



Australian  
Competition &  
Consumer  
Commission

# Determination

Application for authorisation

lodged by

Aurizon Operations Limited & SCT Logistics

in respect of

collective discussions and negotiations  
of the terms and conditions of  
access agreements with Brookfield Rail

Date: 12 February 2016

Authorisation number: A91512

Commissioners: Rickard  
Cifuentes  
Court  
Featherston

## Summary

The ACCC has decided to grant authorisation to Aurizon Operations Limited and SCT Logistics to conduct collective discussions and negotiations of the terms, conditions and price in access agreements with Brookfield Rail relating to use of the Perth-Kalgoorlie rail line for the transportation of general freight.

The ACCC grants authorisation until 5 March 2021.

## The application for authorisation

1. On 12 August 2015 Aurizon Operations Limited (**Aurizon**) and SCT Logistics (**SCT**) (together, the **Applicants**) lodged an application for authorisation<sup>1</sup> (A91512) with the ACCC. The Applicants are seeking authorisation for collective discussions and negotiations of the terms and conditions of access agreements, including price, with Brookfield Rail relating to use of the Perth-Kalgoorlie rail line, for a period of five years.
2. The Applicants also requested interim authorisation to enable them to engage in the arrangements while the ACCC considered the substantive application. Interim authorisation was granted on 2 September 2015.<sup>2</sup>
3. On 8 December 2015 the ACCC issued a draft determination proposing to grant authorisation for five years. No issues were raised in response to the draft determination.

## The arrangements

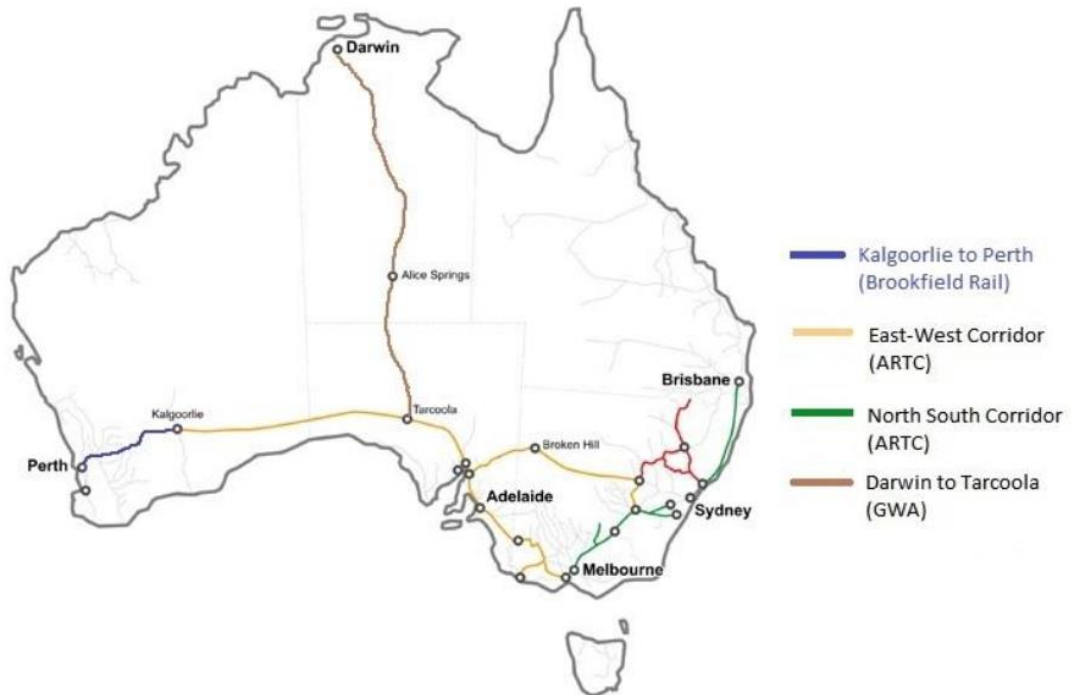
4. Aurizon and SCT operate rail freight haulage (**above rail**) services across Australia, including along the east-west corridor which runs from Perth through Kalgoorlie to Adelaide and on to Melbourne or Sydney. Track and infrastructure management (**below rail**) services on the corridor are provided by Brookfield Rail (on the route segment between Kalgoorlie and Perth) and the Australian Rail Track Corporation (ARTC) on the route segment/s between Perth and Sydney or Melbourne (See Figure 1).

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<sup>1</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>2</sup> See ACCC decision 2 September 2015 available at <http://registers.accc.gov.au/content/index.phtml/itemId/1188496/fromItemId/278039>.

Figure 1: Interstate Rail Freight Network



5. This authorisation application relates to the supply of below rail services by Brookfield Rail between Kalgoorlie and Perth associated with the transportation of interstate general freight (i.e. excluding bulk freight) by rail.
6. The provision of below rail services by Brookfield Rail on this route segment is subject to the Railways (Access) Act 1998 and the Railways (Access) Code 2000 (the **Code**). Further details of the access regime under the Code are discussed below.
7. Authorisation is sought for the Applicants and any other access seeker who wishes to participate, to:
  - collectively discuss and negotiate with Brookfield Rail the terms and conditions of the access agreements, including price, relating to the use of the Perth-Kalgoorlie route segment for the purpose of transportation of freight by rail
  - discuss amongst themselves matters relating to the above discussions and negotiations, and
  - enter into and give effect to contracts, arrangements or understandings regarding the agreements with Brookfield Rail containing common terms and conditions, including price, which relate to the use of the Perth-Kalgoorlie route segment.

(the **conduct**).

8. The Applicants submit the reasons for the conduct are to:

- facilitate common terms and conditions of access for the same types of service in order to promote competition in the rail haulage segment of the east west freight transport market
  - provide the Applicants with some countervailing market power in negotiations with Brookfield
  - provide a significant reduction in the negotiating costs.
9. The Applicants seek to discuss and negotiate an indicative price and consistent terms and conditions for the same benchmark service offering. The Applicants anticipate individual negotiations will then be conducted with Brookfield who will likely seek to vary the indicative price for material differences in cost or risk.
  10. Participation in the conduct is voluntary for Brookfield Rail and the Applicants.
  11. Each Applicant is to independently determine whether to accept the terms and conditions offered by Brookfield Rail following the collective negotiations. Each Applicant is also able to freely undertake independent negotiations with Brookfield Rail on any matter.
  12. The application does not relate to the provision of below rail services for the purpose of transportation of bulk commodities by rail, or to any information sharing or agreements relating to prices or other terms and conditions in respect of the above rail haulage services (operation of the rolling stock) which they offer in competition with one another.
  13. Authorisation is sought for a period of 5 years.
  14. At the time of lodging the application the Applicants sought interim authorisation for the conduct to enable them to commence the conduct while the ACCC considers the substantive application. The ACCC granted interim authorisation on 2 September 2015.

## Background

### *East-west Freight*

15. Bulk and general freight is transported between Western Australia, Adelaide and the east coast by road, rail and sea. Road and rail are predominantly used with approximately equivalent shares. Less than 10% is transported by sea. Freight is also directly imported into Perth from overseas.
16. Brookfield's segment of the east-west rail route is used to transport a range of commodities besides the general freight to which this authorisation relates. The ACCC understands that general freight is a small proportion of the total volume of goods transported on the route. Transported commodities which are not covered by the authorisation include alumina, coal, grain, iron ore.
17. Three above rail operators provide above rail services on the east-west rail route: Aurizon, SCT Logistics and Pacific National (a Division of Asciano Limited). The Applicants advise that Pacific National is the dominant above rail operator on the east-west corridor.

18. The ACCC is currently conducting an informal review of a proposed acquisition of Pacific National's parent company, Asciano Limited, by Brookfield.<sup>3</sup> On 15 October 2015 the ACCC issued a Statement of Issues expressing concerns that the vertical integration of Brookfield's Rail network with Asciano's Pacific National above rail business would lead to a substantial lessening of competition in relation to markets relating to above rail services. This was based on the ACCC's preliminary view that, post-acquisition, Brookfield would have the ability and incentive to foreclose Pacific National's above rail competitors that use Brookfield Rail (i.e. the Applicants in this authorisation application) and will have access to sensitive commercial information of those competitors. Brookfield has offered a s87B undertaking to address the competition concerns and the ACCC expects to make a final decision on 24 March 2016.

#### *Rail access regime*

19. The provision of below rail services by Brookfield Rail on this route segment (unlike the rest of the east-west corridor route) is subject to the Railways (Access) Act 1998 and the Railways (Access) Code 2000. The Code contains a negotiate-arbitrate framework where access seekers must elect to negotiate inside or outside of the requirements of the Code. Access seekers are only able to access the dispute resolution provisions in the Code if they elect to negotiate under the Code. Arbitration is conducted by an independent arbitrator. Under the Code the regulator is only required to approve the floor and ceiling revenue for the requested route and does not provide for the regulator to determine up-front terms and conditions of access, including price, for services which are sufficiently like-for-like across multiple access seekers competing in the same market.
20. An access seeker may ask the regulator to assess whether the price offered by the below rail provider is fair in relation to that which other parties are paying. The Applicants submit this does not extend to the price of access agreements negotiated outside of the Code and that, as a consequence, Brookfield Rail is not precluded under the access regime from differentiating between an access agreement negotiated under the Code and one negotiated outside the Code. Brookfield disputes this assertion and submits the Code permits both the regulator and an arbitrator to have regard to the price of access agreements negotiated outside the Code in considering whether an offered price is fair.
21. The Economic Regulation Authority is currently undertaking a review of the Code and has invited comment from stakeholders on any provisions of the Code which are considered to discourage access agreements from being negotiated under the Code. The ACCC understands that, to date, there are no access arrangements under the Code and three formal access proposals have been made pursuant to the Code since its implementation in 2000.<sup>4</sup>
22. In contrast the Kalgoorlie-Melbourne/Sydney route segments, in relation to which below rail services are provided by ARTC, are subject to the Interstate Rail Access Undertaking approved by the ACCC pursuant to Part IIIA S44ZZA of the CCA. The Undertaking includes the specification of indicative access charges for intermodal freight services in the interstate rail freight network controlled by ARTC. This allows parties to seek access on equal footing. The Applicants submit that Brookfield

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<sup>3</sup> Further details are available on the ACCC's public register:  
<http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991>.

<sup>4</sup> Legislative Assembly, Parliament of Western Australia, Economics and Industry Standing Committee, Report No. 3, *The Management of Western Australia's Freight Rail Network*, October 2014, at [510].

access charges on the east-west corridor currently exceed those of ARTC for the same service on a \$ per net tonne kilometre basis.

## Consultation

23. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
24. Upon receiving the application the ACCC invited submissions from a range of potentially interested parties including Brookfield Rail, the competing above rail operator Pacific National, freight customers (Qube Logistics, Toll and Linfox), government and regulatory bodies and the operator of the adjoining rail network.<sup>5</sup>
25. The ACCC received one submission in response, from Brookfield Rail. Brookfield neither opposed nor supported the application but disputed some factual points in the Applicants' characterisation of the circumstances.
26. The ACCC did not receive any submissions from interested parties in response to its draft determination.
27. The submissions by the Applicants and Brookfield are considered as part of the ACCC's assessment set out below.

## ACCC assessment

28. The ACCC's assessment of the arrangement is carried out in accordance with the relevant net public benefit tests<sup>6</sup> contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the arrangement would outweigh the likely detriment to the public, including from any lessening of competition.
29. In its assessment of the application the ACCC has taken into account:
  - the application and submissions received from the applicant and interested parties<sup>7</sup>
  - other relevant information available to the ACCC, including information from consideration of previous matters<sup>8</sup>
  - the likely future without the conduct that is the subject of the authorisation.<sup>9</sup> In particular, the ACCC considers that, absent the conduct, it is likely that the Applicants would each conduct separate negotiations with Brookfield Rail either inside or outside of the Code in respect to the terms and conditions of their access agreements
  - the relevant areas of competition likely to be affected by the conduct::

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<sup>5</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>6</sup> Subsections 90(5A), 90(5B), 90(6) and 90(7).

<sup>7</sup> Please see the ACCC's Public Register for more details, including a list of parties consulted.

<sup>8</sup> See for example the ACCC's informal review of the Brookfield consortium proposed acquisition of Asciano Limited. (<http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991>).

<sup>9</sup> For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

- supply of below rail services on the relevant route
- supply of rail haulage services for the transportation of general freight to and from Western Australia
- the five year authorisation period requested.

## Public benefit

30. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>10</sup>

31. The Applicants submit the conduct will result in significant public benefits including:

- improved efficiency through increased coordination of the above and below rail inputs
- improved commercial outcomes by improving the bargaining position of access seekers relative to the natural monopoly rail infrastructure provider under the 'negotiate and arbitrate' model of access
- transaction cost savings for both the Applicants and Brookfield resulting from collective negotiations
- promoting competition in the rail haulage market by facilitating consistent terms and conditions, including price, between access seekers for the same services
- promoting demand for rail transportation services by improving the prospect of obtaining efficient access charges for interstate rail services.

32. Brookfield did not make any submission on the likely public benefits of the conduct.

33. The ACCC is satisfied based on the information before it that the conduct is likely to result in some public benefit by:

- providing transaction cost savings in reducing the length of negotiations, the sharing of legal and other costs and/or removing the necessity to engage in an arbitration process under the Code
- leading to more efficient outcomes from negotiation by improving the Applicants' ability to input into the negotiations (whether in individual or joint negotiations).

## Public detriment

34. The CCA does not define what constitutes a public detriment and the ACCC considers its meaning as essentially the opposite of public benefit. In this regard the Tribunal has defined it as:

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<sup>10</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.<sup>11</sup>

35. The Applicants submit the conduct will result in minimal, if any, detriment because:

- participation is to be voluntary for all parties
- no collective boycott activity is proposed
- there will be information sharing restrictions put in place between the Applicants to ensure only necessary information is shared and no commercially sensitive information relating to downstream pricing, customers, costs of operations, volume and capacity projects is shared
- the objectives of the bargaining are consistent with regulation of below rail services in other markets (i.e. to establish consistent terms and conditions for a benchmark service offering)
- the conduct is limited to a narrow range of services – i.e. access to rail on the relevant route segment for the transportation of interstate freight.

36. Brookfield did not make any submission on the likely detriments of the conduct.

37. The ACCC considers that the conduct is likely to result in minimal detriment since:

- participation is to be voluntary for all parties and no collective boycott activity is proposed
- the objectives of the bargaining are consistent with regulation of below rail services in other markets (i.e. to establish consistent terms and conditions for a benchmark service offering)
- the conduct is limited to access to below rail services on the relevant route segment for the transportation of interstate general freight
- the Applicants are subject to competition from alternative forms of transport and other above rail general freight providers on the route, and
- the volume of general freight transported by the Applicants is relatively small in relation to the total volume transported on Brookfield's segment of the east-west corridor.

38. The ACCC acknowledges that the Applicants propose to establish information sharing protocols to minimise the possibility that information sharing extends beyond the intended scope of the authorisation. The ACCC considers that, to be effective, such protocols would need to be approved and monitored by a suitably qualified independent auditor. However, the ACCC also notes that, with or without an information sharing protocol arrangement, any anticompetitive conduct outside of that authorised – including that resulting from information sharing - is at risk of breaching the CCA.

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<sup>11</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.



## Balance of public benefit and detriment

39. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
40. The ACCC considers the conduct is likely to result in some public benefit in the form of transaction cost savings, and more efficient bargaining outcomes. The ACCC considers the detriment resulting from the arrangements is likely to be limited by the voluntary nature of the conduct, the limited range and volume of the services to which the conduct relates, competition to the Applicants from alternative suppliers of freight services, and the fact that the objectives of bargaining are consistent with regulation in other markets.
41. For the reasons outlined in this determination the ACCC is satisfied that the arrangement is likely result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
42. Accordingly, the ACCC has decided to grant authorisation.

## Length of authorisation

43. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>12</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
44. In this instance, the Applicant seeks authorisation for five years. The Applicants submit this reflects the prospective term of an access agreement, and allows sufficient time to undertake arbitration on the terms and conditions of access, negotiate variations associated with any rate review mechanisms through the term of the agreement, and for any relevant amendments to be made as a result of the Economic Regulation Authority's Code Review.
45. Brookfield did not comment on the period for which authorisation was sought.
46. In the current circumstances, given the likely length of the agreements involved, the ACCC considers that five years is an appropriate period to grant authorisation.

## Future parties

47. Pacific National is currently the only other above rail service provider operating on the relevant track segment in addition to the Applicants. As noted, the ACCC is currently conducting an informal review of a proposed acquisition of Pacific National's parent company (Asciano) by Brookfield.
48. At the time of lodging their authorisation application, the Applicants requested that any authorisation granted by the ACCC be expressed to apply to any access seeker, including Pacific National, who is negotiating, or intends to negotiate, with Brookfield Rail for access to interstate rail freight services, unless otherwise subject

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<sup>12</sup> Subsection 91(1).

to a decision or ruling by the ACCC which would preclude the authorisation from applying.

49. The ACCC notes that, if Brookfield were to acquire Pacific National, their inclusion within the negotiating group and/or discussions has potential to undermine the purpose of the conduct, given Brookfield is to be the target of the collective negotiations.
50. In this regard the ACCC notes that participation in the conduct is voluntary for all parties, and this remains the case should a vertically-integrated Pacific National wish to join the Applicants in discussions or negotiations. On this basis the ACCC has decided to extend authorisation to cover potential future parties to the arrangement.

## **Determination**

### **The application**

51. Application A91512 was made using a Form B, under subsections 88(1) and 88(1A), of the CCA. Authorisation is sought to make and give effect to collective discussions and negotiations of the terms and conditions of access agreements with Brookfield Rail.
52. Authorisation is sought as the arrangement may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

### **The net public benefit test**

53. For the reasons outlined in this determination the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the conduct.

### **Conduct which the ACCC has decided to authorise**

54. The ACCC has decided to grant authorisation A91512 to Aurizon Operations Limited and SCT Logistics to:
- collectively discuss and negotiate with Brookfield Rail the terms and conditions of the access agreements, including price, relating to the use of the Perth-Kalgoorlie route segment for the purpose of transportation of general freight by rail
  - discuss amongst themselves matters relating to the above discussions and negotiations, and
  - enter into and give effect to contracts, arrangements or understandings regarding the agreements with Brookfield Rail containing common terms and conditions, including price, which relate to the use of the Perth-Kalgoorlie route segment.

(the **conduct**).

55. Under section 88(10) of the CCA, the ACCC has decided to extend the authorisation to future parties to the arrangement.

## **Conduct not authorised**

56. To be clear, the authorisation does not extend to the Applicants sharing information or reaching agreements relating to:

- the transportation of bulk commodities by rail
- prices or other terms and conditions in respect of the above rail haulage services which the Applicants offer in competition with one another.

## **Interim authorisation**

57. At the time of lodging the application, the Applicants requested interim authorisation for the conduct. The ACCC granted interim authorisation under subsection 91(2) of the CCA on 2 September 2015.

58. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## **Date authorisation comes into effect**

59. This determination is made on 12 February 2016. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 5 March 2016.

## Attachment A - Public benefit tests in CCA

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.