



Submission to:

Australian Competition and Consumer Commission

Brookfield consortium – propose acquisition of Asciano
Limited

Proposed WA Undertaking

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Prepared by:

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Background:

The Western Australian Farmers Federation (Inc.) (WAFarmers) welcomes the opportunity to comment on the proposed WA undertakings on the proposed acquisition of Asciano Limited by Brookfield consortium.

As background, WAFarmers is the state's largest and most influential rural advocacy and service organisation. WAFarmers represents around 3,000 Western Australian farmers from primary industries, with the majority being grain growers. As the largest WA rural advocacy group, our members are responsible for approximately 35 per cent of the overall grain production in WA.

Introduction:

WAFarmers have supported the ACCC in their interests in the Western Australia railway network, and thank them for their concerns identified in the Statement of Issues. WAFarmers' comments will focus specifically on the WA undertaking released by the ACCC.

The proposed undertakings were described as Brookfield removing Pacific National from their investment portfolio. However, the undertakings would remove Intermodal Freight Service provision, while Brookfield retained bulk rolling stock and other rolling stock. The specific inclusions and exclusions are identified in Schedule 4 of the WA undertaking document released by the ACCC¹.

Inadequacies of the WA Undertaking:

WAFarmers acknowledges that Brookfield and Nitro have offered the undertakings in an effort to address the ACCC's competition concerns.

The undertakings do not remove vertical integration of Brookfield's interests in rail operations in Western Australia. The proposed WA undertakings would remove Brookfield from operating Intermodal Freight Services. Within Brookfield's extensive portfolio, they would still have bulk rolling stock and other rolling stock. Their ownership of rolling stock still ensures that they are vertically integrated within the WA railway network.

With Brookfield's retention of rolling stock, they would not be prevented from providing freight services in the future, and therefore would be vertically integrated. The divestment of the Intermodal fleet would also not prevent Brookfield from purchasing further vertically integrated assets in the future.

With the acquisition of Asciano's interests, Brookfield would further specialise their interests in transport infrastructure, and specifically long-life, high quality infrastructure assets with high barriers to entry and low maintenance capital requirements². Their interests would be specialised in the supply chain, and in direct competition to current Brookfield Rail customers that are competing for access to the rail network.

WAFarmers is concerned that the excluded businesses from the divestment would still lead to the potential issues as described in the Statement of Issues.

1 – ACCC Merger: Brookfield consortium - proposed acquisition of Asciano Limited. Page 34-43. <http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991>. 2016.

2 – Brookfield Rail website. <http://www.brookfieldrail.com/about-us/about-brookfield/>. 2016.

The acquisition and the proposed undertakings do not adequately address the market and competition concerns identified by WAFarmers and shared by the ACCC. These concerns would be elevated to a real market situation if a vertically integrated market with monopolistic power was allowed to be created by the acquisition.

The proposed WA undertakings also do not address other issues associated with the WA railway network, as described in the Statement of Issues. Of particular note was the evaluation of alternative market/transport options, the concerns related to the current WA Access Regime, and the inadequacies of relying on an access regime to address significant competition concerns and potential market failures as a result of vertical integration³.

The ACCC has identified that structural undertakings are preferable to behavioural undertakings, and WAFarmers shares this view. However, the proposed undertakings are only partial separation of the vertically integrated businesses. An undertaking that would fully remove Brookfield's interests from a vertically integrated supply chain is essential to prevent potential competition and market issues.

Alternative WA undertakings:

If the proposed acquisition were to proceed, it would need to adequately address competition concerns by the ACCC and wider economy. For reasons previously identified, WAFarmers does not consider the WA divestment undertakings as adequate to address competition concerns.

As opposed to partial divestment of Pacific National's Intermodal Fleet, Brookfield should divest their ownership of the long term lease of the below rail network. The divestment of the lease currently held by Brookfield Rail would adequately address competition concerns associated with ownership of above rail rolling stock, as well as the access holder for the below rail infrastructure.

With the sale of the lease, Brookfield would remove any vertical integration concerns associated with holding the below rail access lease, as well as operating an above rail fleet, which would be in competition for access with current Brookfield customers.

The sale of the lease should be completed under a similar arrangement as that described in the WA undertaking document released by the ACCC, as it enables the competition commission to have adequate control and oversight over the proceedings.

Conclusion:

WAFarmers does not support the proposed undertakings as a method to remedy competition and market concerns. The undertaking does not include the entirety of Pacific National, and the retention of some of the assets by Brookfield still provides significant competition concerns. Brookfield would remain vertically integrated in the WA rail network through the retention of bulk rolling stock and other rolling stock. The retention of the services would still provide incentives for Brookfield to favour their own operations over existing customers of Brookfield Rail. The divestment of the Intermodal Freight Services does not prevent future investment in above rail operations. The WAFarmers preference is for Brookfield to divest their interests as the below rail lease holder. Once divested, Brookfield would be able to compete with other access seekers on an equal, non-vertically integrated rail network market.

3 – Statement of Issues: Brookfield consortium - proposed acquisition of Asciano Limited. Page 12, 15-22. <http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991>. 15 October 2015.
