maximum allowable revenue' in light of Aurizon's reduced labour overheads - distorted the access fees charged of competing rolling stock operators

Despite the RTBU's objections and expert evidence, the FWC in its decision of 22 April 2015, supported Aurizon's arguments in agreeing to the abolition of the pre-existing EBAs[4].

This example serves to demonstrate the ease - through legal loopholes and matters pursued in jurisdictions unrelated to competition law – in which vertically integrated operators who seek to discriminate against their immediate competitors can circumvent access arrangements.

While the RTBU recognises the efficiency benefits of vertically integrated rail operations, such benefits will only come to fruition if market forces cannot be easily distorted by the newly merged entity.

In this context, we have very serious concerns about the potency of the numerous state-based access regimes – particularly their capacity to prevent anti-competitive behaviour such as foreclosing.

Conclusion

The proposed takeover of Asciano by Brookfield has exposed significant inconsistencies in the way that access to below rail infrastructure is managed across Australian jurisdictions.

The differing regulatory models, and the lack of transparency in the application of these models, has created a regulatory "dogs breakfast" in the freight rail sector.

The potential privatisation of the Federal Government-owned rail infrastructure manager, ARTC, will further complicate this environment, particularly if it leads to further vertical integration in the industry.

To put it simply, the scope for market manipulation under current arrangements is unacceptably high, and rail freight operators (and their customers) cannot have faith that the system is either working fairly or efficiently.

A simpler, more transparent, national access regime would be of significant benefit to freight users, and is clearly in the national interest.

For that reason, the RTBU recommends that regulatory control over access to rail networks should be transferred to the Federal Government, under the

[4] As above, in particular refer to paragraphs 28 to 34: "Expert Evidence on Aurizon's market position"

auspices of the ACCC, and a single national access regime should be put in place across the country.

This should be pursued before further industry consolidation or privatisations are considered.