Our Ref: LS18/06057

2 July 2018

Mr Jacob Campbell
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Australian Competition and Consumer Commission
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Dear Mr Campbell

AA1000425 - NSW Track Access Collective Bargaining – submission on interim authorisation

We refer to:

- the application for authorisation made by Genesee & Wyoming Australia, Manildra Group, Pacific National, Qube, SCT Logistics, Southern Shorthaul Railroad, Sydney Rail Services, Linx Rail Pty Ltd, and Aurizon (**Application** and **Applicants** respectively); and
- the ACCC's letter dated 22 June 2018 inviting Transport for NSW (**TfNSW**), as a potentially interested party, to comment on the Application.

TfNSW has concerns regarding the application for authorisation and the application for interim authorisation.

As requested by the ACCC, TfNSW sets out below the key points of concern in relation to the interim and substantive application for authorisation. TfNSW notes that it may provide a further submission in relation to the substantive application for authorisation within the ACCC's stipulated time period.

1. TfNSW has offered to rollover current agreements

The Application for interim authorisation is made on the basis that the existing access arrangements were due to expire on 30 June 2018 and if interim authorisation was not granted the Applicants would have to consider their individual positions with the effect of substantially weakening their collective positions.

The basis for the application for interim authorisation no longer exists. TfNSW has contacted all rail operators offering to extend the current access arrangements for all rail operators (not just the Applicants) for a further 12 months to 30 June 2019 to allow for a further period to negotiate and agree the terms of the standard track access agreement (**STAA**). TfNSW notes that these arrangements under the current access agreements have been in place with rail operators for some time, and in many instances for over five years.

All the rail operators (including the Applicants) with arrangements due to expire on 30 June 2018 have agreed to the one-year extension.

As stated in TfNSW's letter to each rail operator, TfNSW offered a 12 month rollover in order to allow for further consultation with industry and for negotiation of the terms of the draft STAA with that rail operator.

Given the existing arrangements are no longer 'due to expire on 30 June 2018' and instead timely and fulsome negotiations can continue up until 30 June 2019, TfNSW submits that no interim authorisation should be made as TfNSW has already taken steps to 'maintain' the status quo.

2. Public benefits do not outweigh the public detriments

In contrast to the Aurizon Determination (as defined in the Application), which is extensively relied on by the Applicants in the application (see, for example, sections 6.2, 6.3, 6.4 and 7.1 of Aurizon Determination), TfNSW submits that the detriment resulting from the arrangements greatly outweighs the public benefits:

2.1 The Applicants directly compete with one another

The Applicants directly compete to provide above-rail services, with Pacific National, Qube and Southern Shorthaul Rail (**SSR**) comprising 80% of the rail freight market in NSW (excluding the Hunter Valley). Authorisation is therefore likely to have a significant impact on the Australian economy and competition in the rail industry more broadly.

This will be the case even if prices were expressly excluded from the authorised conduct, as the price charged for access depends to a large degree on the non-price terms (such as term, nature of below-rail services, allocation of train paths, network control and management, level of insurance, indemnity, performance etc).

Unlike the Aurizon Determination, which was for one route for general freight (being a small proportion of total freight on that route), the authorisation applies across two entire networks: the Country Regional Network (**CRN**) (owned by TfNSW) and the Sydney metropolitan rail network (where TfNSW acts as agent of the network owner, RailCorp) for all above-rail services provided by the Applicants. This constitutes nearly 3100 km of track within NSW.

Further, the application in the Aurizon Determination was not made by all competitors on the route. Significantly, Pacific National was not an applicant and the broader context for the application included the then proposed acquisition of Pacific National by Brookfield – owner of Brookfield Rail. There are no similar potential vertical integration issues associated with the current application.

Further, the current authorisation is for all current and future applicants, who are and likely will continue to be, direct competitors with each other within that same market. The rail freight business is intensely competitive. Recently there has been a significant transfer of business between the various operators involved in transporting rural commodities from regional NSW to port largely based on price. Additionally, with the exit of one of the three interstate intermodal operators from the market, this business and the capacity used by it has been absorbed by one of its direct competitors who are running at least one extra service daily in each direction between Sydney and Brisbane.

The ACCC has previously made it very clear that authorisations must not extend to conduct by competitors in the same market, expressly stating that the authorised conduct did not include:

> *sharing information or reaching agreements relating to prices or other terms and conditions in respect of the above rail haulage services which the Applicants offer in competition with one another.*

The Applicants claim that authorisation would promote rail freight haulage and competition with road freight. However, the Applicants include the largest users of the CRN and Sydney Metropolitan networks who act in direct competition with each other in the same markets. Any collective bargaining arrangement involving competitors will inevitably reduce competition in the market in question, which will be to the detriment of ultimate consumers.

2.2 The proposed conduct will not benefit the public

The Applicants propose, and seek authorisation, to (at 3.1):

(a) collectively discuss and negotiate the non-price terms and conditions of access to the Sydney Metropolitan Network and the CRN with TfNSW for the purpose of freight transportation by rail;

(b) enter into and give effect to contracts, arrangements or understandings regarding the access arrangements to the Sydney Metropolitan Network and the CRN with TfNSW, in the form of the STAAs and associated documents; and

(c) discuss among themselves matters relating to the above,

(**the proposed conduct**).

The vague and expansive scope of the proposed conduct is not limited in any way, including despite assertions elsewhere in the Application that:

> *the Applicants are not proposing or engaging in any collective boycott activity (at 1.4)*
>
> *…*
>
> *The Applicants do not propose to engage in cartel behaviour in relation to the provision of rail transportation services and will not share commercially sensitive information which might relate to downstream pricing [only], customers, costs of operations, volume and capacity projections (at 7.4)*

The proposed conduct would or might be in breach of cartel provisions as well as anti-competitive provisions. Further, the authorisation is for conduct extending far beyond just "collective bargaining" and includes entering into access arrangements on common terms. That is, the authorisation would shield the Applicants from the application of the cartel laws to conduct that included them jointly agreeing to only contract with TfNSW on common specified terms. Such conduct has the potential to materially limit the manner in which the Applicants then compete with each other in the supply of above rail services.

2.2 The Applicants have substantial resources and negotiating experience

The bargaining position of the Applicants is already strong, despite what the Application claims, as the Applicants are large sophisticated firms that have considerable experience in negotiating access agreements as they have access arrangements with multiple rail networks throughout Australia.

This collective experience is compounded by the extensive resources available to these companies, some of which are multinational corporations. Pacific National and Qube, for example, state they are one of the "largest" freight companies in Australia (at schedule 1). The Applicants represent the bulk of State revenue derived from this service.

It is clear to TfNSW that the Applicants have the bargaining power, negotiating experience, available resources and available time to enable negotiations to continue with TfNSW for the next 12 months. TfNSW anticipates that collectively the resources that the Applicants will devote to the negotiations will far exceed those available to TfNSW.

2.4 Public benefits (if any) are minimal

Authorisation can only be granted where the Applicants have satisfied the ACCC that there is sufficiently substantial public benefit to outweigh the detriment. TfNSW submits that the possible detriment is substantial for the reasons set out above. These detriments are not outweighed by the public benefits as these benefits are overstated in the Application.

Contrary to what may be stated in the Application:

- for the reasons stated elsewhere, the Applicants already have strong bargaining positions relative to TfNSW;
- any increase to that bargaining power will increase the possibility that the Applicants will insist that they will only contract with TfNSW on specified common terms and conditions – to the detriment of downstream competition;
- if the Applicants are granted an authorisation, then there is a risk that the negotiation process proceeds in a way that disenfranchises other smaller rail operators;
- given the Applicants directly compete with each other as well as the potential for collective boycott activity, collective agreement and discussion of access agreements will discourage rather than encourage competition in rail haulage; and
- the reduction in rail haulage competition will also likely result in the increase of road haulage competition as any cartel or anti-competitive conduct causes consumers to shift from rail to road.

3 Conclusion

There are no grounds for granting an interim authorisation. TfNSW has agreed in writing to rollover all of the rail operators (including the Applicants) existing access arrangements for 12 months to allow for constructive and fulsome negotiations on new agreements.

If, despite the above, the ACCC is inclined to grant the authorisation, TfNSW submits that the ACCC should closely consider the scope of the proposed conduct seeking authorisation to:

(a) collectively discuss and negotiate the non-price terms and conditions of access to all routes on two networks in Australia – no other authorisation granted by the ACCC is as wide and contains no limitations as to services or routes;

(b) enter into and give effect to contracts, arrangements or understandings regarding the access arrangements; and

(c) discuss among themselves matters relating to the above (meaning that the parties would be free to "discuss" terms that relate to price).

The proposed conduct contemplated at (b) would mean that any authorisation would shield the Applicants from cartel laws that would otherwise prevent them insisting that they will only contract with TfNSW on specified common terms and conditions.

The scope of the proposed conduct sought by the applicants is wider-ranging in application and more unclear than all of the ACCC's previous determinations as relied on by the applicants in section 4 of the Application.

For the reasons already stated TfNSW considers that the Applicants have not satisfied the ACCC that the public benefits (if any) outweigh the detriments but in the event of the ACCC contemplating any authorisation, requests that the ACCC closely considers the scope of the proposed conduct (with a view to significantly limiting it, including by expressly excluding collective boycott from the proposed conduct).

Yours sincerely

Elizabeth Mildwater
A/Secretary